

Services Subcontract

These sample drafting guidelines have been prepared by King & Wood Mallesons at the request of, and in consultation with, the Office of Social Impact Investment and its advisers. It forms part of a suite of sample transaction documents that have been developed by the Office of Social Impact Investment for use in connection with a social benefit bond (SBB) arrangement involving private investors in the Australian wholesale capital market.



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These sample guidelines intend to provide a guide for, and to streamline the development of, the documentation (and specific provisions) that is used for an SBB arrangement. These sample guidelines can be freely used for such a purpose in accordance with the Creative Commons licence method mentioned above. Use of these sample guidelines may help to make the legal process more efficient and reduce costs.

The NSW Government is not making the use of these sample guidelines mandatory but the NSW Government would expect to take into account in any evaluation of a proposed SBB arrangement the non-use of these sample guidelines and the sample Deed of Implementation Deed on which these sample guidelines rely, the reasons for the non-use, any material departures from the sample guidelines or document and the reasons for the departures and the possible implications for time, cost and efficiency. The acceptance of the final form of the Services Subcontract by the NSW Government and the State of New South Wales (including all departments, agencies and other State bodies and personnel) (together, the “**NSW Government**”) will be a condition precedent to the terms of the SBB arrangement. However, it may not be suitable in all circumstances and the NSW Government reserves the right to require a departure from these sample guidelines in order to address the specifics of a particular SBB arrangement, to address then current market practice and conditions and otherwise as necessary to protect the interests of the relevant department, agency or other State body and the State.

These sample guidelines contain general provisions and other information only and does not take into account the objectives, needs or financial arrangements of any particular transaction.

Before using these sample guidelines, you should perform your own independent investigation and analysis of the suitability and appropriateness of these sample guidelines for any SBB arrangement or other transaction that you are considering. You should consult your own legal, tax and other professional advisers as part of your assessment of these sample guidelines and their suitability for your transaction.

You should satisfy yourself that cross references in these sample guidelines to any provisions or the names of other documents are correct.

No reliance may be placed for any purposes whatsoever on the provisions and other information contained in these sample guidelines (or any other communications or materials separately provided or discussed verbally in connection with these sample guidelines) or on their completeness, accuracy or fairness. No representation or warranty, expressed or implied, is given by, or on behalf of, the NSW Government, King & Wood Mallesons or any other person as to the provisions and other information included in these sample guidelines being acceptable to the NSW Government in all circumstances, that they are suitable for any particular SBB arrangement or as to the accuracy or completeness of the provisions or other information contained in these sample guidelines and no liability whatsoever is accepted by the NSW Government or King & Wood Mallesons for any loss howsoever arising, directly or indirectly, from any use of such provisions or other information or otherwise arising in connection with them. The provisions and other information in these sample guidelines are subject to negotiation, verification, completion and change.

If you have any questions in relation to these sample guidelines, or any specific provision or other related information, queries can be directed to socialimpactinvestment@dpc.nsw.gov.au.

Instructions for use

These sample guidelines include provisions that are intended to apply for a “**SPE Issuer Transaction**”, being an SBB arrangement that involves a special purpose entity acting as the issuer of any bonds.

The drafting instructions included in these sample guidelines to assist in drafting a Services Subcontract rely upon the use of the sample Implementation Deed, and any departures from that sample document need to be taken into account in using these sample guidelines.

Drafting Guidelines

Services Subcontract for Social Benefit Bond Transaction

If the transaction structure for a social benefit bond (**SBB**) arrangement involves a special purpose entity (**Organisation**) that does not possess the capabilities, processes or capacity to perform the services that it has engaged to provide to a NSW Government department (**Department**) under the Deed of Implementation Agreement (**Implementation Deed**), the Organisation may enter into a Services Subcontract. In effect, this Services Subcontract will be an outsourcing arrangement for the services with another proponent who will provide those services to the Department on the Organisation's behalf (**Services Subcontractor**). For example, under The Benevolent Society's (**TBS**) 2013 SBB issuance, TBS was engaged by a special purpose trust to provide its Resilient Families service in satisfaction of the trust's obligations under the Implementation Deed for that SBB arrangement.

Most obligations of the Services Subcontractor under the Services Subcontract will need to directly match the obligations of the Organisation under the Implementation Deed. In this way, there can be a direct outsourcing of the relevant services, and the Organisation – which will be created for the purposes of the transaction, but usually not for the purposes of actually providing the services – does not risk breaching its obligations under the Implementation Deed (and, where the Organisation is a special purpose trust, breaching the trust) because it has not completely outsourced them.

An effective way to prepare a Services Subcontract is to use the final Implementation Deed from the relevant SBB arrangement as a starting point for drafting the Services Subcontract. By doing so, and by following the same document structure, drafting protocols and clause numbering conventions, it can be easier to confirm consistency of, and highlight points of difference between, the Services Subcontract and the Implementation Deed.

The following are guidelines that are intended to assist in the drafting of a Services Subcontract by reference to the sample Implementation Deed (which will have been prepared to include optional "SPE Issuer Transaction" provisions).

The acceptance of the final form of the Services Subcontract by the NSW Government will be a condition precedent to the terms of the SBB arrangement. The NSW Government will not accept any arrangements included by the Services Subcontract that intend to affect (in any way) the direct contractual relationships and dealings that the relevant Department has agreed with the Organisation under the Implementation Deed or with the Services Subcontractor under the Deed of Direct Agreement. The Services Subcontract should be prepared from a fundamental standpoint that it is to document the arrangements as between the Organisation and the Services Subcontractor as to how the Services Subcontractor will assist the Organisation to satisfy its obligations under the Implementation Deed. These principles must be observed in effecting any of the matters described below.

Roles of the Organisation and the Services Subcontractor

- (**Modifying the Implementation Deed**) Generally, equivalent contractual arrangements will need to be agreed between the Services Subcontractor and Organisation as are in place between the Department and the Organisation under the Implementation Deed. Accordingly, in preparing the Services Subcontract, in many cases the provisions of the Implementation Deed can be modified for an equivalent agreement between the Organisation and the Services Subcontractor.

Each clause should be considered carefully and in the context of the outsourcing arrangement, and additional modifications may be required to be made to specific provisions. For example, wherever in the Implementation Deed a provision describes the Organisation "procuring" that certain things are done, the equivalent Services Subcontract provision will describe the Services Subcontractor as the person doing (providing, performing etc.) those things.

- **(Provisions not applicable to the Services Subcontract)** There are a number of provisions under the Implementation Deed that relate to the Department's primary engagement with the Organisation and are not suited to being included by a corresponding outsourcing arrangement. Such provisions may include clauses dealing with the following matters (with all clause and schedule references provided in example relating to the sample form Implementation Deed):
 - the relevant Department's objectives for the SBB arrangement (e.g. clause 2.2);
 - conditions precedent under the Implementation Deed (e.g. clauses 3.5, 3.6, Schedules 6 and 7) (see "Direct relationship to the Implementation Deed and the Direct Agreement – Conditions precedent" below);
 - waivers, consents and approvals of, and rights specific to, the relevant Department (e.g. clauses 3.5, 3.6, 5, 9.1, 9.2, 9.6(f) and 40.9);
 - certain investment requirements and payments outcomes and procedures (e.g. clauses 6, 17.5, 20.2, 20.3, 20.4, 20.14, 20.16, 21, 23.2, 23.4 and 28.3 and Schedule 3) (see "Provisions to be revised, reviewed or acknowledged – Revision") below;
 - matters where the Organisation is to engage as principal (e.g. clauses 20.6 - 20.10 and 20.13 and Schedule 2);
 - termination events (e.g. clauses 25, 26, 27 and 40.6) (see "Direct relationship to the Implementation Deed and the Direct Agreement – Termination" below);
 - external dispute resolution procedures (e.g. clauses 36.1 and 36.4 - 36.11); and
 - provisions recognising the role of the Services Subcontractor under the Implementation Deed (e.g. clause 38 and Schedule 5).

Where these (or other) provisions are to be excluded from the Services Subcontract in their entirety, it can be helpful to retain the clause numbering but replace all of the text of the provision with "Not used". In this way, it can be easier to identify where differences between the Implementation Deed and Services Subcontract arise.

Direct relationship to the Implementation Deed

- **(Conditions precedent)** Most likely, the Service Subcontract should become effective at the same time that the Implementation Deed does. The effectiveness of the Services Subcontract should then rely only upon the satisfaction of the conditions precedent under the Implementation Deed, and not be subject to additional conditions precedent.
- **(Termination)** As a general matter, termination of the Services Subcontract should only occur by reference to the termination of Implementation Deed.

It may also be necessary that a requirement be included in the Services Subcontract that the consent of the Services Subcontractor must be obtained before the Organisation is entitled to enforce or waive any termination rights that it may have under the Implementation Deed.

Co-ordination and administration

- **(Provision of information)** The Services Subcontract should make clear that both the Organisation and the Services Subcontractor are to provide all necessary information, communications, notices, data etc. to one other on a timely basis to ensure that the Organisation is able to fulfil its obligations under the Implementation Deed.

For example, it may be helpful to expressly provide for data sharing arrangements between the Organisation and Services Subcontractor (but without duplicating obligations) to assist the Organisation to fulfil its obligations under clauses 16 and 20 of the Implementation Deed.

- **(Consultation and participation)** As certain provisions of the Implementation Deed may be drafted without recognising the Services Subcontractor, there may be instances where the Organisation should consult with the Services Subcontractor, or provide the Services Subcontractor with an opportunity to participate fully, before the Organisation takes or agrees an action under the Implementation Deed. However, any such procedures should not interfere in the Organisation fulfilling its obligations under the Implementation Deed.

For example, the Organisation may agree to consult with the Services Subcontractor in relation to the appointment of an Independent Certifier for the purposes of clause 20 of the Implementation Deed. The Organisation and Services Subcontractor may also make agreements as to how disputes under the Implementation Deed are to be managed between themselves, and the levels of participation required of each party, for the purposes of the application of clause 37 of the Implementation Deed.

- **(Co-ordination)** The Services Subcontract can set out agreements and acknowledgments on the roles and actions that each of the Organisation and Services Subcontractor have already undertaken, and will assume or perform, in connection with the SBB arrangement.

For example, it may be the case that the Services Subcontractor has a lead role, and the Organisation has only a limited role, in the actual preparation of the Operations Manual for the purposes of clause 4 of the Implementation Deed, and this can be expressed in the Services Subcontract. The Services Subcontractor may also have a role in assisting the Organisation to satisfy the conditions precedent set out under clause 3 of the Implementation Deed.

- **(Conflicts)** The Services Subcontract may also provide for the management for conflicts of interest or duty in connection with the roles that the Organisation and Services Subcontractor may assume in the SBB arrangement more broadly.

Provisions to be revised, reviewed or acknowledged

- **(Revision)** Separate from the provisions of the Implementation Deed that are not applicable for the Services Subcontract arrangements (as described above), there are particular types of provisions that should be retained in the Services Subcontract, but will need to be revised and restated.

For example, the representations and warranties and payments provisions respectively set out under clauses 7 and 20 of the Implementation Deed are conceptually important to the Services Subcontract, but would need to be overhauled to properly capture the different parties and arrangements.

- **(Review)** Consideration may be given to whether or not certain other provisions of the Implementation Deed require modification if they are to be included in the Services Subcontract. However, in each case, care should be taken to ensure that the 'back-to-back' arrangements to be achieved by the Services Subcontract are not compromised by such modifications.

For example, the GST provisions under clause 22 of the Implementation Deed may need to reflect additional or alternative arrangements if they are to be included by the Services Subcontract to ensure that all necessary procedural matters as between the Organisation and the Services Subcontract are properly depicted.

- **(Acknowledgments)** There may be provisions of the Implementation Deed that should be recognised by the terms of the Services Subcontract as being influential upon the ability and capacity of the Organisation to fulfil its obligations under the Services Subcontract.

For example, the parties may acknowledge and agree that the Organisation gives no undertaking in respect of obligations of the Department arising under particular performance-related provisions of clause 13 of the Implementation Deed.

Pass through provisions

Under the Implementation Deed when certain events or circumstances arise, the Organisation has, with respect to the Department, certain rights, entitlements and remedies. The Services Subcontract may provide the Services Subcontractor with comparable rights, entitlements and remedies for such events or circumstances, and to limit the Services Subcontractor's rights, entitlements and remedies against the Organisation and satisfy and limit the Organisation's liability for such events or circumstances by reference to the Organisation's rights, entitlements and remedies under the Implementation Deed.

Set out in the schedule to these drafting guidelines is a sample clause for these matters.

However, to avoid doubt, it may be useful to recognise restrictions on the pass through arrangements under particular provisions under the Services Subcontract. For example, a limitation on pass through payments on amounts actually recovered under clause 23 of the Implementation Deed may be recognised under the equivalent clause in the Services Subcontract.

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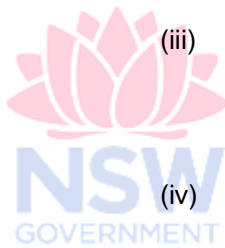


SAMPLE

Sample clause – Pass through from Implementation Deed

40A.1 Purpose

- (a) Under the Implementation Deed when certain events or circumstances arise, the Organisation has with respect to the Department, certain rights, entitlements and remedies. The purpose of this clause 40A is to provide the Services Subcontractor with comparable rights, entitlements and remedies for such events or circumstances, and to limit the Services Subcontractor's rights, entitlements and remedies against the Organisation and satisfy and limit the Organisation's liability for such events or circumstances by reference to the Organisation's rights, entitlements and remedies under the Implementation Deed.
- (b) For the purposes of this clause, "**Corresponding Implementation Deed Entitlement**" means any of the following corresponding entitlements:
- (i) the Organisation is in breach of a provision of this Agreement to the extent such breach is caused by a breach by the Department of a provision of the Implementation Deed;
 - (ii) the Organisation has an entitlement under the Implementation Deed or a Claim against the Department arising out of the termination of the Implementation Deed and, where this Agreement is terminated as a consequence of that termination, the Services Subcontractor has an entitlement under this Agreement or a Claim against the Organisation arising out of the termination of this Agreement;
 - (iii) the Services Subcontractor has rights against the Organisation under the terms of this Agreement and the Organisation has corresponding rights (even if in different terms) against the Department under the terms of the Implementation Deed;
 - (iv) the Organisation is entitled to obtain rights, entitlements or remedies under the Implementation Deed, referenced to a Claim or interest of the Services Subcontractor; or
 - (v) the Services Subcontractor has a Claim against, or dispute with, the Organisation and the Organisation has a Claim against, or dispute with, the Department based on the same or similar events or circumstances.



40A.2 No Effect on Implementation Deed

The parties acknowledge and agree that the purpose of this clause 40A is not to reduce or disentitle or otherwise affect the validity of any claim by the Organisation against the Department under, or in connection with, the Implementation Deed.

40A.3 Implementation Deed dispute resolution

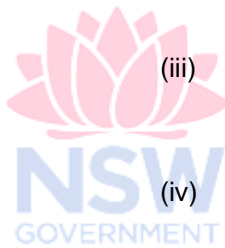
- (a) The Services Subcontractor must, if requested by the Organisation or the Department, consent to any application by the Organisation to have proceedings (including any expert determination or arbitration) between the Organisation and the Services Subcontractor which are related to, or connected with, a Corresponding Implementation Deed Entitlement consolidated or heard together with like proceedings in New South Wales between the Department and the Organisation.
- (b) The Organisation must, if requested by the Services Subcontractor or the Department, consent to and, if necessary, apply to have proceedings (including any expert determination or arbitration) between the Organisation and the Services Subcontractor which are related to, or connected with, a Corresponding Implementation Deed Entitlement consolidated or heard together with like proceedings in New South Wales between the Department and the Organisation.

- (c) The parties agree to be bound by the outcome of any binding settlement or determination by dispute resolution under the Implementation Deed between the Organisation and the Department contemplated under, and effected in accordance with, this clause 40A.

40A.4 Limitation

Notwithstanding anything elsewhere in this Agreement or another Transaction Document, if there is a Corresponding Implementation Deed Entitlement, the following provisions apply:

- (a) the Services Subcontractor must, in relation to any Claim made by the Services Subcontractor arising out of or in connection with any Corresponding Implementation Deed Entitlement ("**Pass Through Claim**"), provide such information and assistance as may be necessary to enable the Organisation to pursue the Pass Through Claim under, and in accordance with, the Implementation Deed and otherwise co-operate fully with the Organisation in negotiations and dispute resolution procedures under the Implementation Deed;
- (b) the Organisation must:
- (i) subject to clause 40A.4(c), exercise all rights and remedies reasonably available to it under the Implementation Deed in respect of any *bona fide* Pass Through Claim;
 - (ii) subject to clause 40A.4(c), to exercise all other rights and remedies available to it in respect of any *bona fide* Pass Through Claim under the Implementation Deed;
 - (iii) regularly, and at all material times, notify the Services Subcontractor of the status of the Pass Through Claim and all steps taken in connection with the Pass Through Claim;
 - (iv) promptly provide to the Services Subcontractor copies of all information which the Organisation has provided to, or has received from, the Department or another Subcontractor in connection with the Pass Through Claim;
 - (v) use its reasonable endeavours to obtain the agreement of the Department to the participation of the Services Subcontractor in, and afford the Services Subcontractor the opportunity to participate in, all negotiations under the Implementation Deed in connection with the Pass Through Claim; and
 - (vi) not discontinue a Pass Through Claim, or enter into any settlement, agreement, arrangement or understanding with the Department in respect of any Pass Through Claim, except on terms previously agreed in writing by the Services Subcontractor (acting reasonably);
- (c) the parties must co-ordinate and co-operate with each other in the preparation and pursuit of any Pass Through Claim including with respect to:
- (i) jointly or separately obtaining any legal or other advice in connection with the Pass Through Claim;
 - (ii) documenting and submitting the Pass Through Claim in accordance with the Implementation Deed; and
 - (iii) determining and abiding by the strategy for optimising the likelihood of resolution or determination of the Pass Through Claim in favour of the Services Subcontractor; and



- (d) subject to compliance by the Organisation with this clause 40A.4 and clauses 20.2 and 41B, the Services Subcontractor must indemnify the Organisation and agrees to pay the Organisation within 10 Business Days of written demand any reasonable costs incurred by the Organisation in:
- (i) obtaining legal or other advice in respect of the Pass Through Claim; and
 - (ii) preparing, submitting and pursuing any Pass Through Claim in accordance with this clause 40A, including any costs incurred pursuant to any order made in connection with any proceedings relating to the Pass Through Claim,

provided that nothing in this clause 40A.4(d) will render the Services Subcontractor liable for any costs or expenses incurred by the Organisation in connection with any Claim by the Organisation for compensation, relief or remedy under the Implementation Deed other than the compensation, relief or remedy the subject of the Pass Through Claim.

40A.5 **Services Subcontractor's remedies**

The Services Subcontractor will not be entitled to:

- (a) receive from the Organisation any amount greater than the:
 - (i) compensation payable by the Department to the Organisation; or
 - (ii) relief or remedy allowable by the Department to the Organisation, or obtained against the Department by the Organisation,

in respect of a Corresponding Implementation Deed Entitlement of the Services Subcontractor; and

- (b) have any Corresponding Implementation Deed Entitlement determined before the compensation payable, or relief or remedy allowable, by the Department to the Organisation has been determined under the Implementation Deed.

40A.6 **Accord and satisfaction**

- (a) Subject to compliance by the Organisation with this clause 40A, this clause will apply to limit the Organisation's liability to the Services Subcontractor in respect of Pass Through Claims and determine the amount the Services Subcontractor must accept by way of accord and satisfaction of the Organisation's obligations in respect of Pass Through Claims.
- (b) The Services Subcontractor agrees to accept in full satisfaction of any Pass Through Claim, the amount agreed by the Organisation and the Department or determined pursuant to clause 39 of the Implementation Deed in respect of that Pass Through Claim.
- (c) If any Claim made by the Organisation under the Implementation Deed includes both:
 - (i) a Claim by the Organisation not referable to a Corresponding Implementation Deed Entitlement; and
 - (ii) a Pass Through Claim by the Services Subcontractor,

and the aggregate amount that the Organisation is entitled to recover from the Department under the Implementation Deed (the "**Recoverable Amount**") is less than the aggregate amount claimed by the Organisation and the Services Subcontractor, then:

- (iii) where the proportion of the Recoverable Amount referable to the Claim by the Services Subcontractor under this Agreement has been agreed or determined under the Implementation Deed as a distinct amount, the Services Subcontractor shall only be entitled to that proportion of the Recoverable Amount and agrees to accept the same in full satisfaction of the Pass Through Claim; or
 - (iv) where the proportion of the Recoverable Amount referable to the Claim by the Services Subcontractor under this Agreement has not been agreed or determined under the Implementation Deed as a distinct amount, the parties will seek to agree the proportion of the Recoverable Amount to which they are each entitled (based on what is just and equitable in the circumstances), and if the parties fail to so agree, the determination as to the proportion of the Recoverable Amount to which they are entitled will be referred to dispute resolution under clause 40 of this deed, and the Services Subcontractor agrees to accept the amount so agreed or determined in full satisfaction of the Pass Through Claim.
- (d) Any amount received under a Pass Through Claim will first be applied towards the reasonable costs of the Pass Through Claim of whichever of the Organisation or the Services Subcontractor has had the conduct of the Pass Through Claim.
- (e) If the amount agreed or determined in respect of the Organisation's entitlement under the Implementation Deed is less than the Services Subcontractor's Pass Through Claim, the Services Subcontractor waives any entitlement to the balance.

40A.7 Time for payment or grant

Any remedy or benefit to which the Services Subcontractor is entitled under this clause 40A must be paid or granted by the Organisation to the Services Subcontractor:

- (a) in the case of monetary payment, as soon as practicable, but not later than 2 Business Days, after payment under; and
- (b) in all other cases, within 5 Business Days of,

the binding settlement or determination of such entitlement under the Implementation Deed.

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