



**Minister for Family and Community Services for and on behalf of  
the Crown in right of the State of New South Wales**

**("Department")**

**and**

**Perpetual Corporate Trust Limited, ABN 99 000 341 533, as  
trustee for The Benevolent Society Social Benefit Trust No 1**

**("Organisation")**

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**DEED OF IMPLEMENTATION AGREEMENT FOR  
TBS SOCIAL BENEFIT BOND PILOT**

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**SCHEDULE 2 SCOPE OF OPERATIONS MANUAL**

**SCHEDULE 3 PAYMENT SCHEDULE**

**SCHEDULE 4 TRANSITION-IN**

**SCHEDULE 5 DIRECT AGREEMENT AGREED SCOPE**

**SCHEDULE 6 EXPERT DETERMINATION PROCEDURE**

## Deed of Implementation Agreement

### Parties

**THE MINISTER FOR FAMILY AND COMMUNITY SERVICES** for and on behalf of the State of New South Wales, acting through the Community Services Division, Department of Family and Community Services, pursuant to section 6 of the Community Welfare Act 1987 ("the **Department**")

And **PERPETUAL CORPORATE TRUST LIMITED**, ABN 99 000 341 533, as trustee for **The Benevolent Society Social Benefit Trust No 1** ("the **Organisation**")

### Background

- A. The NSW Government wishes to undertake a social benefit bond (SBB) trial in the areas of out-of-home care and criminal recidivism in this State. A SBB, also known as a social impact bond, is a relatively new financial instrument that pays a return to private investors based on the achievement of agreed social outcomes. Under a SBB, an investor provides upfront funds to a partner (non-government organisation (NGO) or intermediary) to provide services to government that will, if successful, reduce future costs to government through improved social outcomes in the relevant area. Part of the savings to government is used to repay this investment and provide a reward payment to the NGO or intermediary commensurate with the outcomes achieved.
- B. The NSW Government, through NSW Treasury, issued a Request for Proposal on 30 September 2011 (RFP) to identify preferred proponents with whom to develop a number of SBB pilots in the areas of out-of-home care/family preservation and recidivism.
- C. A consortium (Consortium) comprising The Benevolent Society, ABN 95 084 695 045, Westpac Banking Corporation, ABN 33 007 457 141 and Commonwealth Bank of Australia, ABN 48 123 123 124, lodged a proposal in response to the RFP and was identified as a preferred proponent to develop a SBB pilot in the area of family preservation.
- D. The Department and the Consortium have agreed, following collaborative work and negotiations during a joint development phase in 2012, to undertake an SBB pilot in the area of family preservation and the Consortium has formed the Organisation for this purpose. This Agreement will be a contract for outcomes supporting the SBB pilot.

### Operative provisions

## PART A – INTERPRETATION AND GENERAL MATTERS

### 1. Definitions and interpretation

- 1.1 In this Agreement, unless the context otherwise requires:

"**Act**" means the Children and Young Persons (Care and Protection) Act 1998 (NSW).

**"Agency"** means any government or non-government agency, other than the Department, having involvement with Families in New South Wales.

**"Aggregate Cap on Payments"** is the amount identified as such in Schedule 1.

**"Agreed Minimum Referrals"** means the agreed minimum referrals of Cohort Families stated in Schedule 1.

**"Agreement"** means this deed of agreement which includes the schedules and any other documents that are incorporated into this Agreement by reference (including, once agreed, the Operations Manual), as amended from time to time in accordance with the terms of this Agreement.

**"Agreement Details"** means the details specified in Schedule 1.

**"Agreed Location"** means a geographical location agreed by the parties and listed in the Operations Manual as a location in which Cohort Families must reside to be referred to the Organisation.

**"Approved Bank"** means Australia and New Zealand Banking Group Ltd, Commonwealth Bank of Australia, National Australia Bank Limited and Westpac Banking Corporation and any other bank authorised to carry on the business of banking in Australia that is approved by the Department.

**"Authorised Investments"** in respect of the Organisation means any investments which at their date of acquisition are:

- (a) cash and/or deposits with an Approved Bank or certificates of deposit issued by an Approved Bank;
- (b) bills, promissory notes or other negotiable instruments accepted, drawn or endorsed by an Approved Bank;
- (c) bonds, debentures, stock or treasury bills of any government of an Australian jurisdiction rated A- or better (by S&P);
- (d) debentures or stock of any public statutory body constituted under the law of any Australian jurisdiction where the repayment of the principal secured and the interest payable thereon is guaranteed by that Australian jurisdiction rated A- or better (by S&P);
- (e) notes or other securities of any government of an Australian jurisdiction rated A- or better (by S&P); or
- (f) (i) deposits with, or the acquisition of certificates of deposit (whether negotiable, convertible or otherwise), issued by, a Bank rated A- or better (by S&P) which carries on business in an Australian jurisdiction; or
  - (ii) bills of exchange which at the time of acquisition have a remaining term to maturity of not more than 200 days, accepted or endorsed by an Approved Bank rated A- or better (by S&P) which carries on business in an Australian jurisdiction.

In paragraphs (b)-(f) inclusive of this definition, expressions shall be construed and, if necessary read down, so that the notes in relation to any trust constitute *mortgage-backed securities* for the purposes of both the Duties Act, 1997 of New South Wales, the

Duties Act, 2000 of Victoria, the Duties Act 2001 of Queensland and the Duties Act 2001 of Tasmania.

**"Authorised Representative"** of a party or the Services Subcontractor means the person specified as such in the Agreement Details or such other person, or person holding any position, as may be advised by that party/Services Subcontractor as being an Authorised Representative of that party/Services Subcontractor for the purposes of this Agreement to the other party/ies and the Services Subcontractor in writing from time to time.

**"Authority"** means any government, semi-government, administrative, fiscal, judicial or quasi-judicial body, department, commission, authority, tribunal, agency or entity and includes a person who, under a Law, has a right to impose a requirement, or whose consent is required, in connection with the Services, delivery of the Outcomes or the Project.

**"Bond"** means a debt obligation issued or to be issued by the Bond Issuer on terms (unless otherwise agreed with the Department) consistent with the Bond Model to raise funds for the Organisation's performance of this Agreement in the Bond Issue Amount.

**"Bond Deed"** means the deed or deed poll to be entered into by the Organisation constituting the Bond/s.

**"Bond Issue Amount"** means the total amount to be raised by the issue of the Bond (or if more than one Bond Issues, by all of them), as stated in Schedule 1.

**"Bond Issue Documents"** means the Bond Deed and all other agreements, deeds or other Instruments relating to the issue of the Bonds including, any relevant security documents issued to secure the Organisation's Indebtedness to Investors, the applicable issue supplement for the Trust (including any trust fund allocation methodology), the dealership or subscription agreement and any Management Committee Governance Principles.

**"Bond Issuer"** means the entity identified as such in Schedule 1.

**"Bond Model"** means the commercial terms described as such in Schedule 1.

**"Bond Payment"** means, with respect to a Bond, a payment of principal, interest or any other amount that is due and payable on that Bond in accordance with the terms of the Bond.

**"Bond Settlement Date"** means the date on which the Investors pay the purchase price for the Bond/s in an aggregate amount equal to the Bond Issue Amount.

**"Business Day"** means a day other than a Saturday, Sunday or a public holiday in Sydney.

**"Case Management"** means the process whereby an Individual and/or a family's needs are identified and services are co-ordinated and managed in a systematic way. The elements of case management include assessment, case planning, implementation (service delivery), monitoring and review.

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

**"Child"** means a person who is under the age of 16 years including one who is not yet born and "Children" means more than one of them.



**"Claim"** includes any suit, claim, action demand, proceeding, penalty, fine, order or adverse judgment (at law or in equity) under, arising out of, or in any way in connection with this Agreement.

**"Cohort"** means the group of Families eligible to receive the Services.

**"Co-located"** means residing together under one roof.

**"Commencement Date"** means the date on which this Agreement is last executed by the parties.

**"Condition Precedent"** means a condition precedent specified in clause 5.1.

**"Confidential Information"** means the Information referred to in clause 37.1.

**"Consequential Loss"** means any loss not arising naturally (according to the usual course of things) from the relevant breach, act or omission, whether or not such loss may reasonably be supposed to have been in the contemplation of the parties at the time they entered the Agreement as the probable result of the relevant breach, act or omission, and includes loss of profit, or loss of anticipated savings.

**"Constituent Documents"** means the Trust Deed, the Management Deed (if any) and any other document/s by which the Organisation is constituted, controlled and/or managed.

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

**"Control Group"** means the control group derived and managed in accordance with the requirements and methodology set out in the Operations Manual.

**"Corporations Act"** means the Corporations Act 2001 (Cth).

**"Cut Off Date"** means the date by which a Condition Precedent must either be satisfied by the Organisation or waived by the Department, as specified in the applicable paragraph of clause 5.1.

**"Department's Material"** means any Material the Department owns or in which the Department has any Intellectual Property Rights (other than Materials licensed to the Department by the Organisation under this Agreement) and which the Organisation in performing this Agreement may use.

**"Direct Agreement"** means the document of that name entered into between the Department and the Services Subcontractor in connection with the SBB Arrangement, the terms of which are (unless otherwise agreed by the Department) consistent with the Direct Agreement Agreed Scope.

**"Direct Agreement Agreed Scope"** means the scope as set out in Schedule 5 to this Agreement.

**"Director-General"** means the Director General for the Department or his or her delegate or nominee from time to time.

**"Family"** means two or more persons Co-located as a family unit:

(a) In an Agreed Location;

- (b) that includes at least one Child under 6 years of age who is not in statutory OOHC and/or for whom the Minister does not have Parental Responsibility; and
- (c) in respect of which, at the time of the proposed Referral:
  - (i) the Child/ren under 6 years of age is/are the subject of an open SARA commenced in the preceding 35 days;
  - (ii) none of the Child/ren of the Co-located family unit are the subject of current proceedings to assign Parental Responsibility to another person; and
  - (iii) no member of that Co-located family unit is the subject of criminal proceedings relating to allegations of abuse or neglect of a Child or Young Person.

**"Financial Year"** means the period commencing 1 July in any year and ending on 30 June in the following year.

**"First General Security Deed"** means the document entitled "The Benevolent Society Social Benefit Trust No 1 First General Security Deed" entered into between the Department, the Organisation and The Benevolent Society as Manager on or before the date of this Agreement in connection with the Security and the Project.

**"Force Majeure Event"** means:

- (a) an act of God, lightning strike, meteor strike, earthquake, storm, flood, water damage, landslide, extreme heat conditions, explosion, fire, gas leak, power failure, power surges on any sites, unexpected electromagnetic interference caused by unlicensed or illegal transmission of electromagnetic energy or interference which is not reasonably foreseeable, or collapse of structures;
- (b) disruption of facilities or systems caused by the impact of an aircraft, vessel or vehicle;
- (c) strikes or other industrial actions, other than strikes or other industrial action primarily involving some or all of the party's employees;
- (d) war (declared or undeclared), terrorism, sabotage, blockade, revolution, riot, insurrection, civil commotion or disorder, rebellion, illegal acts or epidemic; or
- (e) embargo, power shortage or water shortage;

the consequence of which:

- (f) is beyond the control of and was not caused or contributed to by the party which is seeking to rely on the event;
- (g) could not have been reasonably prevented or remedied by reasonable expenditure by the party which is seeking to rely on the event; and
- (h) cannot be circumvented by the party which is seeking to rely on the event through the use of other practicable means including alternate sources and work-around plans which provide a viable solution for the other party, as determined by that other party acting reasonably,

but does not include third party non-performance (including, to avoid doubt, non-performance by the Services Subcontractor under the Services Subcontract) or the failure of

an Individual component or group of components (including hardware and software) used in the performance of the Services and/or delivery of the Outcomes.

**"GST Law"** means A New Tax System (Goods & Services Tax) Act 1999 (Cth), related legislation and any delegated legislation made pursuant to such legislation.

**"Health Information"** has the same meaning as in the Health Records and Information Privacy Act 2002 (NSW).

**"Independent Certifier"** means an independent body, acceptable to both parties, that is suitably qualified and experienced to undertake the certification of payments and performance as required under this Agreement, appointed in accordance with clause 22.

**"Insolvency Event"** means the occurrence of any one or more of the following events in relation to the Organisation or the Services Subcontractor:

- (a) application is made to a court for an order, or an order is made, that it be wound up, declared bankrupt or that a provisional liquidator or receiver or receiver and manager be appointed and, in the case of an application, the application is not withdrawn, struck out or dismissed within 21 days of it being made;
- (b) a liquidator or provisional liquidator is appointed and the appointment is not terminated within 21 days of it being made;
- (c) an Administrator (as defined in section 9 of the Corporations Act) or a Controller (as defined in section 9 of the Corporations Act) is appointed to any of its assets and the appointment is not terminated within 21 days of it being made;
- (d) It enters into an arrangement or composition with one or more of its creditors, or an assignment for the benefit of one or more of its creditors, in each case other than to carry out a reconstruction or amalgamation while solvent;
- (e) It proposes a winding-up, dissolution or re-organisation, moratorium, deed of company arrangement or other administration involving one or more of its creditors;
- (f) it is insolvent as disclosed in its accounts or otherwise, states that it is insolvent, is presumed to be insolvent under an applicable law (including under section 459C(2) or section 585 of the Corporations Act) or otherwise is, or states that it is, unable to pay all its debts as and when they become due and payable;
- (g) It becomes, or states that it is, an Insolvent under Administration (as defined in section 9 of the Corporations Act) or action is taken which could result in that event and the proceeding is not dismissed within 21 days of the date action is taken;
- (h) an order is made, a resolution is passed, proposal put forward or any other action taken, in each case which is preparatory to or could result in any of the matters referred to in paragraphs (a) – (g) inclusive;
- (i) it is taken to have failed to comply with a statutory demand as a result of section 459F(1) of the Corporations Act;
- (j) a notice is issued under sections 601AA or 601AB of the Corporations Act and not withdrawn or dismissed within 21 days;
- (k) a writ of execution is levied against it or a material part of its property which is not dismissed within 21 days;

- (l) any step is taken by a mortgagee to enter into possession of or dispose of the whole or any part of the other party's assets or business; or
- (m) anything that occurs under the law of any jurisdiction which has a substantially similar effect to any of the above paragraphs of this definition.

**"Intellectual Property"** means all intellectual and industrial property rights throughout the world, whether created before or after the Commencement Date, including copyright, trade marks, designs, patents, semiconductor or circuit layout rights, know-how, or other proprietary rights, whether or not registered or not registrable and any rights to register such rights.

**"Intervention Group"** means the Families Referred to the Organisation in response to a request for Referral from the Organisation, including those Referred whom the Organisation does not approach and those Referred who refuse the Services, but to avoid doubt excludes any referrals from other Agencies. The Intervention Group will contain no less than 300 Families at the Measurement Date, except in the event of early termination of this Agreement.

**"Investor"** means an investor in the Bond.

**"Joint Working Group"** means the joint working group established in accordance with the Operations Manual.

**"Law"** means all statutes, rules, regulations, proclamations, ordinances, by-laws, and applicable standards, policies and guidelines of an Authority whether federal, state or local or otherwise.

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

**"Management Deed"** means the management deed to be entered into between the Organisation and The Benevolent Society as the manager engaged to manage the SBB transaction (including investor reporting, investor distribution and transaction cash flows).

**"Material"** includes a Record and for the avoidance of doubt also includes know-how, skills, methodologies, tools, equipment and software.

**"Measurement Date"** means the date as at which the Department will measure the Organisation's delivery of the Outcomes under this Agreement, being the date that falls 4 calendar years and 9 Months after the Referral Date or, in the event of early termination of the Agreement, the date of termination.

**"Media and Communications Protocol"** means the media and communications protocol in connection with this Agreement, as agreed by the parties in consultation with the Services Subcontractor and documented in the Operations Manual from time to time.

**"Minister"** means the Minister for Family and Community Services or his or her delegate or nominee from time to time.

**"Month"** means a calendar month.

**"Moral Rights"** means the rights of integrity and rights of attribution of authorship and performership and other rights of a similar nature which now exists or which may exist in the future, including moral rights under Part IX of the Copyright Act 1968 (Cth) and performers protection under Part XIA of the Copyright Act 1968 (Cth).

**"Operations Manual"** means the operations manual agreed by the parties in accordance with clause 6 (Operations Manual) as amended from time to time in accordance with this Agreement.

**"Operational Matters"** means any action, step, matter or thing necessary or incidental to the day-to-day provision, management and administration of the Services.

**"Outcome"** means:

- (a) Children in the Intervention Group have less entries to OOHC than Children in the Control Group;
- (b) there were fewer reports to the Department's Child Protection Helpline in relation to the Intervention Group than the Control Group; and
- (c) there were reduced numbers of SARAs in relation to the Intervention Group compared to the Control Group.

**"Outcome Payments"** means the payment/s specified as such in Schedule 3 (Payment Schedule).

**"Out-of-Home Care" or "OOHC"** means statutory out-of-home care as defined for the purposes of the Act.

**"Parental Responsibility"** has the same meaning as in the Act.

**"Permitted Dealing"** means any assignment, encumbrance, novation or other transfer or dealing with any right or obligation under this Agreement which arises from or under the SBB Arrangement in respect of the Trust in accordance with the terms of the Transaction Documents (including in connection with the grant of the Security) or such other assignment, encumbrance, novation or other transfer or dealing as approved by the Department in writing.

**"Personal Information"** has the same meaning as in the Privacy and Personal Information Protection Act 1998 (NSW).

**"Personnel"** of a party means the officers, employees, agents, volunteers, contractors and Subcontractors of, respectively, that party.

**"Prescribed Rate"** means the applicable total rate of interest as determined under s. 22 of the Taxation Administration Act 1996 (NSW) and published quarterly at [www.osr.nsw.gov.au/taxes/other/taa/rates/](http://www.osr.nsw.gov.au/taxes/other/taa/rates/) (or in any replacement publication/at any replacement address as may be notified from time to time). For example, the Prescribed Rate of interest for the period 1/4/13-30/6/13 is 10.95%.

**"Priority Deed"** means the document of that name entered into between the Department, the Security Trustee and the Organisation in connection with the Project.

**"Privacy Legislation"** means:

- (a) the Privacy and Personal Information Protection Act 1998 (NSW);
- (b) the Health Records and Information Privacy Act 2002 (NSW);
- (c) the Privacy Act 1988 (Cth);
- (d) any legislation (to the extent that such legislation applies to the Department or the Organisation, or any other recipient of Personal Information and/or Health Information) from time to time in force in any:
  - (i) Australian jurisdiction (which includes the Commonwealth of Australia and any State or Territory of Australia);
  - (ii) non-Australian jurisdiction (to the extent that the Department or the Organisation is subject to the laws of that jurisdiction in respect of any Personal Information and/or Health Information), affecting privacy, Personal Information, Health Information or the collection, handling, storage, processing, use or disclosure of personal data; and
- (e) any ancillary rules, guidelines, orders, directions, directives, codes of conduct or other instruments made or issued thereunder, as amended from time to time.

**"Privacy Principle"** means any or all of:

- (a) the information and protection principles contained in sections 8 to 19 of the Privacy and Personal Information Protection Act 1998 (NSW); and
- (b) health privacy principles contained in Schedule 1 to the Health Records and Information Privacy Act 2002 (NSW);

and includes any amendment or replacement of these principles from time to time.

**"Project"** means the SBB trial in the area of family preservation to be undertaken by the parties on the terms and conditions of this Agreement.

**"Record"** means any document or other source of information compiled, recorded or stored in written form or on film, or by electronic process, or in any other manner or by any other means.

**"Referral Date"** subject to clause 5 (Conditions Precedent), means such date agreed by the parties in writing following satisfaction and/or waiver of the Conditions Precedent in accordance with clause 5.

**"Referral Period"** means the period from the Referral Date to the Referral Termination Date.

**"Referral Termination Date"** means the date stated or referenced in Schedule 1.

**"Referred"** means referred by the Department.

**"S&P"** means Standard & Poor's Ratings Services, a division of The McGraw Hill Companies, or Standard & Poor's (Australia) Pty Limited, ABN 62 007 324 852 (trading as Standard & Poor's).

**"SARA"** refers to the safety and risk assessment conducted by the Department of Family and Community Services in assessing the safety of, and future risk of harm to, children in families.

**"SBB"** means a social benefit bond.

**"SBB Arrangement"** means the arrangement documented in this Agreement and the other Transaction Documents and any other legal transaction documentation associated with any of these.

**"Security"** means the first ranking fixed and floating charge taken over the Trust Assets by the Department in connection with the Project.

**"Security Documents"** means the First General Security Deed and the Priority Deed.

**"Security Trust Deed"** means the document entitled "The Benevolent Society Social Benefit Trust No 1 Security Trust Deed" entered into on or before the date of this Agreement between the Organisation, the Security Trustee and The Benevolent Society, ABN 95 084 695 045 as Manager in connection with the Project.

**"Security Trustee"** has the same meaning as in the Security Trust Deed.

**"Service Delivery Material"** means any methodologies developed by or on behalf of the Organisation in relation to the delivery of the Services.

**"Services"** means:

- (a) the services necessary to deliver the Outcomes in accordance with this Agreement (including the Operations Manual) and all statutory and other legal requirements;
- (b) the services that are otherwise necessary or incidental to, or that may be required for, the proper performance of this Agreement in accordance with its terms including any services related to transition-in; and
- (c) Transition-Out Services.

**"Services Subcontract"** means the subcontract of the Services by the Organisation to the Services Subcontractor, the terms of which are agreed by the parties.

**"Services Subcontractor"** means The Benevolent Society, ABN 95 084 695 045, or any other person approved by the Department.

**"Services Subcontract Agreed Scope"** means the terms listed as such in Schedule 1.

**"Special Termination Event"** means an event of default under the Services Subcontract agreed as such between the Organisation and the Department.

**"Standing Charge"** means the amount specified as such in Schedule 3 (Payment Schedule).

**"State"** means the Crown in right of the State of New South Wales and includes the Department.

**"Subcontractor"** means a person, entity or organisation engaged by the Organisation in any capacity whatsoever, either directly or through another person, to perform all or part of the Services and includes the Services Subcontractor and any subcontractor of the Services Subcontractor but does not include any employee or volunteer of the Organisation (and, to

avoid doubt, does not include any person appointed as a Manager pursuant to a Management Deed (if any) or the Security Trustee).

**"Supervision Order"** means an order made under section 76 of the Act as may be amended or replaced from time to time.

**"Taxes"** means taxes, excluding income tax, GST, sales tax and capital gains tax, but including charges, withholding taxes, levies imposts, duties (including stamp and customs duty) excise, and other similar taxes imposed by any taxing authority in any jurisdiction in Australia or elsewhere together with any related interest, penalties, fines, expense or other statutory charge in respect of the supplies contemplated under this Agreement. It also includes taxes which are replacement taxes for the taxes referred to in this definition.

**"Term"** means the duration of this Agreement as specified in Schedule 1 (Term of Agreement) or until the date on which this Agreement is terminated, whichever occurs first.

**"Total Minimum Requests for Referral"** means the total minimum number of requests for Referral specified as such in Schedule 1.

**"Transaction Documents"** means this Agreement, the Services Subcontract, the Direct Agreement, the Management Deed (if any), each Security Document, each Bond Issue Document and each other document or instrument agreed by the parties to be a Transaction Document.

**"Transition-Out Period"** has the meaning given to it by clause 32.

**"Transition-Out Plan"** means the plan developed in accordance with clause 32.

**"Transition-Out Services"** means the services to be provided by the Organisation in accordance with clause 32.7.

**"Trust"** means The Benevolent Society Social Benefit Trust No 1 established by, and subject to the terms of, the Trust Deed.

**"Trust Assets"** means, in relation to the Trust, all the Organisation's rights, property and undertaking which are the subject of the Trust:

- (a) of whatever kind and wherever situated; and
- (b) whether present or future.

**"Trust Deed"** means the trust deed entitled "The Charitable Trust Deed of The Benevolent Society Social Benefit Trust No 1" entered into on or before the date of this Agreement by PA Smith as Settlor, Perpetual Corporate Trust Limited, ABN 99 000 341 533 as trustee and The Benevolent Society, ABN 95 084 695 045 as Manager.

1.2 Except where the context otherwise requires:

- (a) **References to legislation.** A reference to a statute, regulation, ordinance or by-law ("law") will be deemed to extend to include a reference to all statutes, regulations, ordinances or by-laws amending, consolidating or replacing that law from time to time.



- (b) **Reconstitution of a person.** A reference to a person which has ceased to exist or has been reconstituted, amalgamated or merged, or other functions of which have become exercisable by any other person or body in its place, shall be taken to refer to the person or body established or constituted in its place by which its said functions have become exercisable.
- (c) **Time limits and events.** Where any time limit or event pursuant to this Agreement falls or occurs on a non-Business Day then that time limit shall be deemed to have expired or occurred (as applicable) on the next Business Day.
- (d) **Grammatical forms.** Where a word or phrase is given a defined meaning in this Agreement, any other part of speech or other grammatical form in respect of such word or phrase shall unless the context otherwise requires have a corresponding meaning.
- (e) **Singular and gender forms.** The singular includes the plural and vice versa and words importing gender include the other gender.
- (f) **Rules of construction.** No rule of construction operates to the detriment of a party only because that party was responsible for the preparation of this Agreement or any part of it.
- (g) **Actions by the Department.** Where there occurs a reference to the doing of anything by the Department including giving any notice, consent, direction or waiver, this may be done by any duly authorised officer of the Department.
- (h) **Headings.** The headings and index in this Agreement are for convenience only and do not affect the interpretation of this Agreement.
- (i) **Reasonableness.** Where either party is required to act reasonably in the performance of this Agreement that shall be read as a requirement to act as would a party in the position of that party which is acting reasonably in its own best interests.
- (j) **No limitation.** The words "including", "for example" or "such as" when introducing an example do not limit the meaning of the words to which the example relates to that example or examples of a similar kind.
- (k) **References to groups.** A reference to a group of persons is a reference to all of them collectively and to any two or more of them collectively and to each of them individually.
- (l) **References to persons.** Persons will be taken to include any natural or legal person.
- (m) **References to currency.** All references to currency or dollars are references to Australian dollars.
- (n) **References to good faith.** Where a party is required to act in good faith in the performance of this Agreement that will be read as a requirement to act:
  - (i) honestly;
  - (ii) reasonably, having regard to the terms of this Agreement; and
  - (iii) co-operatively, by doing everything properly and reasonably within the control of that party to perform its or their obligations under this Agreement.

- (o) **References to documents.** A reference to a document is to that document as amended or novated from time to time (in accordance with any requirements of this Agreement, if applicable including with any required consent of the Department).

## **2. Communications with Services Subcontractor**

- 2.1 The Authorised Representative of the Services Subcontractor will act on behalf of the Organisation as its primary contact in relation to all Operational Matters, and any communication by or from the Services Subcontractor with regard to such may be relied on by the Department as a communication made on behalf of the Organisation and is binding on the Organisation.

## **3. Liability of Organisation as trustee**

### **Limitation of Organisation's liability**

- 3.1 The Organisation enters into this Agreement only in its capacity as trustee of the Trust and in no other capacity. Notwithstanding any other provisions of this Agreement, a liability arising under or in connection with this Agreement is limited to and can be enforced against the Organisation only to the extent to which it can be satisfied out of the Trust Assets out of which the Organisation is actually indemnified for the liability. This limitation of the Organisation's liability applies despite any other provision of this Agreement and extends to all liabilities and obligations of the Organisation in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this Agreement.
- 3.2 The Department, and any other person (other than the Organisation) with an interest in this Agreement, may not sue the Organisation in any capacity other than as trustee of the Trust, including by seeking the appointment of a receiver (except in relation to the Trust Assets), a liquidator, an administrator or any similar person to the Organisation or by proving in any liquidation, administration or arrangement of or affecting the Organisation (except in relation to the Trust Assets).
- 3.3 The provisions of this clause 3 shall not apply to any obligation or liability of the Organisation to the extent that it is not satisfied because under this Agreement or by operation of law there is a reduction in the extent of the Organisation's indemnification out of the Trust Assets as a result of the Organisation's fraud, negligence or Wilful Default in relation to the Trust.
- 3.4 It is acknowledged by the parties that:
  - (a) the Department is responsible under this Agreement for performing a variety of obligations relating to the Services;
  - (b) the Services will be performed by the Services Subcontractor pursuant to the Services Subcontract; and
  - (c) the Organisation is not responsible for monitoring the performance by the Services Subcontractor of the Services subject to the Services Subcontract.
- 3.5 No act or omission of the Organisation (including any related failure to satisfy its obligations or breach of representation or warranty or undertaking under this Agreement) will be considered fraud, negligence or Wilful Default of the Organisation for the purpose of clause 3.3 to the extent to which the act or omission was caused or contributed to by any failure by the Department, the Services Subcontractor or any other person to fulfil its obligations relating to the Services or by any other act or omission of the Department, the Services Subcontractor or any other person.
- 3.6 Neither the Services Subcontractor nor any attorney, agent, receiver or receiver and manager appointed in accordance with this Agreement has authority to act on behalf of the Organisation in a way which exposes the Organisation to any personal liability and no act or

omission of any such person will be considered fraud, negligence or Wilful Default of the Organisation for the purpose of clause 3.3.

- 3.7 The Organisation is not obliged to do or refrain from doing anything under this Agreement (including incur any liability) unless the Organisation's liability is limited in the same manner as set out in this clause.
- 3.8 In this clause **Wilful Default** means, in respect of the Organisation, any intentional failure to comply with or intentional breach by the Organisation of any of its obligations under this Agreement, other than a failure or breach:
- (a) which arose as a result of a breach by the Department, the Services Subcontractor or any other person to fulfil its obligations relating to the Services or by any other act or omission of the Department, the Services Subcontractor or any other person;
  - (b) which is in accordance with a lawful court order or direction or required by law; or
  - (c) which is in accordance with a proper instruction or direction given by the Department or is in accordance with an instruction or direction given to it by any person in circumstances where that person is entitled to do so at law.

#### **4. Project Parameters**

##### **Objectives**

- 4.1 The Department and the Organisation acknowledge and agree that the predominant object of the parties in entering this Agreement is:
- (a) through the trial of a pilot SBB, to raise funds for, and otherwise assist and support, children and families in communities in New South Wales who are disadvantaged, in need or vulnerable;
  - (b) for the Outcomes to further an improvement of the economic, personal and social circumstances of children and families in communities in New South Wales who are disadvantaged, in need or vulnerable; and
  - (c) to provide the Services as an appropriate means for the Organisation and the Services Subcontractor to act as, and support and assist others to be, leaders in the provision of relief for children and families in communities in New South Wales who are disadvantaged, in need or vulnerable.
- 4.2 The Organisation acknowledges that the Department intends that:
- (a) this Agreement supports a successful trial of a pilot SBB;
  - (b) the Outcomes are achieved to the benefit of the community and the NSW Government; and
  - (c) the Services are evaluated to further the evidence base and focus on measurement for social programs.

##### **Adherence to Objectives**

- 4.3 Each party must, in accordance with and subject to the provisions of this Agreement, perform its obligations under this Agreement having regard to and with the aim of satisfying the objectives referred to in clause 4.1.

### Outcomes and objectives

4.4 For the avoidance of doubt:

- (a) any failure by the Organisation to deliver or achieve any Outcomes, or to satisfy or achieve the objectives set out in clause 4.1 or 4.2; or
- (b) any finding made in connection with an Annual Review undertaken in accordance with clause 18 that any Outcomes have not been delivered or achieved, or that the objectives set out in clause 4.2 have not been satisfied or achieved,

in each case, provided that the terms of this Agreement have been complied with by the Organisation, will not of itself constitute a breach by the Organisation of this Agreement.

## PART B – PRELIMINARY MATTERS

### 5. Conditions Precedent

#### Conditions Precedent

5.1 Subject to clauses 5.2 and 5.3 the obligations of the parties under this Agreement (other than under clauses 5, 6, 7, 9.1, 9.2, 9.4(e)(i), 9.4(e)(ii), 9.4(f), 20.1(c), 20.1(e), 20.1(f), 20.2, 20.3, 20.4, 20.5, 33, 35, 36, 37, 38 and 41, which come into effect on the Commencement Date) do not come into force until satisfaction or waiver by the Department, of the following Conditions Precedent on or before the applicable Cut Off Date:

- (a) on or before the date that is 1 Month after the Commencement Date:
  - (i) receipt by the Department of a legal opinion from lawyers for the Organisation confirming:
    - A. that the Organisation has the legal capacity and authority to enter and perform this Agreement;
    - B. that the Agreement is correctly executed by the Organisation; and
    - C. that the Agreement is legally enforceable against the Organisation;
  - (ii) the parties are satisfied with the arrangements for the establishment and operation of the Organisation including its Constituent Documents and the tax consequences of the SBB Arrangement;
  - (iii) the parties have agreed and finalised in writing the financial model forming the basis of the payments to be made under this Agreement; and
  - (iv) the parties have agreed the terms of reference for the Independent Certifier.
- (b) on or before the date that is 2 Months after the Commencement Date:
  - (i) the parties have agreed and finalised the Operations Manual in accordance with clause 6 (Operations Manual);
  - (ii) the parties have agreed the terms of:
    - A. the Bond Issue Documents;
    - B. Services Subcontract (including the Special Termination Events);
    - C. the Management Deed (if any);

- D. the Security Documents;
  - E. the Direct Agreement; and
  - F. the terms of any other legal agreement in connection with the Project, not otherwise dealt with in these Conditions Precedent, to which the Organisation will be a party.
- (c) on or before the date that is 3 Months after the Commencement Date, receipt by the Department of:
- (i) a certified copy of each Bond Issue Document;
  - (ii) a legal opinion from the lawyers of the Organisation confirming that the Bond and related funding documents, together with all documents forming part of the SBB Arrangement to which the Department will be a party (including the First General Security Deed, Priority Deed and the Direct Agreement) are legal and binding on the parties to those documents;
  - (iii) a copy of each duly executed document (other than the Bond Issue Documents) agreed under clause 5.1(b)(ii); and
  - (iv) evidence of insurances as required by this Agreement.
- (d) on or before the date that is 6 Months after the Commencement Date, receipt by the Department of written confirmation from the Organisation that the Bond has been fully subscribed in the Bond Issue Amount.

#### **Satisfaction or waiver of Conditions Precedent**

- 5.2 The Organisation must use all reasonable endeavours to satisfy each of the Conditions Precedent on or before the applicable Cut Off Date. For the purposes of clauses 5.1(b), the Organisation must provide to the Department the relevant documents for agreement by no later than 1 Month prior to the relevant Cut Off Date.
- 5.3 Each party agrees to act in good faith and provide the other party with reasonable assistance, including reviewing all documentation provided to it in relation to any Condition Precedent, on a timely basis during the period from the Commencement Date until the earlier of:
- (a) waiver or satisfaction of the Conditions Precedent; or
  - (b) termination of this Agreement pursuant to clause 5.7.
- 5.4 The Organisation must promptly notify the Department in writing if it considers that any Condition Precedent is satisfied or becomes incapable of being satisfied.
- 5.5 Only the Department may waive a Condition Precedent. The Department may in its absolute discretion extend any Cut Off Date for a Condition Precedent (including where the Organisation has requested an extension and the Department is satisfied that there are reasonable grounds for such request) provided that any new Cut Off Date must not extend beyond a date that is 9 Months after the Commencement Date.
- 5.6 Clauses 5.2, 5.3, 5.4 and 5.5 do not impose any obligation on the Department to exercise discretion, or give any approval, in any way.

### **Termination for non-fulfilment of Conditions Precedent**

- 5.7 If any Condition Precedent is not waived or satisfied on or before the applicable Cut Off Date, either party may, by giving written notice to the other within 15 Business Days following the relevant Cut Off Date, terminate this Agreement without liability.
- 5.8 If either party terminates this Agreement under clause 5.7, this Agreement has no further effect and neither party is liable to the other for any loss or damage arising from or in connection with such termination provided that nothing in this clause 5.8 shall affect the right of either party to recover loss or damage suffered in connection with a breach of this Agreement by the other party before such termination.

## **6. Operations Manual**

- 6.1 The parties' will act in good faith to agree the Operations Manual, in consultation with the Services Subcontractor, by the Cut Off Date such document to at least cover the matters outlined in Schedule 2 (Scope of Operations Manual) and to be consistent with this Agreement.
- 6.2 Once agreed, the Operations Manual is incorporated into this Agreement by reference and forms part of this Agreement.
- 6.3 The parties acknowledge that the Operations Manual is:
- (a) designed to assist them in the day to day operation of this Agreement;
  - (b) Intended to be a convenient repository of elements of this Agreement (and other Material that may bind the parties by Agreement or as a consequence of this Agreement or may simply be of assistance in the operation of this Agreement) that are considered to have day to day importance; and
  - (c) once agreed in accordance with clause 6.1, the Operations Manual will be subject to regular review, including as part of the Annual Review and may be amended or varied by agreement of the parties from time to time, following consultation with the Services Subcontractor, in writing.

## **7. Variations to agreed agreements**

Any agreements to which the Organisation is a party that are agreed by the Department under this Agreement (including, to avoid doubt, the Services Subcontract) must not be amended (other than to correct minor or typographical errors) without the prior written consent of the Department, such consent not to be unreasonably withheld or delayed, with the Department to act expeditiously with respect to any request for such consent.

## **8. Application of Organisation funds**

Unless and to the extent otherwise agreed, the Organisation must:

- (a) only invest its funds (including the Bond Issue Amount, the Standing Charge, interest and other earnings) in Authorised Investments; and
- (b) only use its funds for payments permitted under the Transaction Documents (including under the Services Subcontract), making required Bond Payments and such other payments as agreed with the Department in writing.

## 9. Representations and warranties

### General warranties

- 9.1 The Organisation represents and warrants to the Department:
- (a) that it has the power and the authority to enter into and observe its obligations under this Agreement; and
  - (b) on the Commencement Date, that no circumstances, (including of a commercial, technical or financial nature), proceedings or obligations exist or are threatened which have had or may have a material adverse effect on the Organisation or its ability to perform any of its obligations under this Agreement.
- 9.2 The Department represents and warrants to the Organisation that:
- (a) it has power and authority to enter into and observe its obligations under this Agreement; and
  - (b) the execution delivery and performance of this Agreement (including the procurement of the Services) by the Department will not contravene any Law.
- 9.3 The representations and warranties given in clauses 9.1(a) and 9.2 are made on the Commencement Date and are taken to be repeated on the Bond Settlement Date and on each anniversary of the Commencement Date, with reference to the facts and circumstances then subsisting.

### Warranties relating to the Services and delivery of Outcomes

- 9.4 Subject to clause 9.5, the Organisation represents, warrants and undertakes to the Department that:
- (a) it will use all reasonable endeavours to achieve the Outcomes specified under this Agreement;
  - (b) it will procure provision of the Services in accordance with this Agreement, including the Operations Manual, with due care, skill and diligence and in a professional manner, using appropriately trained, knowledgeable and experienced Personnel;
  - (c) any Materials supplied by it in connection with the Services (including all documentation and reports) will be fit for the purpose for which they are supplied;
  - (d) it will procure provision of the Services in accordance with all relevant Laws and it will not cause the Minister, the Director-General, or the Department to breach any such Laws;
  - (e) to the best of its knowledge and belief, each of:
    - (i) the Services;
    - (ii) the Organisation's Materials;
    - (iii) any other Materials (including any Service Delivery Material) created by or on behalf of the Organisation in the course of performing this Agreement;

will not infringe Intellectual Property Rights of any person or where there may be an infringement appropriate prior approval has been obtained from the holder of the Intellectual Property Rights;

- (f) It has, or will obtain prior to the Referral Date, all licences, permits, authorisations, consents or approvals required in connection with the provision of the Services and delivery of the Outcomes in accordance with this Agreement; and
- (g) no Insolvency Event has occurred and remains current in respect of the Organisation or (to the best of its knowledge and belief) the Services Subcontractor, and there are no circumstances which could give rise to an Insolvency Event in respect of the Organisation or (to the best of its knowledge and belief) the Services Subcontractor.

9.5 The representations, warranties and undertakings in:

- (a) clauses 9.4(a), (b), (c), (d) and (e) are made on a continuing basis, throughout the Term and any Transition-Out Period; and
- (b) clauses 9.4(f) and (g) are made on the Commencement Date and are taken to be repeated on the Bond Settlement Date and on each anniversary of the Commencement Date, with reference to the facts and circumstances then subsisting.

#### **Additional representations and warranties of Organisation**

9.6 The Organisation represents and warrants to the Department that:

- (a) it has power to enter into the Trust Deed and the Transaction Documents to which it is a party and comply with its obligations under them;
- (b) except as expressly provided in the Trust Deed or under any statute or at law, the Organisation has a right to be fully indemnified out of the Trust Assets in relation to any liability of the Organisation arising under any Transaction Document to which the Organisation is a party;
- (c) the Trust Deed and the Transaction Documents to which it is a party and the transactions under them which involve it do not contravene:
  - (i) its constituent documents (if any), or cause a limitation on its powers or, if applicable, the powers of its directors to be exceeded; or
  - (ii) any law or obligation by which it is bound or to which any of its assets are subject;
- (d) it has in full force and effect the authorisations necessary for it to enter into the Trust Deed and the Transaction Documents to which it is a party, to exercise its rights and comply with its obligations under them and to allow them to be enforced;
- (e) its obligations under the Trust Deed and the Transaction Documents are valid and binding, and are enforceable against it in accordance with their terms subject to any necessary stamping and registration requirements, applicable equitable principles and laws relating to insolvency and affecting creditors' rights generally;
- (f) it is the only trustee of the Trust;
- (g) no action has been taken or proposed to remove it as trustee of the Trust;
- (h) it has no notice that action has been taken or proposed to terminate the Trust;
- (i) it is not in default under the Trust Deed; and
- (j) it has been incorporated in accordance with the laws of its place of incorporation, is validly existing under those laws and has power and authority to carry on its business as it is now being conducted.



### **Additional obligations of Organisation as trustee**

9.7 The Organisation must:

- (a) not commingle the Trust Assets with any of its other assets (including the trust assets of any other trust) or the assets of any other person;
- (b) comply with its obligations under the Trust Deed and the Transaction Documents to which it is a party;
- (c) without the Department's consent, not amend the Trust Deed or any Transaction Documents to which it is a party;
- (d) obtain, renew on time and comply with the terms of each authorisation necessary for it to enter into the Transaction Documents to which it is a party, comply with its obligations under them and allow them to be enforced; or
- (e) not take any action (other than a Permitted Dealing) to prejudice the Trustee's right of indemnity against, and equitable lien over, the Trust Assets.

## **10. Compliance with Law, guidelines, holding of rights, approvals and consents**

10.1 The Organisation must, and must procure that all Subcontractors:

- (a) comply with all Laws applicable to the Services, delivery of the Outcomes and the performance of the Organisation's obligations under this Agreement; and
- (b) hold all rights, obtain and maintain all approvals and consent required by applicable Laws to provide the Services and deliver the Outcomes and otherwise perform its obligations under this Agreement.

10.2 Unless otherwise expressly provided under this Agreement, the Organisation (and any Subcontractor) must continue to comply with the requirements of clause 10.1 throughout the Term, notwithstanding any changes to applicable Laws.

10.3 The Organisation must not, and must procure that its Subcontractors do not, through any negligent or unlawful act or omission of the Organisation/Subcontractor or its Personnel, or through any breach of this Agreement, cause the Minister, the Director-General or the Department to breach any Laws, statutory duty or requirement in respect of any Child or Young Person in OOHC including the Minister's duty of care as guardian.

10.4 Without limiting this clause 10, the Organisation must, and must procure that all Subcontractors, comply with all government policies and guidelines relevant to this Agreement and applicable to the performance of the Services and delivery of the Outcomes as advised by the Department from time to time and set out in the Operations Manual including any changes to these policies and guidelines.

## **11. Subcontracts**

### **Entry into subcontracts**

11.1 Subject to clause 11.4, the Organisation must not subcontract this Agreement or any part of it without the Department's prior written consent, which consent must not be unreasonably withheld but may be given subject to conditions.

11.2 The Department must expeditiously consider, and promptly notify the Organisation of its determination in respect of, any request made under clause 11.1.

- 11.3 The Organisation is not relieved of any of its liabilities or obligations under this Agreement as a result of any subcontract of all or any part of this Agreement or Departmental approval of any subcontract and the Organisation is at all times responsible for the performance of all Subcontractors.

#### **Services Subcontract**

- 11.4 The parties acknowledge that the Organisation will procure performance of the Services through the Services Subcontract, and that the Services Subcontractor will itself procure performance of part of the Services by subcontracting them.

- 11.5 The Organisation must:

- (a) provide the Department with a copy of any notice issued by either party under the Services Subcontract, immediately upon its issue or receipt by the Organisation; and
- (b) not terminate the Services Subcontract without giving the Department at least one week's prior notice of its intention to do so and the basis for termination.

#### **Organisation obligations in respect of subcontracts**

- 11.6 The Organisation must:

- (a) immediately provide the Department, on request, with a copy of each duly executed subcontract of all or part of this Agreement.
- (b) comply with and prudently enforce as necessary any subcontract of all or part of this Agreement;
- (c) ensure that any Subcontractor complies with the subcontract to which it is a party;
- (d) ensure that any Subcontractor complies with clauses 10 and 12 of this Agreement;
- (e) notify Department of any failure by a Subcontractor to comply with clause 10 of this Agreement or of any dispute arising under a subcontract, promptly after it has become aware of such failure or dispute;
- (f) other than a Permitted Dealing, not vary, novate, or assign rights under, a subcontract without the Department's prior consent; and
- (g) ensure that any Subcontractor has sufficient experience, expertise and ability to perform its obligations under the subcontract to which the Subcontractor is a party; and
- (h) ensure that the Services Subcontractor holds all such insurance policies as required by clause 21 of this Agreement.

#### **Notification of alleged Services Subcontractor compliance failures by Department**

- 11.7 The Department will promptly notify the Organisation of any alleged failure of the Services Subcontractor to comply with the equivalent provisions in the Services Subcontract to clauses 10 or 12 as soon as the Department becomes aware of any such allegation. However, a notification or failure to notify by the Department under this clause 11.7 will not affect the Organisation's responsibility to ensure compliance with clauses 10 or 12 or its liability for any breach of those provisions.

## **12. Workforce of Organisation**

### **Employee Requirements**

12.1 The Organisation must:

- (a) ensure that each employee of the Organisation and any Subcontractor engaged in provision of the Services, delivery of the Outcomes or otherwise performing services in relation to this Agreement are appropriately qualified, certified, skilled and experienced to perform their assigned tasks; and
- (b) carry out such investigations of a prospective employee's/person's suitability as are legally required or otherwise appropriate given the nature of the relevant employee's/person's assigned tasks.

12.2 Without limiting clauses 10 (Compliance with Law, guidelines, holding of rights, approvals and consents) and 12.1, the Organisation must, and must ensure that its Subcontractors, comply with:

- (a) all applicable Laws in relation to working with Children and Young Persons as may apply from time to time, including the Child Protection (Working with Children) Act 2012 (NSW); and
- (b) any particular requirements and processes in relation to working with Children and Young Persons set out in the Operations Manual.

### **Department checks**

12.3 Notwithstanding clauses 12.1 and 12.2 the Department may carry out such searches and enquiries as it considers reasonable, to ensure the Organisation's and each Subcontractor's compliance with this clause 12 and with the equivalent provision of the Services Subcontract (as applicable).

12.4 The Organisation must procure, and provide to the Department, the consent of each employee or prospective employee of the Organisation or the Services Subcontractor or of any Subcontractor who is otherwise likely to have contact with a Child or Young Person, to the making of any of the searches or enquiries referred to in clause 12.3.

12.5 Without limiting the Organisation's obligations under clauses 12.1 and 12.2, if, in relation to any individual engaged by the Organisation, the Services Subcontractor or any other Subcontractor, the:

- (a) Department's searches, enquiries or checks reveal information indicating that an individual does not comply with the requirements of this Agreement; or
- (b) Department considers that an individual is unsuitable or unqualified to perform the activities assigned to that individual;

the Department must consult with the Organisation as to whether it is appropriate and lawful to discontinue engagement of that individual in connection with performance of this Agreement. The Department and the Organisation, both acting reasonably and in a timely manner, will agree and implement appropriate measures following such consultation.

### **Organisation's and Subcontractors' employees**

12.6 Other than as expressly provided in this Agreement, the Organisation will be entirely responsible for the employment and conditions of service of the Organisation's employees and must procure that any Subcontractor is likewise responsible for its employees, and that

the Subcontractor complies with the same obligations and requirements as required by the Organisation under this clause 12.

### **Labour relations**

- 12.7 The Organisation must (and must procure that any Subcontractor must):
- (a) establish, maintain and administer a human resources policy for the Services to be provided under this Agreement; and
  - (b) ensure that all persons employed or engaged to provide services in relation to this Agreement are paid all amounts, receive such benefits and allowances and are employed subject to such conditions to which they may be or become entitled to as a result of their engagement in providing the Services and/or delivering the Outcomes under or in relation to this Agreement by virtue of any applicable Law.

### **Independent Contractors and Subcontractors**

- 12.8 The Organisation and all Subcontractors are Independent contractors and nothing contained in this Agreement will be construed as constituting any relationship with the Department other than, with respect to the Organisation, that of principal and independent contractor. Nor will anything in this Agreement be construed as creating any relationship whatsoever between the Department and the employees of the Organisation or any Subcontractor.
- 12.9 Neither the Organisation nor any Subcontractors nor any of their employees, are or will be deemed, by virtue of this Agreement or any agreement between the Organisation and any Subcontractor to be employees of the Department.
- 12.10 The Organisation indemnifies, and must procure that any Subcontractor indemnifies and at all times holds the Department fully and effectively indemnified against any and all Claims and Losses arising directly or indirectly out of or in connection with any Claim that the Department is the employer of the Organisation's employees or any Subcontractor's employees but, subject to clause 20.3, excluding Consequential Loss. The Organisation's and each Subcontractor's liability to indemnify the Department under this clause 12.10 will be reduced proportionally to the extent that any unlawful, wrongful, wilful or negligent act or omission of the Department or its Personnel caused or contributed to the Claim or Loss.
- 12.11 Without limiting clauses 12.9 and 12.10, the Organisation is responsible for and must procure that any Subcontractor is responsible for:
- (a) remuneration and benefits, including superannuation contributions, annual leave, sick leave, long service leave, overtime and penalty rates and provision of accommodation and sustenance;
  - (b) work care levies, group tax, payroll tax, fringe benefits tax, superannuation guarantee charges and other imposts or levies imposed by Law; and
  - (c) any payment upon termination of service;

payable to or in respect of the Organisation's employees or contractors or any Subcontractor's employees or contractors.

### **Work health and safety obligations**

- 12.12 In undertaking the Services, delivery of the Outcomes and other services related to or in connection with this Agreement, the Organisation must:
- (a) keep the workplace in a good and safe condition so that they do not present a risk to the health or safety of any person; and

- (b) ensure the safety of people from harm in providing the Services, delivery of the Outcomes and other services related to or in connection with this Agreement.

## **PART C- PERFORMANCE OF SERVICES AND DELIVERY OF OUTCOMES**

### **13. Term of Agreement**

- 13.1 The term of this Agreement is as stated in Schedule 1.

### **14. Transition-In**

- 14.1 The parties agree to comply with their respective obligations, if any, in relation to transition-in as set out in Schedule 4 (Transition-In).

### **15. Referrals to Organisation**

#### **Timeframe and process for Referrals**

- 15.1 The timeframe and process for Referrals will be as set out in the Operations Manual.

#### **Anticipated size of Cohort**

- 15.2 It is anticipated, but not guaranteed, that the Cohort will comprise the number of Families specified in Schedule 1.

#### **Total Minimum Requests for Referral and Agreed Minimum Referrals**

- 15.3 The Organisation undertakes to make the Total Minimum Requests for Referral over the Referral Period in accordance with any requirements regarding the timing of such requests as detailed in the Operations Manual.
- 15.4 The Department undertakes during the Referral Period to Refer the lesser of:
- (a) the Agreed Minimum Referrals; and
  - (b) the number of Referrals requested by the Organisation.
- 15.5 The Department will use reasonable endeavours to meet requests for Referrals above the Agreed Minimum Referrals, but is under no obligation to do so.
- 15.6 If the Department fails to make the Agreed Minimum Referrals over the Referral Period, for the purpose of measuring the Outcomes at the Measurement Date the Performance Levels as defined in Schedule 3 will be re-calculated in accordance with the Operations Manual.
- 15.7 The Organisation agrees that, provided the Department complies with clause 15.6, a failure to make Agreed Minimum Referrals will not of itself constitute a breach of this Agreement.

### **16. Services and Outcomes**

#### **Performance of Services**

- 16.1 The Organisation undertakes, in delivery of the Outcomes, to perform the Services:
- (a) with a view to achieving the objectives referred to in clause 4.1 and in accordance with this Agreement including the Operations Manual;
  - (b) in a diligent manner and with all necessary skill, diligence and care expected in the provision of such services; and

- (c) In accordance with all representations and warranties as to the Organisation's and any Subcontractors' experience and ability expressly made by reference to this Agreement.

#### **Outcomes measurement**

- 16.2 The Organisation's success in delivering the Outcomes for the Intervention Group will be measured as at the Measurement Date against results for the Control Group, in accordance with the methodology and process described in the Operations Manual.

### **17. Communication and consultation with Department and Agencies**

#### **Roles and responsibilities**

- 17.1 The respective roles and responsibilities of the Department, the Organisation and the Services Subcontractor and lines of communication and consultation in relation to the Project and delivery of the Outcomes by the Organisation, including the respective responsibilities of these entities in relation to Services delivery, case management and court processes, are as set out in the Operations Manual.

#### **Organisation and Services Subcontractor to co-operate with Agencies**

- 17.2 The Organisation agrees to, and agrees to ensure that the Services Subcontractor will, work collaboratively and co-operatively with all other Agencies and any other stakeholders involved in child wellbeing and child protection regardless of the differences in size, individual philosophies, structures and funding sources to create an Integrated system across government and non-government agencies in accordance with the Child Wellbeing and Child Protection NSW Interagency Guidelines (available at [www.community.nsw.gov.au/kts/guidelines](http://www.community.nsw.gov.au/kts/guidelines)).

## **PART D – REVIEW AND EVALUATION**

### **18. Reviews and Evaluation**

#### **Annual review of performance**

- 18.1 Within 20 Business Days from 1 July each year, the parties will undertake a review of performance of this Agreement ("**Annual Review**") in accordance with the requirements and timeframes set out in the Operations Manual.
- 18.2 The Annual Review will include review of:
- (a) the performance of the parties in achieving the objectives set out in clause 4.2;
  - (b) the performance of the Services and progress in delivery of the Outcomes for the Intervention Group during the year under review;
  - (c) the implementation of the Operations Manual; and
  - (d) such other matters as the parties may reasonably determine from time to time.
- 18.3 The results of the Annual Review will be communicated to the Services Subcontractor and Investors on a commercial-in-confidence basis unless otherwise agreed.
- 18.4 The annual performance data produced or collated by the Department will not be subject to certification by the Independent Certifier unless the parties agree that such data supports a right to terminate this Agreement, in which case the party seeking to terminate may, at its own cost, obtain certification of the data from the Independent Certifier.

### **Other Reviews and Evaluations**

- 18.5 The Department may, at the cost of the Department, conduct, or requisition a third party provider to conduct, reviews and/or evaluations from time to time during the Term of the Project, including with respect to the Organisation's and/or the Services Subcontractor's service delivery model.

### **Organisation and Services Subcontractor participation and co-operation in reviews and evaluations**

- 18.6 The Organisation will in good faith participate, and will ensure that its Services Subcontractor participates as necessary, at its/their own reasonable cost, in any reviews and/or evaluations under this clause 18 and will provide the Department, or any third party provider, with such assistance and Material as may reasonably be required.

### **Provision of annual performance data by Department**

- 18.7 The Department will provide the Organisation, on an annual basis or at more frequent intervals if agreed in the Operations Manual, with a copy of its raw performance data with respect to the Control Group and the Intervention Group. The timeframes for provision of the data will be as set out in the Operations Manual.

## **PART E - ADVERSE EVENTS**

### **19. Force majeure**

#### **Force Majeure Event**

- 19.1 A party will not be liable for any failure or delay:
- (a) in the case of the Organisation, in the performance or discharge of its obligation to provide the Services, deliver the Outcomes and other services pursuant to this Agreement; and
  - (b) in the case of the Department, in the performance or discharge of its obligations pursuant to this Agreement,
- due to a Force Majeure Event.

#### **Notification of Force Majeure Event**

- 19.2 A party whose performance or discharge of its obligations referred to in clause 19.1 is affected by a Force Majeure Event must as soon as practicable:
- (a) notify the other party's Representative; and
  - (b) describe in a reasonable level of detail the nature of the Force Majeure Event and its likely effect in that non-performing party's performance or discharge of its obligations under this Agreement.

#### **Response to a Force Majeure Event**

- 19.3 On the occurrence of a Force Majeure Event, the non-performing party must use its reasonable endeavours to continue to resume performance or observance whenever and to whatever extent possible without delay, including by means of alternate sources, work-arounds or other means.

- 19.4 Either party may terminate this Agreement in whole by notice to the other party if any Force Majeure Event has the result that the affected party fails to perform all or substantially all of its obligations under this Agreement for more than 3 Months.
- 19.5 Where either party terminates this Agreement in accordance with clause 19.4, the payment consequences are as detailed in Schedule 3 (Payment Schedule).
- 19.6 Where a Force Majeure Event prevents either party from carrying out all or substantially all of its obligations under this Agreement in respect of some but not all of the Agreed Locations (and provided that the effects of such occurrence are subsisting), either party may 3 Months after the occurrence of the relevant Force Majeure Event require that the location no longer be designated an Agreed Location and the parties will agree any consequent adjustment to the Agreed Minimum Referrals.

## **PART F – LOSS, DAMAGE AND INSURANCE**

### **20. Indemnities**

- 20.1 Subject to clause 20.2, the Organisation is responsible for, and hereby releases and indemnifies the Department, the Minister, the Director-General and their respective Personnel (those indemnified) on demand from and against any Claim or Loss, including for:
- (a) death or personal injury;
  - (b) loss of or damage to property (including property belonging to the Department or for which it is responsible);
  - (c) any infringement or alleged infringement of any Intellectual Property Rights (including Moral Rights);
  - (d) third party suits claims, actions, demands, proceedings, penalties, costs, charges or expenses in respect of the Services and/or delivery of the Outcomes;
  - (e) any unlawful, wrongful, wilful or negligent act or omission of the Organisation or its Personnel (including without limitation defamation); and
  - (f) any breach of this Agreement;
- which may arise out of, or in connection with the performance or non-performance by the Organisation and/or its Personnel of this Agreement or any subcontract by the Organisation of any part of this Agreement but, except in the circumstances specified in clause 20.3, excluding Consequential Loss.
- 20.2 The Organisation's liability to indemnify those Indemnified under this Agreement will be reduced proportionally to the extent that any unlawful, wrongful, wilful or negligent act or omission of those indemnified caused or contributed to the Claim or Loss.
- 20.3 The exclusion of Consequential Loss from the Indemnities given under this Agreement shall not apply in respect of any of the following:
- (a) loss that cannot be legally excluded;
  - (b) loss arising from death or personal injury;
  - (c) loss arising from property damage caused by the Organisation or its Subcontractors;
  - (d) loss caused by the Organisation's breach of the privacy and IP clauses of this Agreement; and



- (e) loss caused by fraud or illegal conduct on the part of the Organisation or its subcontractors.

#### **Notification of Claims**

- 20.4 The Organisation must advise the Department immediately it becomes aware of any third party claim, or likely claim, against the Organisation or its Personnel in connection with this Agreement.

#### **Continuing Liability**

- 20.5 The indemnity contained in this clause 20 is a continuing obligation of the Organisation separate and independent of any other responsibility of the Organisation and will continue beyond the Term.

### **21. Insurance**

#### **Subcontractors to maintain**

- 21.1 The Organisation must procure the taking out and maintenance by each Subcontractor of the Insurances specified in the Agreement Details at the times, in the manner and in the form specified in the Agreement Details.

#### **No limit of Liability**

- 21.2 Neither failure to comply nor full compliance by the Organisation or any relevant Subcontractor with the Insurance provisions of this Agreement will limit or relieve the Organisation of its liabilities and obligations under this Agreement.

#### **Evidence of Insurance**

- 21.3 The Organisation must, on request, procure from any relevant Subcontractor satisfactory evidence to the Department, acting reasonably, that the applicable insurance policies referred to in this clause 21 and required to be held and maintained by that Subcontractor have been effected and renewed.

#### **Notification of insurance claims**

- 21.4 The Organisation must ensure that all relevant Subcontractors, as soon as practicable:
- (a) inform the Department in writing of a claim, or an occurrence of an event that may give rise to a claim, under a policy of Insurance required under this clause 21; and
  - (b) keep the Department fully informed of subsequent action and developments concerning the claim or event referred to in clause 21.4(a).

## **PART G – PAYMENT PROVISIONS**

### **22. Payments to Organisation**

#### **Payments to Organisation**

- 22.1 Subject to this Agreement (including clause 22.15 (Right of set-off) and clause 23 (Repayment of Standing Charge on early termination)), the Department will, in consideration of the Organisation entering and performing its obligations under this Agreement:

- (a) Irrespective of the delivery of any Outcomes, pay the Organisation the Standing Charge as a payment on account in respect of the Services required to deliver the agreed Outcomes, in accordance with Schedule 3 (Payment Schedule); and
- (b) if and to the extent that the specified Outcomes are delivered, pay the Organisation the applicable Outcome Payment, net of the Standing Charge and other amounts identified in, and calculated in accordance with, Schedule 3 (Payment Schedule).

#### **Late Payments**

- 22.2 Subject to clauses 22.3 and 22.4, if any payment due under this Agreement is not paid by its due date interest (calculated on a daily basis) will be payable on that payment at the Prescribed Rate (converted to a daily rate of interest) from the day after the date on which payment was due to (and including) the date of payment.
- 22.3 Interest on a late payment is not payable unless the amount of interest owed exceeds \$20.

#### **Disputed Amounts**

- 22.4 If the Department disputes, in good faith, any amount set out in an Organisation invoice the Department will be entitled to withhold payment of the disputed amount (the "**Disputed Amount**"). A Disputed Amount will be resolved in accordance with clause 39 (Disputes). Until the dispute is resolved, and subject to the outcome of that dispute, the Disputed Amount will be held in suspense for the duration of the dispute. Any Disputed Amount found to be payable by the Department to the Organisation shall be paid forthwith on resolution of the dispute together with interest (calculated on a daily basis) at the Prescribed Rate (converted to a daily rate of interest) from the original due date for payment of the Disputed Amount until actual payment is made to the Organisation by the Department.

#### **Independent Certifier**

- 22.5 The Organisation must at its own cost appoint an Independent Certifier to verify performance data, any payment due to the Organisation and whether the Outcomes have been delivered (in accordance with the methodology and process set out in the Operations Manual), to the Department and to Investors on or after the Measurement Date by no later than 3 Months from the Referral Date.
- 22.6 The appointment of the Independent Certifier must be made by way of a competitive tender process and be approved, such approval not to be unreasonably withheld, by the Department.
- 22.7 The terms and conditions of the:
  - (a) Organisation's tender process including the services to be provided by the Independent Certifier; and
  - (b) contract for services between the Organisation and the Independent Certifier,
 must be agreed between the parties, acting reasonably. Without limiting this clause 22.7, the contract for service must include a term giving the Department direct access to and contact with the Independent Certifier for the purposes of this Agreement and the Project and the right to directly request independent certification of annual performance data in the circumstances specified in clause 18.4.
- 22.8 The Independent Certifier will have such functions and responsibilities as set out in the contract for services between the Organisation and the Department referred to in clause 22.7(b).

- 22.9 Subject to clause 22.10, if the contract between the Organisation and Independent Certifier is terminated or the Independent Certifier is otherwise unable to perform its obligations under that contract, the Organisation must replace the Independent Certifier with another suitably qualified body on substantially the same terms and conditions as the previous certifier and clauses 22.6 and 22.7 will apply to that appointment.
- 22.10 The Organisation must not terminate its contract with the Independent Certifier without obtaining the Department's prior written consent, such consent not to be unreasonably withheld.
- 22.11 Subject to compliance with any legal requirements in relation to privacy, each party must provide, on a confidential basis, all necessary information and documents within its possession or control to the Independent Certifier to enable the Independent Certifier to perform the services required of the Independent Certifier by this clause 22.

#### **Independent Certifier's reports**

- 22.12 The Organisation must within the timeframes specified within Schedule 3 (Payment Schedule) submit to the Department, together with any invoice for the Outcome Payment, a report from the Independent Certifier addressing the matters set out in Schedule 3 (Payment Schedule).

#### **Reconciliation at Measurement Date**

- 22.13 The Department will, at the Measurement Date, undertake a reconciliation of the Outcome Payment payable for the Referral Period in accordance with clause 22.1(b) and the aggregate of all amounts identified in Schedule 3 (Payment Schedule) as payable by the Organisation.

#### **Aggregate Cap on amounts payable under this Agreement**

- 22.14 The Organisation agrees and acknowledges that the total aggregate amount payable by the Department to the Organisation during the Term (to avoid doubt, exclusive of GST but inclusive of any stamp duty arising in connection with this Agreement and the other Transaction Documents) is capped at the Aggregate Cap on Payments.

#### **Right of Set-Off**

- 22.15 Without limiting any other rights it may have under this Agreement, the Department may deduct, from amounts which may be payable to the Organisation, any amount due from the Organisation to the Department in connection with this Agreement (including any amount of the Standing Charge owed to the Department by the Organisation in consequence of the early termination of this Agreement). If that money is insufficient for that purpose, the balance remaining unpaid will be a debt due by the Organisation to the Department.

### **23. Repayment of Standing Charge on early termination**

In the event of early termination of this Agreement the Organisation must repay the Department the Remaining Standing Charge as defined in Schedule 3 (Payment Schedule) in accordance with that Schedule.

#### **When payable**

- 23.1 The Department will pay the Standing Charge at the date and on the conditions specified in Schedule 3.

- 23.2 Any other payments due by either party under this Agreement are payable within the timeframes stated in Schedule 3 (Payment Schedule) or otherwise as the parties may agree in writing.

## **24. GST**

### **GST exclusive**

- 24.1 The consideration expressed in this Agreement (unless otherwise specified) is GST exclusive and does not include any amount for GST.
- 24.2 Subject to clause 24.5, if anything supplied under or in connection with this Agreement constitutes a taxable supply made for GST exclusive consideration, the supplier may, subject to issuing a tax invoice, recover from the recipient of the supply an amount on account of the GST payable in respect of that taxable supply ("GST Amount").
- 24.3 The GST Amount will be:
- (a) equal to the value of the supply calculated in accordance with GST Law multiplied by the prevailing GST rate; and
  - (b) subject to clauses 24.5 and 24.6, payable at the same time and in the same manner as any monetary consideration for the supply concerned but no later than the end of the tax period to which the relevant taxable supply is attributable under the GST Law.
- 24.4 The supplier of a taxable supply made under or in connection with this Agreement must issue a tax invoice for the supply in accordance with the GST Law to the recipient of the supply.

### **Non-monetary consideration or partly non-monetary and partly monetary consideration**

- 24.5 If either the Department or the Organisation makes a supply to the other for consideration which is wholly non-monetary consideration, or partly non-monetary and partly monetary consideration, then:
- (a) If the consideration is wholly non-monetary:
    - (i) the supply will for the purposes of this clause be styled a "Consideration in Kind Supply";
    - (ii) the consideration for the Consideration in Kind Supply is GST inclusive and will not be increased on account of GST under subclause 24.2;
    - (iii) the Department and the Organisation agree that the GST inclusive market value of each of the Consideration in Kind Supply and the consideration for that supply (being in turn, a Consideration in Kind Supply) are equal;
    - (iv) the Department and the Organisation will each include in any tax invoice, issued by it in respect of a Consideration in Kind Supply made by it in return for a Consideration in Kind Supply by the other, the same amount on account of the GST inclusive market value of the supply to which the tax invoice relates being the price for that supply;
    - (v) prior to the issue of the tax invoices referred to in clause 24.5(a)(iv), the Department and the Organisation will use all reasonable endeavours to agree upon the GST inclusive market value of the reciprocal Consideration in Kind Supplies and, failing agreement, will accept as final and binding the GST inclusive market value of the reciprocal Consideration in Kind Supplies

determined (at the cost of the Department and the Organisation shared equally between them) by an independent expert nominated by the President or other most senior officer of the Institute of Chartered Accountants in Australia.

- (b) if the consideration is, in part, monetary and, in part non-monetary then:
  - (i) part of the supply will be treated as made for the non-monetary consideration and will for the purposes of this clause be styled a "Consideration in Kind Supply" and will be subject to the operation of clause 24.5(a); and
  - (ii) the remaining part of the supply shall be treated as made for monetary consideration which is GST exclusive and subject to the operation of clause 24.3.

24.6 If the Commissioner of Taxation or a court determines for any reason whatsoever that the Consideration in Kind Supplies referred to in clause 24.5 which each of the Department and the Organisation make in return for the other do not have an equal GST Inclusive market value for GST purposes, then:

- (a) if the Consideration in Kind Supply made by the Department to the Organisation is determined to have a greater GST Inclusive market value than the reciprocal Consideration in Kind Supply made by the Organisation to the Department, the Department will pay to the Organisation an additional amount equal to the GST payable on 10% of the difference within 10 Business Days of the date the relevant determination is made;
- (b) if the Consideration in Kind Supply made by the Organisation to the Department is determined to have a greater GST Inclusive market value than the reciprocal Consideration in Kind Supply made by the Department to the Organisation, then the Organisation will pay to the Department an additional amount equal to the GST payable on 10% of the difference within 10 Business Days of the date the relevant determination is made;
- (c) the Department and the Organisation will do all things required, including issuing new tax invoices and adjustment notes (if necessary), to give effect to the relevant determination by the Commissioner or court; and
- (d) any amount payable under this subclause is GST inclusive and will not be increased on account of GST under clause 24.3.

#### **Adjustment notes**

24.7 If in relation to a taxable supply under or in connection with this Agreement an adjustment event occurs that gives rise to an adjustment, then the GST Amount will be adjusted accordingly and, where necessary, a payment will be made to reflect the change in the GST Amount (by the recipient to the supply in respect of an increase in the GST Amount and by the supplier to the recipient in respect of a decrease in the GST Amount). If a payment is required, it will be made within 10 Business Days of the issue of an adjustment note by the payee who must issue an adjustment note immediately upon becoming aware of the adjustment event concerned.

#### **Reimbursements of costs, expenses or other amounts**

24.8 Notwithstanding any other provision of this Agreement, any amount payable under or in connection with this Agreement, which is calculated by reference to a cost, expense, or amount paid or incurred by a party to this Agreement, will be reduced by an amount equal

to any input tax credit to which that party is entitled in respect of that cost, expense or amount.

#### **Input tax credits**

- 24.9 Any amount on account of GST payable by the Department to the Organisation under this clause will be limited to the amount of an input tax credit to which the Department is entitled in respect of the relevant supply which the Department acquires.

#### **GST groups**

- 24.10 If a party is a member of a GST group, references to GST for which the party is liable and to input tax credits to which the party is entitled include GST for which the representative member of the GST group is liable and input tax credits to which the representative member is entitled.
- 24.11 Where a word or phrase is defined under GST Law, it has the same meaning in this Agreement.

### **25. Other Taxes, future changes in law**

- 25.1 Subject to clause 24 (GST) and this clause 25 (Other Taxes, future changes in law), the Organisation must pay, and must keep the Department indemnified against, any Taxes payable upon, or in respect of this Agreement or the supply of the Services and delivery of the Outcomes wherever and however such Taxes arise.
- 25.2 The Department will on application by the Organisation consider reimbursing the Organisation for any stamp duty paid by the Organisation on:
- (a) this Agreement; and/or
  - (b) the Bond; and/or
  - (c) any additional tax paid by the Organisation as a direct result of changes to Commonwealth tax legislation specifically directed at SBB arrangements.
- 25.3 The Commonwealth government has indicated an intention to reform tax concessions provided to not for profit ("**NFP**") Organisations to ensure that they are only targeted at activities that directly further the purpose they were established for, being the purpose that is the basis of the NFP's exemption from income tax. In the event that the Commonwealth implements such reforms and the Organisation is adversely impacted by the reforms, the Department agrees to consider reimbursing the Organisation for any additional tax it is required to pay directly associated with this Agreement.
- 25.4 In the event that:
- (a) any future change to Commonwealth tax legislation has a materially adverse impact on the tax that the Organisation is required to pay as a direct consequence of this Agreement; or
  - (b) any future change to any Law has or is likely to have a materially adverse impact on the Organisation's reasonably expected financial return from its performance of this Agreement in accordance with its terms (and to avoid doubt excluding any adverse impact referable to a Force Majeure Event, lack of Referrals or breach of this Agreement),

and in either case the parties are unable to reach agreement on how to manage that impact, the Organisation may terminate this Agreement on 1 Month's notice, such notice to be given

no later than 1 Month following reasonable details of the proposed change in Law becoming publicly available or being made available to the Organisation (as applicable), and the parties' respective rights to any payment in consequence of such termination are as detailed in Schedule 3 (Payment Schedule).

- 25.5 The parties acknowledge and agree that if any reimbursement or additional payment is agreed pursuant to clause 25.3 or 25.4, then the Aggregate Cap on Payments will be increased by an amount equivalent to the amount of that reimbursement or additional payment.

## **Part H – BREACH AND TERMINATION**

### **26. Termination upon termination of Services Subcontract by reference to a Special Termination Event**

Either party may terminate this Agreement on one month's notice in writing to the other party if the Services Subcontract is terminated by reference to a Special Termination Event.

### **27. Pre-termination discussions**

- 27.1 Where practicable, neither party will seek to exercise a right to terminate this Agreement without first giving the other party two Business Days' notice of its intention to do so and, if requested by the other party, will, to the extent reasonable and appropriate, engage in "without prejudice" discussions with the other party at a senior level in that notice period, such discussions not to exceed 5 Business Days unless otherwise agreed, to explore possible options for the Agreement to continue.
- 27.2 The parties are obligated by clause 27.1 only to the extent that such discussions did not occur or could not reasonably have occurred during any period of notice, grace or remedy contained in the relevant clause dealing with the existence or exercise of rights to terminate.

### **28. Termination by Department for Convenience**

- 28.1 The Department may terminate this Agreement at its convenience and without cause at any time by giving at least 20 Business Days' notice in writing.
- 28.2 Any payment made to the Organisation under clause 31.3 will be in total satisfaction of any liability of the Department to the Organisation in respect of this Agreement and its termination. Upon request by the Department the Organisation must execute a deed of release on terms acceptable to both parties as a condition precedent to payment.
- 28.3 The Organisation must do everything reasonably possible to prevent or otherwise mitigate any losses resulting to the Organisation from the termination.

### **29. Termination by Department for Cause and on Other Grounds**

#### **For Cause**

- 29.1 The Department may terminate this Agreement at any time with immediate effect by giving notice to the Organisation if:
- (a) the Organisation has committed a material breach of any provision of this Agreement, the breach is not capable of being remedied and the parties have not agreed in writing a basis upon which this Agreement can continue within 20 Business Days of the Organisation receiving notice of that breach;

- (b) the Organisation commits a material breach of this Agreement that is capable of remedy and the Organisation fails to remedy that breach within 20 Business Days following receipt of a notice requiring it to do so;
- (c) the Organisation commits any breach of this Agreement on a recurring basis in any rolling 3 Month period being a breach in respect of which the Department has, during that 3 Month period, issued at least 3 notices under clause 29.1(b);
- (d) the Organisation or the Services Subcontractor is the subject of or suffers an Insolvency Event;
- (e) the Organisation or the Services Subcontractor abandons the Services or expresses or demonstrates an intention to cease or substantially cease performance of this Agreement or the Services Subcontract;
- (f) the Services Subcontract is terminated other than by reference to a Special Termination Event;
- (g) the Organisation or the Services Subcontractor suffers a Change in Control which the Department reasonably considers will have an adverse impact on the performance of the Services or the delivery of the Outcomes under this Agreement;
- (h) the Department is entitled to terminate as a result of a conflict of interest in accordance with clause 41.6;
- (i) the repayment of principal by the Organisation is accelerated under the terms of the Bond upon an event of default under the Bond/s;
- (j) any of the following documents is amended (other than to correct minor or typographical errors) without the prior written consent of the Department:
  - (i) the Constituent Documents;
  - (ii) the Bond Deed;
  - (iii) the Security Trust Deed;
  - (iv) any security documents issued to secure the Organisation's indebtedness to Investors;
  - (v) the Services Subcontract; or
  - (vi) any other Transaction Document
- (k) the Services Subcontractor has committed a material breach of the Services Subcontract, the breach is not capable of being remedied and the parties to the Services Subcontract have not agreed in writing, with the concurrence of the Department, a basis upon which the Services Subcontract can continue within 20 Business Days of the Services Subcontractor receiving notice of that breach;
- (l) the Services Subcontractor commits a material breach of the Services Subcontract that is capable of remedy and the Services Subcontractor fails to remedy that breach within 20 Business Days following receipt of a notice from the Organisation requiring it to do so;
- (m) the Direct Agreement is declared invalid or unenforceable by a court or is terminated for material breach by the Services Subcontractor;



- (n) this Agreement is declared invalid or unenforceable by a court, other than as a result of a change in Law under clause 25.4(b);
- (o) any Security Document is declared invalid or unenforceable by a court other than as a result of a change in Law under clause 25.4(b);
- (p) the Organisation fails, in any year of the Referral Period, to make the number of requests for Referral specified for that period in the Operations Manual and fails to show cause to the Department's reasonable satisfaction why the Agreement should continue within 20 Business Days following receipt of a notice from the Department requiring it to do so; or
- (q) without the prior written consent of the Department, the Organisation ceases to be the trustee or the only trustee of the Trust or any action is taken (other than by the Department) to remove the Organisation as trustee of the Trust or to appoint another person as trustee in addition to the Organisation.

#### **Other Grounds**

- 29.2 The Department may terminate this Agreement if the Department is otherwise entitled under a specific provision of this Agreement to terminate this Agreement, provided that the Department complies with any conditions or restrictions applying to such a provision.

### **30. Termination by Organisation**

#### **Termination for cause**

- 30.1 The Organisation may terminate this Agreement at any time with immediate effect by giving notice to the Department if:
- (a) the Department has committed a material breach of any provision of this Agreement, the breach is not capable of being remedied and the parties have not agreed in writing the basis upon which this Agreement can continue within 20 Business Days of the Department receiving notice of that breach; and/or
  - (b) the Department commits a material breach of this Agreement that is capable of remedy and the Department fails to remedy that breach within 20 Business Days following receipt of a notice requiring it to do so.

#### **Other grounds**

- 30.2 The Organisation may terminate this Agreement if the Organisation is otherwise entitled under a specific provision of this Agreement to terminate this Agreement, provided that the Organisation complies with any conditions or restrictions applying to such a provision.

### **31. Consequences of Termination**

- 31.1 Except as otherwise required in accordance with relevant legislative requirements and the Organisation's reasonable commercial record keeping requirements, the Organisation must, and must cause its Subcontractors to, immediately following expiry or earlier termination of this Agreement, return to the Department, or, if expressly required by the Department, destroy (at the Department's sole option and in the manner reasonably specified by the Department), all:
- (a) Confidential Information of the Department;
  - (b) Department's Materials;
  - (c) New Contract Material;

- (d) all Records referred to at clauses 35.2, and 37.5 to the extent that they are requested by the Department; and
- (e) other tangible property and materials of the Department,

which is or are in the possession, custody or control of the Organisation, a Subcontractor or any Personnel or either of them as at the date of expiry or earlier termination and which the Organisation is not expressly entitled, in accordance with the terms of this Agreement, to retain following such expiry or termination.

31.2 Except as otherwise required in accordance with relevant legislative requirements and the Department's reasonable commercial record keeping requirements, the Department must, immediately following expiry or earlier termination of this Agreement, return to the Organisation, or destroy (at the Organisation's sole option and in the manner reasonably specified by the Organisation), all Organisation's Materials and Confidential Information of the Organisation which:

- (a) are in the possession, custody or control of the Department or any Personnel of the Department as at the date of expiry or earlier termination of this Agreement; and
- (b) the Department is not expressly entitled, in accordance with the terms of this Agreement, to retain following such expiry or termination.

31.3 Where the Agreement is terminated by either party, each party shall make the relevant payments required in consequence of such termination as detailed or referenced in Schedule 3 (Payment Schedule) and subject to the obligations of the parties under clause 22.

31.4 Termination of this Agreement will not affect the accrued rights and remedies of either party.

31.5 On and from the date of termination, the Organisation must provide the Transition-Out Services in accordance with its obligations under clause 32 (Transition-Out) and the Transition-Out Plan.

31.6 The Department and the Organisation acknowledge that the termination of this Agreement may constitute a default event under the Bond/s.

## **32. Transition-Out**

32.1 This clause 32 applies:

- (a) during the period commencing 12 Months prior to expiry of the Term and will expire on the last day of the Term; or
- (b) in the event this Agreement is terminated, during the period commencing on the date of termination and ending on a date to be determined by the Department after consultation with the Organisation.

32.2 The Organisation must, in consultation with the Department and the Services Subcontractor, commence drafting a transition-out plan no later than 12 Months before expiry of the Term.

32.3 The parties will work in good faith so that the draft transition-out plan is finalised and agreed by the parties no later than 6 Months before expiry of the Term.

32.4 The content and process for the finalisation of the Transition-Out Plan will be as set out in the Operations Manual.

32.5 Once the Transition-Out Plan has been finally agreed by the parties, that plan is incorporated into and becomes part of, this Agreement.

- 32.6 In the event of termination of this Agreement prior to the expiry of the Term, the parties agree to transition out in accordance with the arrangements and timeframes set out in the Operations Manual for transition-out on early termination of this Agreement.
- 32.7 Services disengaged in accordance with this clause 32 (whether encompassing all or part of the Services or Outcomes), and any additional services which the Organisation is required to provide under this clause 32, are referred to as Transition-Out Services.
- 32.8 Once the Transition-Out Period has commenced the Organisation must do all things necessary to provide the Transition-Out Services described in the Transition-Out Plan as being the obligations of the Organisation.
- 32.9 Except where this Agreement is terminated by the Department under clause 29.1 (for cause) in which case the Organisation will provide the Transition-Out Services at no cost to the Department, the Department will pay the fees for the Transition-Out Services, if any, agreed in the Transition-Out Plan.

## **PART I – ADMINISTRATION OF PROJECT**

### **33. Authorised Representatives**

- 33.1 Subject to this clause 33 the Authorised Representatives are the primary contact for their respective parties.
- 33.2 Subject to clause 2.1, the Authorised Representative of each party has authority to deal with all matters relating to the administration of this Agreement on behalf of the relevant party and otherwise as described in this Agreement.
- 33.3 The Authorised Representative of a party may not agree to vary or terminate this Agreement except on the basis of satisfactory written evidence of authority from that party. To avoid doubt, the Authorised Representative of the Services Subcontractor has no authority to amend or terminate this Agreement on behalf of the Organisation.

### **34. Project Oversight Framework**

- 34.1 A Joint Working Group will be established in accordance with the Operations Manual to review and discuss Operational Matters, monitor Outcomes achieved and seek to resolve any disputes arising under this Agreement.
- 34.2 The frequency of, and procedure for, Joint Working Group meetings will be in accordance with the Operations Manual, which may also establish more detailed terms of reference for the group.

### **35. Records, data and other information**

#### **Maintenance of records**

- 35.1 The Organisation must, and must ensure that its Subcontractors (to the extent relevant to the particular subcontract), during the Term:
- (a) prepare and maintain up to date, comprehensive, true and accurate computerised Records of, and supporting documentation for the Services and the delivery of Outcomes and other services provided under and/or in relation to this Agreement, in accordance with generally accepted industry standards, accounting principles and applicable Law;
  - (b) unless otherwise required by the Department, retain the Records for the period of 7 years after the expiry or earlier termination of this Agreement except where the

Records relate to, or are in connection with a Family, unborn Child, Child or Young Person, in which case the Organisation must retain the Records for the period of 7 years from when the youngest Child and/or Young Person of the Family turns 18 years of age ("**Additional Period**").

35.2 Without limiting clause 35.1

- (a) the Organisation must maintain, and must ensure that its Services Subcontractor maintains, complete and accurate Records and supporting documentation in relation to the matters set out in the Operations Manual and in accordance with any records management protocol established by the Department under this clause and included in the Operations Manual once agreed; and
- (b) the Department may, from time to time and in consultation with the Organisation, approve protocols for the maintenance and management of Records, with which, once approved, the Organisation and its Subcontractors will comply.

#### **Access to records**

35.3 The Department will be entitled during the Term and the Additional Period to:

- (a) have access to all such Records at any time upon giving the Organisation reasonable notice;
- (b) take extracts, make and/or obtain copies of any such Records (at the Department's cost) as the Department considers appropriate; and

the Organisation and its Personnel must give the Department all reasonable assistance to enable the Department to exercise its rights under this clause 35.3.

#### **Information, reports and evidence for court proceedings**

35.4 In addition to the Information which the Organisation may be required to provide to the Department pursuant to Chapter 16A and s.248 of the Act the Organisation must also provide, or ensure that its Services Subcontractor provides, to the Department the various reports, Information and evidence for court proceedings as specified in the Operations Manual and in accordance with any requirements and timeframes specified in the Operations Manual.

#### **Government Information (Public Access) Act 2009 (NSW)**

35.5 Without limiting clause 35.3 and for the purposes of the Government Information (Public Access) Act 2009 (NSW), the Organisation must provide, and ensure that its Subcontractors provide, the Department with immediate access to the following information contained in Records held by the Organisation/the Subcontractor (as applicable):

- (a) Information that relates directly to the performance of the Services and the delivery of the Outcomes and any other services provided to the Department by the Organisation pursuant to this Agreement;
- (b) information collected by the Organisation from members of the public to whom it provides, or offers to provide, the Services pursuant to this Agreement; and
- (c) information received by the Organisation from the Department to enable it to provide the Services and deliver the Outcomes and any other services pursuant to this Agreement.

35.6 For the purposes of clause 35.5, Information does not include:

- (a) Information that discloses or would tend to disclose the Organisation's/Subcontractor's financing arrangements, financial modelling, cost structure or profit margin;
  - (b) Information that the Organisation/Subcontractor is prohibited from disclosing to the Department by provision made by or under any Law, whether of any State or Territory, or of the Commonwealth; or
  - (c) Information that, if disclosed to the Department, could reasonably be expected to place the Organisation/Subcontractor at a substantial commercial disadvantage in relation to the Department, whether at present or in the future.
- 35.7 The Organisation will provide, and will ensure that its Subcontractors provide, copies of any of the Records, and Material referred to in this clause 35, as requested by the Department, at the Organisation's/Subcontractor's own cost.

#### **Reports and other information**

- 35.8 Without limiting this clause 35, the Organisation must promptly provide, and must ensure that its Subcontractors provide, the Department with such information and reports as the Department may from time to time reasonably require in relation to this Agreement, the Project and the Organisation's/Subcontractor's financial position.

### **36. Privacy**

- 36.1 During this Agreement the Organisation must comply, and must ensure that its Subcontractors and Personnel comply, with the Privacy Legislation to the extent that the Organisation/Subcontractors is/are required to do so at Law.
- 36.2 Without limiting its obligations under clause 36.1, the Organisation agrees, and must ensure that its Subcontractors agree (so far as applicable):
- (a) not to do any act, or engage in any practice, that would breach a Privacy Principle, or which if done or engaged in by the Department, would be a breach of a Privacy Principle;
  - (b) to comply with, carry out and discharge to the maximum extent possible, the obligations contained in the Privacy Principles as if it were the Department carrying out and discharging those obligations and to comply with all reasonable directions of the Department in relation to these obligations;
  - (c) to notify the Department immediately upon becoming aware of a breach or possible breach of any of the obligations contained in or referred to in this clause 36, whether by the Organisation or its Personnel;
  - (d) to ensure that any Personnel of the Organisation who is required to deal with Personal Information and/or Health Information for the purposes of this Agreement is made aware of the obligations in this clause 36; and
  - (e) to ensure that any other agreement with a Subcontractor, who may be fulfilling a requirement in relation to this Agreement which includes the handling of Personal Information and/or Health Information, contains the same or equivalent obligations as this clause 36 which are enforceable by the Organisation against the Subcontractor, as applicable.
- 36.3 This clause 36 will survive termination or expiry of this Agreement for a period of 7 years.

## 37. Confidentiality

### Obligation to keep confidential

37.1 The Organisation and the Department must:

- (a) keep confidential:
  - (i) the contents of this Agreement, information relating to negotiations concerning this Agreement and/or the commercial arrangements between the parties;
  - (ii) information regarding Children, Young Persons and their Families;
  - (iii) reports, files, professional advice, information and data required to be prepared or maintained under or for the purposes of this Agreement;
  - (iv) any information which is marked or identified as confidential by either party; and
  - (v) any information which is required to be kept confidential at Law.
- (b) use all reasonable endeavours to prevent their Personnel from making any disclosure to any person of any such matters.

### Permitted Disclosure

37.2 Clause 37.1 will not apply to:

- (a) any disclosure of any information the disclosure of which is agreed between the Organisation and the Department, in accordance with that agreement;
- (b) any disclosure of information that is reasonably required by persons engaged in the performance of the obligations of a party under this Agreement (including the Services Subcontractor);
- (c) any matter which a party can demonstrate is already generally available and in the public domain otherwise than as a result of a breach of clause 37.1;
- (d) any disclosure which is required by any Law (including any order of a court of competent jurisdiction) or in accordance with clause 39 (Dispute Resolution);
- (e) any disclosure of information which is already lawfully in the possession of the receiving party, prior to the disclosure by the disclosing party;
- (f) any provision of information to investors and potential investors and assignees in the Bond but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- (g) any disclosure or provision of information that is required to be disclosed to the Independent Certifier;
- (h) any disclosure by the Department of any information or document relating to this Agreement to any department, office or agency of the government of New South Wales including Cabinet, any Minister or member of a Minister's staff;
- (i) any disclosure of information that is reasonably required by a person in order to exercise or enjoy the rights under any licence granted under clause 38 (Intellectual Property);

- (j) any disclosure of Information to the advisers of a party to this Agreement, an Investor, the Services Subcontractor or investors and potential investors and assignees in the Bond but so as not to identify any members of the Cohort (unless legally required or permitted);
- (k) any disclosure of information to any ratings agency, stock exchange, Authority (including the Australian Taxation Office and the Office or Commissioner of State Revenue) or regulatory agency (including the Australian Prudential Regulation Authority) that is required in connection with this Agreement, the Services Subcontract, the Services or the Bonds or the Organisation, an Investor or an investor in the Bond's involvement in the Project of the SBB Arrangement, but, in each case, so as not to identify any members of the Cohort (unless legally required or permitted); and
- (l) any disclosure of Information to the extent such disclosure is required to apply for, obtain or maintain any licences or approvals in connection with this Agreement, the Services Subcontract, the Services or the Bonds, but so as not to identify any members of the Cohort (unless legally required or permitted).

#### **Disclosure subject to confidentiality**

- 37.3 Where disclosure is permitted under clause 37.2, other than clauses 37.2(c), 37.2(d), 37.2(h), 37.2(j), 37.2(k) and 37.2(l), the party making the disclosure must ensure that the recipient of the Information will be subject to the same obligation of confidentiality as that contained in this Agreement.

#### **No exploitation of information**

- 37.4 The Organisation must not make use of this Agreement or any Information Issued or provided by or on behalf of the Department in connection with this Agreement otherwise than for purposes connected with this Agreement, except with the prior written consent of the Department.

#### **Return of certain information on request**

- 37.5 Without limiting clause 31 (Consequences of Termination), on or before the expiration or earlier termination of the Term, the Organisation must, if requested by the Department, ensure that all Records in the Organisation's possession, custody or control which contain information relating to any Child, Young Person and their respective Family, including the documents in the possession, custody or control of any Subcontractor, are delivered up to the Department to the extent requested by the Department.

#### **Organisation's confidentiality obligations to clients**

- 37.6 Without limiting this clause 37 both the Department and the Organisation will ensure the rights to confidentiality of any Child, Young Person and their respective Family and staff are protected in both policy and practice in accordance with any relevant Law, subject to any requirements to disclose information in relation to such persons for the purposes of this Agreement or at Law.
- 37.7 The Organisation acknowledges that it is subject to section 76 of the Community Welfare Act 1987 (NSW) and as a result, a breach of confidentiality under this Agreement may be an offence under that section.

### **38. Intellectual Property**

- 38.1 This Agreement does not assign ownership of any Intellectual Property existing on the Commencement Date and neither party may assert ownership of all or any part of the other party's pre-existing Intellectual Property.

- 38.2 If the Organisation has any pre-existing Intellectual Property as at the Commencement Date that are applied in the performance of this Agreement, the Organisation grants to the State by this clause an irrevocable, non-exclusive, world-wide, perpetual, transferable, sub-licensable, royalty-free licence of that pre-existing Intellectual Property for use in relation to or in connection with the implementation of this Agreement by the State, or on its behalf.
- 38.3 If any Intellectual Property (excluding Service Delivery Material) is developed solely by, or on behalf of, the Organisation, or jointly by or on behalf of the parties, in the course of the parties performing their obligations under this Agreement, or is developed by or on behalf of the Services Subcontractor and vests in the Organisation under the terms of the Services Subcontract, the State owns that Intellectual Property and such Intellectual Property on its creation vests, or otherwise is assigned or transferred to the State without the need for further assurance.
- 38.4 To the extent that any Intellectual Property (excluding Service Delivery Material) is developed by, or on behalf of, the Services Subcontractor in performing the Services Subcontract and does not vest in the Organisation under the Services Subcontract, the Organisation undertakes to promptly procure the transfer of ownership of that Intellectual Property to the State.
- 38.5 If ownership of Intellectual Property referred to in clause 38.3 and 38.4 is not capable of being vested in or transferred to the State under clause 38.3 or 38.4 (as applicable) because the Organisation does not own or is unable at a reasonable cost to obtain ownership of that Intellectual Property, or the Intellectual Property is Service Delivery Material, the Organisation must at its own cost ensure that the State is suitably and irrevocably licensed to use and to sub-license the use of that Intellectual property (but to avoid doubt subject to the confidentiality requirements of this Agreement) in connection with:
- (a) the implementation and evaluation of this Agreement; and
  - (b) in the case of Intellectual Property other than Service Delivery Material, a SBB or similar other products, services or programmes within Australia and overseas.
- 38.6 The Organisation must hold or obtain at its own cost all necessary consents from any individual that has Moral Rights in the Intellectual Property to its use, adaptation and all other actions by the State (or any of its officers, employees, contractor and agents) or the Organisation in the exercise of the rights conferred under this clause 38. Such consents must be without restriction and without any requirement to attribute authorship or performership, including any act of omission that might otherwise infringe the moral Rights of any individual.
- 38.7 The State (acting through the Department) by this Agreement grants to the Organisation an irrevocable, non-exclusive, perpetual, royalty-free licence (including the right to sublicense the Services Subcontractor) of any Intellectual Property referred to in clause 38.3 (but to avoid doubt subject to the confidentiality requirements of this Agreement) for use in connection with:
- (a) the implementation and evaluation of this Agreement and the Services Subcontract; and
  - (b) a SBB or similar other products, services or programmes within Australia and overseas.
- 38.8 If the Organisation requires a licence (including any right to sublicense) additional to that granted under clause 38.7 to use the State's Intellectual Property referred to in clause 38.3, the Organisation must make a written request to the State, through the Department, stating the nature of the additional licence required and the reason why such licence is required. The State will consider the request in good faith and, if the State considers it reasonable to do so in the circumstances, grant to the Organisation a further licence



subject to the parties entering into a written agreement as to the terms of any additional licence.

- 38.9 Without limiting any other rights which the State may have under this Agreement or at law, the Organisation agrees to compensate the State and its officers, employees, contractors and agents (**those compensated**) against all damage, liability or loss incurred or suffered by any of those compensated (including legal costs on a solicitor client basis) arising directly or indirectly out of or in connection with:
- (a) a breach of this clause 38, whether by any act or omission and whether negligent, wilful reckless or unlawful; and/or
  - (b) any claim for infringement or alleged infringement of any Intellectual Property and Moral Rights in relation to or in connection with this Agreement and its implementation or any material provided or created under this Agreement including any modifications, variations or adaptations to that material.
- 38.10 The Organisation's liability will be reduced to the extent the damage, liability or loss incurred or suffered was caused by those compensated.

## **39. Dispute resolution**

### **Dispute resolution procedure**

- 39.1 Subject to clause 39.12, the parties must attempt to resolve any dispute in relation to this Agreement in accordance with this clause 39 before resorting to court proceedings or other external dispute resolution mechanisms except as specified in this clause.

### **Notice of dispute**

- 39.2 A party claiming a dispute has arisen in relation to this Agreement must immediately notify the other party ("**Notice of Dispute**") in accordance with clause 40 (Notices).
- 39.3 The Notice of Dispute must specify in reasonable detail the nature of the dispute.

### **Referral to Joint Working Group**

- 39.4 If a dispute is notified under clause 39.2 the Joint Working Group will attempt to resolve the dispute.

### **Escalation**

- 39.5 If the dispute is not resolved by the Joint Working Group within 10 Business Days of it being referred to them then the dispute will be escalated by each party to:
- (a) in the case of the Organisation, a nominated senior representative of the Organisation and the CEO or CEO's nominee of the Services Subcontractor; and
  - (b) in the case of the Department, its Director-General or the Director-General's nominee.
- 39.6 If the dispute is not resolved within 10 Business Days of the dispute being referred to the parties' respective senior representatives in accordance with clause 39.5, or within 20 Business Days of the dispute being notified in accordance with clause 39.2, either party may, by notice to the other specifying the issue for determination ("**ED Referral Notice**"), refer the dispute to Independent expert determination under clause 39.7, provided that (for the purposes of clause 39.11) an ED Referral Notice must be given within 5 Business Days of the right to refer the dispute to expert determination having arisen.

### **Expert determination**

- 39.7 If a dispute is referred to expert determination under this clause 39, unless otherwise agreed the parties will be bound by the procedure set out in Schedule 6 (Expert Determination Procedure).
- 39.8 The fees and expenses of the expert will be borne by the parties equally.
- 39.9 The determination of the expert, if made within the period stated in clause 39.11, will be binding on the parties.
- 39.10 The expert must:
- (a) act as an expert, not an arbitrator;
  - (b) be independent of both parties;
  - (c) have no interest or duty that conflicts with his/her role as an independent expert;
  - (d) keep confidential all materials and information made available to that expert in respect of the dispute; and
  - (e) issue a written decision giving reasons within the period stated in clause 39.11.
- 39.11 If an ED Referral Notice is not submitted within the time specified in clause 39.5 (or such longer period as may be agreed), or if the dispute is not determined within 2 Months of being referred to the expert (or such longer period as the parties may agree in writing), either party is free to pursue resolution of the dispute by legal proceedings or any other external dispute mechanism.

### **Exclusions**

- 39.12 This clause 39 does not apply in either of the following circumstances:
- (a) the exercise by either party of its rights to terminate this Agreement; or
  - (b) the commencement of legal proceedings by either party seeking urgent interlocutory relief.

### **Continued performance of Agreement**

- 39.13 Notwithstanding the existence of a dispute, unless and to the extent otherwise agreed, each party must continue to perform this Agreement.

## **40. Notices**

- 40.1 A notice under this Agreement must be:
- (a) in writing, directed to the Authorised Representative of the other party (and copied to the Services Subcontractor's recipient for copies of notices named as such in Schedule 1); and
  - (b) forwarded to the address or facsimile number of that Authorised Representative or the address last notified by the intended recipient to the sender.
- 40.2 A notice under this Agreement will be deemed to be served:
- (a) in the case of delivery in person – when delivered to the recipient's address for service and a signature received as evidence of delivery;

- (b) in the case of delivery by post – within three business days of posting;
  - (c) in the case of delivery by facsimile – at the time of dispatch If the sender receives a transmission report which confirms that the facsimile was sent in its entirety to the facsimile number of the recipient.
- 40.3 Notwithstanding the preceding clause, if delivery or receipt of a communication is on a day which is not a Business Day in the place to which the communication is sent or is later than 5 pm (local time in that place) it will be deemed to have been duly given or made at 9 am (local time at that place) on the next business day in that place.

## **41. General**

### **No fetter**

- 41.1 Nothing in this Agreement is to be construed as requiring the Department (including the Director-General or Minister or any delegate of the Director-General or Minister) to do anything that would cause it to be in breach of any of its obligations at Law, and without limitation nothing in this Agreement is to be construed as limiting, fettering or otherwise preventing in any way the exercise of any statutory function (including a power, discretion or duty).
- 41.2 No action or decision by the Department (including the Minister or the Director-General or any delegate of the Director-General or Minister) in the lawful exercise of a statutory function (including a power, discretion or duty) in connection with any Family, unborn Child, Child or Young Person will give rise to any liability for breach of this Agreement.

### **Publicity and Media and Communications Protocol**

- 41.3 The parties must, and the Organisation must ensure its Services Subcontractor, use/s best endeavours to observe the Media and Communications Protocol.
- 41.4 Both parties will make reasonable efforts to consult with each other before the making of any press or other announcements or releases relating to this Agreement or its subject matter.

### **Disclosure of Conflict of Interest**

- 41.5 The Organisation must:
- (a) notify the Department in writing immediately upon becoming aware of the existence or possibility of a conflict of interest that affects the Organisation (which to avoid doubt does not include any conflict that might affect its equity investors or Bond holders); and
  - (b) subject to clause 41.6 comply with any reasonable direction by the Department in relation to managing that conflict of interest.
- 41.6 Where, in the Department's reasonable view a conflict of interest referred to in clause 41.5 cannot be appropriately managed, the Department may terminate this Agreement for cause with immediate effect by giving notice to the Organisation.

### **Assignment or Novation**

- 41.7 Other than a Permitted Dealing, the Organisation must not assign, encumber, novate or otherwise transfer any right or obligation under this Agreement without the Department's prior consent which consent may be withheld in the Department's absolute discretion.

41.8 The Organisation acknowledges that the Department may conduct financial and other inquiries or checks on the entity proposing to take over this Agreement before determining whether or not to give consent to the assignment, novation or transfer.

41.9 The Department, at its own cost, may assign, novate or transfer this Agreement to a new legal entity where, by operation of statute or executive decision of the NSW Government, the Department is reconstituted into that new legal entity.

#### **Writing**

41.10 All amendments to this Agreement and all consents, approvals, waivers and agreements made under or pursuant to this Agreement must be evidenced in writing.

#### **Consents**

41.11 A party may give its consent or approval conditionally or unconditionally or may withhold its consent, in its absolute discretion, unless this Agreement specifically provides otherwise.

#### **Non-waiver**

41.12 No failure or delay by a party in exercising any right, power or remedy under this Agreement and no course of dealing or grant by that party of any time or other consideration, will operate as a waiver of the breach or a default by the other party. Any waiver of a default of this Agreement will not be construed as a waiver of any further breach of the same or any other provision.

#### **Severability**

41.13 If any part of this Agreement is prohibited, void, voidable, illegal or unenforceable, then that part is severed from this Agreement but without affecting the continued operation of the remainder of the Agreement.

#### **Relationship**

41.14 The relationship between the parties is one of principal and independent contractor. Neither party has the power, right or authority to bind the other or to assume or create any obligation on behalf of the other or in their name, other than as expressly provided in this Agreement. Neither party may represent that it has any such right, power or authority.

41.15 Nothing in this Agreement is to be construed as constituting the parties as partners or as creating the relationship between them of employer and employee or principal and agency, other than as expressly provided in this Agreement.

#### **Rights cumulative**

41.16 The rights and remedies provided under this Agreement are cumulative and not exclusive of any rights or remedies provided by law or any other right or remedy.

41.17 No indemnity in this Agreement limits the effect or operation of any other indemnity in this Agreement. Unless expressly provided otherwise, each indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations of the parties.

41.18 A party may recover a payment under an indemnity in this Agreement before it makes the payment in respect of which the indemnity is given. Each indemnity in this Agreement (and each release and each exclusion in respect thereof) survives the expiry or earlier termination of this Agreement.

### **Inconsistency**

41.19 In the event of an inconsistency between the terms of this Agreement, or the terms of this Agreement and any other document (as applicable) for the purpose only of resolving the inconsistency, the following order of decreasing priority applies, unless otherwise agreed between the parties in writing:

- (a) operative provisions of this Agreement;
- (b) Schedule 1 (Agreement Details);
- (c) Schedule 3 (Payment Schedule);
- (d) Schedule 2 (Scope of Operations Manual);
- (e) the Operations Manual;
- (f) Schedule 4 (Transition-In);
- (g) Schedule 5 (Direct Agreement Agreed Terms); and
- (h) other Schedules, attachments or documents (if any).

### **Survival**

41.20 Notwithstanding clause 13 (Term of Agreement), and without limiting any other provision of this Agreement relating to survival the following clauses survive any termination or expiration of this Agreement:

- (a) clause 9 (Representations and warranties);
- (b) clause 19.5 (Force majeure – payments on termination);
- (c) clause 20 (Indemnities);
- (d) clause 21 (Insurance);
- (e) clause 22 (Payments to Organisation);
- (f) clause 23 (Repayment of Standing Charge on early termination)
- (g) clause 24 (GST);
- (h) clause 28 (Termination by Department for Convenience);
- (i) clause 31 (Consequences of Termination);
- (j) clause 32 (Transition-Out);
- (k) clause 35 (Records, data and other information);
- (l) clause 36 (Privacy);
- (m) clause 37 (Confidentiality);
- (n) clause 38 (Intellectual Property);
- (o) clause 39 (Dispute Resolution); and

- (p) any other provision of this Agreement (including Schedule 3 (Payment Schedule)) which contemplates performance or observance following any termination or expiration of this Agreement including where referenced by, or necessary to, the operation of a clause the survival of which is expressly provided for in this clause 41.20.

#### **Legal advice and costs**

- 41.21 Except as otherwise agreed in writing each party will bear its own costs and expenses incurred in relation to this Agreement including the negotiation, preparation and negotiation of this Agreement or any related document.
- 41.22 A party to this Agreement that has an obligation to do anything under this Agreement must perform that obligation at its cost, unless this Agreement expressly provides otherwise.
- 41.23 A party that requests any consent, waiver, amendment, supplement, replacement, novation, assignment or transfer under this Agreement or any related document must pay all costs associated with such consent, waiver, amendments, supplement, replacement, novation, assignment or transfer unless this Agreement expressly provides otherwise.

#### **Counterparts**

- 41.24 This Agreement may be executed by counterparts by the respective parties, which together will constitute one agreement.

#### **Applicable law**

- 41.25 This Agreement is governed by, and must be construed in accordance with, the laws in force in the State of New South Wales.

#### **Submission to jurisdiction**

- 41.26 Each party submits to the exclusive jurisdiction of the Courts exercising jurisdiction in the State of New South Wales and the courts of appeal therefrom.

Executed as a Deed on 13th of June 2013

**Executed as a deed by the Department:**

**Signed, sealed and delivered by the Minister** )  
**for Family and Community Services** for and on )  
 behalf of the Crown in right of the State of New )  
 South Wales )

by the Hon. Prudence Goward, MP )

in the presence of William Crook )  
 (insert name of witness) )



(signature of Minister)

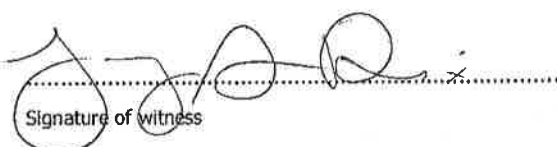


(signature of witness)

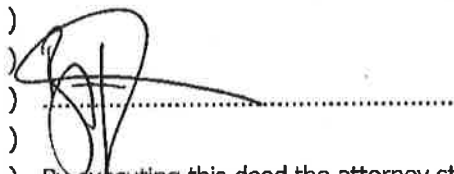
**Executed as a deed by the Organisation:**

**Signed, sealed and delivered by** )

as attorney for **Perpetual Corporate Trust** )  
**Limited as trustee for The Benevolent Society** )  
**Social Benefit Trust No 1** under power of attorney )  
 in the presence of: )

  
 Signature of witness

Georgina Amelia Rix  
 Name of witness (block letters)



) By executing this deed the attorney states  
 ) that the attorney has received no notice  
 ) of revocation of the power of attorney  
 )  
 Brian Spellman  
 Senior Manager

## SCHEDULE 1 AGREEMENT DETAILS

This attachment forms part of the Agreement between the Department and the Organisation.

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### Item 1      DEPARTMENT

Name:      The Minister for Family and Community Services, for and on behalf of the State of New South Wales, acting through Community Services, Department of Family and Community Services

A.B.N:      87 503 966 787

Address      c/- 4-6 Cavill Avenue, Ashfield NSW 2131

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### Item 2      ORGANISATION

Name:      Perpetual Corporate Trust Limited, as trustee for The Benevolent Society Social Benefit Trust No 1

A.B.N:      99 000 341 533

Address:      As for Organisation's Authorised Representative

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### Item 3      DEPARTMENT'S AUTHORISED REPRESENTATIVE

Name:

Position:

Address:      4-6 Cavill Avenue, Ashfield NSW 2131

Tel:      (02)

Fax:      (02)

Email:      [OOHCSocialBenefitBondPilots@facs.nsw.gov.au](mailto:OOHCSocialBenefitBondPilots@facs.nsw.gov.au)



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**Item 4 ORGANISATION'S AUTHORISED REPRESENTATIVE**

Position:

Address:

Tel:

Fax:

Email:

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**Item 5 SERVICES SUBCONTRACTOR'S AUTHORISED REPRESENTATIVE**

Name:

Position:

Address:

Tel:

Fax:

Email:

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**Item 6 SERVICES SUBCONTRACTOR'S RECIPIENT OF COPIES OF NOTICES**

Name:

Position:

Address:

Tel:

Fax:

Email:

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**Item 7 TERM OF AGREEMENT**

This Agreement commences on the Commencement Date and, unless earlier terminated in accordance with its terms, will expire on the fifth anniversary of the Referral Date.

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**Item 8      BOND ISSUER**  
**The Organisation.**

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**Item 9      BOND MODEL**

Bond Model	Element	Detail																								
		Class P and E will receive the following annual compounding coupon rates associated with performance (definitions of performance levels are as set out in Schedule 3):																								
		<table> <tr> <th></th><th>Class P</th><th>Class E</th></tr> <tr> <td>Fail:</td><td>0%</td><td>0%</td></tr> <tr> <td>Baseline:</td><td>5%</td><td>8%</td></tr> <tr> <td>Good 1:</td><td>6%</td><td>10.5%</td></tr> <tr> <td>Good 2:</td><td>7%</td><td>15%</td></tr> <tr> <td>Good 3:</td><td>8%</td><td>20%</td></tr> <tr> <td>Good 4:</td><td>9%</td><td>25%</td></tr> <tr> <td>Out-Performance:</td><td>10%</td><td>30%</td></tr> </table>		Class P	Class E	Fail:	0%	0%	Baseline:	5%	8%	Good 1:	6%	10.5%	Good 2:	7%	15%	Good 3:	8%	20%	Good 4:	9%	25%	Out-Performance:	10%	30%
	Class P	Class E																								
Fail:	0%	0%																								
Baseline:	5%	8%																								
Good 1:	6%	10.5%																								
Good 2:	7%	15%																								
Good 3:	8%	20%																								
Good 4:	9%	25%																								
Out-Performance:	10%	30%																								
1	Coupon rates																									
2	Principal protection	Repayment of the principal on Class P Bonds will be secured by a second ranking fixed and floating charge over Trust Assets.																								
3	Principal Amounts	The total principal amount of the Bond/s is \$10 million, divided between the classes as follows: Class P: \$7.5 million Class E: \$2.5 million																								
4	Frequency of payments to Investors	Investors will receive repayment of principal and an aggregate coupon payment (In each case, subject to relevant payment tests based on the assessed Performance Level) only upon the redemption of the Bond/s (at maturity or upon an early redemption) in accordance with the applicable terms and conditions of the Bond/s.																								
5	Scheduled maturity date	The fifth anniversary of the Bond Settlement Date.																								

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**Item 10      BOND ISSUE AMOUNT**

\$10 million (GST excl.).

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<b>Item 11</b>	<b>SERVICES SUBCONTRACT AGREED SCOPE</b>
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The Services Subcontract will be back to back with this Agreement to the extent applicable.

In addition, payment for Services under the subcontract will be in monthly instalments of \$166,667.00 GST excl.).

The Services Subcontractor will represent and warrant that it has made its own assessment of the risks, contingencies and other circumstances which might affect the Project and has satisfied itself as to the Project's viability and its ability to successfully deliver the Outcomes.

The Services Subcontract will define a "Special Termination Event".

<b>Item 12</b>	<b>REFERRAL TERMINATION DATE</b>
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The Referral Termination Date that is agreed by the Parties in the Transition-Out Plan such date not to be later than 4 years from the Referral Date.

<b>Item 13</b>	<b>ANTICIPATED SIZE OF COHORT</b>
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The anticipated size of the Cohort is approximately 322 Families.

<b>Item 14</b>	<b>TOTAL MINIMUM REQUESTS FOR REFERRALS</b>
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300 Families (the timing of which will be as detailed in the Operations Manual).

<b>Item 15</b>	<b>AGREED MINIMUM REFERRALS</b>
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The agreed minimum number of Referrals from the Cohort over the Referral Period (the timing of which will be as detailed in the Operations Manual) is 400 Families.

<b>Item 16</b>	<b>AGGREGATE CAP ON PAYMENTS</b>
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The aggregate cap on all Departmental payments under this Agreement

<b>Item 17</b>	<b>INSURANCE</b>
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1. Insurance required to be held and maintained by each Subcontractor for and in respect of the period of the Term and any additional period stated for the particular policy are listed below.

- (a) broad form public liability policy of insurance which includes:

- (i) occurrence based public liability insurance of the value of at least \$20 million in respect of each occurrence and of at least \$20 million in the annual aggregate;
    - (ii) products liability insurance arising out of the provision of the Services and/or delivery of the Outcomes for the period of cover, for an amount of at least \$20 million in respect of each occurrence and of at least \$20 million in the annual aggregate;
  - (b) workers' compensation insurance in accordance with applicable legislation for all the relevant employees;
  - (c) professional indemnity insurance for an amount of at least \$5 million in respect of each claim and of at least \$5 million in the annual aggregate. The professional indemnity insurance:
    - (i) must cover liability owed to or incurred by the Organisation and the Department in respect of the Services and any products supplied ancillary to the Services;
    - (ii) must be maintained until the expiry or termination of this Agreement and for a period of not less than 6 years after the expiry or termination of this Agreement;
  - (d) all risk property insurance for the insurable value of all of equipment and materials used in the provision of the Services and/or delivery of the Outcomes;
  - (e) business continuity insurance for an appropriate amount to cover for business interruption in respect of the Services and delivery of the Outcomes;
  - (f) personal accident (volunteers) insurance insuring volunteers for personal injury risk arising during voluntary duties in respect of the Services and delivery of the Outcomes; and
  - (g) such other insurance policies to be effected by the relevant Subcontractor as reasonably required by the Department from time to time in respect of the Services and delivery of the Outcomes.
2. For all public liability insurance policies required under this Item 17, all such insurance policies must:
- (a) name the Department and the Organisation as additional insured for their respective rights and interests;
  - (b) contain a cross-liability clause in which the insurer agrees to waive any rights of subrogation or action that it may have to acquire against all or any of the persons comprising the insured or otherwise entitled to the benefit of the policy;
  - (c) require the insurer to notify all named insured of any variation or cancellation of the policy provided that a notice of claim given to the insurer by the Department, the Organisation or any Subcontractor (as applicable) will be accepted by the insurer as a notice of claim given by all of the insured;
  - (d) upon its terms and subject to relevant policy limits, deductibles, exclusions and conditions, cover the Department or the Organisation in respect of the Services and/or delivery of the Outcomes; and
  - (e) not exclude liability assumed by the Organisation under this Agreement or by the Subcontractor under any subcontract.

3. All Insurance policies required under this Item 17 must be effected with an Insurance company which, if Australian, is licensed by the Australian Prudential Regulatory Authority or, if the insurer is an international company, has a rating of not less than A- from S&P.

## **SCHEDULE 2**

### **SCOPE OF OPERATIONS MANUAL**

This attachment forms part of the Agreement between the Department and the Organisation

**The Operations Manual will cover the following subject areas:**

#### **Control Group**

- > Control Group (requirements and methodology for deriving and managing this Group)
- > Process and methodology for measuring Outcomes for Intervention Group and comparison with Control Group annually and at the Measurement Date

#### **Agreed Locations**

- > Agreed Locations
- > Process for agreeing new Agreed Locations
- > Process for agreeing removal of location from Agreed Locations

#### **Referral process (includes requirements and timeframes)**

- > referrals by Department
- > Agreed Minimum Referrals over the Referral Period, including timing of Referrals over that period.

#### **Cohort and eligibility criteria**

#### **Roles and Responsibilities**

#### **Records**

- > list of records the Department requires the Organisation and its Subcontractors to maintain and those for which copies are required, including documents/records which the Department will require the Organisation and its Subcontractors to hand over on termination/expiry of the Agreement and that will be required for Project evaluation
- > Records management protocol agreed by the parties

#### **Reporting Requirements**

- > reports, information and evidence required from Organisation for court proceedings (requirements and timeframes)

#### **Information Exchange**

- > includes IT arrangements and electronic sharing of data

#### **Government policies and guidelines**

- > any Department or other Government policies and guidelines with which the Organisation and its Subcontractors must comply
- > any particular requirements in relation to working with children checks etc

### **Annual review**

- > Content of annual review:
  - includes review of the performance of the parties in achieving the objectives set out in clause 4.2
  - the performance of the Organisation in delivering the Outcomes under the Agreement
  - Implementation of Operations Manual
- such other matters as the Department may determine from time to time.
- > timeframe for annual reviews

### **Communications and Media Protocol**

#### **Transition Out**

- > process for agreeing transition-out plans (content and timeframes)

#### **Contract management**

- > Joint Working Group
  - membership
  - terms of reference
  - frequency of meetings
  - procedure
- > Contract Representatives
- > Tracking and monitoring referrals and Outcomes
- > Payment process
  - process for agreeing variations to timeframes for payment in Schedule 3
- > Dispute resolution
- > Independent certification
  - process for requesting certification of annual performance data that evidences a breach of the Agreement
  - process for disputing Independent certifier's report

#### **Key contacts**

- > Include Department, Organisation and Services Subcontractor Authorised Representatives as listed in the Agreement Details

## SCHEDULE 3 PAYMENT SCHEDULE

### INTRODUCTION

This schedule (Payment Schedule) sets out the terms and amounts for specified payments to be made under the terms of this Agreement between the Department and the Organisation. The information in this schedule reflects the financial model agreed between the parties prior to the Referral Date being the basis on which these payment amounts have been calculated, increased and/or discounted.

All amounts specified below are exclusive of GST.

### DEFINITIONS

Unless otherwise indicated, capitalised terms used but not defined in this Payment Schedule have the same meanings as in the Agreement.

**"Actual CPI"** means the Consumer Price Index ("CPI") published by the Australian Bureau of Statistics as at the relevant termination date divided by the CPI as at the Referral Date.

**"Annual Cohort"** means for a Referral Year,

(a) in relation to the Intervention Group, the Families Referred to the Organisation in that Referral Year including any Families so Referred that the Organisation does not make contact with or who refuse the Services, but to avoid doubt excludes any referrals made to the Organisation by agencies or persons other than the Department; and

(b) in relation to the Control Group, the Families Included in the Control Group in that Referral Year in accordance with the requirements and methodology set out in the Operations Manual.

**"Break Costs"** means all amounts of losses that the Organisation is able to demonstrate to the Department that the Organisation or the Services Subcontractor has incurred, or will incur, as a direct result of the termination of this Agreement. This includes, without limitation, the costs of winding up the Organisation and any costs, expenses, charges, fee payments or other losses associated with ending the Services, the Management Deed and Services Subcontract.

**"Index Children"** means the group comprising the youngest Child from each Family in the Intervention Group or the Control Group, as the context admits.

**"Payment Date"** means the date that is 3 months after the Measurement Date.

**"Performance Level"** means the percentage of difference between the Intervention Group and the Control Group relative to the Outcomes, derived using the methodology set out in the Operations Manual.

**"Referral Year"** means each calendar year for four years from the Referral Date:

(a) in respect of the first Referral Year, commencing on the Referral Date and ending on the day immediately prior to the first anniversary of the Referral Date; and



(b) in respect of each subsequent Referral Year, commencing on the day immediately following the day on which the previous Referral Year ends and ending on the day immediately prior to the first anniversary of the commencement date for that Referral Year.

**"Remaining Bond Capital"** means cash retained by the Organisation after realising its Authorised Investments at the end of Term or following early termination of the Agreement, less the Remaining Standing Charge.

**"Remaining Standing Charge" or "RSC"** means the amount calculated by the following formula:

$$RSC = SC \times \left( \frac{1 - v^{(60 - T)}}{1 - v^{60}} \right)$$

where:

SC = the Standing Charge as set out in Part A of this Payment Schedule

$v = 1/(1 + (0.0371/12))$

T = the number of days elapsed from (and including) the Referral Date to (but excluding) the Payment Date, converted to months by dividing by 30.42 (being (365/12)).

**"ROSH report"** means a report to the Department that there is a risk of significant harm to a Child.

**"Total Outcome Payment"** means, the sum of the Standing Charge and the Outcome Payment, each as set out in Parts A and B of this schedule.

#### **PART A: STANDING CHARGE (Clause 22)**

1. The Standing Charge is \_\_\_\_\_ and is a pre-payment of part of the Total Outcome Payment to be paid in accordance with this Payment Schedule.
2. No amount of the Standing Charge will be refunded to the Department if the Agreement goes to Term.
3. The Organisation will issue the Department with an invoice for payment of the Standing Charge no less than 10 days prior to the Referral Date. Subject to receipt of the invoice in accordance with this item 3, the Department will pay the Invoice within 10 days of receipt of the invoice and, in any event, by no later than the Referral Date.
4. In the case of an early termination of this Agreement, the Remaining Standing Charge will be refunded to the Department.
5. Where the Remaining Standing Charge is required to be refunded, the Organisation will pay the Remaining Standing Charge to the Department within 4 weeks of the Independent Certifier's Report prepared in accordance with this Payment Schedule being provided.

#### **PART B: OUTCOME PAYMENT (Clause 22)**

The Outcome Payment will be calculated and paid in accordance with this Part B in the event:

- (a) the Agreement goes to Term (items 1-7);
- (b) the Department terminates for convenience under clause 28 (Items 1-6 and 8);
- (c) the Department terminates for cause under clause 29.1 (including as a result of a conflict of interest in accordance with clause 41.6) (items 1-6 and 9);
- (d) the Organisation terminates for cause under clause 30.1 (items 1-6 and 10)
- (e) Department or Organisation terminates this Agreement for Force Majeure under clause 19 or for a change of tax legislation or Law under clause 25.4 or as a result of the termination of the Services Subcontract for a Special Termination Event under clause 26 (Items 1-6 and 11).

### Outcome Payment timeframe

1. The Outcome Payment is payable by the Department to the Organisation on or before the Payment Date.
2. The Organisation will, within 8 weeks of the Measurement Date, provide the Department with:
  - (a) a valid Invoice for the total amount payable to the Organisation, including itemisation of the Outcome Payment and Break Costs (if any); and
  - (b) a copy of the Independent Certifier's report prepared in accordance with the requirements of this Agreement.
3. Subject to:
  - (a) the Department being satisfied as to the conclusions of the Independent Certifier's report; and
  - (b) if required by the Department, the parties having executed a deed of release in accordance with the relevant clause in this Agreement,

the Department will pay the total amount payable within 4 weeks of receipt of the invoice.

### Outcome Payment

4. The Organisation will be paid an Outcome Payment (net of the Standing Charge) based on the relevant Performance Level as determined in accordance with the Operations Manual.
5. Unless otherwise specified, each Performance Level (expressed as a percentage) is to be rounded to the nearest whole number (with 0.5% rounded up to 1%).
6. If there is no early termination of this Agreement, the Outcome Payment payable in relation to each assessed Performance Level is as set out in **Table 1: Outcome Payment Look-up Table**; each such amount being net of the Standing Charge.

**Table 1: Outcome Payment Look-up Table**

Performance Level	Outcome Payment (net of Standing Charge)
<5%	
≥5% <15%	
≥15% <20%	
≥20% <25%	
≥25% <35%	
≥35% <40%	
≥40%	

8. If the Department terminates this Agreement under clause 28 (Termination by Department for Convenience), the Outcome Payment payable in relation to each Performance Level assessed to be greater than or equal to 5% is as set out in **Table 1: Outcome Payment Look-up Table**; each such amount being net of the Standing Charge, and the Outcome Payment due in relation to any Performance Level assessed to be less than 5% is such amount being net of the Standing Charge.
9. If the Department terminates this Agreement under clause 29.1 (Termination by Department for Cause) (including as a result of a conflict of interest in accordance with clause 41.6) the

Outcome Payment payable in relation to each assessed Performance Level is as set out in **Table 2: Outcome Payment Look-Up Table.**

**Table 2: Outcome Payment Look-Up Table**

Performance Level	Outcome Payment
<5%	
≥5% <15%	Remaining Bond Capital
≥15% <20%	Remaining Bond Capital
≥20% <25%	Remaining Bond Capital
≥25% <35%	Remaining Bond Capital
≥35% <40%	Remaining Bond Capital
≥40%	Remaining Bond Capital

where, as applicable, "N" is the number of days elapsed from (and including) the Referral Date to (but excluding) the date of termination, divided by 365.

10. If the Organisation terminates this Agreement under clause 30.1 (Termination by the Organisation for Cause), the Outcome Payment payable in relation to each assessed Performance Level is as set out in **Table 3: Outcome Payment Look-Up Table.**

**Table 3: Outcome Payment Look-Up Table**

Performance Level	Outcome Payment
<25%	
≥25% <35%	

≥35% <40%	
≥40%	

where, as applicable, "N" is the number of days elapsed between the Referral Date and the applicable Payment Date, divided by 365.

11. If the Department or Organisation terminates this Agreement under clause 19 (Termination for Force Majeure), clause 25.4 (termination for a change of tax legislation or Law) or clause 26 (Termination upon termination of Services Subcontract by reference to a Special Termination Event) the Outcome Payment payable in relation to each assessed Performance Level is as set out in **Table 4: Outcome Payment Look-Up Table.**

**Table 4: Outcome Payment Look-Up Table**

Performance Level if date of termination is < 18 months after Referral Date	Performance Level if date of termination is ≥ 18 months after Referral Date	Outcome Payment
	<5%	
<15%	≥5% <15%	
≥15% <20%	≥15% <20%	
≥20% <25%	≥20% <25%	
≥25%, <35%	≥25% <35%	

≥35% <40%	≥35% <40%	
≥40%	≥40%	

where, as applicable, "N" is the number of days elapsed from (and including) the Referral Date to (but excluding) the applicable Payment Date, divided by 365. To avoid doubt, in the case that termination is less than 18 months after the Referral Date and the Performance Level is less than 5%, the Outcome Payment will be that associated with a Performance Level of <15%.

### PART C: BREAK COSTS

1. The Department is required to pay to the Organisation all Break Costs (up to the amount specified in item 3 of this Part C), if:
  - a. the Department terminates this Agreement under clause 28 (Termination by Department for Convenience);
  - b. either the Department or the Organisation terminates this Agreement under clause 19 (Termination for Force Majeure Event) or clause 25.4 (termination for a change of tax legislation or Law) or clause 26 (Termination upon termination of Services Subcontract by reference to a Special Termination Event); or
  - c. the Organisation terminates this Agreement under clause 30.1 (Termination by the Organisation for Cause).
2. The Organisation must use its reasonable endeavours to mitigate any Break Costs and must, on request, provide evidence to the Department that it has done so.
3. The Department's contribution to Break Costs shall be capped subject to indexation for Actual CPI between the Referral Date and the date of termination of this Agreement.
4. The Organisation must demonstrate to the Department that the Break Costs were actually incurred, or will be incurred, by the Organisation or the Services Subcontractor.

### PART D: INDEPENDENT CERTIFIER'S REPORT (Clause 22)

1. The Department and the Organisation must each provide to the Independent Certifier, within 10 Business Days of the Measurement Date, such information as required to enable the Independent Certifier to prepare his/her report.
2. The Independent Certifier must determine and report on the following for the relevant period for which payment is due, based on information and data supplied by the Organisation and the Department and in accordance with the provisions of this Payment Schedule and any relevant calculation and measurement methods set out in the Operations Manual:

- (a) the total number of Families in the Intervention Group and the number of Families in each Annual Cohort of the Intervention Group;
  - (b) the total number of Families in the Control Group and the number of Families in each Annual Cohort of the Control Group;
  - (c) the occasions on which Index Children in each Annual Cohort of the Intervention Group entered Out-Of-Home Care ("OOHC") using the calculation method in the Operations Manual;
  - (d) the occasions on which Index Children in each Annual Cohort of the Control Group entered OOHC using the calculation method in the Operations Manual;
  - (e) the percentage difference in the occasions on which Index Children in the Intervention Group entered OOHC compared to Index Children in the Control Group, using the calculation method in the Operations Manual and weighting each Annual Cohort equally;
  - (f) the total number of ROSH reports related to Index Children in each Annual Cohort of the Intervention Group and the total number of ROSH reports related to Index Children in each Annual Cohort of the Control Group;
  - (g) the percentage difference in the number of ROSH reports related to Index Children in the Intervention Group compared to the Control Group, using the calculation method in the Operations Manual and weighting each Annual Cohort equally;
  - (h) the total number of SARAs related to Index Children in each Annual Cohort of the Intervention Group and the total number of SARAs related to Index Children in each Annual Cohort of the Control Group;
  - (i) the percentage difference in the number of SARAs related to Index Children in the Intervention Group compared to those Referred to the Control Group, using the calculation method in the Operations Manual and weighting each Annual Cohort equally;
  - (j) the performance of the Organisation in achieving Outcomes using the measurement method in the Operations Manual and weighting the performance of the Organisation on each of the measures as provided by that measurement method;
  - (k) the Performance Level and Outcome Payment;
  - (l) the Remaining Standing Charge and Remaining Bond Capital amounts;
  - (m) the amount payable by the Department to the Organisation and, as applicable, vice versa.
3. The Independent Certifier must in providing his/her report include details in relation to the determination of the matters in Item 2 of this Part D, setting out the evidence used in the determination and the formula or method by which the matters were determined.
  4. The Independent Certifier must provide his/her final report to the Organisation within 20 Business Days of the Measurement Date.

5. In the event of an early termination of the Agreement, the Independent Certifier will be required to certify the data and information required to calculate the amounts payable under this Payment Schedule. In addition, the report will include details of the determination of the data, information and calculations relating to the payments.
6. Either party may dispute the findings in the Independent Certifier's report within 20 Business Days of receipt of the report.
7. The process for disputing any report by the Independent Certifier is as set out in the Operations Manual.
8. Any agreement on the variations to time-frames for payment as set out in this Payment Schedule must be reached following the process set out in the Operations Manual.

## **SCHEDULE 4 TRANSITION-IN**

Not Used



## **SCHEDULE 5**

### **DIRECT AGREEMENT AGREED SCOPE**

The Direct Agreement, to be prepared by the Department upon finalisation of the Services Subcontract, will be based upon the following terms, executed in the form of a deed:

#### **TBS Social Benefit Bond Pilot**

#### **Direct Agreement**

#### **Parties:**

The Minister for Family and Community Services for and on behalf of the Crown in right of the State of New South Wales, acting through the Community Services Division, Department of Family and Community Services ("the Department")

The Benevolent Society, ABN 95 084 695 045 ("Services Subcontractor")

#### **Background**

- A. The Department and Perpetual Corporate Trust Limited [ABN 99 000 341 533 as trustee for The Benevolent Society Social Benefit Trust No 1 ("the Organisation") have entered into an Implementation Agreement for a SBB pilot in the area of family preservation (in this Background section and in the Operative Provisions, referred to as "Implementation Agreement") under which the Organisation has agreed with the Department to deliver certain family preservation outcomes through a subcontract with the Services Subcontractor.
- B. The Organisation has accordingly entered into a subcontract with the Services Subcontractor of its obligations under the Implementation Agreement to provide the services necessary to deliver agreed family preservation outcomes (in this Background section and in the Operative Provisions, referred to as "Services Subcontract").
- C. As part of its arrangements to mitigate risk, the Department wishes to obtain directly from the Services Subcontractor, and the Services Subcontractor has agreed to provide the Department with:
  - (a) certain undertakings given by the Services Subcontractor under the Services Subcontract; and
  - (b) rights to certain intellectual property owned and used by the Services Subcontractor, or created by the Services Subcontractor, in connection with the Services Subcontract.

#### **Operative Provisions**

##### **1. Definitions**

Unless otherwise stated, capitalised terms in this Direct Agreement have the meanings set out below:

*[Drafting note: Applicable definitions from the Implementation Agreement to be inserted prior to execution of the Direct Agreement. Applicable definitions to have the same meanings as they have in the Implementation Agreement, mutatis mutandis. To the extent that these definitions reference details contained in Schedule 1 to the Implementation Agreement these details will be incorporated in a Schedule (Direct Agreement Details) to this Direct Agreement.]*

## **2. Repeated representations, warranties, undertakings and indemnities**

- 2.1 The Services Subcontractor repeats to, and for the benefit of, the Department the representations, warranties, undertakings and Indemnities that it has given to the Organisation in the following clauses of the Services Subcontract:

Clause 10	Compliance with Law, guidelines, holding of rights, approvals and consents
Clause 11.7	Subcontracts
Clause 12	Workforce of Services Subcontractor
Clause 20	Indemnities
Clause 21	Insurance
Clause 35	Records, data and other information
Clause 36	Privacy
Clause 37	Confidentiality
Clauses 41.3-41.4	Publicity and Media Communications Protocol

- 2.2 In construing the above clause references as they are repeated under this Direct Agreement, references in those clauses, where appearing in the Services Subcontract, to "the Organisation" are taken to be references to "the Department", and references to "the Agreement" or "this Agreement" are taken to be references to the Services Subcontract, unless the context yields a contrary meaning.
- 2.3 The Services Subcontractor is not required to give any notice by reference to clause 2.1 if the Services Subcontractor knows or has reasonable grounds to believe that it would be a duplicate of a corresponding notice already given by the Organisation. The Services Subcontractor is not required to pay an amount by reference to clause 2.1 if and to the extent such payment would duplicate a corresponding payment already made by the Organisation.

### **2A Additional Representation**

The Services Subcontractor represents and warrants to the Department that it has made its own assessment of the risks, contingencies and other circumstances which might affect the Project and has satisfied itself as to the Project's viability and its ability to successfully deliver the Outcomes.

### 3. Intellectual Property

3.1 The Services Subcontractor repeats to, and for the benefit of, the Department the undertakings that it has given to the Organisation in the Services Subcontract with respect to Intellectual Property and in addition the parties to this Direct Agreement agree as between themselves as follows:

- (a) If the Services Subcontractor has any pre-existing Intellectual Property as at the Commencement Date that is applied in the performance of the Services Subcontract, the Services Subcontractor grants to the State by this clause an irrevocable, non-exclusive, world-wide, perpetual, transferable, sub-licensable, royalty-free licence of that pre-existing Intellectual Property for use in connection with the Implementation Agreement (including performance of any agreed Departmental roles and responsibilities associated with performance of the Services Subcontract).
- (b) If any Intellectual Property (excluding Service Delivery Material) is developed solely by, or on behalf of, the Services Subcontractor, or jointly by or on behalf of the State and the Services Subcontractor, in the course of performance of the Implementation Agreement and/or the Services Subcontract, the State owns that Intellectual Property and such Intellectual Property on its creation vests, or otherwise is assigned or transferred to the State without the need for further assurance.
- (c) If ownership of Intellectual Property referred to in clause 3.1(b) is not capable of being vested in the State under that clause because the Services Subcontractor does not own or is unable at a reasonable cost to obtain ownership of that Intellectual Property, or the Intellectual Property is Service Delivery Material, the Services Subcontractor must at its own cost ensure that the State is suitably and irrevocably licensed to use and to sub-license the use of that Intellectual property (but to avoid doubt subject to the confidentiality requirements of the Services Subcontract, in respect of which the Department repeats the undertakings given by the Organisation in favour of the Services Subcontractor) in connection with:
  - (i) the implementation and evaluation of the Implementation Agreement; and
  - (ii) in the case of Intellectual Property other than Service Delivery Material, a SBB or similar other products, services or programmes within Australia and overseas.

3.2 The Services Subcontractor must hold or obtain at its own cost all necessary consents from any individual that has Moral Rights in the Intellectual Property to its use, adaptation and all other actions by the State (or any of its officers, employees, contractor and agents) or the Organisation in the exercise of the rights conferred under this clause 3. Such consents must be without restriction and without any requirement to attribute authorship or performership, including any act of omission that might otherwise infringe the Moral Rights of any individual.

- 3.3 The State by this Direct Agreement grants to the Services Subcontractor an irrevocable, non-exclusive, perpetual, royalty-free licence of any Intellectual Property referred to in clause 3.1(b) (but to avoid doubt subject to the confidentiality requirements of the Services Subcontract, in respect of which the Services Subcontractor repeats the undertakings given by it to and for the benefit of the State) for use in connection with:
- (a) The implementation and evaluation of the Implementation Agreement and the Services Subcontract; and
  - (b) a SBB or similar other products, services or programmes within Australia and overseas.
- 3.4 If the Services Subcontractor requires a licence (including any right to sublicense) additional to that granted under clause 3.3 to use the State's Intellectual Property referred to in clause 3.1(b), the Services Subcontractor must make a written request to the State, through the Department, stating the nature of the additional licence required and the reason why such licence is required. The State will consider the request in good faith and, if the State considers it reasonable to do so in the circumstances, grant to the Services Subcontractor a further licence subject to the parties entering into a written agreement as to the terms of any additional licence.
- 3.5 Without limiting any other rights which the State may have under this Agreement or at law, the Services Subcontractor agrees to compensate the State and its officers, employees, contractors and agents (**those compensated**) against all damage, liability or loss incurred or suffered by any of those compensated (including legal costs on a solicitor client basis) arising directly or indirectly out of or in connection with:
- (a) a breach of this clause 3, whether by any act or omission and whether negligent, wilful reckless or unlawful; and/or
  - (b) any claim for infringement or alleged infringement of any Intellectual Property and Moral Rights in connection with the Implementation Agreement, the Services Subcontract and/or this Direct Agreement and its/their implementation or any material provided or created under any of these agreements including any modifications, variations or adaptations to that material.
- 3.6 The Services Subcontractor's liability will be reduced to the extent the damage, liability or loss incurred or suffered was caused by those compensated.

#### 4. Enforcement

The Services Subcontractor acknowledges and agrees that the Department can seek to enforce this Direct Agreement in the event of any breach by the Services Subcontractor of the above undertakings and obligations.

## 5. GST

- 5.1 The consideration expressed in this Direct Agreement (unless otherwise specified) is GST exclusive and does not include any amount for GST.
- 5.2 Subject to clause 5.4, if anything supplied under or in connection with this Direct Agreement constitutes a taxable supply made for GST exclusive consideration, the supplier may, subject to issuing a tax invoice, recover from the recipient of the supply an amount on account of the GST payable in respect of that taxable supply ("GST Amount").
- 5.3 The GST Amount will be:
- (a) equal to the value of the supply calculated in accordance with GST Law multiplied by the prevailing GST rate; and
  - (b) subject to clauses and, payable at the same time and in the same manner as any monetary consideration for the supply concerned but no later than the end of the tax period to which the relevant taxable supply is attributable under the GST Law.
- 5.4 The supplier of a taxable supply made under or in connection with this Direct Agreement must issue a tax invoice for the supply in accordance with the GST Law to the recipient of the supply.
- 5.5 If either the Department or the Services Subcontractor makes a supply to the other for consideration which is wholly non-monetary consideration, then:
- (a) the supply will for the purposes of this clause be styled a "Consideration in Kind Supply";
  - (b) the consideration for the Consideration in Kind Supply is GST inclusive and will not be increased on account of GST under clause 5.3;
  - (c) the Department and the Services Subcontractor agree that the GST inclusive market value of each of the Consideration in Kind Supply and the consideration for that supply (being in turn, a Consideration in Kind Supply) are equal;
  - (d) the Department and the Services Subcontractor will each include in any tax invoice, issued by it in respect of a Consideration in Kind Supply made by it in return for a Consideration in Kind Supply by the other, the same amount on account of the GST inclusive market value of the supply to which the tax invoice relates being the price for that supply;
  - (e) prior to the issue of the tax invoices referred to in clause 5.5(d), the Department and the Services Subcontractor will use all reasonable endeavours to agree upon the GST inclusive market value of the reciprocal Consideration in Kind Supplies and, failing agreement, will accept as final and binding the GST inclusive market value of the reciprocal Consideration in Kind Supplies determined (at the cost of the Department and the Organisation shared equally between them) by an independent expert

nominated by the President or other most senior officer of the Institute of Chartered Accountants in Australia.

- 5.6 If the Commissioner of Taxation or a court determines for any reason whatsoever that the Consideration in Kind Supplies referred to in clause 5.5 which each of the Department and the Services Subcontractor make in return for the other do not have an equal GST inclusive market value for GST purposes, then:
- (a) If the Consideration in Kind Supply made by the Department to the Services Subcontractor is determined to have a greater GST inclusive market value than the reciprocal Consideration in Kind Supply made by the Services Subcontractor to the Department, the Department will pay to the Services Subcontractor an additional amount equal to the GST payable on 10% of the difference within 10 Business Days of the date the relevant determination is made;
  - (b) If the Consideration in Kind Supply made by the Services Subcontractor to the Department is determined to have a greater GST inclusive market value than the reciprocal Consideration in Kind Supply made by the Department to the Services Subcontractor then the Services Subcontractor will pay to the Department an additional amount equal to the GST payable on 10% of the difference within 10 Business Days of the date the relevant determination is made;
  - (c) the Department and the Services Subcontractor will do all things required, including issuing new tax invoices and adjustment notes (if necessary), to give effect to the relevant determination by the Commissioner or court; and
  - (d) any amount payable under this subclause is GST inclusive and will not be increased on account of GST under clause 5.2.
- 5.7 If in relation to a taxable supply under or in connection with this Direct Agreement an adjustment event occurs that gives rise to an adjustment, then the GST Amount will be adjusted accordingly and, where necessary, a payment will be made to reflect the change in the GST Amount (by the recipient to the supply in respect of an increase in the GST Amount and by the supplier to the recipient in respect of a decrease in the GST Amount). If a payment is required, it will be made within 10 Business Days of the issue of an adjustment note by the payee who must issue an adjustment note immediately upon becoming aware of the adjustment event concerned.
- 5.8 Notwithstanding any other provision of this Direct Agreement, any amount payable under or in connection with this Direct Agreement, which is calculated by reference to a cost, expense, or amount paid or incurred by a party to this Agreement, will be reduced by an amount equal to any input tax credit to which that party is entitled in respect of that cost, expense or amount.
- 5.9 Any amount on account of GST payable by the Department to the Services Subcontractor under this clause will be limited to the amount of an input tax credit to which the Department is entitled in respect of the relevant supply which the Department acquires.

- 5.10 If a party is a member of a GST group, references to GST for which the party is liable and to input tax credits to which the party is entitled include GST for which the representative member of the GST group is liable and input tax credits to which the representative member is entitled.
- 5.11 Where a word or phrase is defined under GST Law, it has the same meaning in this Agreement.

## **6. Applicable law and jurisdiction**

- 6.1 This Direct Agreement is governed by, and must be construed in accordance with, the laws in force in the State of New South Wales.
- 6.2 Each party submits to the exclusive jurisdiction of the Courts exercising jurisdiction in the State of New South Wales and the courts of appeal therefrom.

### **Executed as a deed**

[Execution clauses]

## **SCHEDULE 6 EXPERT DETERMINATION PROCEDURE**

### **Expert Determination**

1. If an ED Referral Notice is submitted, the expert is to be agreed between the parties. If they cannot agree within 10 Business Days of the Referral Notice, the expert is to be nominated on the application of either party by the Chief Executive Officer, Australian Commercial Disputes Centre of NSW.
2. The expert nominated must be a person who is an experienced Australian legal practitioner or a person with practical experience in the subject matter of the dispute, unless otherwise agreed. The expert must not be:
  - (a) an employee of or consultant to the parties;
  - (b) a person who has been connected with the Agreement or has a conflict of interest, as the case maybe; or
  - (c) a person who the parties have not been able to agree on.
3. When the person to be the expert has been agreed or nominated, the Organisation, on behalf of both parties, must engage the expert by letter of engagement (and provide a copy to the Department) setting out:
  - (a) the issue referred to the expert for determination;
  - (b) the details of the dispute;
  - (c) the expert's fees;
  - (d) the procedure for the determination set out in this Schedule; and
  - (e) any other matter which is relevant to the engagement.
4. The expert is authorised to initiate such enquiries and investigations as it considers necessary or desirable for the purposes of performing its functions including:
  - (a) Informing itself independently as to the facts to which the dispute relates;
  - (b) receiving submissions, statements and documents and acting upon same;
  - (c) consulting with other qualified persons as it in its absolute discretion considers fit; and
  - (d) taking such measures as it thinks fit to expedite the resolution of the dispute.

### **Submissions**

5. The procedure for submissions to the expert is as follows:
  - (a) The party that has referred the issue to expert determination ("Referring Party") must make a submission in respect of the issue, within 5 Business Days after the date of the letter of engagement referred to above.



- (b) The other party ("Responding Party") must respond within 5 Business Days after receiving a copy of that submission. That response may include cross-claims.
- (c) The Referring Party may reply to the response, but must do so within 5 Business Days after receiving the response, and must not raise new matters.
- (d) The Responding Party may comment on the reply, but must do so within 5 Business Days after receiving the reply, and must not raise new matters.
- (e) The expert must ignore any submission, response, reply, or comment not made within the time given in this Item 4, unless the parties agree otherwise.
- (f) The expert may request further information from either party. The request must be in writing, with a time limit for the response. The expert must send a copy of the request and response to the other party, and give the other party a reasonable opportunity to comment on the response.
- (g) All submissions, responses, replies, requests and comments must be in writing. If a party gives information to the expert, it must at the same time give a copy to the other party.

#### **Conference**

- 6. The expert must arrange at least one conference with both parties. The request must be in writing, setting out the matters to be discussed.
- 7. Each party is entitled to be represented at any preliminary conference before the expert by its legal representatives and other authorised representatives, with information and knowledge of the issues.
- 8. The expert is not bound by the rules of evidence and may receive information in any manner the expert sees fit, but must observe the requirements of procedural fairness. Consultation between the expert and a party must only take place in the presence of the other party, unless a party fails to attend a conference or meeting which has been convened by the expert and of which prior notice has been given. Any party providing information to the expert must provide that information to the other party.
- 9. The parties agree that such a conference is considered not to be a hearing that would give anything under this Schedule the character of arbitration.
- 10. In answer to any issue referred to the expert by a party, the other party can raise any defence, set-off or counter-claim.

#### **Questions to be determined by the Expert**

- 11. The expert must determine for each issue any questions required by the parties, having regard to the nature of the issue.
- 12. The expert must make his or her determination only in respect of matters expressly referred by the parties for resolution;
- 13. Any determination of the expert will include a determination as to the award of costs. The expert must not tax the costs of a party.

14. Unless a party has a right to commence litigation or otherwise resolve the dispute under the Agreement:
- (a) In the absence of a manifest error the parties must treat each determination of the expert as final and binding and give effect to it; and
  - (b) if the expert determines that one party owes the other money, that party must pay the money within 20 Business Days.
15. The expert is released by the parties to this Agreement from liability (other than for fraud, negligence or wilful misconduct) in acting as an expert.