

---

# **INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT**

Commissioned by:

Civil Contractors Federation Tasmania Ltd.



**CIVIL CONTRACTORS  
FEDERATION  
TASMANIA**

Prepared by:

David Palser, CLC Advisory

---

# INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

## KEY INFORMATION AND PURPOSE

<b>Prepared on behalf of</b>	Civil Contractors Federation (Tasmania)	<b>Date:</b>	26 September 2024
------------------------------	---	--------------	-------------------

<b>Prepared By</b>	David Palser
--------------------	--------------

### Context and Purpose

In June 2024, the Department of State Growth (**DSG**) released Requests for Tenders for four construct-only projects incorporating the State of Tasmania’s new standard form “Business as Usual” contract terms (amended AS4000-1997) for use on construct-only projects where the value is greater than \$500,000 (excluding “Complex Projects”).

Due to concerns with this new form of contract raised by the civil construction industry, the State agreed to revert to its previous standard form construct-only contract (AS2124-1992 with amendments) for those four projects to give the industry an opportunity to undertake a detailed analysis of the new terms and conditions.

The Civil Contractors Federation (Tasmania) (**CCF**) has engaged CLC Advisory Pty Ltd (David Palser) to undertake a detailed review of the new terms and conditions and provide an independent opinion as to whether those terms:

- represent a fair and reasonable allocation of “substantive risk” and “process risk” (ie. the rules and processes in relation to how a party obtains relief and the administrative processes) between the parties;
- are easy to read and will be easy to administer for the Government, the Superintendent and the Contractors; and
- are likely to foster a positive outcome for industry, government and Tasmania as a whole, and

to the extent that they do not meet these standards, provide proposed changes to address any concerns identified.

It is understood that the CCF intends to share this report with its members on the understanding that it is an independent report that is not in the nature of legal advice applicable to a live tender. Further, as every project is unique and every contract will be interpreted by reference to its surrounding circumstances known to both parties, this report is not legal advice that can be relied upon by any person for the purposes of any tender or project in the future.

For the avoidance of doubt, CCF members must not make or give effect to any arrangement or understanding with each other as to how they might proceed with respect to these new contract terms in relation to future projects, including collectively refusing to tender or responding to an RFT with the same position on the contract terms, as this may be illegal under the provisions of the *Competition and Consumer Act 2010* (Cth).

It is also understood that the CCF intends to submit these observations to representatives of the Tasmanian Government for the sole purpose of lobbying the government to review and reconsider many of the changes to its standard form contract arrangements for the procurement of simple construct-only contracts.

Given the volume of changes from AS4000-1997 and the State’s previous standard form construct-only contract, whilst every effort has been taken to identify all applicable changes, it is likely that some may have been missed.

### Contract Documents Reviewed

This review is limited to the following documents that were attached to the DSG’s RFT 3449 - Frankford Main Road Chapel Road, Harford and Pipers River Road Waddles Road, Karoola - Junction Upgrades (**DSG’s RFT 3449**):

- Formal Instrument of Agreement (**FIA**);
- Amended “Australian Standards AS 4000-1997 General Conditions of Contract (Business As Usual)” (01-2023);
- List of Annexures
- List of Optional Clauses
- List of Optional Annexures
- Annexures Part A to Part CC,

(for the purpose of this report these documents are collectively referred to as the **Contract**).

The form of the previous standard form construct-only contract (AS2124-1992 with amendments) used for comparison in this report includes the amendments attached to the DSG’s RFT 3741 issued in December 2023 (**Old Government Standard Form**).

CLC Advisory has not been instructed to review the new template Request for Tender (RFT) nor the other contracts in the Government’s suite of new contracts (including AS4902-2000 for design and construct, and the “Complex Projects versions), however, most of the observations below will be equally applicable. Finally, content of DSG’s revised Standard Specification (revision June 2024) have also not been reviewed.

**TABLE OF CONTENTS**

KEY INFORMATION AND PURPOSE.....	0
TABLE OF CONTENTS.....	2
ABOUT CLC ADVISORY.....	3
PART 1 - EXECUTIVE SUMMARY.....	4
PART 2 – PARTIES, ROLES & FUNCTIONS.....	8
PART 3 – THE CONTRACT & DOCUMENTS.....	24
PART 4 – PAYMENT.....	49
PART 5 – SECURITY, INSURANCE, RISK OF HARM & CONTRACTOR LIABILITY.....	92
PART 6 – CONSTRAINTS ON PERFORMING WUC.....	103
PART 7 – TIME & COMPLETION.....	114
PART 8– EOT AND DELAY DAMAGES.....	136
PART 9 – OTHER COST RELIEF.....	146
PART 10 – NOTIFICATIONS, TIME BARS & DISPUTES.....	153
PART 11 – CONTRACTOR’S OBLIGATIONS, WARRANTIES & DEFECTS.....	162
PART 12 – ASSIGNMENT, NOVATION & SUBCONTRACTING.....	196
PART 13 – SUSPENSION AND TERMINATION.....	202
PART 14 – OTHER.....	211



### ABOUT CLC ADVISORY

CLC Advisory, based in Hobart, was established by David Palser in 2017 to provide a mix of legal and commercial services to the construction industry in Australia and overseas, including governments, private principals and contractors.

David has almost 30 years of experience with construction contracts and projects, as a lawyer in private practice and in-house, and as a senior executive for international companies delivering construction and contract mining services, including:

- 1 Mallesons Stephen Jaques (now King & Wood Mallesons), Melbourne (1995 to 1999) – Articled Clerk and Solicitor in the Construction Group
- 2 Linklaters, London (2000 to 2003), Associate and Managing Associate in the Construction and Projects Group
- 3 Mallesons Stephen Jaques (now King & Wood Mallesons), Melbourne (2003 to 2004), Senior Associate in the Construction Group
- 4 Leighton Contractors (now CPB Contractors), Melbourne (2004 to 2007), Project Lawyer (Southern Cross Station Redevelopment) and Regional Commercial Manager (Southern Region, Vic, SA, Tas & NZ)
- 5 Alstom Power, Thermal Systems Division, Zurich (2007 – 2010), Global Head of Legal
- 6 Leighton Asia (part of Leighton Holdings / CIMIC Group), Hong Kong (2010 to 2015), General Counsel, General Manager Commercial, and Executive General Manager, Pre-Contracts, Risk & Governance
- 7 Page Seager, Hobart (2015 to 2017), Partner and Head of Construction and Dispute Resolution
- 8 CLC Advisory, seconded to D&CJV (Lend Lease, John Holland and Bouygues) on the Melbourne Metro Tunnels & Stations PPP Project (April 2018 to August 2019)
- 9 CLC Advisory, seconded to an unsuccessful bidder for the North East Link PPP Project tender (2020).

David has been based in Melbourne, London, Zurich, Hong Kong and Hobart and has had direct involvement with tenders and live projects in over 40 countries across Asia-Pacific, Europe, Africa, the Middle East and the Americas.

**CIVIL CONTRACTORS  
FEDERATION  
TASMANIA**

## PART 1 - EXECUTIVE SUMMARY

### Context

- 1 At the Industry Briefing given by Infrastructure Tasmania and the Office of the Crown Solicitor on 24 July 2024, it was explained that the objective of the review and update of the full suite of procurement and contract documents used by government agencies and entities to procure construction works and services was to modernise, ensure consistency and streamline the contract documentation process for construction related projects undertaken across Tasmanian Government Agencies.
- 2 The “Collective Aim” was described as follows:
  - (a) Aim - To improve the quality, modernise and create consistency and greater efficiency across whole of government procurement and contracting.
  - (b) Result - Fostering better outcomes for industry, government and Tasmania as a whole.
- 3 Importantly, in the course of the presentation, it was asserted that the “substantive risk allocation” and “process risk allocation” are unchanged from the Old Government Standard Form. Whilst the conclusion presented was that the new suite of contracts is easier to read, easier to administer, contain fewer mistakes and contain fewer documents.

### Guiding Principles

- 4 It has been recognised for decades that there are two important principles that should guide the development of commercial arrangements for construction projects:
  - (a) Risks should be allocated (not transferred) to the party or parties best placed to manage them, enabling collaboration and more productive delivery.
  - (b) Contracting arrangements and commercial models should be founded on the principle of fair return, supporting a more financially sustainable and innovative industry.

See Recommendations 5.2 and 5.3 in Infrastructure Australia’s report titled “*Delivering Outcomes - A roadmap to improve infrastructure industry productivity and innovation*” (March 2022) (**Delivering Outcomes**).

- 5 In addition to these principles, in forming the opinions as to whether the changes incorporated in the Contract are “reasonable” for these types of projects, I have been assisted by various publicly available resources, including:
  - (a) UK Institution of Civil Engineers, ICE Infrastructure Client Group’s report titled “*From Transactions to Enterprises - A new approach to delivering high performing infrastructure*” (March 2017), particularly the observations under the heading “What is wrong with the traditional approach?” on pages 11 to 13.
  - (b) *The Health of the Australian Construction Industry Research Report* (Professor John Sharkey AM, Phillip Greenham, Dr Mathew Bell, Wayne Jovic, Julia Korolkova and Didi Hu, September 2020).
  - (c) Infrastructure Australia’s *Delivering Outcomes* report, particularly pages 5 to 7 and sections 3.4 and 3.5, incorporating Recommendations 4.2, 5.2, 5.3 and 5.5 (and all sub Recommendations under each).
  - (d) *The Building Tasmania’s Future Memorandum of Understanding (MoU)* dated 30 May 2022 signed by the then Ministers and the industry representatives of the Tasmanian Building and Construction Roundtable, including clause 13(ii) which identified as a key focus area of the MOU was “*developing a sustainable approach to risk allocation*”.
  - (e) *The Procurement Better Practice Guidelines (Principles and Policies)* (August 2024) published by the Tasmanian Government’s Department of Treasury and Finance, particularly the “Procurement Principles” (pages 6 to 8).
  - (f) The current *Treasurer’s Instructions – Procurement* issued by the Treasurer pursuant to section 51 of the *Financial Management Act 2016* (Tas), including PF-1, PF-2, PF4, PF-6, PP-4 and C-1.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

- (g) AS 4120-1994 *Code of Tendering* (expressly referred to in Treasurer’s Instructions PF-1 and PF-4), particularly section 6.1.2.
- (h) The longstanding principle that governments are expected to act as “moral exemplars” in its commercial dealings with the private sector, demonstrating the highest standards of fair dealing, equity and good conscience (see Nicholas Seddon, “*Government Contracts, Federal, State and Local*” (7th edition 2023) at [1.8]-[1.10] and *Hughes Aircraft Systems International v AirServices Australia* (1997) 76 FCR 151 per Finn J at 195 – 197). As Seddon notes at [1.9] (pages 17 to 21) governments are not in a comparable position to the private sector when contracting in a number of respects, including:

- (i) Government is expected to behave impeccably when contracting with its citizens because it should set an example and should exercise constraint in the exercise of its undoubted power (see the judicial authority cited at footnote 70).

This is often reflected in purchasing policy documents, procurement rules, codes of conduct and sometimes in legislation (for example, see “Observation of ethical procurement standards” on page 7 of the *Procurement Better Practice Guidelines (Principles and Policies)* and section 1.2 of Treasurer’s Instruction PF-1).

- (ii) It is arguable that the imposition of higher standards on government is justified on a commercial basis which, in turn, has a public policy dimension. If the government is seen as a fair and reasonable contracting party then potential suppliers may be encouraged to bid for work which, in turn, will provide keener competition, with beneficial effects on the efficient use of public resources.
- (iii) Access to government is an important policy concern, as government contracting is a very significant part of the economy. It is important that suppliers are seen to have an equal opportunity to secure government business.

- (i) The definition of “unfair contract terms” in Part 2-3 of the Australian Consumer Law (ACL) (sections 23 to 28A), incorporated into the laws of Tasmania by the *Australian Consumer Law (Tasmania) Act 2010* (Tas). Section 24 defines an “unfair” contract term as one which:

- (i) would cause a significant imbalance in the parties’ rights and obligations arising under the contract;
- (ii) is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term;
- (iii) would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

A relevant factor is whether a term is transparent in the sense of whether it is expressed in reasonably plain language, legible, presented clearly, and readily available to any party affected by the term.

It is acknowledged that Part 2-3 of the ACL may not be apply to contracts entered into with the State for these types of projects, but is considered to be a useful guide against which to judge the reasonableness of terms in the State’s standard form contracts for construction work, particularly in light of the previous point.

- 6 Further, I have assumed, for current purposes, that the unamended AS4000-1997 provides a fair and reasonable baseline. I also consider that the Old Government Standard Form (being AS2124-1992 as amended) is reasonable, unless specifically identified to the contrary in the attached table.

### Overview of Observations

- 7 This report has been structured by grouping provisions of the Contract by issue, rather than going through the provisions in the order in which they appear in the Contract. The intention is to enable readers to better understand the impact of the changes in this new form of Contract.
- 8 This is particularly important in the present case because the effect of many of the changes only becomes clear when multiple provisions are considered together. To illustrate this point, consider the allocation of risk for Latent Conditions, a matter of great importance to civil contractors. As clause 25 of the Contract is, for all relevant purposes, unamended from AS4000-1997 it appears that the State has

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

accepted the allocation of substantive risk for physical conditions that satisfy the definition of “Latent Conditions”.

However, given the changes to the definition of “Qualifying Cause of Delay” (see Issue #167) and clause 34.9 (see Issue #180), there is no longer an entitlement to an extension of time (EOT) or delay cost recovery due to delay caused by “Latent Conditions”. Further, due to the changes to clause 36.4 and the introduction of section 8 of the Valuation Rules, the valuation of the deemed Variation to compensate the Contractor for the effects of the Latent Condition is likely to be substantially less than is necessary to cover the costs of the additional Work, resources, time and cost which will be necessary to deal with the Latent Condition (see Issues #79, #80 and #193).

- 9 Whilst each provision of the Contract discussed in the attached table, in my opinion, either does not represent a fair and reasonable allocation of “substantive risk” and “process risk” between the parties and/or renders the Contract difficult to read, understand and administer (including unnecessary complexity, drafting errors, and potential inconsistencies), I have sought to identify those provisions that I consider to have the most significant impacts by adopting a **red** identifier.
- 10 In my independent opinion, taking into account that the Contract is for use on “business as usual” construct-only projects which may have a contract value of as low as \$500,000, the Contract does not produce a better outcome for industry, government and Tasmania as a whole, including because:
- (a) The Contract involves a **significant shift** in both “substantive” and “process” risk allocation from the State to the Contractor compared with the industry standard (AS4000-1997) and the Old Government Standard Form. Many of these shifts in risk allocation are not transparent, only becoming apparent when changes to multiple provisions are considered together.
  - (b) In many respects, the terms of the Contract are **inconsistent** with principles outlined above.
  - (c) The Contract contains a **substantial** number of changes to the Old Government Standard Form. Contrary to suggestions at the Industry Briefing, it cannot be said that the increase in the number of pages from AS4000-1997 was simply due to a consolidation of multiple parts of the Old Government Standard Form.
  - (d) The drafting and structure adopted creates greater complexity, inconsistency and significant additional contract administration requirements for industry and government. It will be impossible for Tenderers to properly assess the time and cost implications when responding to Requests for Tenders, particularly given the usually short tender periods for such projects.
- 11 As examples to illustrate these conclusions see:
- (a) Clauses 1.2(m), 1.2(n), 20 and 45.5 - Principal’s and Superintendent’s rights, powers and discretions under the Contract (**Issues #1 to #11**).
  - (b) Clause 5.4C - Release and Retention of Security (**Issue #109**).
  - (c) Clauses 24, 24B, and 31A - Constraints on the Contactor’s ability to perform the WUC, including the Principal’s unilateral rights to change these constraints and the Contractor’s obligations (**Issues #127, #132 to #135**).
  - (d) Clause 32A - Milestones (**Issues 141 to 145**).
  - (e) Clauses 34.2 to 34.5B and 34.9 - Delays, including the definition of “Qualifying Cause of Delay” and “Compensable Cause” (**Issues #167 to #174 and #176 to #181**).
  - (f) Clauses 34.6, 34A and 34B - Practical Completion and Conditional Practical Completion (**Issues #153 and #154**).
  - (g) Clauses 34.6, 37.1A and 37.4 - Deed of Release or Warranties and Releases for Progress Claims, Certificate of Practical Completion and Final Certificate (**Issues #86, #99 and #153**).
  - (h) Clauses 2B.3, 8A.2(c), 8B.7(b), 20A.3, 34.3(c), 34.6, 37.1A, 37.4 and 41 - Additional or amended exclusion clauses (time bars) (**Issues #31, #36, #136, #199 to #201, #205 and #216**).
  - (i) Annexure Part K - The Valuation Rules (**Issues #67 to #83**)

This list should not be understood as placing any greater importance on these issues than others identified in the report.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

---

- 12 In conclusion, I believe that the new form of Contract will most likely:
- (a) create greater antipathy, rather than collaboration, between industry and the State, leading to more disputes and less opportunity for innovative solutions for the benefit of all parties; and
  - (b) result in increased costs and poorer outcomes for all parties in the delivery of reasonably simple construction projects for the people of Tasmania.
- 13 Finally, where possible, I have identified cross-referencing errors, defined terms without definitions and other drafting errors, but expect that the expected 12 month review mentioned by Infrastructure Tasmania will consider such matters more comprehensively.

Thank you for the opportunity to undertake this review.



**David Palser**  
**Director**



**CIVIL CONTRACTORS  
FEDERATION  
TASMANIA**

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

### PART 2 – PARTIES, ROLES & FUNCTIONS

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Principal and Superintendent</b>				
1.	General Principles		<p>The relatively unique circumstances of a construction project (and associated arrangements for works and services) has resulted in the development of various processes for the efficient administration of the contract, including (without limitation):</p> <ul style="list-style-type: none"> <li>• The appointment of a person to act as an <b>independent certifier</b>, assessor and valuer to determine various matters that affect the obligations, rights, entitlements and liabilities of the parties under the contract. In the Australian Standards contracts this person is identified as the “Superintendent”.</li> </ul> <p>The courts have recognised that, when undertaking these independent certification functions, the person is performing a contractual “expert determination”. Subject to the specific terms of the contract, such determinations are usually binding on the parties provided that it was made in accordance with the terms of the contract.</p> <ul style="list-style-type: none"> <li>• It is also accepted that the Principal should have various contractual powers and discretions (including rights of approval and rights to unilaterally adjust the parties’ obligations various matters under the contract) and obligations necessary for the efficient and effective delivery of the project.</li> </ul> <p>These are often expressly delegated to an agent or representative, such as the person nominated as Superintendent.</p> <p>As agents, these people “stand in the shoes” of the Principal, bound to exercise these rights and discharge the obligations as if they were the Principal in accordance with the terms of the contract and the law.</p> <p>Given that these processes will affect the obligations, rights, entitlements and liabilities of the parties under the contract, the courts apply various “rules” to constrain these rights and processes, including:</p> <ul style="list-style-type: none"> <li>• Where a person under the contract is acting as independent certifier, they must undertake this role must act in an impartial and fair manner, that is they must act reasonably and in good faith, and not in a way that advances the Principal’s interests over those of the Contractor.</li> </ul> <p>This rule applies even if that person is also an employee, agent or other representative of the Principal.</p> <ul style="list-style-type: none"> <li>• The Principal’s (and its agents) contractual powers and discretions (including rights to approve various matters under the contract) will be reasonably constrained, including as follows: <ul style="list-style-type: none"> <li>○ Where the Principal or its agent is required to form an opinion or belief, it must act reasonably and honestly (ie. in good faith).</li> </ul> </li> </ul>	Note

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>○ Where a contractual power or discretion is given to the Principal (directly or through its agent) for a particular purpose, it must be exercised for that purpose (and not an ulterior purpose) and reasonably and in good faith.</li> </ul> <p>That is, contractual powers and discretions must not be exercised dishonestly, capriciously, unreasonably or arbitrarily.</p> <ul style="list-style-type: none"> <li>• The common law recognises that it is necessary that all commercial contracts include a “duty of co-operation” on the parties. This duty has been described by the courts in various way, but is generally understood to mean that:               <ul style="list-style-type: none"> <li>○ each party must not hinder or prevent the fulfilment of the purpose of the express terms of the contract;</li> <li>○ each party must do all things necessary on its part to enable the other party to have the benefit of the contract; and</li> <li>○ each party must abstain from any act which would destroy or deprive the agreement of its efficacy or efficiency.</li> </ul> </li> </ul> <p>An example is that a Principal and its agents are expected to respond to reasonable requests for information by a Contractor where that information is necessary to permit the Contractor to perform its obligations and obtain the benefit of the contract.</p> <ul style="list-style-type: none"> <li>• Finally, where the contract specifies an obligation on a party (or its agent) and does not specify a time for the performance of that obligation, it must be performed within a “reasonable time”, taking account of all the circumstances.</li> </ul> <p>The importance of these duties is amplified, where the Principal is a government, by the expectations that it will act as a “moral exemplar”, demonstrating the highest standards of fair dealing, equity and good conscience (discussed above).</p> <p>Each of these “rules” is considered by the courts to be so necessary to the fair operation of all construction contracts that if the contract does not expressly provide for these duties, the courts will imply terms to this effect <b>unless</b> the contract expressly <b>excludes or modifies</b> them.</p> <p>The Contract contains numerous changes to the terms of the unamended AS4000-1997 and the Old Government Standard Form that have been introduced to <b>exclude or minimize</b> the Principal’s responsibilities for its own acts or omissions, and those of its agents (including the Superintendent) with respect to each of the above necessary duties, including (without limitation):</p> <ul style="list-style-type: none"> <li>• Clauses 1.2(m) and 1.2(n) (discussed further below);</li> <li>• Clauses 20.1, 20.2 and 20.5 (discussed further below); and</li> <li>• Clause 45.5 (discussed further below).</li> </ul>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><b>Each of these general provisions (often referred to as “boilerplate”) has a material and negative impact on the substantive and process risk allocation under the Contract from the Contractor’s perspective.</b></p>	
<b>Superintendent</b>				
2.	Superintendent - General	20	<p>Clauses 20.1 to 20.5 of the Contract contain the primary general provisions dealing with the roles and responsibilities of the person nominated as “Superintendent” under the Contract.</p> <p>These provisions are critical as they impact the operation of every other provision of the Contract that expressly refers to the “Superintendent”.</p> <p>In particular:</p> <ul style="list-style-type: none"> <li>• Clauses 20.1, 20.2 and 20.5 address the Superintendent’s appointment, role and functions, limits of authority and relationship with the Principal.</li> <li>• Clauses 20.3 and 20.4 provides the Superintendent with further general powers when exercising its responsibilities under the Contract.</li> </ul> <p>Clause 20.1 makes it clear that the person nominated as “Superintendent” for the purposes of the Contract has two separate roles, generally consistent with the above discussion:</p> <ul style="list-style-type: none"> <li>• Independent certifier – limited to when the Superintendent is performing the “Certifying Functions” (as defined) under the applicable other provisions of the Contract (clause 20.1(b))</li> <li>• Principal’s agent – for all other purposes (ie. except when the superintendent is performing the Certifying Functions) (2<sup>nd</sup> paragraph of clause 20.1)</li> </ul> <p>It is important to keep these roles in mind when considering the impact of the various provisions and changes introduced into the Contract, as their impact will be different depending on the role that the Superintendent is undertaking under the relevant other provisions of the Contract.</p>	Note
3.	Superintendent’s Duties – Certifying Functions	20.1(b)	<p>Clause 20.1(b) states:</p> <p><i>“The Principal shall ensure that: ...</i></p> <p><i>(b) subject to Subclause 20.5, the Superintendent, in performing the Certifying Functions, acts reasonably and independently.”</i></p> <p>From the Contractor’s perspective, there are three material changes from AS4000-1997 and the amended clause 23 of the Old Government Standard Form as a consequence of the drafting of clause 20.1(b):</p> <ul style="list-style-type: none"> <li>• The circumstances covered by Clause 20.1(b) are limited to the “Certifying Functions” (as defined in clause 1.1).</li> </ul>	<p>Definition of “Certifying Functions” in clause 1.1:</p> <ul style="list-style-type: none"> <li>• Delete paragraph (a).</li> <li>• Replace paragraph (b) with all of the Superintendent functions under clause 34.6.</li> <li>• Replace paragraph (c) with all of the Superintendent’s functions under clauses 34.4 and 34.5.</li> <li>• Replace paragraph (d) to expressly include Variations and deemed Variations, the last</li> </ul>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>The Principal’s responsibility in these circumstances is only to ensure that the Superintendent acts “<i>reasonably and independently</i>”.</li> <li>The Principal’s responsibility is expressly conditioned by clause 20.5. That is, to the extent that the duties in clause 20.1(b) conflicts with clause 20.5, then clause 20.1(b) has no operation.</li> </ul> <p><b>Clause 20.1(b) - “Certifying Functions”</b></p> <p>The limitation in clause 20.1(b) to “Certifying Functions” differs from the unamended clause 20 of AS4000-1997 and the amended clause 23 of the Old Government Standard Form as follows:</p> <ul style="list-style-type: none"> <li>AS4000-1997 - the Principal’s responsibility applies to “<i>all aspects of the role and functions</i>” of the Superintendent.</li> <li>Old Government Standard Form - the Principal’s responsibility is limited to when the Superintendent is “<i>performing all valuations, assessments, determinations and certifications</i>”.</li> </ul> <p>As long as the provisions dealing with the functions undertaken by the Superintendent as agent of the Principal are addressed (as discussed below), and the definition of “Certifying Functions” is amended to ensure that it includes all functions of the Superintendent under the Contract where the Superintendent is undertaking what are generally understood to be “independent certifier functions” as highlighted in this section, I am comfortable with the general approach adopted in clause 20.1.</p> <p>The amendments to the definition of “Certifying Functions” that I consider to be reasonable and appropriate are:</p> <ul style="list-style-type: none"> <li>Paragraph (a) – “<i>Definition of The Works – the forming of an opinion as to whether certain work was reasonably and obviously necessary for the completion of WUC or was reasonably capable of inference from the Contract Documents (is thereby by of The Works)</i>”.</li> </ul> <p>As discussed elsewhere, I do not consider that defining “The Works” by reference to the Superintendent’s opinion, rather objectively by the terms of the Contract, is reasonable.</p> <ul style="list-style-type: none"> <li>Paragraph (b) – “<i>Practical Completion - the forming of an opinion as to whether Practical Completion has been reached as required by Clause 34.6</i>”.</li> </ul> <p>This is not wide enough as the Superintendent other functions under clause 34.6 that should be covered by clause 20.1(b).</p> <ul style="list-style-type: none"> <li>Paragraph (c) – “<i>EOT – the assessment of an EOT under Clause 34.5</i>”</li> </ul> <p>This is not wide enough. All of the Superintendent’s functions under clauses 34.4 and 34.5 should be covered by clause 20.1(b).</p> <ul style="list-style-type: none"> <li>Paragraph (d) – “<i>Variations - the pricing of a Variation under Clause 36.4</i>”</li> </ul> <p>This is not wide enough. It is not just Variations that are priced under clause 36.4, but also deemed Variations. To avoid doubt, this should be included.</p>	<p>paragraph of clause 36.2 and all of clause 36.4.</p> <ul style="list-style-type: none"> <li>Delete paragraph (g) and replace with <b>all</b> of the Superintendent’s functions referred to in or covered by Annexure Part K.</li> <li>Insert clauses 2.3, 34.7, 34.8, 37.4, 37.7, 39.5, 39.6, 39.9, 40(a), 40A and 41.3.</li> <li>Insert a catch-all provision:  “<i>any other circumstance where the Superintendent is required to act as valuer, assessor, determiner or certifier by the Contract</i>”.</li> </ul> <p>In clause 20.1(b), delete “<i>Subject to Subclause 20.5</i>”.</p> <p>In clause 20.1(b), replace “<i>reasonably and independently</i>” with either:</p> <ul style="list-style-type: none"> <li>“<i>reasonably and in good faith</i>” (to reflect clause 20 of AS4000-1997); or</li> <li>the following (to reflect the Old Government Standard Form).  “(a) <b>acts honestly and fairly</b>;  (b) <i>acts within the time prescribed under the Contract or where no time is prescribed, within a <b>reasonable</b> time; and</i>  (c) <i>arrives at a <b>reasonable</b> measure or value of work, quantities or time.</i>” (emphasis added)</li> </ul> <p>Make the necessary changes to reflect the deletion of clauses 1.2(m), 1.2(n) and 45.5.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>Further, the last paragraph of clause 36.2 and the whole of clause 36.4 should be covered by clause 20.1(b).</p> <ul style="list-style-type: none"> <li>Paragraphs (g) – “<i>Valuation Rules – any valuation ... undertaken through the application of the Valuation Rules</i>”.</li> </ul> <p>As discussed elsewhere, the Valuation Rules are unreasonable and should be deleted. In these circumstances, <b>each</b> function of the Superintendent either expressly referred to in Annexure Part K or otherwise covered by that Annexure must be covered by the definition of “Certifying Function”.</p> <ul style="list-style-type: none"> <li>Other provisions that should be specifically referred to include clauses 2.3, 8A.2 (both the Direction and the certification of cost impact), 34.7, 34.8, 37.4, 37.7, 39.5, 39.6, 39.9, 40(a), 40A and 41.3, and finally, to ensure that nothing is inadvertently missed, a further paragraph should be included in the definition of “Certifying Function” to reflect the general wording in the amended clause 23 of the Old Government Standard Form.</li> </ul> <p>Finally, I have not referred to those provisions that involve the Superintendent undertaking functions that fall within the usual understanding of independent certifier functions which I consider should be deleted (eg. Clauses 14.1A, 20.3, 20.4, 34.5A, 34A, 34B, 36.6(b) and 36.7) or amended to remove the Superintendent (eg. clause 39.10(a)).</p> <p><b><u>Clause 20.1(b) - “reasonably and independently”</u></b></p> <p>Limiting the nature of the Superintendent’s duty under clause 20.1(b) to acting “<i>reasonably and independently</i>” is, again, to be contrasted with the unamended clause 20 of AS4000-1997 and the amended clause 23 of the Old Government Standard Form as follows:</p> <ul style="list-style-type: none"> <li>AS4000-1997 - the Principal is required to ensure that “<i>the Superintendent fulfils all aspects of the role and functions <b>reasonably and in good faith.</b></i>” (emphasis added).</li> <li>Old Government Standard Form – the Principal is required to ensure that the Superintendent: <ul style="list-style-type: none"> <li>“(a) <b>acts honestly and fairly;</b></li> <li>(b) <i>acts within the time prescribed under the Contract or where no time is prescribed, within a <b>reasonable</b> time; and</i></li> <li>(c) <i>arrives at a <b>reasonable</b> measure or value of work, quantities or time.</i>” (emphasis added)</li> </ul> </li> </ul> <p>Whilst different wording is adopted in these contractual provisions, the meaning is generally the same in this context. These provisions are consistent with the duties that the common law would imply into the Contract if it were silent as to the duties applicable to the person undertaking the independent certifier functions.</p>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>However, as noted above, the law allows the parties to <b>exclude or modify</b> these duties, and the purpose of the amendments to clause 20.1(b) is to do just that. The Principal’s obligation has been materially weakened from:</p> <ul style="list-style-type: none"> <li>ensuring that the Superintendent perform its certifying functions reasonably and <b>“honestly and fairly”</b> (Old Government Standard Form) or <b>“reasonably and in good faith”</b> (AS4000-1997);</li> <li>to <b>“reasonably and independently”</b> (clause 20.1(b) of the Contract).</li> </ul> <p>This becomes clear from the following:</p> <ul style="list-style-type: none"> <li>The word “independent” in this context means “impartial”, in the sense that the Superintendent must not act in a way that advances the interest of either party over those of the other party. Put another way, there must not be any actual bias in favour of a party in the discharge of these functions.</li> <li>The phrase <b>“honestly and fairly”</b> in the context of clause 23 of AS2124-1992 has been interpreted by the courts to mean when the individual <i>“is not dishonest, is just and impartial and conducts himself or herself in a reasonable manner”</i>.</li> <li>The courts have stated that, ordinarily, a “good faith” obligation in a contract requires the person to act honestly and with a fidelity to the bargain; not to undermine the bargain entered or the substance of the contractual benefit bargained for; and act reasonably and with fair dealing having regard to the provisions, aims and purposes of the contract, objectively ascertained.</li> </ul> <p>Accordingly, a requirement for the Superintendent to act <b>“honestly and fairly”</b> or in <b>“good faith”</b> goes beyond simply acting “independently” (impartiality) (as the caselaw confirms).</p> <p>Given the importance of the Superintendent’s Certifying Functions to the Contractor’s obligations, rights, entitlements and liabilities and the limited grounds for challenging the product of those functions, it is unreasonable to narrow the Principal’s obligation to just <b>“reasonably and independently”</b>.</p> <p><b><u>Clause 20.1(b) - “Subject to Clause 20.5”</u></b></p> <p>The entirely new clause 20.5 is addressed in detail below.</p> <p>As it is my opinion that it is unreasonable for clause 20.5 to apply where the Superintendent is performing Certifying Functions, the reference to clause 20.1(b) being subject to clause 20.1(b) should be deleted.</p> <p><b><u>Other Provisions</u></b></p> <p>There are a number of other provisions in the Contract that may undermine the requirements of the Superintendent in clause 20.1(b) when performing Certifying Functions that are unreasonable, in particular:</p> <ul style="list-style-type: none"> <li>Clause 20.2 – Relationship with the Principal</li> <li>Clause 20.3 - Amendment of Directions or decisions</li> </ul>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>Clause 20.4 – Further Information</li> <li>Clauses 1.2(m) – Discretions</li> <li>Clause 45.5 – Discretions and conditions (see below)</li> </ul> <p>Each of these are discussed in detail below. For current purposes, it should be noted that none of these provisions are expressed to be subject to clause 20.1(b), potentially resulting in an inconsistency and further watering down of the critical protections for the Contractor where the Superintendent is acting as an independent certifier.</p>	
4.	Superintendent – Principal’s Agent	20.1	<p>The 2<sup>nd</sup> paragraph of clause 20.1 states:  <i>“Except where the Superintendent is performing the Certifying Functions, the Superintendent acts as agent of the Principal.”</i></p> <p>This means that each reference to the “Superintendent” in the Contract that does not involve the Superintendent performing Certifying Functions is to be read as if “Principal” were substituted for “Superintendent”, with the effect that in these circumstances:</p> <ul style="list-style-type: none"> <li>all of the obligations, rights, powers and discretions expressly given to the Superintendent under the Contract are, in fact, given to the Principal;</li> <li>all of the implied duties and limitations that apply to the Principal when exercising its rights, powers and discretions (discussed above) apply equally to the Superintendent <b>unless</b> the Contract expressly <b>excludes or modifies</b> the above duties.; and</li> <li>the Principal is bound by, and liable for, all actions of the Superintendent that are not authorised by Contract as if they were the actions of the Principal.</li> </ul> <p>Whilst the 2<sup>nd</sup> paragraph of clause 20.1 is consistent with the general principles discussed above, it is the effect of numerous other provisions in the Contract that either <b>exclude or modify</b> the usual implied duties and limitations that apply to a principal under a construction contract when exercising its rights, powers and discretions (discussed above) that are unreasonable, in particular:</p> <ul style="list-style-type: none"> <li>Clause 20.2 – Relationship with the Principal</li> <li>Clause 20.3 - Amendment of Directions or decisions</li> <li>Clause 20.4 – Further Information</li> <li>Clause 20.5 – Limits of authority</li> <li>Clauses 1.2(m) and 1.2(n) – Discretions</li> <li>Clause 45.5 – Discretions and conditions</li> </ul> <p>Each of these are discussed in detail below.</p>	Note

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
5.	Relationship with the Principal	20.2	<p>Clause 20.2 states:</p> <p><i>“The Contractor acknowledges that the Superintendent may be an employee of the Principal or may have a general commercial relationship with the Principal beyond the performance of the role of Superintendent under the Contract and the Contractor shall not have any Claim against the Principal by reason of these matters.”</i></p> <p>This provision is the equivalent of the amendment to clause 23 in the Old Government Standard Form.</p> <p>The reasonableness of this provision will depend on which role the superintendent is performing – independent certifier or agent of the Principal.</p> <p><b><u>Superintendent as Independent Certifier</u></b></p> <p>The caselaw recognises that there is no general legal rule which prohibits a person being appointed to undertake the “independent certifier functions” of the Superintendent whilst also being an employee of the Principal or having a commercial relationship with the Principal, even though the possibility of a conflict of interest is real and the appearance of bias is the likely result.</p> <p>As noted above, clause 20.1(b) requires the Principal to ensure that when the Superintendent is performing the Certifying Functions it will act in the manner specified. Should the Superintendent not act in that manner, the Principal is in breach of the Contract and the Contractor has remedies at law and under the Contract.</p> <p>In these circumstances, it is important that the Principal’s obligation under clause 20.1(b) is not undermined by clause 20.2.</p> <p><b><u>Superintendent as Principal’s Agent</u></b></p> <p>Otherwise, clause 20.2 adds very little where the Superintendent is acting as agent of the Principal.</p>	<p>Insert a new paragraph into clause 20.2:</p> <p><i>“The Contractor acknowledges that the Superintendent may be an employee of the Principal or may have a general commercial relationship with the Principal beyond the performance of the role of Superintendent under the Contract.</i></p> <p><i>Without prejudice to clause 20.1(b), the Contractor shall not have any Claim against the Principal by reason of these matters.”</i></p>
6.	Amendment of Directions or decisions	20.3	<p>This is an entirely new provision (no equivalent in the Old Government Standard Form) which states:</p> <p><i>“The Superintendent may vary any Direction, decision, assessment, valuation or the like (other than an assessment under Subclause 41.3) if the Superintendent is of the view that the Direction, decision, assessment, valuation or the like <b>was based on incorrect or incomplete information or is otherwise inappropriate.</b>”</i></p> <p>As with the previous point, the reasonableness of this provision will depend on which role the Superintendent is performing – independent certifier or agent of the Principal.</p>	Delete clause 20.3.

**INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT**

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><b><u>Superintendent as Independent Certifier</u></b></p> <p>Whilst this drafting is wide enough to cover all Directions of the Superintendent, it appears to primarily focus on the outcome of the performance of the Superintendent’s Certifying Functions.</p> <p>As discussed above, when acting as an independent certifier, the Superintendent is undertaking an expert determination in accordance with the terms of the Contract, and that the outcome will usually be binding on the parties as long as they have been undertaken in accordance with the requirements of the contract. If a party considers that it was not issued in accordance with the requirements of the Contract, they have a process for disputing it.</p> <p>There are good commercial reasons for the parties to adopt such a course, including informality and speed, suitability of some types of disputes for determination by persons with particular expertise, privacy; and a desire to resolve disputes in a way which may be seen as reasonably consistent with the maintenance of ongoing commercial relationships.</p> <p>In these circumstances, it is unreasonable to give the Superintendent the discretion to decide, after the fact, that a certificate or determination is effectively null and void.</p> <p>Finally, for completeness, see the separate discussion in relation to the similar point with respect to clause 37.7 elsewhere.</p> <p><b><u>Superintendent as Principal’s Agent</u></b></p> <p>Where the Superintendent is acting as agent of the Principal, there is nothing in the Contract or at law that prevents it from revising any direction that involves the exercise of a right, power or discretion under the Contract, provided the Principal authorises it under the agency agreement and subject to any remedies that the Contractor may have under the Contract or at law.</p> <p>In these circumstances, clause 20.3 is unnecessary, but also may cause confusion if a Superintendent feels that this provision authorises it to amend such directions at the Contractor’s risk.</p> <p><b><u>Clauses 1.2(m), 1.2(n) and 45.5</u></b></p> <p>As this provision is expressed as giving the superintendent a discretionary power, the comments on clauses 1.2(m), 1.2(n) and 45.5 below are also applicable to this provision.</p>	

**INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT**

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
7.	Further information	20.4	<p>Clause 20.4 is also an entirely new provision (no equivalent in the Old Government Standard Form), which states:</p> <p><i>“If the Superintendent considers that further information from the Contractor may be of assistance in the Superintendent considering any <b>Direction, decision, assessment, valuation or the like</b> the Superintendent <b>may direct the Contractor to provide that further information.</b></i></p> <p><i>The Superintendent may issue or make an <b>interim</b> Direction, decision, assessment, valuation or the like pending the provision of the further information.</i></p> <p><i>The Superintendent may <b>defer</b> issuing or making a Direction, decision, assessment, valuation or the like pending the provision of the further information.</i></p> <p><i>Following the provision of the further information, the Superintendent shall issue or make an <b>interim</b> Direction, decision, assessment, valuation or the like within the time, from the provision of the further information, in which the Superintendent was originally required to issue or make an interim Direction, decision, assessment, valuation or the like.”</i> (emphasis added)</p> <p>Accordingly, this clause permits the Superintendent to:</p> <ul style="list-style-type: none"> <li>• <b>direct</b> the Contractor to provide further information, which the Contractor must comply with (see clause 2.1); and</li> <li>• <b>defer</b> the issuing of any Direction beyond the contractually agreed time for issuing such Direction,</li> </ul> <p>simply because the Superintendent considers that the further information “<b>may</b>” be of assistance in considering “<b>any Direction, decision, assessment, valuation or the like</b>”.</p> <p><b><u>Superintendent as Independent Certifier</u></b></p> <p>Where the Superintendent is performing its Certifying Functions, the Contract already addresses the information that the Contractor is obliged to provide and if it fails to provide sufficient information, the Superintendent is obliged to make a determination based on the information provided.</p> <p>Of course, in practice, the Superintendent can request additional information, and the Contractor is likely to do its best to provide it. However, this is very different to the extreme contractual powers given the Superintendent in this provision.</p> <p>Further, as this is not itself a “Certifying Function” is unclear whether clause 20.1(b) would apply to any directions under clause 20.4 with respect to Certifying Functions.</p> <p>Finally, there is no reasonable justification to permit the Superintendent to defer the performance of any of its Certifying Functions beyond the contractually agreed time frames, least of all because the Superintendent “<i>considers that further</i></p>	Delete clause 20.4.

**INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT**

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><i>information from the Contractor may be of assistance</i>". This provision could permit the Superintendent to defer determinations indefinitely.</p> <p><b>Superintendent as Principal's Agent</b></p> <p>The most likely directions that this provision might apply to where the Superintendent is acting as the Principal's agent are:</p> <ul style="list-style-type: none"> <li>• Where the Superintendent is exercising a right or discretion of the Principal under the Contract to unilaterally change the Contractor's obligations (eg. a Variation).</li> </ul> <p>In this case, the Contract generally contains mechanisms for requesting such information from the Contractor with appropriate compensation attached (eg. clause 36.2).</p> <ul style="list-style-type: none"> <li>• Where the Superintendent is considering whether to exercise a discretion on behalf of the Principal to approve or consent to a request of the Contractor (eg. approval to subcontract the works).</li> </ul> <p>In these circumstances there are either express or implied timeframes in the Contract for the Superintendent to respond. Again, I can see no justification to undermine these agreed timeframes simply because the Superintendent <i>"considers that further information from the Contractor may be of assistance"</i>. This provision could permit the Superintendent to defer determinations indefinitely.</p> <p><b>Clauses 1.2(m), 1.2(n) and 45.5</b></p> <p>As this provision is expressed as giving the Superintendent a discretionary power, the comments on clauses 1.2(m), 1.2(n) and 45.5 below are also applicable to this provision.</p>	
8.	Limits of authority	20.5	<p>Clause 20.5 is an entirely new general provision (with no equivalent provision in the Old Government Standard Form) which states:</p> <p><i>"The Contractor accepts that the Superintendent, when performing its functions under the Contract, may be required by internal delegations or policies of the Principal or by reason of the nature of the Principal, to obtain the consent of, or act under the Direction of, personnel of the Principal or to give effect to particular policies or internal Directions of the Principal.</i></p> <p><i>The Contractor shall not have any Claim against the Principal by reason of the performance of the Superintendent's functions under this Contract in accordance with any such Directions or policies."</i></p> <p>The only similar provision in the Old Government Standard Form was clause 40.6, which was limited to when the Superintendent was <i>"performing the functions of the Superintendent under Clause 40 in relation to variations"</i>.</p> <p>Again, the reasonableness of this provision will depend on which role the Superintendent is performing – independent certifier or agent of the Principal.</p>	<p>Amend clause 20.5 to read:</p> <p><i>"The Contractor accepts that the Superintendent, when performing its functions under the Contract as agent of the Principal, may be required by internal delegations or policies of the Principal or by reason of the nature of the Principal, to obtain the consent of, or act under the Direction of, personnel of the Principal or to give effect to particular policies or internal Directions of the Principal.</i></p> <p><i>The Contractor shall not have any Claim against the Principal solely by reason of the performance of the Superintendent's functions under this Contract when acting</i></p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><b><u>Superintendent as Independent Certifier</u></b></p> <p>Clause 20.5 undermines the effect of clause 20.1(b) where the Superintendent is acting as an independent certifier.</p> <p>Clause 20.1(b) requires the Principal to ensure that when the Superintendent is performing the Certifying Functions (which will affect the rights, entitlements and liabilities of the parties) it will act in the manner specified, including making its determinations in an impartial manner.</p> <p>However, if clause 20.5 is applied to the Certifying Functions, it removes any requirement of impartiality, permitting the Principal to direct the Superintendent in respect of matters affecting the rights, entitlements and liabilities of the parties, with limited opportunity for the Contractor to dispute those determinations.</p> <p><b><u>Superintendent as Principal’s Agent</u></b></p> <p>Whilst the 1<sup>st</sup> paragraph is consistent with the general legal principles applicable to relationships of agency, the drafting of the 2<sup>nd</sup> paragraph is too broad in such circumstances. In particular:</p> <ul style="list-style-type: none"> <li>As discussed above, when acting as agent, the Superintendent “stands in the shoes” of the Principal. As such, the Superintendent cannot act in a manner that the Principal is not permitted to act, and the Principal is responsible for all acts or omissions of the Superintendent.</li> </ul> <p>Consequently, simply because the Superintendent (as agent of the Principal) may be directed to do something by the Principal that would otherwise amount to a breach of the Contract by the Principal should not be used to deny the Contractor of an entitlement.</p> <ul style="list-style-type: none"> <li>Secondly, as drafted, the literal meaning of the 2<sup>nd</sup> paragraph is that the Contractor would have no claim pursuant to an express entitlement in the Contract (eg. for a Variation) if the Superintendent were directed by the Principal to exercise that right. This cannot be intended.</li> </ul> <p>As such, the 2<sup>nd</sup> paragraph is unnecessary and could be deleted. As an alternative, I have proposed some drafting to address these concerns.</p>	<p><i>as agent of the Principal in accordance with any such Directions or policies.”</i></p>
<b>Contractual Powers and Discretions</b>				
9.	Principal’s (and Superintendent’s) discretions	1.2(m)	<p>Clause 1.2(m) of the Contract reflects the amended clause 2 of the Old Government Standard Form. This states:</p> <p><i>“when the Principal ‘may’ exercise a right, remedy or discretion, the Principal has an <b>absolute discretion</b> whether or not to do so and is <b>not required to exercise the discretion in good faith</b> or having regard to, or for the benefit of the Contractor”.</i></p> <p>There is some uncertainty whether this provision only applies where the Contract expressly provides that the Principal “may” act, or whether it has broader</p>	<p>Delete clauses 1.2(m), 1.2(n) and 45.5.</p> <p>Whilst not strictly necessary, to promote clarity for the users of the Contract, each reference in the Contract to when the Principal ‘may’ exercise a right, remedy or discretion could be amended to include the words “(not to be unreasonably delayed, conditioned or withheld)”.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>application covering all discretions of the Principal under the Contract. In this respect, see also clause 45.5 discussed below.</p> <p>Specific provisions in the Contract which expressly provides that the Principal “may” act includes clauses 5.3, 5.4C, 9.1, 9.1A, 9.1C, 9.4, 11D(b), 12, 19.2, 20.1, 20.5, 20A.5, 22A, 24.3, 24.3A, 24.3C, 24B, 27, 29.3, 31A, 35, 36.6(a), 37.4, 37.6, 37A.3, 38.2, 38.3, 39.2, 39.4, 39.5, 39.6, 39.11, and 40A(f).</p> <p>These provisions involve a mix of rights, powers and discretions falling into the following broad categories:</p> <ul style="list-style-type: none"> <li>• A right, power or discretion to unilaterally change the Contractor’s obligations under the contract (eg. a Variation).</li> </ul> <p style="padding-left: 20px;">In this case, the Contract generally contains mechanisms for requesting such information from the Contractor with appropriate compensation attached (eg. clause 9.1).</p> <ul style="list-style-type: none"> <li>• A discretion to approve or consent to a request of the Contractor (eg. clause 9.4).</li> </ul> <p>The apparent purpose of clause 1.2(m) is to <b>exclude</b> the following essential duties implied into all commercial contracts (discussed above):</p> <ul style="list-style-type: none"> <li>• The obligation to act reasonably and for a proper purpose in the exercise of contractual rights, powers and discretion (including rights to approve various matters under the contract).</li> <li>• The duty of co-operation.</li> <li>• The requirement to exercise rights, powers or discretions within a “reasonable time” if the contract does not otherwise specify a timeframe.</li> </ul> <p>It is unusual to find in a contract an express disclaimer that a party is “<i>not required to exercise the discretion in good faith</i>”, as that suggest that the party may fail to co-operate, act for ulterior purposes, or for purposes extraneous to the grant of the powers or discretions, and/or act dishonestly, capriciously, unreasonably or arbitrarily with impunity.</p> <p>It is not possible to say whether clause 1.2(m) and similar provisions will have this effect in a particular contract, as it will be a matter of interpreting that contract in accordance with common law principles, but it certainly cannot be ruled out.</p> <p>Further, when the Superintendent is acting as agent of the Principal under the Contract, clause 1.2(m) will apply to it on the basis of the principles of agency discussed elsewhere (although unlike clause 1.2(n), there is no express exclusion of clause 20.1(b)).</p> <p>Finally, whilst not strictly necessary, to promote clarity for the users of the Contract, each reference in the Contract to when the Principal ‘may’ exercise a right, remedy or discretion could be amended to include the words “<i>(not to be unreasonably delayed, conditioned or withheld)</i>”.</p>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
10.	Superintendent’s discretions	1.2(m) 1.2(n)	<p>Clause 1.2(n) is an entirely new provision (with no equivalent in the old Government Standard Form) which states:</p> <p><i>“when the Superintendent ‘may’ exercise a right, remedy or discretion then, subject to paragraph (b) of Subclause 20.1, the Superintendent has an absolute discretion whether or not to do so and is not required to exercise the discretion in good faith or having regard to, or for the benefit of the Contractor”</i></p> <p>That is, clause 1.2(n) appears to overlap entirely with clause 1.2(m), given that:</p> <ul style="list-style-type: none"> <li>• It is only intended to apply where the Superintendent is acting as agent of the Principal (ie. it is subject to clause 20.1(b) where the Superintendent is performing Certifying Functions as an independent certifier).</li> <li>• Clause 1.2(m) arguably applies where the Superintendent is acting as the Principal’s agent (see above).</li> </ul> <p>The provisions in current form of the Contract that expressly provide that the Superintendent “may” act include clauses 2.3(b), 2.4, 2A.2, 4.1, 4.2, 9.2, 9.2A, 11B.7, 11C.4, 13, 14.1A, 20.3, 20.4, 20A.1, 20A.2, 20A.3, 20A.4, 21, 23.1, 23.3, 24.3C, 26.1, 27, 28.1, 28.2, 29.3, 29.5, 30.1, 30.2, 30.5, 31, 32.4, 32.6, 32.7, 33.1, 33.2, 34.5A, 34.5B, 34.6, 34A.1, 34A.5, 34B.2(a), 34B.4, 35, 36.1, 36.2, 36.3, 36.5, 37.2, 37.7, 37A.5, and Annexure Part K.</p> <p>For the same reasons as discussed in detail with respect to clause 1.2(m) above, this provision is unreasonable.</p> <p>Finally, whilst not strictly necessary, to promote clarity for the users of the Contract, each reference in the Contract to when the Superintendent ‘may’ exercise a right, remedy or discretion could be amended to include the words “(not to be unreasonably delayed, conditioned or withheld)”.</p>	<p>Delete clauses 1.2(m), 1.2(n) and 45.5.</p> <p>Whilst not strictly necessary, to promote clarity for the users of the Contract, each reference in the Contract to when the Superintendent ‘may’ exercise a right, remedy or discretion could be amended to include the words “(not to be unreasonably delayed, conditioned or withheld)”.</p>
11.	Conditions – Approvals, consents or permission	45.5	<p>This entirely new provision (with no equivalent in the Old Government Standard Form) is the last clause in the Conditions of Contract under the heading “Miscellaneous Provisions”. The 1<sup>st</sup> paragraph states:</p> <p><i>“Where the Principal or the Superintendent is called upon, or is able to give any <b>approval, consent or permission or exercise any discretion pursuant to the Contract</b> the Principal or the Superintendent, as the case may be, may, in their <b>absolute discretion</b>:</i></p> <p><i>(a) give the approval, consent or permission;</i></p> <p><i>(b) not give the approval, consent or permission; or</i></p> <p><i>(c) give the approval, consent or permission subject to conditions.”</i></p> <p>Specific provisions in the Contract dealing with the need for approval from the Principal or the Superintendent include the definition of “Security” and clauses 5.3, 8G1, 9.1A, 9.1B, 9.1C, 9.2, 9.2A, 9.3, 9.4, 16, 17, 23.3, 24.2A, 26.1, 28.2, 29A, 29B, 30.1B, 31, 33.2, 34.6, 37.1, 37.4 and 39.2(c).</p>	<p>Delete clauses 1.2(m), 1.2(n) and 45.5.</p> <p>Whilst not strictly necessary, to promote clarity for the users of the Contract, each reference in the Contract to where the Principal or the Superintendent is called upon, or is able to give any approval, consent or permission or exercise any discretion could be amended to include the words “(not to be unreasonably delayed, conditioned or withheld)”.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>Clause 45.5 overlaps with clauses 1.2(m) and 1.2(n) (discussed above) to the extent that they involve contractual rights, powers and discretions, but goes further as it appears to authorise the Principal and Superintendent to place any conditions on such approvals, consents or permissions, <b>regardless</b> of whether such conditions are reasonably necessary to protect any legitimate interests of the Principal.</p> <p>Again, this provision appears to have been included to serve the same purpose as clauses 1.2(m) and 1.2(n), to <b>exclude</b> the essential duties implied in all commercial contracts (discussed above).</p> <p>In this respect, it should also be noted:</p> <ul style="list-style-type: none"> <li>• Many of the circumstances where the Contractor requires approval from the Principal or the Superintendent under the Contract will be critical to the completion of the Works, such as approval of subcontracts pursuant to clause 9.2. If approval is withheld unreasonably, the Contractor may be unable to proceed with the WUC.</li> <li>• Clause 45.5 <b>directly conflicts</b> with a number of other provisions in the Contract dealing with approval, consent or permission and the exercise any other discretion which expressly provide that approval or consent will “not be unreasonably withheld” or are subject to “reasonable conditions”, including clauses 8G.1, 9.2, 16, 17, 23.3 and 28.2.</li> <li>• It is not clear whether clause 45.5 might apply when the superintendent is exercising some Certifying Functions and thus, it is possible that it will also conflict with clause 20.1(b).</li> </ul> <p>Finally, whilst not strictly necessary, to promote clarity for the users of the Contract, each reference in the Contract to where the Principal or the Superintendent is called upon, or is able to give any approval, consent or permission or exercise any discretion could be amended to include the words “(not to be unreasonably delayed, conditioned or withheld)”.</p>	
<b>Contractor</b>				
12.	Contractor’s Personnel – Contractor’s Personnel	1.1 & 23.2	In my opinion, the inclusion of the phrase “ <i>in the vicinity of the WUC</i> ” in the definition of “Contractor’s Personnel” creates unreasonable risks for the Contractor and potentially unintended consequences.	Delete the phrase “ <i>in the vicinity of the WUC</i> ” in the definition of “Contractor’s Personnel.”

**INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT**

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
13.	Certificates and Clearances	23.4	<p>Clause 23.4 states:</p> <p><i>“The Contractor must ensure that the Contractor’s Personnel nominated at Item 86:</i></p> <p><i>(a) hold and continue to hold, until they are no longer involved in in the carrying out of WUC or in the vicinity of WUC, the clearances and certificates nominated at Item 87; and</i></p> <p><i>(b) comply with the Site Rules.”</i></p> <p>It is unclear what is intended to be covered by “<i>the clearances and certificates nominated at Item 87</i>”, and in particular, whether they go beyond Legislative Requirements.</p> <p>It is also unclear why Items 86 and 87 could not be combined, or why it is necessary to include a reference to “site Rules” in this provision given the separate clause 24.3B dealing with “Site Rules”.</p>	Seek clarification from the State.



## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

### PART 3 – THE CONTRACT & DOCUMENTS

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Formal Instrument of Agreement (FIA)</b>				
14.	Formal Instrument of Agreement – General	FIA	The FIA reviewed is the one issued with DSG RFT 3449.	Note.
15.	Contract Comprises “Conditions of Contract”	1.2 of FIA	<p>The definition of “Contract Documents” in clause 1.1 of the Conditions of Contract is “<i>the documents described as such in the Formal Instrument of Agreement</i>”.</p> <p>It is presumed that this is a reference to clause 1.2 of the FIA, which states:</p> <p><i>“The Contract consists of:</i></p> <ul style="list-style-type: none"> <li><i>(a) this Formal Instrument of Agreement;</i></li> <li><i>(b) Conditions of Contract as described in the Details, <b>including the Annexures</b> identified in the Conditions of Contract (some of which may be included in Attachment 1);</i></li> <li><i>(c) the Specification (included in listed at Attachment 2);</i></li> <li><i>(d) the Drawings (included in or listed at Attachment 3);</i></li> <li><i>(e) any other documents included in or listed at Attachment 4.</i></li> </ul> <p>This provision of the FIA is inconsistent with the Conditions of Contract as follows:</p> <ul style="list-style-type: none"> <li>• “Conditions of Contract” – Defined in clause 1.1 of the Contract as “<i>this document headed ‘Conditions of Contract’ and comprising Clauses 1 to 46</i>”. Thus, the Annexures are excluded.</li> </ul> <p>Further, reference to “<i>Annexures identified in the Conditions of Contract</i>” in clause 1.2(b) of the FIA is potentially ambiguous as the optional Annexures that are not intended to apply are “<i>identified in the Conditions of Contract</i>”.</p> <ul style="list-style-type: none"> <li>• “Specification” – Defined in clause 1.1 of the Contract as “<i>the documents described as such at Annexure Part D</i>”, not Attachment 2.</li> <li>• Drawings” – Defined in clause 1.1 of the Contract as “<i>the Documents described as such at item 18 or as identified at Annexure Part E</i>”, not Attachment 3.</li> </ul>	Resolve inconsistencies between clause 1.2 of the FIA and the balance of the Contract.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
16.	Ambiguities and the Like - Order of Precedence	1.3 of FIA	<p>Clause 1.3 of the FIA states:</p> <p><i>“Subject to the Conditions of Contract, if there is any inconsistency, ambiguity, discrepancy or omission in, between or from any of the documents described in clause 1.2 the order of precedence between them will be as follows:</i></p> <p><i>(a) this Formal Instrument of Agreement (as described in clause 1.2(a)); followed by</i></p> <p><i>(b) the Conditions of Contract and other documents described in clause 1.2(b) (but excluding the documents described in clause 1.3(c)); followed by</i></p> <p><i>(c) the documents described in clauses 1.2(c), 1.2(d) and 1.2(e) which are mutually explanatory.”</i></p> <p>I have a number of concerns with the drafting of this provision:</p> <ul style="list-style-type: none"> <li>• It is unclear what is meant by “<i>Subject to the Conditions of Contract</i>”. It is presumed that it is a reference to clause 8.2A (Discrepancies in the Contract Documents), but the words used could go further than this. In any event, clause 8.2A is expressly “<i>subject to the Formal Instrument of Agreement</i>”, creating an unworkable circularity.</li> <li>• Given that there are only three levels of precedence (with the first being the FIA), the order of precedence is of limited value in resolving inconsistencies between the many parts of the Contract. In particular: <ul style="list-style-type: none"> <li>○ It is essential that Annexure Part A takes priority over the remaining Annexures given its intended purpose.</li> <li>○ Clause 1.3(c) states that the Specification, the Drawings and all other contract documents are accorded the same level of precedence. In the old Government Standard Form the Specification had precedence over the Drawings.</li> </ul> </li> </ul> <p>See also the discussion above regarding clause 1.2 of the FIA and the discussion below regarding clause 8A.2 of the Conditions.</p>	<p>With respect to clause 1.3 of the FIA:</p> <ul style="list-style-type: none"> <li>• Delete the words “<i>Subject to the Conditions of Contract</i>” in the chapeau.</li> <li>• Consider splitting the parts of the Contract into further levels of precedence. In particular: <ul style="list-style-type: none"> <li>○ Annexure A must take precedence over the remaining Annexures.</li> <li>○ The Specification should take precedence over the Drawings (as per Old Government Standard Form).</li> </ul> </li> </ul>
17.	Formal Instrument of Agreement – Amendments to Conditions of Contract	8 of FIA	<p>The DSG RFT 3449 version of the FIA contains clause 8 (Special Conditions), which appears to amend errors in the Conditions of Contract. I have assumed that these amendments are applicable to all projects and have considered them where they amend the Conditions of Contract below.</p>	Note.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Contract Documents</b>				
18.	“Contract Documents”	1.1	<p>Clause 1.1 includes:</p> <p><b>“Contract Documents</b> means the documents described as such in the Formal Instrument of Agreement.”</p> <p>See the discussion above in relation to clause 1.2 of the FIA.</p> <p>Note that “Contract Documents” are “Principal Materials” as per clause 8.1 (see further discussion below).</p> <p>My current view, given how the term “Contract Documents” is used throughout the Contract that it would be appropriate to include general wording to the effect “and any amendment or supplement to, or replacement or novation of any of those documents”.</p>	Amend the definition in clause 1.1 to include wording to the effect “and any amendment or supplement to, or replacement or novation of any of those documents”.
19.	“Drawings”	1.1	<p>Clause 1.1 includes:</p> <p><b>“Drawings</b> means the Documents described as such at item 18 or as identified at Annexure Part E”</p> <p>Item 18 includes the permanent statement “together with any drawings referred to in Annexure Part E”. For simplicity and clarity, it is suggested that the identification of the Drawings be limited to Annexure Part E.</p> <p>Annexure Part E includes the following statement:</p> <p><b>“Contents of this Annexure</b></p> <p><i>The drawings should be identified so as to ensure there is no uncertainty or ambiguity as to which drawings and versions are intended to be included. The reference should, where relevant, include the description, title, number, date and revision. Where the drawings are held electronically a printout of the file details may be included here.”</i></p> <p>It is important to note that the defined term only refers to the revisions of the drawings existing at the date of the Contract as identified in Item 18 and Annexure Part E, and thus, does not capture revised drawings issued after the Contract is entered into by the parties.</p> <p>This is fine as revised drawings are Variations, provided that the definition of “The Works” (discussed below) is appropriately drafted.</p>	<p>Amend the definition in clause 1.1 to read:</p> <p><b>“Drawings</b> means the Documents identified as such at Annexure Part E”</p> <p>See amendments to the definition of “The Work” proposed below.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
20.	Optional Annexures – General	Various	<p>The Contract includes a table titled “List of Optional Annexures” referring to 21 Annexures that are “optional”, with the following statement:</p> <p><i>“The following Annexures are optional. They are only activated if ‘Yes’ is selected in this table or if there is relevant content in the Annexure.”</i></p> <p>This is unnecessarily complex and creates opportunities for errors when the contract is being put together. If an Annexure is intended to have no application, this can be reflected in the Annexure itself.</p>	Delete all references to “List of Optional Annexures”
21.	Annexures – Guidance Notes	Various	<p>Each of Annexure Parts E to J, L to CC include guidance notes.</p> <p>It is unclear whether the notes to the Annexures are intended to be part of the binding contractual provisions or simply guidance to assist with interpretation of the Contract or are intended to be deleted before execution of the Contract.</p>	The State should clarify in the Contract the purpose of the “guidance notes” in the Annexures.
22.	Contract Documents held by the Contractor	8A.1	<p>The entirely new clause 8A.1 (no equivalent in the Old Government Standard Form) states:</p> <p><i>“The Contractor acknowledges that it holds sufficient of the Contract Documents to enable it to carry out WUC or is able to produce copies of those documents to enable it to carry out WUC.”</i></p> <p>My view is that this provision is unreasonable:</p> <ul style="list-style-type: none"> <li>• The Contractor cannot give such an acknowledgement when it enters into the Contract as it is the Principal that is responsible for preparing the Contract Documents (which form part of the “Principal’s Materials”). There should be an express obligation on the Principal to provide at least one full set of the Contract Documents.</li> <li>• Further, the phrase “sufficient of the Contract Documents to enable it to carry out WUC” is potentially ambiguous. Does it mean that the Contract Documents contain sufficient information to permit the Contractor to complete the WUC or simply that the Contractor has a sufficient number of copies of each Contract Document?</li> </ul>	Delete clause 8A.1 and replace with an express obligation on the Principal to provide at least one full set of the Contract Documents.
<b>Boilerplate</b>				
23.	Interaction with other Contract Documents	1.3	<p>The entirely new clause 1.3 (no equivalent in the Old Government Standard Form) is a boilerplate provision providing general rules to be applied to all Contract Documents other than the Conditions of Contract.</p> <p>As discussed above, there is potential uncertainty with respect to whether the “Conditions of Contract” includes or excludes the Annexures. This should be resolved to avoid issues with respect to the application of clause 1.3.</p>	Delete clause 1.3.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>Nevertheless, it is clear that clause 1.3 applies at least to the Specification and the Drawings.</p> <p>It contains 5 “rules” to be applied to these documents:</p> <ul style="list-style-type: none"> <li>• Clause 1.3(a) – “Where ... an obligation is prescribed, unless the Principal is, pursuant to an express provision of these Conditions of Contract, required to fulfil the obligation, the Contractor must fulfil that obligation”.</li> <li>• Clause 1.3(b) – “Where ... <b>a right or benefit is given to the Contractor</b>, the Contractor may only enjoy that right or benefit if the right or benefit is also prescribed in these Conditions of Contract”</li> <li>• Clause 1.3(c) – “Where ... a precondition is prescribed in relation to <b>any right or benefit that the Contractor</b> might become entitled to enjoy then”: <ul style="list-style-type: none"> <li>○ the Contractor is not entitled to the right or benefit unless the precondition is satisfied, even if it is only specified in one of the other Contract Documents (but in the Conditions of Contract); and</li> <li>○ if the precondition is specified in both the Conditions of Contract and the other Contract Documents but in different forms, the Contractor is not entitled to the right or benefit unless both are satisfied, but if both cannot be satisfied the precondition in the Contract Document is satisfied.</li> </ul> </li> <li>• Clause 1.3(d) – “Where ... the word ‘may’ is used (i) in the context of providing a list of examples; or (ii) in the context of conferring a precondition to a right or benefit that the Contractor might become entitled to enjoy, <b>then the word ‘may’ shall be interpreted as ‘must’</b>”.</li> <li>• Clause 1.3(d) – “Where ... it is not specified which party is required to carry out a particular obligation <b>the Contractor must</b> carry out the obligation as if it were specifically required to fulfil the obligation under these Conditions of Contract.”</li> </ul> <p>Each of these provisions is designed to change the usual rules for interpreting and applying contracts (including the “order of precedence” in the FIA) in a manner that inherently disadvantages the Contractor</p> <p>It is important to recognise that, other than clause 1.3(c), this drafting goes much further than a mere “order of precedence” where there is an inconsistency, ambiguity, or discrepancy between the Conditions of Contract and these documents, which is addressed in any event in the FIA.</p> <p>In fact, in some respects, clause 1.3 operates to in a manner inconsistent with pre-agreed order of precedence.</p>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
24.	Pricing adjustment clause	2.7 Items 40 & 41	<p>The 1<sup>st</sup> paragraph of clause 2.7 states:  <i>“Pricing Adjustment Clause means any provision in a Contract Document (other than these Conditions of Contract) whereby the amount payable to the Contractor may be varied”.</i></p> <p>The 2<sup>nd</sup> and 3<sup>rd</sup> paragraphs of clause 2.7 state:  <i>“A Pricing Adjustment Clause only operates if:</i>  <i>(a) ‘Yes’ is selected in respect of this clause in the List of Optional Clauses or if there is relevant content inserted at Item 41; and</i>  <i>(b) the particular clause is identified and referred to at Item 41.</i>  <i>This Subclause 2.7 is to be given effect to notwithstanding any provision to the contrary elsewhere in the Contract Documents.”</i></p> <p>Items 40 and 41 in Annexure Part A are relevant:</p> <ul style="list-style-type: none"> <li>• Item 40 - Contains a choice of “Yes” or “No”, plus: <ul style="list-style-type: none"> <li>○ An introductory note: <i>“Item 40 is only relevant if ‘Yes’ is selected in the List of Optional Clauses at page 133 in relation to Subclause 2.7 or if ‘Yes’ is selected at ‘Yes’ is selected”.</i></li> <li>○ A default position: <i>“If nothing stated, ‘No’ is taken to be selected. In order for the Pricing Adjustment Clause to operate it must be identified and referred to at Item 41.”</i></li> </ul> </li> <li>• Item 41 – Contains a text box and two permanent statements: <ul style="list-style-type: none"> <li>• <i>“Item 41 is only relevant if ‘Item 40 is relevant.”</i></li> <li>• <i>“A Pricing Adjustment Clause only operates if ‘Yes’ is selected at Item 40 and if the clause is identified and referred to at this Item.”</i></li> </ul> </li> </ul> <p>Finally, in the DSG RFT 3449 version Annexure Part CC is titled “Pricing Adjustment Clauses”, which is referred to in Item 41.</p> <p>Clause 2.7 is unreasonable and unworkable, including because:</p> <ul style="list-style-type: none"> <li>• It is incredibly complex, with the true purpose and intended operation very difficult to ascertain. For example: <ul style="list-style-type: none"> <li>○ There is no apparent reason why it is necessary to include clause 2.7(a) and Item 40, when the drafting makes clear that only the “Pricing Adjustment Clauses” expressly identified in Item 41 are to have any contractual force.</li> <li>○ The full extent of the meaning of “Pricing Adjustment Clause” is difficult to understand.</li> </ul> </li> </ul> <p>On its face, it appears to cover any provision in FIA, any Annexure, the Specification and the Drawings <i>“whereby the amount payable to the Contractor may be varied”.</i></p>	<p>The defined term “Pricing Adjustment Clause” and Item 40 are unnecessary and should be deleted.</p> <p>Clause 2.7 and Item 40 should be redrafted so that the default position is that all “Pricing Adjustment Clauses” in the Contract Documents apply in accordance with their terms <b>unless</b> expressly identified in Item 41.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>However, it is unclear how cross-references to clauses in the Conditions of Contract in the Annexures (especially Annexure Part A) are to be treated.</p> <p>It appears that the project team at the Department may have been unclear how these provisions are intended to operate when putting together DSG RFT 3449.</p> <ul style="list-style-type: none"> <li>More significantly, this provision will have the effect of <b>excluding</b> the operation of all provisions that appear in the Contract Documents which provide the Contractor with a right to additional payment if they meet the unclear definition of “Pricing Adjustment Clause” <b>unless</b> the “<i>particular clause is identified and referred to at Item 41</i>”.</li> </ul> <p>This places the onus on the Contractor when responding to every RFT to identify all “Pricing Adjustment Clauses” (as defined) in the Contract Documents and ensure that they are expressly referred to in Item 41 and if not, raise a departure.</p> <p>This is unreasonable. If the State wishes to exclude specific provisions from its standard form Contract and/or Specification, it should expressly identify those specific provisions.</p>	
25.	Continuing provisions	45.4	<p>The new clause 45.4 (there is no equivalent in the Old Government Standard Form) provides that certain specified provisions of the Contract continue notwithstanding the termination or expiration of the Contract.</p> <ul style="list-style-type: none"> <li>Clause 45.4(a) specifies 14 clauses in the Conditions of Contract that are included in the definition of “Continuing Provision”.</li> </ul> <p>Great care must be taken to ensure that only those parts of these clauses survive the termination or expiry of the Contract. For example:</p> <ul style="list-style-type: none"> <li>Clauses 8C.1 and 8C.8 contain obligations on the Contractor that should not continue following termination, whereas clause 8C.6(a) is obviously intended to survive termination.</li> <li>The obligations in clause 11E(c) are not reasonable to survive termination or expiry of the contract,</li> <li>Clause 29C.1 requires the Contractor to procure warranties. It is not reasonable to require such obligations to continue following termination or expiration of the Contract.</li> <li>Finally, it is unclear why clauses 39, 40 and 40A are not included.</li> </ul> <ul style="list-style-type: none"> <li>2<sup>nd</sup> paragraph states:  <i>“Each Continuing Provision survives the termination or expiration of the Contract, shall continue to have full effect as if the Contract had not been terminated or had not expired <b>and shall not be affected by the issue of a Final Certificate.</b>”</i> (emphasis added)</li> </ul>	<p>Ensure that each of the provisions identified in clause 45.4(a) to ensure that only those specific sub-clauses that should survive termination or expiry are included.</p> <p>Delete the words “<i>and shall not be affected by the issue of a Final Certificate</i>”.</p> <p>Delete the 3<sup>rd</sup> paragraph.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>The highlighted wording (and the similar wording in the 3<sup>rd</sup> paragraph) is unreasonable - Clause 37.4 deals with the consequences of the Final Certificate on the parties' rights and obligations and nothing in a general boilerplate provision placed at the end of the Conditions of Contract should change that position.</p> <ul style="list-style-type: none"> <li>It is unclear why the 3<sup>rd</sup> paragraph is necessary. Nonetheless, why is the drafting limited to the obligations of the Contractor under the relevant provisions, when these provisions also contain obligations of the Principal?</li> </ul>	
<b>Discrepancies Clause</b>				
26.	Discrepancies in the Contract Documents	8A.2	<p>Clause 8A.2 of the Contract is materially different to the equivalent provisions in the Old Government Standard Form (clauses 8.1 and 8.1A), changing both the substantive risk allocation and the administration (process) risk allocation to the disadvantage of the Contractor.</p> <p>Each of the key paragraphs of clause 8A.2 and how they differ from the Old Government Standard Form are addressed in the following items.</p>	Note
27.	Discrepancies in the Contract Documents – Warranty from Contractor	8A.2	<p>The 2<sup>nd</sup> paragraph contains an entirely new, one-side “warranty” from the Contractor:</p> <p><i>“The Contractor warrants that it has carefully reviewed the Contract Documents. The Contractor must continue to carefully review the Contract Documents.”</i></p> <p>A “warranty” in this context is a contractually binding statement of present fact (as at the time of entry into the Contract) and of future intention that gives the other party various remedies (ranging from common law damages to a right to terminate the contract) should either prove to be incorrect.</p> <p>On its face, there is nothing objectionable about an expectation that each party has reviewed the Contract Documents carefully when they enter into the Contract.</p> <p>However, the presence of this one-sided provision is objectionable because, in the context of clause 8A.2, its purpose is to give the Principal contractual and other remedies against the Contractor should the Contractor subsequently discover any error, inconsistency, ambiguity, discrepancy or omission in, between or from any Contract Document.</p> <p>Should the Contractor be entitled to recover any compensation pursuant to clause 8A.2 due to discrepancies in the Contract Documents, the Principal may have a right to recover the amount payable to the Contractor as common law damages for breach of the warranty, thus rendering the apparent allocation of risk to the Principal in clause 8A.2 totally illusory.</p>	Delete the 2 <sup>nd</sup> paragraph of clause 8A.2.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
28.	Discrepancies in the Contract Documents – Discovery of Discrepancy & Direction	8A.2	<p>The 3<sup>rd</sup> paragraph of clause 8A.2 states:</p> <p><i>“If the Contractor discovers any error, inconsistency, ambiguity, discrepancy or omission in, between or from any Document prepared for the purpose of carrying out of WUC, the Contractor shall, as soon as practicable, notify the Superintendent in writing of the error, inconsistency, ambiguity, discrepancy or omission the Superintendent shall Direct the Contractor as to the interpretation and construction to be followed.”</i> (emphasis added)</p> <p>The primary differences from the Old Government Standard Form are:</p> <ul style="list-style-type: none"> <li>The obligation in clause 8A.2 to notify the Superintendent of any error etc is limited to the Contractor, whereas the Old Government Standard Form requires either party to notify the Superintendent should they become aware of the error etc.</li> </ul> <p>Further, in the Old Government Standard Form, the Superintendent is authorised to direct the Contractor when either an error etc is brought to its attention <b>or is discovered by it</b>.</p> <p>It is unclear why it is necessary that only the Contractor should have such an obligation, whilst the Principal and the Superintendent may stay quiet should either identify any errors etc.</p> <ul style="list-style-type: none"> <li>In the Old Government Standard Form, the nature of the direction that the Superintendent is authorised to give is <i>“as to the interpretation to be followed by the Contractor in carrying out the work”</i> (emphasis added).</li> </ul> <p>The additional (highlighted) words are important as they do not permit the Superintendent to direct interpretation of other provisions of the contract, such as those involving obligations and liabilities of the Principal, or rights, liabilities and remedies of the Contractor.</p>	<p>Replace the 3<sup>rd</sup> paragraph with the 2<sup>nd</sup> and 3<sup>rd</sup> sentences of clause 8.1 of the Old Government Standard Form.</p> <p>Ensure that the whole of the Superintendent’s functions under clause 8A.2 are covered by clause 20.1(b).</p>
29.	Discrepancies in the Contract Documents	8A.2	<p>The 4<sup>th</sup> paragraph of clause 8A.2 states:</p> <p><i>“If there is an error, inconsistency, ambiguity, discrepancy or omission in the Contract Documents, then, subject to the Formal Instrument of Agreement.”</i></p> <p>This appears to be an error as it has no sub-clauses and is unnecessary.</p>	Delete the 4 <sup>th</sup> paragraph of clause 8A.2.
30.	Discrepancies in the Contract Documents – Addition to or deduction from the Contract Sum	8A.2	<p>The 5<sup>th</sup> paragraph of clause 8A.2 addresses the addition to or deduction from the Contract Sum should compliance with the Direction cause the Contractor to incur more or less cost.</p> <p>There are two primary differences from the Old Government Standard Form:</p> <ul style="list-style-type: none"> <li>The 5<sup>th</sup> paragraph contains <b>three entirely new conditions</b> in clauses 8A.2(a), (b) and (c) that <b>must be satisfied</b> before the Superintendent is</li> </ul>	Delete the 5 <sup>th</sup> paragraph of clause 8A.2 and replace it with the 4 <sup>th</sup> sentence of clause 8.1 of the Old Government Standard Form.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>authorised to assess the difference which is to be added to or deducted from the Contract Sum.</p> <ul style="list-style-type: none"> <li>The assessment by the Superintendent is to be in accordance with the Valuation Rules (section 5 of Annexure Part K).</li> </ul> <p>With respect to the new conditions:</p> <ul style="list-style-type: none"> <li>Clause 8A.2(a) – <i>“If the Direction is to follow an interpretation or construction other than one which is consistent with the rules set out in the Formal Instrument of Agreement”</i>.</li> </ul> <p>This condition seeks to pass the risk of error in the preparation of the Contract Documents (by or on behalf of the Principal) to the Contactor.</p> <p>In essence, it requires the Contractor during what is often a very short tender period to analyze in detail the hundreds of pages of Contract Documents, including drawings and other technical documents, and identify all errors, inconsistencies, ambiguities, discrepancies or omissions in or between them and either include in the tender departures or make an assessment how that would be resolved applying the FIA and then price that. This is neither practical nor reasonable.</p> <p>Further, tenderers are typically dissuaded from submitting any departures or clarifications, leaving them with the impossible task of trying to price how these errors etc will be affected by the FIA.</p> <ul style="list-style-type: none"> <li>Clause 8A.2(b) – <i>“If ... the error, inconsistency, ambiguity, discrepancy or omission would not have been apparent to a reasonably competent contractor had that contractor carefully reviewed the Contract Documents prior to the Date of Contract”</i>.</li> </ul> <p>This condition also seeks to pass the risk of error in the preparation of the Contract Documents (by or on behalf of the Principal) to the Contactor.</p> <p>Again, it is neither practical nor reasonable to expect a tenderer to do what is expected of this condition in the context of the typical RFT process.</p> <p>If any <i>“error, inconsistency, ambiguity, discrepancy or omission”</i> in the Contract Documents produced by or on behalf of the Principal exists as at the Date of the Contract that should be solely the responsibility of the Principal.</p> <ul style="list-style-type: none"> <li>Clause 8A.2(c) – <i>“if ... the Contractor has notified the Superintendent as required by this Subclause”</i>.</li> </ul> <p>This is another new exclusion (time bar) provision which is not in the Old Government Standard Form.</p> <p>See the separate comments below with respect to:</p> <ul style="list-style-type: none"> <li>The effect of adopting the Valuation Rules on the substantive risk allocation under the Contract.</li> <li>The impact of the amendments to the definitions of Qualifying Cause of Delay”, “Compensable Cause” and clause 34 on the substantive and process</li> </ul>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			risk allocation under the Contract with respect to the Contractor’s entitlement to EOTs and delay damages.	
31.	Discrepancies in the Contract Documents – Exclusion (Time Bar)	8A.2	<p>The 6<sup>th</sup> paragraph of clause 8A.2 introduces a new and very board exclusion clause as follows:</p> <p><i>“If the any of the requirements set out in paragraphs (a), (b), (c) or (d) of this Subclause 8A.2 are not satisfied, then the Contractor <b>shall not have any Claim against the Principal by reason of or in connection with the error, inconsistency, ambiguity, discrepancy or omission.</b>”</i> (emphasis added)</p> <p>There is no equivalent in the Old Government Standard Form.</p> <p>This goes much further than simply excluding a claim for the additional costs incurred as a consequence of the Direction given by the Superintendent pursuant to the 3<sup>rd</sup> paragraph. It includes any “Claim” (as noted elsewhere is very widely defined) with any “connection” to the error etc, which may include errors etc that the Superintendent should not be empowered to direct an interpretation of (see discussion above).</p> <p>This is unreasonable as it could have far-reaching and difficult to predict negative consequence for the Contractor (noting again, that it is a one-sided exclusion clause).</p>	Delete the 6 <sup>th</sup> paragraph of clause 8A.2.
<b>Documents &amp; Data</b>				
<b>General</b>				
32.	Types of documents and data	1.1 8.1	<p>The Contract contains many relevant definitions (often incorporating other definitions) to describe the documents and data relevant to the Contract, including “Document”, “Data”, “Input Data”, “Processed Data”, “Principal’s Material”, “Contract Documents”, “Relied Upon Information” and “Contract Material”.</p> <p>Clause 8.1 appears to have been inserted as additional guidance to the parties and the Superintendent as to the nature of “Documents” and “Data”.</p> <p>In my view, many of the defined terms / definitions and clause 8.1 create unnecessary complexity and uncertainty (in this context, it is important to be reminded that the BAU version is to be used on projects with a contract value from \$500,000). For example:</p> <ul style="list-style-type: none"> <li>• It is unclear why it is necessary to have separate definitions of “Document” and “Data”. These definitions appear to overlap, and do not require definitions as they have well understood natural and ordinary meanings.</li> <li>• It is also unclear why it is necessary to define “Input Data” and “Processed Data” given their limited usage in the Contract (although note that the word “data” is used in a number of other places in the Contract).</li> </ul>	<ul style="list-style-type: none"> <li>• Delete clause 8.1,</li> <li>• Consolidate “Document”, “Data”, “Input Data”, “Processed Data”, “Principal’s Material”, “Contract Documents”, “Relied Upon Information” and “Contract Material”.</li> <li>• Re-name “Contract Material” to “Contractor’s Material”.</li> </ul>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>Clause 8.1 is overly complex and generally unhelpful. To the extent that it is helpful to provide this guidance (eg. clause references etc), it should be included in the applicable definitions. Care must also be taken to ensure that these defined terms are not the subject of multiple provisions.</li> </ul> <p>It should be noted that <b>none</b> of the defined terms “Documents”, “Data”, “Input Data” or “Contract Documents” are used in the important definitions of “Contract Documents”, “Principal’s Material” or “Contract Material”, supporting the view that these definitions are unnecessary.</p> <p>In addition, should a definition of “document” be required, paragraph (f) of the current definition of “Document” is inappropriate in that context (cf. definition of “Contract Documents”). Each of paragraphs (a) to (e) describe a medium upon which information is recorded or stored, whereas paragraph (f) states “<i>any amendment or supplement to, or replacement or novation of any of the above</i>”. This may create unintended consequences.</p> <p>See also below on “Principal’s Material”, “Contract Material” (which I suggest is re-named “Contractor’s Material” for clarity) and “Relied Upon Information).</p>	
<b>Principal’s Material</b>				
33.	“Principal’s Material”	1.1 8B.2 8B.3 8B.4	<p>Clause 1.1 defines “Principal’s Material” as  <i>“any material provided by, or on behalf of, the Principal to the Contractor for the purpose of the Contract, including documents, equipment, information and data stored by any means”.</i></p> <p>Clause 8B.2 (which is the equivalent of the 1<sup>st</sup> sentence in the 2<sup>nd</sup> paragraph of clause 8.3 of the Old Government Standard Form) provides that:  <i>“All Principal’s Material remains the property of the Principal.”</i></p> <p>Clause 8B.3 is an entirely new provision, with no equivalent in the Old Government Standard Form, which states:  <i>“The Contractor must, at its cost, comply with any reasonable security requirements of the Principal related to confidentiality, storage and safe keeping of Principal’s Material.”</i></p> <p>Clause 8B.4 states:  <i>“The Contractor shall only use, copy or supply Principal’s Material to the extent necessary to perform its obligations under the Contract.”</i></p> <p>This is the equivalent of the 2<sup>nd</sup> sentence of the 2<sup>nd</sup> paragraph of clause 8.3 and the whole of clause 8A.3 of the Old Government Standard Form (which deals with both confidentiality and use of “any information or material acquired or produced in connection with, or by performing, this Contract). Importantly, clauses 8A.3(a) to (f) contain additional authorised uses.</p>	Amend clause 8B.4 to ensure that the authorised uses in clauses 8A.3(a) to (f) of the Old Government Standard Form are covered.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
34.	Documents to be supplied by the Principal	8B.1 Item 53	<p>Clause 8B.1 of the Contract states:</p> <p><i>“The Principal shall supply to the Contractor the documents and number of copies thereof, both stated in Item 53.</i></p> <p><i>The Principal shall not be obliged to supply the documents earlier than the Principal should reasonably have anticipated at the Date of Contract.”</i></p> <p>With respect to each paragraph:</p> <ul style="list-style-type: none"> <li>1<sup>st</sup> paragraph - The default position in Item 53 of the Contract is <i>“If nothing stated, the Principal is not obliged to provide any further documents”</i>. This is to be contrasted with the 1<sup>st</sup> paragraph of clause 8.3 of the Old Government Standard Form.</li> </ul> <p>As noted elsewhere, there is no express obligation anywhere in the Contract that requires the Principal to provide any of the Contract Documents. Obviously, it is impossible for the Contractor to under the WUC without at least the Drawings and the Specification</p> <ul style="list-style-type: none"> <li>2<sup>nd</sup> paragraph - As drafted, this is limited to the documents referred to in the 1<sup>st</sup> paragraph (ie. <i>“the documents”</i>), which are those identified in Item 53.</li> </ul> <p>The dates or times for the provision of these documents should also be included in Item 53 and if nothing is stated, no later than 5 Business Days after the date of Contract.</p>	<p>Replace clause 8B.1 as follows:</p> <p><i>“The Principal shall supply to the Contractor the documents and number of copies thereof in accordance with Item 53”</i></p> <p>Amend Item 53 to insert:</p> <ul style="list-style-type: none"> <li>1 full set of the Contract Documents as the default position</li> <li>Space for timing of provision of documents identified in Item 53, and if nothing is stated, no later than 5 Business Days after the date of Contract.</li> </ul>
35.	Contractor must return Principal’s Material	8B.5	<p>Clause 8B.5 deals with the return by the Contractor to the Principal of all “Principal’s Material” (other than “Contract Documents”), which is broken into two parts:</p> <ul style="list-style-type: none"> <li>2<sup>nd</sup> paragraph - An <b>automatic</b> obligation on the Contractor (at its own cost) to <i>“immediately return”</i> all Principal’s Materials on the earlier of termination of the Contract (for any reason) and the issue of the Final Certificate.</li> <li>1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> paragraphs – These contain express exceptions to the obligation in the 2<sup>nd</sup> paragraph.</li> </ul> <p>The equivalent is part of the 2<sup>nd</sup> paragraph of clause 8.3 of Old Government Standard Form.</p> <p>It is accepted that the State may have a legitimate interest in ensuring that the Contractor is no longer has possession of the Principal’s Materials after the purposes authorised by Clause 8B.4 have ceased. However, there are more reasonable and practical ways to address this interest. For example:</p> <ul style="list-style-type: none"> <li>Whilst the Principal may wish to invoke its rights under his clause, it is equally likely that it may not. Accordingly, rather than an automatic obligation, it is more sensible for it to be a matter of discretion for the Principal (to be exercised reasonably).</li> </ul>	<p>Amend clause 8B.5 as follows:</p> <ul style="list-style-type: none"> <li>Rather than an automatic obligation, it is more sensible for it to be a matter of discretion for the Principal (to be exercised reasonably).</li> <li>As an alternative, the Principal may direct the Contractor to destroy the materials and confirm in writing once this is done.</li> <li>The exceptions to be extended so that the Contractor is permitted to retain any material to the extent that it falls within the authorised uses in clauses 8A.2 and 8B.4 of the Contract.</li> </ul>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>Further, the Principal may not reasonably require the materials to be returned to it, and thus, as an alternative, often the Contractor is required to destroy the materials and confirm in writing once this is done. This is usually less costly for the Contractor and can be a more practical solution for both parties.</li> </ul> <p>Finally, the express exceptions need to be extended so that the Contractor is permitted to retain any material to the extent that it falls within the authorised uses in clauses 8A.2 and 8B.4 of the Contract (see elsewhere).</p>	
36.	Non Reliance Relied Upon Information	8B.6 8B.7	<p>Clause 8B.6 and 8B.7 are entirely new provisions, with no equivalent in the Old Government Standard Form. These must be considered together.</p> <p>Clause 8B.6 is an <b>exclusion clause</b> which prevents any Claims by the Contractor in connection with:</p> <ul style="list-style-type: none"> <li>the provision of the Principal’s Materials (except the Contract Documents and the Relied Upon Information), including adequacy and accuracy; and</li> <li>the non-provision of any other information.</li> </ul> <p>Accordingly, the Principal takes <b>no responsibility</b> for any information provided on its behalf at any time or any failure to provide information (including that which it must provide under the Contract) other than:</p> <ul style="list-style-type: none"> <li>the Contract Documents; and</li> <li>any “Relied Upon Information”.</li> </ul> <p>“Relied Upon Information” is currently limited to information referred to or identified in Item 21 (the default position being that there is no such information), and the Contractor’s rights to make claims with respect to such information is severely limited by the unreasonable obligations and restrictions in clause 8B.7.</p> <p>Any such exclusion of responsibility by a Principal is generally unreasonable, but more so where the Principal is a government body (see above the discussion on Governments as moral exemplars).</p> <p>However, in some cases (depending on the nature of the information) a limited disclaimer covering specific information provided <b>before</b> the Contract <b>may</b> be reasonable, since the Contractor may be able to assess the risks from such a limited and transparent disclaimer.</p> <p>Accordingly, clause 8B.6 should be amended to only apply to specific information identified in Item 21, which should be defined as “Non-Reliance Information” (replacing the definition of “Relied Upon Information), which cannot include the Contract Documents.</p> <p>Further specific amendments are required to clause 8B.6:</p> <ul style="list-style-type: none"> <li>Clause 8B.6(d) should be deleted as “Non-Reliance Information” cannot include the Contract Documents.</li> </ul>	<p>Re-name “Relied Upon Information” to be “Non-Reliance Information” and amend Item 21 in the Annexure accordingly (making it clear that it cannot include “Contract Documents”).</p> <p>Amend clause 8B.6 as follows:</p> <ul style="list-style-type: none"> <li>Delete 1<sup>st</sup> paragraph.</li> <li>Amend the chapeau of the 2<sup>nd</sup> paragraph to read <i>“The Contractor acknowledges that the Non-Reliance Information:”</i></li> <li>Delete clause 8B.6(d).</li> <li>Amend the 3<sup>rd</sup> paragraph as follows: <i>“The Contractor agrees that the Contractor shall not have any Claim against the Principal in connection with the Non-Reliance Information.”</i></li> <li>Amend the 4<sup>th</sup> paragraph as follows: <i>“The Contractor must not rely upon (or allow any other person to rely upon) the Non-Reliance Information for or in connection with the carrying out of WUC until it has satisfied itself as to the accuracy, completeness and adequacy of the applicable Non-Reliance Information”.</i></li> </ul> <p>Delete clause 8B.7.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>3<sup>rd</sup> &amp; 4<sup>th</sup> paragraphs – Appropriate changes to reflect the above general principle. Further, clause 8B.6 should not apply to the non-provision of any information. The Principal either has a contractual or legal duty to provide the information or it does not. If it has a duty, then there is no justification for excluding Claims that the Contractor may have for its non-provision.</li> </ul>	
37.	Requests for Information (RFIs)	20C	<p>Clause 20.C is an entirely new provision (with no equivalent in the Old Government Standard Form), although the 3<sup>rd</sup> and 4<sup>th</sup> paragraphs of clause 33.1 covers similar ground (see clause 32.2 of the Contract).</p> <p>As discussed above, the common law recognises that it is necessary that commercial contracts include a “duty of co-operation” on all parties to contracts. This duty has been described by the courts in various ways, but is generally understood to mean that:</p> <ul style="list-style-type: none"> <li>each party must not hinder or prevent the fulfilment of the purpose of the express terms of the agreement;</li> <li>each party must do all things necessary on its part to enable the other party to have the benefit of the agreement; and</li> <li>each party must abstain from any act which would destroy or deprive the agreement of its efficacy or efficiency.</li> </ul> <p>These requirements ensure, in a construction contract, that a Principal is expected to respond to reasonable requests for information by a Contractor where that information is necessary to permit the Contractor to perform its obligations and obtain the benefit of the contract.</p> <p>The courts recognise that the parties are free to limit, condition or exclude these requirements by the express terms of the contract. Clause 32.2 of the Contract and the 3<sup>rd</sup> and 4<sup>th</sup> paragraphs of clause 33.1 are relevant examples of such express terms.</p> <p>Clause 20C is another express term which contains additional and unreasonable limits, conditions and exclusions on these general requirements of co-operation. It does this in multiple ways:</p> <ul style="list-style-type: none"> <li>Clause 20C.1 - Defines “RFI” in clause 20C.1 incredibly broadly as “<b>any request from or on behalf of the Contractor in relation to any aspect of the performance of the Contractor’s obligations under the Contract</b>”.</li> </ul> <p>This would include any request for approval or consent, which is dealt with by an express provision elsewhere in the Contract.</p> <ul style="list-style-type: none"> <li>Clause 20C.2 - Specifies very proscriptive requirements for an RFI in clause 20C.2 quite proscriptively, causing potentially unnecessary and excessive contract administration costs and potential disputes whether these were complied with.</li> </ul>	<p>Delete the whole of clause 20C.</p> <p>If the State considers it necessary to include a more detailed request for information process, clause 20C should be redrafted to facilitate co-operation between the parties to ensure successful outcomes, rather act as an exclusion clause to prevent claims by the Contractor.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>• Clause 20C.3 - The Superintendent is required to “facilitate” a response to an RFI “<i>as soon as practicable</i>”, although the last part of the 2<sup>nd</sup> paragraph suggests that the Superintendent may simply decide to ignore an RFI.</li> </ul> <p>Clause 20C.3 also:</p> <ul style="list-style-type: none"> <li>○ States that the Contractor “<i>is not entitled to delay WUC or the performance of the Contractor’s Activities by reason of the submission of a RFI or the time taken for a RFI Response to be provided (if one is provided)</i>”.</li> <li>○ <b>Excludes</b> any Claim (time or cost) by the Contractor in relation to the contents of a response or the time taken to deliver a response (including if no response is ever given).</li> </ul> <p>These points conflict with every provision of the Contract that expressly requires the Superintendent to respond to requests for information or approval / consent, in particular clauses 8A.2 and 32.2, and the fundamental principle of co-operation referred to above.</p> <p>More importantly. what if the Principal’s design is inadequate or contains obvious errors? In the absence of a timely response to a Contractor’s request for information, these works will have to cease until a response is provided.</p> <p>The alternative would be for that Contractor to proceed to construct the Works in accordance with the inadequate design resulting in the Principal receiving something less than they expected and a likelihood of a major dispute over whether the works are defective. This is in no-one’s interests.</p>	
<b>Contractor’s Material</b>				
38.	“Contract Material”	1.1 8.1(b) 8C	<p>Clause 8C deals with “Contract Material” which is defined in clause 1.1 as:</p> <p><i>“<b>Contract Material</b> means all material (including Documents, information and Processed Data stored by any means) brought, or required to be brought, into existence by or on behalf of the Contractor as part of, or for the purposes of performing its obligations under the Contract”.</i></p> <p>Clause 8.3 of the Old Government Standard Form is the equivalent provision, but significantly that is <b>limited</b> to documents supplied or to be supplied by the Contractor to the Principal and the Superintendent.</p> <p>As is clear from the definition, “Contract Materials” also captures material brought, or required to be brought, into existence by or on behalf of the Contractor as part of, or for the purposes of performing its obligations under the Contract that are never provided to the Principal or Superintendent.</p> <p>This difference has profound and unreasonable impacts on the nature of the Contractor’s obligations (including the transfer of rights to the Principal) in clauses 8C, 8E and 10 (discussed below)</p>	Rename “Contract Material” as “Contractor’s Material” and make associated changes throughout the Contract.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>In a further contrast, the definition of “Principal’s Materials” and associated obligations on the Principal are limited to materials actually provided to the Contractor.</p> <p>Finally, for greater ease in understanding what is intended here and to avoid confusion with concepts such as “Contract Documents”, it is suggested that this definition be called “Contractor’s Material”.</p>	
39.	Contract Material - Documents to be supplied by the Contractor	8C.1	<p>Clause 8C.1 states:</p> <p><i>“The Contractor shall supply to the Superintendent the documents and number of copies thereof, both stated elsewhere in the Contract.</i></p> <p><i>The documents, number of copies and time or stage of provision is stated at Item 54.”</i></p> <p>Whilst the 1<sup>st</sup> paragraph reflects 1<sup>st</sup> paragraph of clause 8.3 of AS4000-1997 and is consistent with the first paragraph of clause 8.4 of the Old Government Standard Form, the attempt to create certainty with the entirely new 2<sup>nd</sup> paragraph in clause 8C.4 may result in conflicts with other provisions of the Contract.</p> <p>This was only partially resolved by in DSG RFT 3449 by simply including in Item 54 the words “As required by the Contract Documents” in the “Document” column (which defeats the purpose), whilst leaving the No. of Copies and Time/stage columns empty.</p>	Delete the 2 <sup>nd</sup> paragraph of clause 8C.1 and Item 54.
40.	Contract Material - Title to, and property in, Contract Material	8C.2 & Item 63	<p>Clause 8C.2 of the Contract contains 3 parts:</p> <ul style="list-style-type: none"> <li>1<sup>st</sup> paragraph – <i>“This Subclause 8C.2 does not relate to and does not affect Intellectual Property Rights in Contract Material. The Intellectual Property Rights in the Contract Material are dealt with as provided for in Clause 10.”</i></li> <li>2<sup>nd</sup> and 3<sup>rd</sup> paragraphs – <i>“Title to, and property in, all Contract Material vests, or will vest, in the Principal or are the subject of a licence as provided for in Item 63 (with any such licence being as described in Subclause 10.5). The Contractor shall take any action directed by the Principal, including the execution of any document, in order to perfect or evidence the vesting of title as described in this Subclause.</i></li> </ul> <p>The default position in Item 63 is that all Contract Material vests in the Principal.</p> <ul style="list-style-type: none"> <li>3<sup>rd</sup> paragraph – <i>“The Contractor warrants that all Contract Material will be and will remain free from any Security Interest (except for a Security Interest created by the Principal).”</i></li> </ul> <p>Clause 8C.2 is to be contrasted with the more reasonable 3<sup>rd</sup> paragraph of clause 8.4 of the Old Government Standard Form which states:</p>	<p>Delete the 1<sup>st</sup> paragraph of clause 8C.2.</p> <p>Replace the 2<sup>nd</sup> paragraph with the last paragraph of clause 8.4 of the Old Government Standard Form.</p> <p>To the extent that the 3<sup>rd</sup> paragraph is still necessary, amend it to read:</p> <p><i>“The Contractor shall take any actions reasonably necessary in order to perfect or evidence the vesting of title as described in this Subclause, including the execution of any document.”</i></p> <p>Delete the last paragraph of clause 8C.2.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><i>“Copies of documents supplied by the Contractor shall be the property of the Principal but shall not be used or copied otherwise than for the use, maintenance or alteration of the Works.”</i></p> <p>There are two important aspects to this paragraph of clause 8.4 of the Old Government Standard Form:</p> <ul style="list-style-type: none"> <li>• The vesting of ownership in the Principal is limited to copies of documents actually supplied to (or on behalf of) the Principal. This is to be compared with the definition of “Contract Materials” in the Contract discussed above and the operation of clause 8C.2.</li> <li>• Despite ownership in such copies vesting in the Principal, there is an express limitation on the use and copying of such documents by the Principal – only for <i>“the use, maintenance or alteration of the Works.”</i></li> </ul> <p>Clause 8C.2 should be amended to reflect the more reasonable position in the Old Government Standard Form, which reflects the context that this is a contract to be used for a construct-only project where the design is undertaken by or on behalf of the Principal.</p> <p>Other specific concerns with the current drafting of clause 8C.2 include:</p> <ul style="list-style-type: none"> <li>• 1<sup>st</sup> paragraph – It is unnecessary to distinguish between ownership of the physical materials and the ownership of the intellectual property in those materials given the position in relation to ownership of the IPRs discussed below (clause 10).</li> <li>• 3<sup>rd</sup> paragraph –The Contractor should only be required to take such actions as are reasonably necessary to perfect the vesting of ownership.</li> <li>• 4<sup>th</sup> paragraph – The effect of the PPSA and Security Interests is (and should only be) addressed in clause 11E.</li> </ul>	
41.	Contract Material - Time for review (if required)	8C.4 & Item 55	<p>Clause 8C.4 states:</p> <p><i>“If the Contract requires the Contractor to obtain the Superintendent’s Direction about any Contract Material, the Superintendent shall give, within the time stated in Item 55, the appropriate Direction, including reasons if the Documents are not suitable.”</i></p> <p>Whilst this drafting follows clause 8.3(c), it does not include the essential context provided by the chapeau of that provision:</p> <p><i>“If the Contractor submits documents to the Superintendent, then except where the Contract otherwise provides ...”</i></p> <p>The express exception ensures that there are no inconsistent time periods for Directions in relation to such documents elsewhere in the Contract.</p>	<p>Amend clause 8C.4 to read:</p> <p><i>“If the Contractor submits documents to the Superintendent, then except where the Contract otherwise provides, if the Contract requires the Contractor to obtain the Superintendent’s Direction about such documents, the Superintendent shall give, within the time stated in Item 55, the appropriate Direction, including reasons if the documents are not suitable.”</i></p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
42.	Contract Material - No diminution of Contractor’s obligations etc.	8C.5	<p>Clause 8C.5 is an entirely new provision (with no equivalent in the Old Government Standard Form), which states:</p> <p><i>“The liabilities, obligations and responsibilities of the Contractor under the Contract are not diminished by:</i></p> <p><i>(a) any permission to use, or any comment, review, acceptance, approval, consent to proceed, consent, request to vary, or refusal to give permission to use, given by, or on behalf of the Superintendent, the Principal or the Principal’s Representative, in relation to any Contract Material; or</i></p> <p><i>(b) any approval or monitoring by the Superintendent, the Principal or the Principal’s Representative.”</i></p> <p>In my view, this is unworkable and ought to be deleted.</p> <p>The Contract expressly provides for many situations where a Direction or permission, approval, consent etc relating to Contractor’s material is intended to affect the liabilities, obligations and responsibilities of the Contractor. An obvious example might be a Variation Direction pursuant to clause 36.1.</p> <p>The consequences of Directions by the superintendent should be left to the particular provisions authorizing the Direction, and not excluded by a general provision such as this.</p>	Delete clause 8C.5.
43.	Contract Material - Contractor must give Contract Material to Principal	8C.6	<p>The entirely new clause 8C.6 (with no equivalent in the Old Government Standard Form) applies to the Contract Material upon termination or expiry of the Contract in essentially the same way as clause 8B.5 does with respect to the Principal’s Material (discussed above).</p> <p>However, there is one major difference – this provision applies to the “Contract Material” which is defined as:</p> <p><i>“all material (including Documents, information and Processed Data stored by any means) brought, or required to be brought, into existence by or on behalf of the Contractor as part of, or for the purposes of performing its obligations under the Contract”.</i></p> <p>There are two reasons why this provision is unreasonable:</p> <ul style="list-style-type: none"> <li>As discussed above, property in “Contract Materials” should only vest in the Principal with respect to copies of that material physically provided to the Principal (see clause 8.4 of the Old Government Standard Form).</li> <li>The definition of “Contract Material” is an incredibly wide definition that will capture an immense amount of information that is not just created by and in the possession of the Contractor, but also created by and/or in possession of all subcontractors, suppliers, consultants engaged to do any work on the project.</li> </ul>	Delete clause 8C.6.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>It will also cover all internal drafts and working documentation (whether in hard copy or electronic form), including potentially trade secrets and “commercial-in-confidence” information.</p> <p>Compliance with this requirement will create significant and unreasonable costs (including diversion of resources) and is likely to also be impractical for the Principal - does it really wish to have delivered to it all copies of all sch documentation?</p>	
44.	Contract Material - No Harmful Code	8C.7	Whilst such a warranty is not unreasonable (see the definition of “Harmful Code”), I note that a similar warranty has not been given by the Principal in relation to materials provided electronically by or on behalf of the Principal.	Amend to create mutual warranties.
<b>Intellectual Property Rights (IPRs)</b>				
45.	Intellectual Property Rights (IPRs) – General	10	<p>As touched on above, it is important to keep in mind that this is a construct-only contract.</p> <p>Many principals argue that it is reasonable for them to own all property (including IPRs) in information created by the Contractor for the purposes of the project is that the Principal has specifically paid for such information.</p> <p>Whilst that argument may have some merit in a design and construct contract with respect to the design documentation (eg. see clause 10.2 of AS4902-2000), it has little (if any) merit in a construct-only contract where the Principal is primarily paying for the construction and handing over of the Works.</p> <p>The Australian Standard construct-only contracts do not even expressly address ownership of IPRs (other the warranty that it does not infringe 3<sup>rd</sup> party rights), as a license will be implied to permit the Principal to use materials provided by the Contractor.</p> <p>The usual and reasonable position in relation to IPRs in such contracts is as follows:</p> <ul style="list-style-type: none"> <li>• Both parties warrant that materials provided by them to the other party will not infringe any IPRs and each provides an indemnity to the other against any infringement. See clause 10.1 of the Contract.</li> <li>• Each party retains ownership of IPRs in all materials produced and shared with each other (regardless of whether it is prepared for the Project or otherwise).</li> <li>• Each party grants the other party an appropriate licence to use any materials provided to the other for the purposes of the Project.</li> </ul> <p>The equivalent provision to clause 10 of the Contract was clause 13 (unamended AS2124-1992) in the Old Government Standard. It is entirely consistent with this framework.</p>	Note

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>Clauses 10.2, 10.4, 10.5 and 10.6 all deal (in some respect) with IPRs in “Contract Material” (as defined above). In the circumstances, whilst it is reasonable that the Contractor be required to provide a licence to the Principal to permit it to use any materials provided to the Principal for the purpose that they are provided, it is not reasonable to go any further.</p> <p>My comments below follow this framework.</p>	
46.	Intellectual Property Rights - Background IP	10.2	In light of the framework discussed above, it is unnecessary to distinguish between IPRs and Background IP.	Delete clause 10.2 and the definition of “Background IP”
47.	Intellectual Property Rights - Licence to Contractor	10.3	<p>Clause 10.3 is an entirely new provision (no equivalent in the Old Government Standard Form) which states:</p> <p><i>“The Principal grants to the Contractor a non-exclusive licence to use, reproduce and/or adapt any Contract Material that is vested in the Principal for the purposes of carrying out of WUC.”</i></p> <p>Given my view above that no Contractor’s Material should vest in the Principal, this provision is unnecessary. In any event, the scope and nature of the licence is inadequate for its purpose:</p> <ul style="list-style-type: none"> <li>The nature of the licence is simply a “<i>non-exclusive licence</i>”. It is important that the licence be “<i>an irrevocable, non-exclusive, perpetual, royalty-free licence</i>” and that the Contractor is authorised to sub-licence to all subcontractors, suppliers, consultants, professional advisors and agents to permit its obligations under the Contract to be performed (cf. clauses 10.5(a) and 10.5(e)).</li> </ul> <p>The necessary protections for the Principal are defined by the permitted use and the authorised purpose.</p> <ul style="list-style-type: none"> <li>The authorised purpose is also too narrow – it must be “<i>to the extent necessary to perform its obligations and enforce its rights arising out of or in connection with the Contract</i>” (cf. clause 8B.4).</li> </ul> <p>Further, there is currently no provision creating a licence in favour of the Contractor with respect to materials owned by the Principal and provided to the Contractor by or on behalf of the Principal (ie. the “Principal’s Material”).</p>	<p>Replace clause 10.3 with the following:</p> <p><i>“The Principal grants to the Contractor an irrevocable, non-exclusive, perpetual, royalty-free licence, with the right to sub-licence, to use, reproduce and/or adapt any Principal’s Material and any Contract Material that is vested in the Principal for the purposes of performing its obligations under the Contract and enforcing any rights arising out of or in connection with the Contract.”</i></p>
48.	Intellectual Property Rights generally	10.4	<p>Following the framework discussed above, clause 10.4 should be replaced with two simple statements:</p> <ul style="list-style-type: none"> <li>The Contractor retains ownership of Intellectual Property Rights in all materials brought into existence by or on behalf of the Contractor, including the Contractor’s Material.</li> </ul>	<p>Replace clause 10.4 with a simple provision to the following effects:</p> <ul style="list-style-type: none"> <li>The Contractor retains ownership of Intellectual Property Rights in all materials brought into existence by or on behalf of the</li> </ul>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>The Principal retains ownership of Intellectual Property Rights in all materials brought into existence by or on behalf of the Principal, including the Principal’s Material.</li> </ul> <p>For completeness, I have the following comments on the current drafting:</p> <ul style="list-style-type: none"> <li>The defined terms “Design Documents (Principal)” and “Design Documents (Contractor)” do not have definitions, and the 2<sup>nd</sup> paragraph separately refers to “Processed Data” separately, even though is part of “Contract Material”.</li> <li>Clause 10.4(c) suggests that Input Data is subject to a licence to the Contractor pursuant to clause 10.3. Based on the definitions of “Input Data” and “Contract Material” it is not clear that the current clause 10.3 grants the Contractor such a license.</li> <li>Clause 10.4(d) appears to replicate the 1<sup>st</sup> paragraph of clause 10.2, although it seems to be far more limited in its application. In any event, see comments above regarding Background IP.</li> </ul> <p>Finally, the 3<sup>rd</sup> paragraph of clause 10.4 states:  <i>“The Contractor must do all things necessary, and all things requested by the Principal to perfect the vesting, or the granting of the licence required by this Subclause 10.4 and Item 63.”</i></p> <p>Given that clause 10 creates licences from and to both Parties, it is reasonable to expect both parties be required to co-operate to ensure the licences are perfected, and the nature of the co-operation ought to be limited to all things “reasonably” necessary and “reasonably” requested by the other party.</p> <p>Finally, it would be clearer if this this was in clauses 10.3 and 10.5 respectively.</p>	<p>Contractor, including the Contractor’s Material.</p> <ul style="list-style-type: none"> <li>The Principal retains ownership of Intellectual Property Rights in all materials brought into existence by or on behalf of the Principal, including the Principal’s Material.</li> </ul>
49.	Intellectual Property Rights - Extent of Licence	10.5	<p>Clause 10.5 is an entirely new provision (with no equivalent in the Old Government Standard Form) which addresses the form and content of all licenses to be granted by the Contractor to the Principal permitting it to <b>use and exploit</b> the Contractor’s IPRs and Contractor’s Material.</p> <p>I have a number of points in relation to this provision:</p> <ul style="list-style-type: none"> <li>Clause 10.5(b) – Whilst it is reasonable for the Principal to be able to use these materials to repair, maintain and service The Works, it is a different matter for the Principal to exploit for its own benefit these rights and materials to add to or alter the Works.</li> <li>Clauses 10.5(c), 105(d) and (f)– It is also unreasonable for the Principal to expect to be able to exploit for its own benefit these rights and materials for the purposes set out in these provisions. If the Principal wishes to do so, it can engage the Contractor (for payment) to do so on its behalf.</li> <li>Clause 10.5(e) – The primary concern for Contractors is that this provision may permit the Principal to give competitors access to and use of commercial-</li> </ul>	<p>Amend clause 10.5(b) to delete the words “<i>additions or alterations to</i>”.</p> <p>Delete clauses 10.5(c), 105(d) and (f).</p> <p>Amend clause 10.5(e) to read:  <i>“enables the Principal to sub-licence the rights to a third party subject to the Contractor’s written consent (not to be unreasonably delayed, conditioned or withheld)”</i></p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

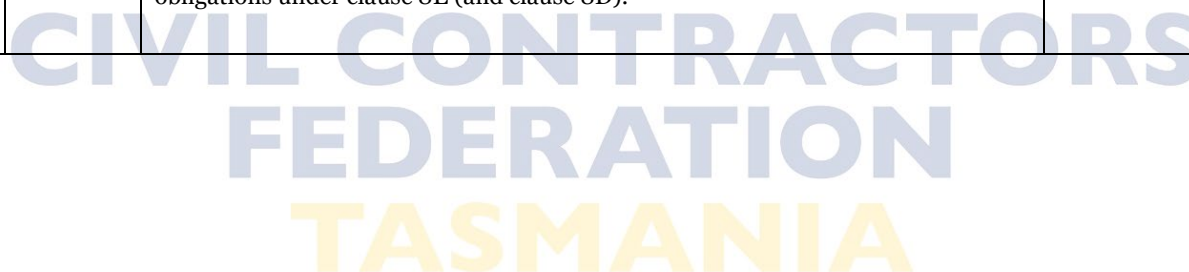
#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			in-confidence information. A reasonable solution would be to give the Contractual a reasonable right of veto.	
<b>Confidential Information</b>				
50.	Disclosure, confidentiality, privacy and personal information  Confidentiality and protection of Contract Material and Principal's Material  General Comments	8D & 8E	<p>Clauses 8D and 8E of the Contract deal with confidentiality and protection of personal information. These are complex and appear to overlap. The equivalent provisions in the Old Government Standard Form are:</p> <ul style="list-style-type: none"> <li>• Clause 8.6 (unamended AS2124-1997) – a simple confidentiality provision</li> <li>• Clauses 8A.1 and 8A.2 addressing the “Confidential Provisions” (provisions of the contract expressly identified in Annexure Part D). See clauses 8D.1 and 8D.2 of the Contract below.</li> <li>• Clause 8A.3, creating an additional (one-sided) obligation on the Contractor not to disclose or use any information connected to the contract, subject to express exceptions. See Clause 8E.1 of the Contract below.</li> <li>• Clause 8A.4 requires the parties to ensure that their employees are aware of an comply with that party’s confidentiality obligations. See clause 8D.4 of the Contract below.</li> <li>• Clause 8A.5 provides that “<i>Nothing in this Clause derogates from a party’s obligations under the Personal Information Protection Act 2004 (Tas) or the Privacy Act 1988 (Cwlth).</i>” See clause 8D.3 of the Contract below.</li> </ul> <p>Clauses 8D.5, 8E.2 and 8E.3 of the Contract are entirely new, having no equivalent in the Old Government Standard Form</p>	Clauses 8D and 8E could be combined (as they were in the Old Government Standard Form) and re-ordered so that they flow better and simplify the drafting.
51.	Disclosure, confidentiality, privacy and personal information	8D.1 & 8D.2	<p>As noted above, clauses 8A.1 and 8A.2 of the Old Government Standard Form are the equivalent provisions to clauses 8D.1 and 8D.2 of the Contract.</p> <p>The provisions of the Old Government Standard Form serve three purposes:</p> <ul style="list-style-type: none"> <li>• Either party may publish, without reference to the other, all or any part of the Contract, except those parts specifically identified as the “Confidential Provisions” (clause 8A.1).</li> <li>• Confirmation that the accountable authority (as defined in the <i>Financial Management Act 2016 (Tas)</i>) has determined that the Confidential Provisions must remain confidential (clause 8A.2(a)).</li> <li>• The parties must maintain confidentiality of the Confidential Provisions for the period determined and approved by the accountable authority, so far as the law allows, subject to the identified exceptions.</li> </ul> <p>In my view, the drafting of clauses 8D,1 and 8D.2 of the Contract are now unnecessarily complex and unreasonable compared with the Old Government Standard Form, including because:</p>	<p>Revert to the drafting in clauses 8A.1 and 8A.2 of the Old Government Standard Form, subject to minor tidying up of the drafting.</p> <p>Add into clause 8D.2 a new exception:</p> <p style="padding-left: 20px;"><i>“(g) it is necessary for the Contractor to disclose the Confidential Provisions to the Contractor’s Personnel for the purpose of performing the WUC and its other obligations under the Contract; or”</i></p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>As discussed elsewhere, the 1<sup>st</sup> paragraph creates unnecessary complexity, requires users to search multiple places to determine if there are “Confidential Provisions” and makes errors in putting together the Contract Documents more likely.</li> <li>The effect of the 2<sup>nd</sup> paragraph of clause 8D.1 is to completely override the 1<sup>st</sup> paragraph, but only with respect to the Contractor (<i>cf.</i> the Old Government Standard Form).</li> <li>It is unclear why it is necessary for the provision dealing with the Confidential Provisions of the Contract to be expressly subject to clause 8F.2, as the requirements to disclose to the public Auditor must be subject to the exception in clause 8D.2(b).</li> <li>Clause 8D.2(b) – “Legislative Requirement” is too narrow as limits other requirements of the law or equity (<i>cf.</i> the reference to “law” in the Old Government Standard Form).</li> <li>Depending on the nature of the particular provisions identified as Confidential Provisions, it may be necessary to disclose them to subcontractors, consultants and other agents for the purpose of performing the WUC and other obligations under the Contract.</li> <li>Clause 8D.2(f) has changed the formatting that was applied to clause 8A.2(b)(vi) of the Old Government Standard Form and in doing so has created an ambiguity.</li> </ul>	
52.	Employees to comply	8D.4	<p>This provision reflects clause 8A.4 of the Old Government Standard Form. However, note that “Confidential Material” is not a defined term (<i>cf.</i> clause 8A.3 of the Old Government Standard Form).</p>	Insert a definition of “Confidential Material”
53.	Privacy and Personal information protection	8D.3 & 8D.5	<p>As noted, equivalent to clause 8D.3 of the Contract is clause 8A.5 of the Old Government Standard Form, whilst there is no equivalent to clause 8D.5.</p> <p>Specific observations:</p> <ul style="list-style-type: none"> <li>As clauses 8D.3 and 8D.5 overlap, it makes sense to combine them into one provision to reduce complexity.</li> <li>It is unclear why this provision has been drafted as only containing obligations on the Contractor (<i>cf.</i> clause 5A.5 of the Old Government Standard Form).</li> <li>Is the reference to “<i>the Principal’s obligations</i>” in clause 8D.5 an error? Should it read “Contractor’s obligations”?</li> <li>As noted above, clause 8A of the Old Government Standard Form was the equivalent of clauses 8D and 8E. As such, clause 8A.5 applied to applied to</li> </ul>	<p>Combine clauses 8D.3 and 8D.5 and make them mutual.</p> <p>Confirm whether the reference to “<i>the Principal’s obligations</i>” in clause 8D.5 should read “Contractor’s obligations”.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			the provisions that are now in 8D and 8E, whereas clause 8D.3 of the Contract is limited to clause 8D.	
54.	Duty to preserve confidentiality of Contract Material and Principal’s Material	8E.1	<p>As noted above, clause 8E.1 of the Contract is the equivalent to clause 8A.3 of the Old Government Standard Form.</p> <p>My primary concerns with clause 8E.1 of the Contract are as follows:</p> <ul style="list-style-type: none"> <li>The 2<sup>nd</sup> paragraph of clause 8E.1 covers <b>use</b> of the Contract Materials and Principal’s Materials (as did clause 8A.3 of the Old Government Standard Form). However, clauses 8B and 8C of the Contract also deal with use of these materials in an inconsistent manner.</li> <li>3<sup>rd</sup> paragraph of clause 8E.1 – The exceptions in clauses 8E.1(a) to (c) are more limited than under clause 8A.3 of the Old Government Standard Form and clause 8D.2 of the Contract.</li> <li>It is also unclear why this provision is one-sided as the Contract Material is provided to the Principal (I note that clause 8A.3 of the Old Standard Form Contract is similarly one-side, but clause 8.1 of that contract contains mutual confidentiality obligations).</li> </ul>	<p>Amend the 2<sup>nd</sup> paragraph to delete “<i>or use for a purpose other than for the purposes of the Contract</i>”.</p> <p>Amend the 3<sup>rd</sup> paragraph of clause 8E.1 to align it with clause 8A.3 of the Old Government Standard Form and clause 8D.2 of the Contract.</p> <p>Make the obligations and restrictions in this provision mutual.</p>
55.	Protection of Contract Material and Principal’s Material	8E.2	As this entirely new provision addresses protection of the Principal’s Material and the Contractor’s Material, it is reasonable for the obligations to be mutual and the logical place for it to be located is in clauses 8B and 8C respectively.	Amend to make mutual and move to Clause 8B (Principal’s Material) and clause 8C (Contractor’s Material)
56.	Contractor to notify Principal	8E.3	It is unclear why this provision is limited to the Contractor when both parties have obligations under clause 8E (and clause 8D).	Amend clause 8E.3 to make mutual.



## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

### PART 4 – PAYMENT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Contract Sum &amp; Payment</b>				
<b>Pricing Model</b>				
57.	Contract Sum	FIA	<p>Clause 2 of the FIA states</p> <p><i>“Subject to the Contract, the Contract Sum is as described in the Details”.</i></p> <p>The “Details and background” in the FIA contains two options – “As Noted Below” and “As Described in the Annexure identified below”. It is unclear what Annexure the drafters had in mind here.</p>	Clarify which Annexure is applicable.
58.	“Contract Sum”	1.1	<p>More importantly, the amended clause 1.1 states:</p> <p><b><i>“Contract Sum means the amount described as such in the Formal Instrument of Agreement, (which includes any Provisional Sums) together with any additions or deductions which may be required to be made under the Contract”.</i></b> (emphasis added)</p> <p>The definition AS4000-1997 and the Old Government Standard Form differs from this in two material respects:</p> <ul style="list-style-type: none"> <li>• It addresses the possibility that the “Contract Sum” made be represented by a lump sum amount, rates or a combination of both.</li> </ul> <p>In the absence of such wording, it is unclear how the original Contract Sum could be defined where the price is based on rates or a combination of rates and lump sum amount.</p> <ul style="list-style-type: none"> <li>• “Contract Sum” expressly includes provisional sums but <b>excludes</b> any additions or deductions which may be required to be made under the Contract. Accordingly, “Contract Sum” as used throughout AS4000-1997 and the Old Government Standard Form only means the <b>original</b> Contract Sum identified or able to be calculated as at the Date of Contract. Its purpose is to identify a baseline.</li> </ul> <p>The whole structure of AS4000-1997 is based on the premise that the “Contract Sum” only covers the original Contract Sum. This was a very deliberate decision by the drafters which reflected in the drafting of a number of important concepts that apply equally to the Contract.</p> <p>Nothing in the Contract obliges the Principal to pay the “Contract Sum” nor provides the Contractor with an entitlement to be paid the Contract Sum. The last paragraph of clause 2.1 of the Conditions of Contract sets out the Principal’s primary payment obligation (and thus, Contractor’s entitlement). Significantly, it makes no mention of the “Contract Sum”.</p>	The definition of “Contract Sum” should revert to the unamended AS4000-1997 to avoid either unintended or unreasonable consequences of the amendments.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>This is also consistent with the carefully chosen words in the various “compensation” provisions in the Contract. For example, clause 36.4 dealing with pricing Variations states:</p> <p style="padding-left: 40px;"><i>“That price shall be <b>added to or deducted from</b> the Contract Sum”.</i></p> <p>Significantly, it does not provide that the Contract Sum is to be adjusted by that price to create a new or amended contract sum, but instead reflects the wording in clause 2.1. See also clauses 3, 8A.2, 8B.7, 11.2, 24.3A, 24.3B, 24B, 24.4, 26.2, 26.3, 29A, 31, 31A, 32.7, 32A, 33.4, and 36.7.</p> <p>Other provisions of the Contract are also predicated on the basis that “Contract Sum” means the original Contract Sum, not an adjusted Contract Sum, including Clause 4 (Separable Portions), clause 5 and Items 42 and 43 (amount of Contractor’s Security), clause 16 and Items 75, 76 and 78 (amount of Works Insurance) and clause 34.8 and Item 140(Bonus for Early Practical Completion).</p> <p>The amendment to the definition of “Contract Sum” in clause 1.1 of the Contract to <b>include</b> “any additions or deductions which may be required to be made under the Contract” fundamentally changes the effect of all provisions in the Contract which use the defined term “Contract Sum”, often in ways that appear unintended.</p>	
59.	<p>“Pricing Reference Document”</p> <p>“Schedule of Rates”</p> <p>“Bill of Quantities”</p> <p>“Contract Sum Breakdown Schedule”</p> <p>“Contractor’s Rate Schedule”</p>	<p>1.1</p> <p>2A.1</p>	<p>The entirely new clause 2A (with no equivalent in the Old Government Standard Form) introduces a new concept of “Pricing Reference Document”, which is defined in clause 2A.1 as:</p> <ul style="list-style-type: none"> <li>• any Document described as a pricing reference document in the Contract;</li> <li>• any Schedule of Rates or Bill of Quantities;</li> <li>• the Contractor’s Rate Schedule (if any);</li> <li>• a Contract Sum Breakdown Schedule (if any); and</li> <li>• any other breakdown of a money amount (whether prepared, completed or provided by the Principal or the Contractor).</li> </ul> <p>In comparison, AS4000-1997 includes only two “pricing reference” documents – “Bill of Quantities” and “Schedule of Rates”.</p> <p>Accordingly, the Contract now includes the possibility of there being many additional contractually binding documents which are relevant to pricing of the WUC and other amounts payable to the Contractor under the Contract, including:</p> <ul style="list-style-type: none"> <li>• <b>“Bill of Quantities”</b> – “a document named therein as a Bill of Quantities issued to tenderers by or on behalf of the Principal, stating estimated quantities of Work to be carried out” (clause 1.1).</li> </ul> <p>However, note that the introduction of Annexure Part I specifies that it “sets out or otherwise identifies the documents (if any) which constitute the Bill of Quantities”.</p>	<p>Delete the whole of clause 2A.</p> <p>Consider consolidating the various pricing documents and associated definitions to minimize complexity.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>Note that the definition in clause 1.1 refers to a document issued to the tenderers, whilst Annexure Part I and other parts of the Contract suggests that there is no Bill of Quantities unless it is included in Annexure I. This may create an inconsistency, which may have a material impact on the Contractor’s rights and remedies.</p> <ul style="list-style-type: none"> <li>• <b>“Schedule of Rates”</b> – <i>“any schedule included in the Contract which, in respect of any section or item of Work to be carried out, shows the rate or respective rates of payment for the execution of that Work and which may also include lump sums, Provisional Sums, other sums, quantities and prices”</i> (clause 1.1).</li> </ul> <p>There is an inconsistency between this general definition in Clause 1.1 of the Contract (which is likely to cover all other “Pricing Reference Documents”) and Annexure Parts A, F and H which suggests that “Schedule of Rates” should only mean a document identified as such in Annexure Part H.</p> <ul style="list-style-type: none"> <li>• <b>“Contract Sum Breakdown Schedule”</b> – <i>“means a schedule setting out the components of the Contract Sum on a trade by trade or some other elemental basis (and which is a Pricing Reference Document and which may be set out in Annexure Part G and to which Subclause 2A.1 and Subclause 36.4 apply)”</i> (clause 1.1).</li> </ul> <p>See the discussion later with respect to the balance of clause 2A and clause 36.4 (pricing Variations and deemed Variations).</p> <ul style="list-style-type: none"> <li>• <b>“Contractor’s Rate Schedule”</b> – <i>“means the schedule identified or included at Annexure Part F, and which is the subject of clause 2A and Subclause 36.4”</i> (clause 1.1).</li> </ul> <p>The covering page to Annexure Part F includes:</p> <p><i>“The Contract contemplates that the Contractor may have provided a Contractor’s Rate Schedule. <b>This is different to a Schedule of Rates (Annexure Part H).</b></i></p> <p><i>The Contractor’s Rate Schedule is a Pricing Reference Documents (refer to clause 2A). It may be utilised by the Superintendent to assist with valuation. It does not influence the Contract Sum.”</i></p> <p>See the discussion later with respect to the balance of clause 2A and clause 36.4 (pricing Variations and deemed Variations).</p> <ul style="list-style-type: none"> <li>• Clause 2 of the FIA.</li> <li>• Any Document described as a pricing reference document in the Contract, and any other breakdown of a money amount (whether prepared, completed or provided by the Principal or the Contractor).</li> </ul> <p>The significance of these documents is that they are collectively “Pricing Reference Documents” and thus, subject to clause 2A, and are also key components of other specific provisions throughout the Contract (such as clauses 2.2, 2.4, 2.5, 2.6, and 36.4), as discussed blow.</p>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>In particular, note the effect of clause 8(2) of the FIA of the DSG RFT 3449 version, which replaces clause 2A.3 of the Conditions of Contract with respect to the inclusion of “Allowances” in these various documents.</p> <p>In my view, this creates significant and unnecessary complexity, including inconsistent overlapping definitions and provisions and uncertainty. These should be carefully reviewed, consolidated and simplified, including whether it is necessary to have separate concepts of “Contract Sum Breakdown Schedule” and “Contractor’s Rate Schedule” at all, given y comments below on the clause 2A and the changes to clause 36.4.</p> <p>Finally, note that clause 2A.1(e) would appear to permit the Principal to prepare a document at any time (including after the Contract was executed) and not even share it with the Contractor and still treat it as a “Pricing Reference Document”. Given the application of this defined term in the balance of the Contract this is not reasonable.</p>	
60.	Pricing Reference Document	2A.2	<p>Clause 2A.2 is an entirely new “general” provision (no equivalent in the Old Government Standard Form) that essentially has two effects:</p> <ul style="list-style-type: none"> <li>1<sup>st</sup> paragraph - “Pricing Reference Documents” (as defined above) cannot be relied upon at all by the Contractor as a basis for any Claim and do not form part of the Contract nor define the extent of the WUC or The Works. Whilst this is stated to be “<i>subject to clause 2</i>”, it is not entirely clear what this means.</li> <li>2<sup>nd</sup> paragraph - However, despite the first paragraph, the Principal or the Superintendent “may” use any “Pricing Reference Document” for the purpose of <b>any</b> valuation or other determination under the Contact “<i>to the extent the Principal or the Superintendent, in its discretion, decides to do so</i>”.</li> </ul> <p>Note that clause 2A.2 of the Contract is also affected by clauses 1.2(m), 1.2(n) and 45.5 discussed elsewhere.</p> <p>Despite the fact that this information is expressly excluded from the terms of the Contract and the clear and, in some cases, detailed specific provisions dealing with the <b>pre-agreed</b> methodology for valuation of the Contractor’s compensation throughout the Contract, these general provisions allow the Principal and the Superintendent, in their absolute and unlimited discretion, to ignore those contractual requirements and take into non-contractual information that may include information prepared by the Principal and never even shared with the Contractor. See discussion below regarding clause 36.4.</p> <p>Further, taken literally, the 2<sup>nd</sup> paragraph of clause 2A allows the Principal and the Superintendent to ignore the Schedule of Rates when determining the amount payable to the Contractor with respect to the original WUC.</p>	Delete the whole of clause 2A.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
61.	Pricing Reference Document – All Inclusive	2A.3	<p>As I believe that clause 2A is unreasonable and should be deleted, it is not strictly necessary to address the drafting of clause 2A.3.</p> <p>Nonetheless, Clause 8(2) of the FIA of the DSG RFT 3449 replaces clause 2A.3 with the following:</p> <p><b><i>"All amounts set out in a Pricing Reference Document shall be taken to be inclusive of all Allowances with the exception of the Contractor's Rate Schedule, in which the rates against items are to be taken as exclusive of all Allowances."</i></b></p> <p>Accordingly, all rates in all “Pricing Reference Documents” (other than the Contractor’s Rates Schedule) are taken to be <b>inclusive</b> of all “Allowances”.</p> <p>“Allowances” is defined in clause 1.1 and section 2.1 of Annexure Part K (Valuation Rules), which is discussed in detail below.</p> <p>For the reasons discussed elsewhere, this definition creates uncertainty and is neither reasonable nor appropriate to be used in the Contract in its current form (if such an approach is required, it should be limited to an allowance for offsite overheads and profit only).</p> <p>Further, from a practical perspective, it may not be possible to separate out the “Allowances” in many of items in a Schedule of Rates etc. This is why the content of items in pricing documents are usually determined on a case-by-case basis and it is generally clear from the relevant document.</p> <p>Finally, there is a real risk that when preparing documents which might fall within the meaning of a “Pricing Reference Document”, tenderers will miss this reference in the FIA and inadvertently not include amounts to cover these costs in the items.</p>	Delete the defined term “Allowance” and the whole of clause 2A.
62.	Bill of Quantities Priced Bill of Quantities	2.2 2.3 Item 33	<p>As discussed elsewhere, the drafting approach adopted to introduce “optional” clauses requiring a user to search through multiple parts of the Contract Document to determine whether a provision is applicable, is overly and unnecessarily complex.</p> <p>In any event, clauses 2.2 and 2.3 should not be “optional” provisions in the sense adopted in the Contract, and the changes to clauses 2.2 and 2.3 and Item 34 conflict with the balance of those clauses.</p> <p>The unamended part of these clauses (ie. AS4000-1997) operates on the basis that they always form part of the Contract, but whether and how these provisions operate depends upon:</p> <ul style="list-style-type: none"> <li>• Whether the Principal provides a “Bill of Quantities” during the tender (clause 2.2). If none provided, then clause 2.2 can have no operation.</li> <li>• Whether Alternative 1 or Alternative 2 is chosen in the applicable Item in the Annexure (if none chosen, Alternative 1 is deemed). If Alternative 2 is chosen, then clause 2.3 has no operation unless “<i>so stated in Item 34(b)</i>” (which permits a BOQ to be priced for use in pricing Variations even if it does not</li> </ul>	<ul style="list-style-type: none"> <li>• Delete the new 1<sup>st</sup> paragraphs of clauses 2.2 and 2.3, and Item 33 in Annexure Part A,</li> <li>• Insert a new Item 34(b) in Annexure Part A, as referred to in clause 2.3(b).</li> <li>• Make the necessary changes to the Contract to reflect the deletion of clauses 1.2(m), 1.2(n) and 45.5 above.</li> <li>• Delete Annexure Part K.</li> </ul>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>form part of the Contract). Note that there is no Item 34(b) in Annexure Part A of the Contract.</p> <p>The approach now adopted also creates further confusion and uncertainty. For example:</p> <ul style="list-style-type: none"> <li>Does clause 2.2 apply if “Yes” is not included in the List of Optional Clauses and Item 33 is left blank? Based on the new first paragraph, the answer is “No”.</li> <li>However, what if Item 34 is properly completed, choosing an Alternative but no Bill of Quantities is included in Annexure Part I, but one was provided to tenderers as per the definition in clause 1.1?</li> </ul> <p>Given the effect of clause 2.3(c) (ie. “<i>notwithstanding any other provision of the Contract, the Contractor shall not be entitled to payment until the Contractor has lodged the Bill of Quantities so priced and extended</i>”) it is critical that the position regarding the existence of a Bill of Quantities and the requirement to price it be absolutely clear.</p> <p>Further, as discussed elsewhere, clauses 1.2(m), 1.2(n), 20.1(b) and 45.5 will affect the Superintendent’s rights and responsibilities under clause 2.3(b) and the last paragraph of clause 2.3.</p> <p>Finally, it is unclear from the terms of Annexure Part K whether the Valuation Rules are intended to apply to the Superintendent’s determination in the last paragraph of clause 2.3. Given my views elsewhere that Annexure Part K should be deleted it is unnecessary to consider issue in detail.</p>	
63.	Quantities	2.4 Items 33 & 37	<p>There are three additional paragraphs inserted into clause 2.4:</p> <ul style="list-style-type: none"> <li>1<sup>st</sup> paragraph – “<i>This Subclause 2.4 only applies if ‘Yes’ is selected in respect of this clause in the List of Optional Clauses or if there is relevant content inserted at Item 33 or Item 37.</i>”</li> </ul> <p>As with clause 2.2 above, this is both unnecessary and likely to create uncertainty and potential confusion. Whether this clause applies depends solely on whether there is a document which satisfies the definition of “Bill of Quantities” and/or “Schedule of Rates” (each as defined).</p> <ul style="list-style-type: none"> <li>4<sup>th</sup> paragraph – “<i>The rate nominated in a schedule of rates includes allowance for all work, materials and other costs, allowances and margins associated with the nominated item.</i>”</li> </ul> <p>There is no equivalent in the Old Government Standard Form.</p> <p>My views are similar to those discussed above with respect to clause 2A.3 – it is not appropriate for a standard form agreement that is supposed to be flexible enough to address many potential ways forward. As noted above, often it is not possible or preferable to independently price each item in a Schedule of Rates.</p>	Delete all amendments to clause 2.4 and revert to the unamended AS4000-1997.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>5<sup>th</sup> paragraph – <i>“The Contractor is responsible for providing evidence of the quantities actually carried out. In the absence of evidence from the Contractor the Superintendent may estimate the quantities and the Superintendent’s estimate is final and binding.”</i></li> </ul> <p>There is no equivalent in the Old Government Standard Form to this unreasonable provision. I can see no reasonable or legitimate basis for permitting the Superintendent to “<i>estimate the quantities</i>” at all, let alone in a manner that is “<i>final and binding</i>”.</p> <p>This is made worse by the existence of clauses 1.2(m), 1.2(n) and 45.5 discussed elsewhere (“absolute discretion”). It is also unclear whether the Superintendent’s duties in clause 20.1(b) apply here.</p> <p>Clause 2.1(m) requires the Principal to pay the Contractor “<i>for Work for which the Principal accepted rates, the sum of the products ascertained by multiplying the measured quantity of each section or item of Work actually carried out under the Contract</i>”. This is question of fact, not a question of the Superintendent’s discretion.</p> <p>Further, the meaning of “evidence” in this context is unclear, as is whether the decision as to whether evidence has been provided rests with the Superintendent.</p> <p>Finally, the suggestion that any estimate be “final and binding” is inconsistent with the principle in clause 37.2B that “<i>Neither a Progress Certificate nor a payment of moneys shall be evidence that the subject WUC has been carried out satisfactorily. Payment other than Final Payment shall be payment on account only</i>”</p>	
64.	Adjustment for actual quantities	2.5 & Items 38 & 39 Sect 8.3(a) of Ann Part K	<p>The only direct amendment to clause 2.5 is the 1<sup>st</sup> paragraph, which states: <i>“This Subclause 2.5 only applies if Subclause 2.4 applies and if ‘Yes’ is selected in respect of this clause in the List of Optional Clauses or if there is relevant content inserted at Item 38.”</i></p> <p>The default position in Item 38 is “Not applicable”.</p> <p>As with clauses 2.2 and 2.4 above, this is both unnecessary and likely to create uncertainty and potential confusion. Clause 2.5 already addresses whether it operates – there must be in existence a Bill of Quantities (as defined) which forms part of the Contract (Alternative 1 under clause 2.2) or a Schedule of Rates (as defined).</p> <p>Further, and more importantly, the unamended clause 2.5 of AS4000-1997 is the equivalent to clause 3.3 of the old Government Standard Form. For current purposes, that provision applied as a matter of course (rather than only being optional and requiring a positive decision to apply it). Consequently, these amendments <b>reverse the risk allocation of risk</b> Compared with Government Standard Form.</p>	<p>Delete all amendments to clause 2.5 and revert to the unamended AS4000-1997.</p> <p>Delete Annexure Part K and all references to “Valuation Rules” in the Contract.</p> <p>Ensure that the Superintendent’s responsibilities with respect to clause 2.5 are Certifying Functions.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>Finally, clause 2.5 provides for a “deemed Variation”. Key points to note:</p> <ul style="list-style-type: none"> <li>Deemed Variation – As a “deemed Variation”, the impact is to be priced pursuant to clause 36.4 and section 8.3 of Annexure Part K (Valuation Rules). The issues with these provisions are dealt with in detail elsewhere and are repeated here.</li> <li>EOT - Due to the amendments to the definition of “Qualifying Cause of Delay”, there is no EOT for delays caused by loss and damage to the WUC from Excepted Risks.</li> <li>Delay damages – Delays caused by loss and damage to the WUC from Excepted Risks are also not a Compensable Cause and due to the introduction of the 3<sup>rd</sup> paragraph in clause 34.9 is to be excluded from recovery under clauses 14.2 and 36.4.</li> <li>Certifying Function – The Superintendent’s valuation of the deemed Variation may not be a Certifying Function.</li> </ul>	
65.	Unpriced items and omitted items	2.6	<p>Clause 2.6 states:</p> <p><i>“This Subclause 2.6 only applies if Subclause 2.2 or Subclause 2.4 applies. An item of work listed in the Schedule of Rates, or the Bill of Quantities and any material listed in the Schedule of Rates or the Bill of Quantities (and the rates nominated in respect of those items) shall be taken to include all incidental and ancillary items of works and materials and all costs relevant to the item.”</i></p> <p>The 2<sup>nd</sup> paragraph differs materially from clause 3.3 of the Old Government Standard Form, which states:</p> <p><i>“Where any item in a completed Schedule of Rates is unpriced by the Contractor, all costs applicable to that item shall be deemed to be included elsewhere in the Schedule of Rates.”</i></p> <p>With respect to clause 2.6:</p> <ul style="list-style-type: none"> <li>1<sup>st</sup> paragraph – Again, this is both unnecessary and likely to create uncertainty and potential confusion.</li> <li>2<sup>nd</sup> paragraph – This is unreasonable because: <ul style="list-style-type: none"> <li>The question of incidental and ancillary works is already addressed in clause 2.1(k).</li> <li>Bills of Quantity may not be priced.</li> <li>It conflicts with the (now) 3<sup>rd</sup> paragraph of clause 2.5 (ie. <i>“If such a Bill of Quantities or Schedule of Rates omits an item which should have been included, the item shall be a deemed Variation”</i>). This is important, since it is to be acknowledged that a Bill of Quantities (as defined) is prepared</li> </ul> </li> </ul>	Replace clause 2.6 with the amendment to clause 3.3 in the Old Government Standard Form.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>by or on behalf of the Principal and a Schedule of Rates (as defined) is included in the Contract.</p> <p>In the circumstances, to avoid unintended consequences and to give the parties the necessary flexibility to agree on the form of a Schedule of Rate</p>	
<b>Provisional Sums</b>				
66.	Provisional Sums Valuation Rules	3	<p>Clause 3 of the Conditions of Contract addresses how the works or items to which a Provisional Sum relates are to be <i>“priced by the Superintendent”</i>.</p> <p>As the new last paragraph expressly refers to the Valuation Rules, I have addressed this below in the sub-section titled “Valuation Rules”.</p>	<p>Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopt the applicable drafting in the Old Government Standard Form.</p> <p>Ensure that the Superintendent’s responsibilities with respect to clause 3 are Certifying Functions.</p>
<b>Valuation Rules</b>				
67.	Valuation Rules – General		<p>One of the most significant changes from the Old Government Standard Form is the introduction of the “Valuation Rules” (set out in Annexure Part K), which effectively replaces the existing valuation rules in AS4000-1997 and AS2124-1992 for positive and negative adjustments of the amounts payable to the Contractor under the Contract.</p> <p>Annexure Part K is separated into the following sections:</p> <ul style="list-style-type: none"> <li>• Section 2 - Definitions</li> <li>• Section 3 - General</li> <li>• Section 4 - Schedule of Rates</li> <li>• Section 5 - More or Less Cost</li> <li>• Section 6 - Provisional Sum Items</li> <li>• Section 7 - Separable Portions</li> <li>• Section 8 - Variations (and Deemed Variations)</li> <li>• Section 9 - Progress Certificate</li> <li>• Section 10 - Contractor’s Delay Damages</li> </ul> <p>I understand that a key objective of this change was to provide greater clarity for the parties and the Superintendent as to the principles to be adopted in such valuations, thereby minimizing the likelihood of disputes.</p> <p>However, in my opinion, the approach adopted is unlikely to achieve this objective for three key reasons:</p>	<p>Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopting the applicable drafting in the Old Government Standard Form.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>• Instead of creating a regime that is easy to understand and apply, I find it lacks clarity, being unnecessarily complex and with inconsistencies.</li> <li>• By adopting bespoke solutions, it is no longer possible to easily rely on over 30 years of judicial guidance on the meaning and application of the provisions from AS4000-1997 and AS2124-1992.</li> <li>• <b>As will become apparent, this change materially affects the substantive risk allocation between the parties, reducing the types and amounts of compensation that the Contractor was previously entitled to receive.</b></li> </ul> <p>In my experience, contrary to the above objective, such an approach will promote disputes as Contractors are forced to find other ways to recover its legitimate entitlements.</p> <p>In the circumstances, it is my view that this change should be reversed in its entirety with the relevant provisions under the Contract reverting to the unamended AS4000-1997 or adopting the applicable drafting in the Old Government Standard Form.</p> <p>It is also recommended, with the above objective in mind, that a publicly available, non-binding guidance note be produced which explains the meaning and operation of such provisions, based on the interpretation given to these provisions by the courts.</p> <p>Alternatively, specific drafting could be incorporated into the relevant provisions, with the sole purpose of adding clarity based on the judicial guidance, without changing the scope and nature of the relevant party's entitlement.</p> <p>Whilst I have addressed the provisions of Annexure Part K in significant detail below, it should not be inferred if I have not addressed a specific provision or point that I accept that provision as reasonable or having a place in this Contract. The following detail review supports my conclusion above.</p> <p>Finally, a reference to “section” below is a section of Annexure Part K unless specified to the contrary.</p>	
68.	Valuation Rules – Application	Sects 2.4 & 3.1	<p>The first concern with the Valuation Rules is that it is difficult to determine every circumstance where it is applicable.</p> <p>There appears to be three ways in which the Valuation Rules in Annexure Part K can apply to a provision of the Contract:</p> <ul style="list-style-type: none"> <li>• The relevant provision in the Conditions of Contract expressly refers to the Valuation Rules. Unfortunately, many provisions dealing with valuations by the Superintendent are silent as to whether the Valuation Rules apply (eg. provisions involving amounts payable to the Principal by the Contractor, including clauses 12, 13, 14.1A, 16, 17, 20A.5, 27, 29.3, 35 and 37A.5, as well as clauses 39.6 and 39.9).</li> </ul>	Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopting the applicable drafting in the Old Government Standard Form.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>Sections 5 to 10 also expressly refer to many, but not all, of the provisions of the Conditions of Contract that may be caught by the Valuation Rules.</li> <li>Finally, section 3.1 appears to provide the definitive answer. It states:  <i>“The Contract provides that where a <b>Valuation</b> is to be made by the Superintendent, it is to be made in accordance with the Valuation Rules. This Annexure Part K sets out those Valuation Rules.”</i>                      “Valuation” is defined in section 2.4 very widely as follows:  <i>“<b>Valuation</b> means a valuation, assessment, calculation, pricing or determination called for by the Contract an [sic] any other similar activity.”</i>                      However, the meaning and operation of section 3.1 is not easy to understand. There seems to be two possible meanings:                     <ul style="list-style-type: none"> <li>Option 1 - It can be as read “Where the Contract provides that a Valuation is to be made by the Superintendent, it is to be made in accordance with the Valuation Rules.”                              If this meaning is applied, any provision in the Contract that requires a “Valuation” (as defined in section 2.4) by the Superintendent, regardless of whether it expressly refers to the Valuation Rules, must be valued in accordance with the Valuation Rules.</li> <li>Option 2 - It can be read as “Where the Contract provides that a Valuation is to be made by the Superintendent in accordance with the Valuation Rules, this Annexure Part K sets out those Valuation Rules.”                              In this case, only those provisions in the Conditions that expressly refers to the Valuation Rules are covered.</li> </ul>                     I can see arguments for both interpretations. However, given my opinion that Annexure Part K should be deleted, it is not necessary to resolve this ambiguity at this stage.                 </li> </ul>	
69.	Valuation Rules – General Rules	Sects 3.2 & 3.3	<p>Sections 3.2 and 3.3 provide a set of general rules applicable to valuations. It is apparent that there are difficulties with these paragraphs, including the possibility that they overlap in an inconsistent manner.</p> <p>Section 3.1, which forms part of the Contract, provides:  <i>“The Contract provides that where a Valuation is to be made by the Superintendent, it is to be made in accordance with the Valuation Rules.”</i></p> <p>See discussions below regarding the effect of section 3.1 and the difficulty in understanding how section 4.1 (Schedule of Rates) is to be applied.</p> <p>Section 3.2 states:</p>	Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopting the applicable drafting in the Old Government Standard Form.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES						
			<p><i>“Unless expressly provided for in this Annexure Part K, the Valuation shall only take account of Direct Costs or Direct Savings (as is appropriate) and shall not take account of any Allowance.”</i></p> <p>Given my opinion that Annexure Part K should be deleted, I have not completed a detailed analysis of all potential provisions that may be affected by this “rule”.</p> <p>Section 3.3 states:</p> <p><i>“If the Contract provides that a Valuation is to be made in accordance with the Valuation Rules and these Valuation Rules do not provide for a valuation, then the valuation shall be made on the basis of More or Less Cost under clause 5 of these Valuation Rules.”</i></p> <p>When sections 3.1, 3.2 and 3.3 are read together, it is unclear how sections 3.2 and 3.3 can operate together or at all. The uncertainty arises because:</p> <ul style="list-style-type: none"> <li>• Each of sections 3.1 and 3.2 on the one hand, and section 3.3 appear to be subject to the same condition. That is, they only apply if the Contract provides that a Valuation is to be made in accordance with the Valuation Rules and the Valuation Rules do not provide for a valuation.</li> <li>• Each of sections 3.2 and 3.3 are part of the Contract and Annexure Part K, and each provides a valuation methodology. Consequently, they are circular, but inconsistent.</li> </ul>							
70.	Percentages	Item 15 & Sect 3.4	<p>A key element of the Valuation Rules is the adoption of fixed percentages for the valuation of each “Allowance” to be included (where applicable).</p> <p>It is clear from section 3.4 and Item 15 of Annexure Part A that:</p> <ul style="list-style-type: none"> <li>• The default percentages are set out in the Valuation Rules: <ul style="list-style-type: none"> <li>○ “Percentage on increases” – 12.5%</li> <li>○ “Perces” – 5%</li> </ul> </li> <li>• The default percentages can be replaced with specific percentages inserted in Item 15 to be placed against: <ul style="list-style-type: none"> <li>○ “Percentage on increases”</li> <li>○ “Percentage on decreases”</li> </ul> </li> </ul> <p>However, section 3.4 and Item 15 do not align with the balance of the Valuation Rules, which refer to three default percentages – 12.5%, 7.5% and 5%.</p> <p>Further confusion arises in the DSG RFT 3449 where Item 15 amended the template as follows:</p> <table style="margin-left: 20px;"> <tr> <td>• Profit and Overhead Allowance</td> <td style="text-align: right;">15%</td> </tr> <tr> <td>• Overhead Allowance</td> <td style="text-align: right;">10%</td> </tr> <tr> <td>• Profit Allowance</td> <td style="text-align: right;">5%</td> </tr> </table>	• Profit and Overhead Allowance	15%	• Overhead Allowance	10%	• Profit Allowance	5%	Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopting the applicable drafting in the Old Government Standard Form.
• Profit and Overhead Allowance	15%									
• Overhead Allowance	10%									
• Profit Allowance	5%									

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>None of these concepts are defined, nor do they align with section 3.4 and Item 15, but do appear to align with the balance of the Valuation Rules.</p> <p>Importantly, none of the above says anything about what figure the percentage is to be applied to. The balance of Annexure Part K provides this detail – in most cases it is to be applied to the “Direct Cost” or “Direct Saving” (see below).</p>	
71.	“Direct Cost” - Definition	1.1 Sect 2.2	<p>There are three key definitions in the Valuation Rules - “Direct Cost”, “Direct Savings” and “Allowance”.</p> <p>The there is a slight inconsistency between the definition of “Direct Costs” in clause 1.1 and in section 2.2.</p> <p>The definition of “Direct Costs” in section 2.2 is broken into three parts:</p> <ul style="list-style-type: none"> <li>1<sup>st</sup> paragraph – <b>“Direct Cost means the amount actually expended by the Contractor on materials, plant, labour and subcontractors as reasonably determined by the Superintendent.”</b> (emphasis added)</li> </ul> <p>There is an important distinction between a statement of the methodology to be adopted by the Superintendent and the Superintendent’s task and duties when arriving at the certified value based on that methodology (cf. the wording of clause 36.4).</p> <p>In this case, the amounts actually expended by the Contractor should solely be a question of fact, which should not be confused with the Superintendent’s duties with respect to certification that are addressed in clause 20.1(b).</p> <p>A similar point applies to each reference in the Valuation Rules to phrases such as <i>“the opinion of the Superintendent”</i>.</p> <p>A more significant issue is the uncertainty as to what costs are to be covered by the phrase <i>“materials, plant, labour and subcontractors”</i> in the context of the definition of “Allowance” discussed below. Whilst it is presumed that “Direct Cost” and “Allowance” are intended to be mutually exclusive, it is not at all clear into which bucket many costs are intended to fall.</p> <ul style="list-style-type: none"> <li>2<sup>nd</sup> paragraph – <b>“The rates contained in a Contractor’s Rates Schedule may, at the Superintendent’s absolute discretion, be considered to be the Direct Cost for any item specified in that schedule that is applicable to a Valuation.</b> (emphasis added)</li> </ul> <p>See the discussion above with respect to the meaning and application of the <i>“Contractor’s Rate Schedule”</i>. It is not clear from the template document the purpose of the “Contractor’s Rates Schedule”, but experience suggests that it is likely to contain pre-agreed rates to be used for valuing Variations (ie. the type of schedule that meets the description in clause 36.4(b)).</p> <p>With this in mind, the 2<sup>nd</sup> paragraph demonstrates one of the fundamental issues with the Valuation Rules - they mix up two different and incompatible</p>	Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopting the applicable drafting in the Old Government Standard Form.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>concepts, pre-agreed “rates and prices” and amounts actually expended. It is self-evident that the former can never equal the latter.</p> <p>Further, as noted elsewhere, I can see no legitimate reason why the Superintendent should be given any discretion (let alone an “absolute discretion”) to choose between these mutually exclusive pricing methodologies. Logically, the Superintendent is always likely to choose the methodology that gives the lower amount to the Contractor.</p> <p>The only reasonable approach is for the Contract to specify the parties’ agreement as to which approach is to be adopted for each type of valuation - some valuations should be based on “rates and prices” (eg. variations) and some are more appropriately based on costs actually incurred (eg. clause 36 of AS2124-1992).</p> <ul style="list-style-type: none"> <li>• 3<sup>rd</sup> paragraph – “Where an item specified in the Contractor’s Rates Schedule that is applicable to a Valuation is subcontracted, the Contractor agrees that the subcontracted rate will not exceed the specified rate for the purpose of calculating Direct Cost.”</li> </ul> <p>The effect of this qualification is to create a guaranteed maximum price for subcontracted costs by reference to the Contractor’s Rates Schedule. That is, if the actual costs incurred by the Contractor with respect to subcontracted activities is less than the applicable rates, then the Direct Cost is the actual costs, but if they are more than the applicable rate, the Direct Costs are capped at the rate.</p> <p>Again, whilst this also mixes up rates and costs, it also unreasonably limits the Contractor’s entitlements, particularly when many of the matters being valued are considered.</p> <p>Finally, it should be noted that a similar limitation has not been included in the definition of “Direct Savings” (which benefits the Principal).</p>	
72.	“Direct Savings” - Definition	Sect 2.3	<p>Unlike “Direct Costs” and “Allowance”, the only definition of “Direct Savings” is in section 2.3, which states:</p> <p><b>“Direct Savings means the amount in respect of materials, plant, labour and subcontractors which will not be expended by the Contractor as a result of the circumstance giving rise to the Direct Savings, as reasonably determined by the Superintendent.</b></p> <p><i>The rates contained in a Contractor’s Rates Schedule may, at the Superintendent’s absolute discretion, be considered to be the Direct Savings for any item specified in that schedule that is applicable to a Valuation.”</i></p> <p>This definition has similar issues as “Direct Cost” (discussed above), noting that only applies to where a provision of the Contract reduces the amount payable to the Contractor by the Principal. However, as noted above, the 3<sup>rd</sup> paragraph of the definition of “Direct Costs” has not been included.</p>	Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopting the applicable drafting in the Old Government Standard Form.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			One material difference is that the primary methodology for determining “Direct Cost” is the “actual cost involved”, whereas “Direct Savings” involves a theoretical assessment of the amount that “ <i>will not be expended</i> ”.	
73.	“Allowance” - Definition	Sect 2.3	<p>This is the most important definition because of its impact on the amounts payable to the Contractor under the Contract.</p> <p>The definition in section 2.1 states:</p> <p><i>“<b>Allowance</b> means an amount or percentage in relation to profit, overhead, attendance, preliminaries, administration, risk or any other allowance in addition to the actual direct cost incurred by the Contractor.</i></p> <p><i>For the avoidance of doubt, this includes head office costs, as well as labour and other costs associated with the Contractor’s senior management, contract administration inclusive of programming and budget management, occupational health and safety, stakeholder management, environmental management, and quality assurance.”</i></p> <p>This definition is critical because most of the valuation methodologies involve two parts:</p> <ul style="list-style-type: none"> <li>• “Direct Cost” or “Direct Saving” (excluding any Allowances); plus / minus</li> <li>• Percentage (%) of “Direct Cost” or “Direct Saving” representing the “Allowance” (with the default percentages being 5%, 7.5% and 12.5%).</li> </ul> <p>As noted above, whilst it is presumed that “Direct Cost” and “Allowance” are intended to be mutually exclusive, it is not at all clear into which bucket many costs are intended to fall.</p> <p>Consequently, it is not easy to clearly understand exactly which components of the Contractor’s pricing are included within this definition. However, it appears likely that it is intended to cover at least the following:</p> <ul style="list-style-type: none"> <li>• <b>Onsite or project overheads, attendances, preliminaries, administration costs etc</b>, including <i>“labour and other costs associated with the Contractor’s senior management, contract administration inclusive of programming and budget management, occupational health and safety, stakeholder management, environmental management, and quality assurance”</i>.</li> </ul> <p><b>These are real project costs that are necessarily incurred to permit the Works to be constructed and completed and perform the other activities mandated by the terms of the Contract.</b> These are often referred to as “Indirect Costs” or “IDCs”.</p> <p>In my experience, there is no correlation between the value of Direct Costs (based on my broad understanding of this defined term) and these costs. For example, the dollar amount of IDCs may be identical for two projects, whilst</p>	Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopting the applicable drafting in the Old Government Standard Form.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>the DCs for one of the projects may be 5 times as much as the other project. This is also the case for particular types of work within a specific project.</p> <p>Accordingly, it is my opinion that it is never reasonable, nor appropriate for either party, to value onsite overheads (IDCs) by use of a fixed percentage of direct costs(as mandated by Annexure Part K). This will inevitably result in either an under-recovery or an over-recovery depending on the specific circumstances.</p> <p>Further, it is unclear whether other project costs such as insurances, bank guarantees, site compounds and laydown areas (including rental of land), services (electricity, potable water, ablutions), cranes, scaffolding, site clearing and rubbish disposal, general plant and equipment (owned and hired), surveys, testing, materials handling and storage, etc are “Direct Cost” or “Allowances”. Which bucket they fall into can have a significant impact on these valuations.</p> <ul style="list-style-type: none"> <li>• <b>Risk contingency</b> – A risk contingency is an allowance for the risk that forecast costs are greater than expected. This is not relevant if compensation is limited to costs actually incurred, but will be relevant to valuations based on reasonable rates and prices that occur before costs are incurred.</li> <li>• <b>Offsite Overheads</b> – These are also often called “Head Office Overheads” or “Corporate Overheads”. These are costs incurred by the Contractor in the overall management of its business and are not directly incurred in the performance of the Contract.</li> </ul> <p>They will usually include property costs, rent, rates, heat and light together with other central services and utilities at the corporate office, and the cost of corporate office staff, the directors and other senior management and support staff, their salaries and other benefits including cars and pension payments; the cost of information systems, finance and accounting departments, and the in-house legal team and secretariat etc.</p> <p>Contractors must pay for these costs through the margin earned on its projects. It is not unusual for the tendered allowance to cover these costs to be 60% of the Contractor’s margin (the remaining 40% being profit).</p> <ul style="list-style-type: none"> <li>• <b>Profit</b> – This is the portion of the price referable to the gross profit from the project. As noted above, it is not unusual for this amount to be 40% of the Contractor’s margin.</li> </ul> <p>Whilst the proportion of each component of a Contractor’s price varies from project to project (usually dependent on the type of works, such as building or civil), the tendered price for civil projects based on my experience gained from working in various commercial and tendering roles for a Tier 1 construction company in Australia and Asia, is often broken down roughly as follows:</p> <ul style="list-style-type: none"> <li>• Direct costs (DCs) – estimated from first principles, but often around 60% of the tendered price</li> </ul>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>Onsite overheads / IDCs – estimated from first principles, but as a “rule of thumb” will often equate to roughly 40% of DCs or about 25% of tendered price</li> <li>Risk and margin – a commercial decision which can fluctuate based on various commercial matters, but often around 15% of the total DCs and IDCs</li> </ul> <p>Put another way, in aggregate, the percentage allowed in the tender price to cover onsite overheads, risk and margin (ie. offsite overheads and profit) is usually around <b>60%</b> of Direct Costs. This is substantially greater than the default percentage of 12.5% in the Valuation Rules, resulting in the Contractor suffering a substantial under-recovery of its onsite overheads (IDCs).</p> <p>Finally, as with “Direct Costs”, there is a slight inconsistency between the definition of “Allowance” in clause 1.1 and in section 2.1.</p>	
74.	Valuation Rules – Schedule of Rates	Sect 4	<p>Section 4.1 of Annexure Part K states:  <i>“Where there is a Schedule of Rates the rates in the Schedule of Rates shall be utilised in relation to the valuation, assessment, calculation, pricing or determination in respect of the Item to which the Schedule of Rates applies.”</i></p> <p>As noted above, “Schedule of Rates” is defined in clause 1.1 as follows:  <i>“<b>Schedule of Rates</b> means any schedule included in the Contract which, in respect of any section or item of Work to be carried out, shows the rate or respective rates of payment for the execution of that Work and which may also include lump sums, Provisional Sums, other sums, quantities and prices”.</i></p> <p>Annexure Part H (Schedule of Rates) includes the following under the heading “Contents of this Annexure”:  <i>“This Annexure Part H sets out or otherwise identifies rates or documents which are included in the definition of Schedule of Rates. There may be Schedule of Rates also set out or included elsewhere in the Contract Documents.”</i></p> <p>Accordingly, I do not understand the intended application of section 4.1. In particular, is unclear whether it is intended to only apply to the pricing of the original WUC where it is to be priced on a “rates” basis or whether it is to apply to every “Valuation” to be undertaken under Annexure Part K. In either case, it appears to be <b>inconsistent</b> with a number of other provisions of the Contract (as currently drafted) including clauses 2A and 36.4, and the definitions of “Direct Cost” and “Direct Savings” in sections 2.2 and 2.3.</p>	<p>Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopt the applicable drafting in the Old Government Standard Form.</p> <p>Ensure that the Superintendent’s responsibilities with respect to the provisions covered by section 4 of Annexure Part K are Certifying Functions.</p>
75.	Valuation Rules – More or Less Cost	Sect 5	<p>The primary concern with section 5 of the Valuation Rules is that it will most likely <b>result in the Contractor substantially under-recovering</b> under provisions dealing with acts or omissions of the Principal (or its agents, contractors etc) (see clauses 4.2, 8A.2, 8B.7, 24.3B, 24.3A, 24C.4, 24B (24F), 26.2, 26.3, 29A, 31, 31A,</p>	<p>Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopt the</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>32.8, 32C, 33.4 and 36.7) and neutral events for which the Principal has accepted the risk (see clauses 11.2 and 24.4).</p> <p>There appears to be three ways that section 5 can be invoked:</p> <ul style="list-style-type: none"> <li>Where a provision of the Conditions expressly provides that “<i>if the Contractor incurs <b>more or less cost</b> than otherwise would have been incurred in certain circumstances then the difference shall be assessed by the Superintendent in accordance with the Valuation Rules and added to or deducted from the Contract Sum</i>” (section 5.1).</li> <li>The circumstances identified in section 5.2. Note that there is no clause 24C.4 or 29A in the AS4000-1997 BAU version.</li> <li>Section 3.3 (which may not have any operation as discussed above).</li> </ul> <p>Each of these “more or less” provisions in the Conditions of Contract are drafted to ensure that the Contractor is not expected to suffer any losses or obtain any windfall gains should the applicable circumstance occur.</p> <p>The unamended AS4000-1997 simply requires the Superintendent (acting reasonably and in good faith) to determine “the difference” between the costs actually incurred and the costs the Contractor would have incurred had the circumstance not occurred. There is no distinction between types of costs to be taken into account in undertaking this assessment (ie. all types of costs are “costs” for the purposes of these provisions).</p> <p>Similarly, each of the equivalent provisions in the Old Government Standard Form expressly stated that “<i>the difference shall be valued under Clause 40.5</i>”.</p> <p>In contrast, section 5.3 of the Valuation Rules provides as follows:</p> <ul style="list-style-type: none"> <li>Where “<b>More Cost</b>” is incurred by the Contractor, the Valuation is the Direct Costs plus 7.5% of the Direct Costs for the Allowance (subject to ‘Overhead Allowance’ in Item 15) (section 5.3(a)).</li> <li>Where “<b>Less Cost</b>” is incurred by the Contractor, the Valuation is the Direct Savings plus 5% of the Direct Costs for the Allowance (subject to ‘Profit Allowance’ in Item 15) (section 5.3(b)).</li> </ul> <p>It is not clear whether “Direct Cost” is intended to be “Direct Saving” in this section.</p> <p>Accordingly, where the Contractor has incurred <b>more cost than it would otherwise have incurred</b> by reason of such the circumstance above (most of which are Principal’s acts or omissions), instead of being entitled to be compensated for <b>all</b> of those extra costs valued as a deemed Variation (the position under the Old Government Standard Form) the Contractor’s entitlement is now <b>limited</b> to:</p> <ul style="list-style-type: none"> <li>those costs which fall within the description of “Direct Costs” as defined in section 2.2 (with its uncertainties described above); and</li> </ul>	<p>applicable drafting in the Old Government Standard Form.</p> <p>Ensure that the Superintendent’s responsibilities with respect to the provisions covered by section 5 of Annexure Part K are Certifying Functions.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>an amount of 7.5% (or such different percentage in Item 5) of those Direct Costs to cover <b>all other extra costs incurred</b>, including all onsite and offsite overheads (no profit).</li> </ul> <p>There can be no reasonable justification for the Principal to impose a valuation regime that results in the Contractor being worse off than it would have been had the circumstance not occurred.</p> <p>Put another way, whilst the Conditions of Contract appear to place the risk of these issues with the Principal, the Valuation Rules actually pass on much of the risk to the Contractor.</p> <p>Having said that, it is conceivable that in certain circumstances this methodology will actually result in the Principal paying the Contractor more than it would otherwise be entitled to receive.</p>	
76.	Valuation Rules – Provisional Sum Items	3 Sect 6	<p>Clause 3 of the Conditions of Contract addresses how the works or items to which a Provisional Sum relates are to be <i>“priced by the Superintendent”</i>.</p> <p><b>General Principles</b></p> <p>The common understanding of a “provisional sum” (as reflected in the Australian and UK caselaw) is that it refers to an amount of money included as part of the Contract Sum that is “provisional” in the sense that it is intended by the parties to be subject to adjustment.</p> <p>Often industry participants believe that a “provisional sum” refers to particular works that are “provisional” in the sense that the Principal has a choice whether the works are to be performed. Whilst it always depends on the specific terms of the contract, this is generally not the case. The work the subject of a “provisional sum” is usually part of the WUC, although the exact quantity of the work to be performed cannot be ascertained at the time of entering into the contract.</p> <p>In such a case, the contract usually operates as follows:</p> <ul style="list-style-type: none"> <li>The Contract Sum will include a provisional amount, based on a high-level estimate, which is not the amount that the Contractor is entitled to be paid.</li> <li>The Contract will specify a methodology for determining the price of the work (ie. the amount that the Contractor is entitled to be paid) once it has actually been performed. This price is then substituted for the “provisional sum”.</li> </ul> <p>As the purpose of this mechanism is to “price” these works after the contract has been entered into (as opposed to when the contract is entered into), it is appropriate that the price of the works reflects the contractor’s costs plus a reasonable mark-up for offsite overheads and profit (which is why the methodology for pricing variations is often adopted).</p> <ul style="list-style-type: none"> <li>If the price of all “provisional sum” works determined in accordance with this methodology is less than the “provisional sum” amount there will be a final adjustment in the Final Certificate to remove the balance.</li> </ul>	<p>Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopt the applicable drafting in the Old Government Standard Form.</p> <p>Ensure that the Superintendent’s responsibilities with respect to the provisions covered by section 6 of Annexure Part K are Certifying Functions.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>This is important context when considering the effect of the amendment to clause 3 requiring the valuation in accordance with section 6 of the Valuation Rules.</p> <p><b>Section 6 of the Valuation Rules</b></p> <p>The most significant issue is that section 6.1 proceeds on a misunderstanding as to the nature and operation of “Provisional Sums” and the “Contract Sum”. This is encapsulated by clarification (in the chaussette) which states “<i>noting that payment in respect of the Total Allowances is facilitated through this amount being included in the Contract Sum</i>”.</p> <p>As discussed above:</p> <ul style="list-style-type: none"> <li>• In the Australian Standards contracts, the Contractor is not entitled to be paid, nor is the Principal obliged to pay, the “Contract Sum” (cf. clause 2.1).</li> <li>• The Contractor is not entitled to be paid, nor is the Principal obliged to pay, the “provisional sum” allowance, as this amount is to be replaced by the actual valuation in accordance with the contractual terms.</li> </ul> <p>Accordingly, whilst it is correct that the “Total Allowances” (as defined) is part of the Contract Sum, it does not follow that the Contractor has an entitlement to be paid that amount, and there must always be a determination of the “price” of the applicable works to determine the Contractor’s entitlement. This is how clause 3 operates.</p> <p>However, section 6.1 provides that the Contractor’s entitlement is limited to the difference between the Total Allowance and the Total Costs (each as defined), whilst there is no other mechanism in the Contractor for the Contractor to be entitled to the “provisional sum” allowances (notwithstanding the statement in the chaussette). That is, section 6 operates as follows:</p> <ul style="list-style-type: none"> <li>• Section 6.1(a) provides that:  <i>“a Valuation shall only be made if the total of all allowances in respect of Provisional Sums (<b>Total Allowances</b>) is different to <b>the actual cost</b> to the Contractor of carrying out all of the Works and supplying all of the materials in respect of which there is a Provisional Sum (<b>Total Costs</b>)”</i></li> </ul> <p>This is based on aggregate amounts. However, the parties may wish to incorporate multiple provisional sums for different items of work and apply clause 3 to each separately. Section 6.1(a) does not permit such flexibility.</p> <ul style="list-style-type: none"> <li>• Section 6.1(b) defines “actual costs” in this context as “<i>the relevant Direct Costs and an Allowance equal to 12.5% of the Direct Costs</i>” (unless a different percentage is included in Item 15).”</li> </ul> <p>As discussed, this is likely to result in the Contractor being paid <b>materially less</b> than is permitted under the unamended clause 3 of AS4000-1997 and pursuant to the Old Government Standard Form.</p> <ul style="list-style-type: none"> <li>• Section 6.1(c) specifies the amount of the valuation if the Total Costs exceed the Total Allowances.</li> </ul>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>This involves a potential doubling up of the “Allowance”. For example, assume a Total Allowance of \$100 and Direct Costs of \$100, resulting in Total Costs (as defined) of \$112.50.</p> <p>Under clause 3 of the Conditions of Contract, the Contractor would be entitled to be paid \$112.50 (which is substituted for the \$100 “provisional amount”), \$12.50 more than the “provisional amount”.</p> <p>However, pursuant to section 6.1(c) the valuation is only \$14.06 (based on the current drafting), resulting in an <b>under-recovery</b> of \$98.44 from the \$112.50 that the Contractor ought to have received (see discussion below).</p> <p>Even if the original “provisional sum” amount of \$100 would also be paid to the Contractor, the Contractor would be paid \$114.0625, which is an <b>over-recovery</b> compared with clause 3, because the percentage for the Allowance is double counted.</p> <ul style="list-style-type: none"> <li>Section 6.1(d) specifies the amount of the Valuation if the Total Allowances exceed the Total Costs.</li> </ul> <p>There is a similar issue with a potential doubling up of the “Allowance”. For example, assume a Total Allowance of \$100 and Direct Costs of \$50, resulting in Total Costs of \$56.25.</p> <p>Under clause 3 of the conditions of Contract the Contractor would only be entitled to be paid \$56.25 which is substituted for the \$100 “provisional amount” (\$44.75 less than the “provisional amount”).</p> <p>However, section 6.1(d) produces a valuation as follows:</p> $V = (\$56.25 - \$100) + [(\$56.25 - \$100) \times 5\%] = \$46.99$ <p>Based on the current drafting of the Contract, this would result in a debt from the Contractor to the Principal of \$46.99, despite otherwise being entitled to be paid \$56.25 (a loss of over \$100 on these works).</p> <p>Even if the original “provisional sum” amount of \$100 would also be paid to the Contractor, the net position for the Contractor would only be \$53.0125, despite the Total Cost being \$56.25. This is because the 5% Allowance is effectively deducted twice.</p> <p>In the circumstances, section 6 of the Valuation Rules is not an appropriate methodology for addressing the valuation of Provisional Sums work.</p>	
77.	Separable Portions – Creation of Separable Portions	4 Sect 7.1	<p>The reasonable position under AS4000-1997 that, when new Separable Portions are created, the respective amounts for Security, bonus, liquidated damages and delay damages are to be “<i>all calculated pro-rata according to the ratio of the Superintendent’s valuation of the Separable Portion to the Contract Sum</i>” has been replaced with a reference to the Valuation Rules.</p>	Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopt the applicable drafting in the Old Government Standard Form.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>In contrast, section 7.1 of Annexure Part K contains complex provisions dealing with this valuation. My specific observations on these provisions are as follows:</p> <ul style="list-style-type: none"> <li>Section 7.1(a) &amp; (b) - I can see no logical basis for mandating that, in all cases, 100% of the daily bonus for early completion (if any) is only payable on the final Separable Portion as there must be a benefit for the Principal in having other Separable Portions completed earlier.</li> <li>Section 7.1(c) – This deals with liquidated damages (being the liquidated damages the subject of Clause 34.7 and Item 138) and states:  <i>“the Liquidated damages in respect of an individual Separable Portion will be the percentage of the total of all liquidated damages amounts which the loss associated with delayed completion of the particular Separable Portion (assessed in the opinion of the Superintendent) represents of the total loss associated with the delayed completion of all Separable Portions (assessed in the opinion of the Superintendent)”.</i></li> </ul> <p>I have great difficulty in understanding the meaning and intended operation of this drafting. In particular, it is unclear whether the intention is to apportion the daily liquidated damages rates or apportion the actual amounts of liquidated damages incurred.</p> <p>Whilst the wording of clause 4 of AS4000-1997 and clause 35.3 of AS2124-1997 refers to apportionment of the “<i>amount</i>” of liquidated damages rather than “the daily rate”, it is clear that each Separable Portion must have a separate daily rate of liquidated damages.</p> <p>Accordingly, the task is to apportion the daily rate of liquidated damages for the work that is split into Separable Portions between the new Separable Portions. As the Principal obtains a real benefit in having part of the Works completed earlier than otherwise, it is reasonable to apportion the daily rate by reference to the value of each Separable Portion, as per AS4000-1997 and the Old Government Standard Form.</p> <p>For example, assume that there are no initial Separable Portions (ie. one Date for Practical Completion) and the daily liquidated damages rate is \$1,000. The Superintendent / Principal then decides that it wishes to create two Separable Portions so it can take over part of the works before the balance is completed. Assume that the value of the Separable portion taken over is 80% of the total, In this example, the daily rate of \$1,000 should be apportioned as \$800 per day (SP 1) and \$200 per day (SP 2).</p> <ul style="list-style-type: none"> <li>Section 7.1(d) – This deals with delay damages (being the delay damages the subject of Clause 34.9 and Item 142) and states:  <i>“the delay damages in respect of an individual Separable Portion will be the percentage of the total of delay damages associated with The Works which the loss associated with delay in relation to the particular Separable Portion (assessed in the opinion of the Superintendent) represents of the</i></li> </ul>	<p>Ensure that the Superintendent’s responsibilities with respect to the provisions covered by section 7.1 of Annexure Part K are Certifying Functions.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><i>total loss associated with the delay in relation to all Separable Portions (assessed in the opinion of the Superintendent.)</i></p> <p>I have similar difficulties in understanding the intended meaning and operation of section 7.1(d).</p> <p>Finally, see the separate discussion with respect to clause 34.9.</p>	
78.	Deletion and Merger of Separable Portions - Valuation Rules	4.2 Sect 7.2	<p>Clause 4.2 expressly permits the Superintendent to direct:</p> <ul style="list-style-type: none"> <li>• the deletion of one or more Separable Portions (clause 4.2(a)); and</li> <li>• the merger of one or more Separable Portions with another Separable Portion (clause 4.2(b)).</li> </ul> <p>As discussed elsewhere, clause 4.2 is neither appropriate nor reasonable in these circumstances and should be deleted. Accordingly, it is not strictly necessary to address section 7.2 of Annexure Part K.</p> <p>Nevertheless, for completeness, I note that:</p> <ul style="list-style-type: none"> <li>• Section 7.2 is limited to “<i>deletion of a Separable Portion</i>”, which must be a reference to clause 4.2(a) only.</li> </ul> <p>Accordingly, there is nothing in Annexure Part K that addresses merger of Separable Portions pursuant to clause 4,2(b).</p> <ul style="list-style-type: none"> <li>• It appears to be intended to calculate the amount to be deducted from the Contract Sum (as per the last paragraph of clause 4.2), rather than the adjustment to the amounts for bonus, liquidated damages and delay damages (as per clause 4.2(d)).</li> </ul> <p>However, the last paragraph of clause 4,2 appears to invoke section 5 (More or Less Cost).</p> <ul style="list-style-type: none"> <li>• If clause 4.2(a) is intended to permit the omission of WUC (which seems the most likely interpretation), then this is a Variation and presumably section 8 would be applicable.</li> </ul>	<p>Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopt the applicable drafting in the Old Government Standard Form.</p> <p>Ensure that the Superintendent’s responsibilities with respect to the provisions covered by section 7.2 of Annexure Part K are Certifying Functions.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
79.	Valuation Rules - Variations (and deemed Variations)	2.5 14.2 25-3 29.4 36.4 Sect 8	<p>Variations directed under clause 36.1 and “deemed Variations” which may arise under clause 2.5 (Variation in Quantities), clause 14.2 (Reinstatement), clause 25.3 (Latent Condition) and clause 29.4 (Defective Works) are to be priced pursuant to clause 36.4, which has been extensively amended (from AS4000-1997 and the Old Government Standard Form) by inserting new 1<sup>st</sup> and 4<sup>th</sup> paragraphs.</p> <p><b><u>1<sup>st</sup> Paragraph of Clause 36.4</u></b></p> <p>The new 1<sup>st</sup> paragraph of clause 36.4 states:</p> <p style="padding-left: 40px;"><i>“The pricing to be undertaken by the Superintendent under Subclause 36.4 shall be in accordance with the Valuation Rules <b>in priority</b> over any other method”</i> (emphasis added).</p> <p>Section 8.1 of the Valuation Rules confirms that <i>“The following rules <b>take precedence</b> over the rules set out in Subclause 36.4”</i>.</p> <p>The reference to “<i>priority</i>” and “<i>precedence</i>” does not mean that the valuation methodology in the balance of clause 36.4 has no application unless there is an inconsistency between the two methodologies.</p> <p>This creates uncertainty for users and administrators as to when a valuation is to be solely in accordance with the Valuation Rules and when it is to be a combination of clause 36.4 and the Valuation Rules, and if the latter, what that might look like.</p> <p>For example, a valuation based on “<i>prior agreement</i>” (clause 36.4(a)) will always conflict with the Valuation Rules. A literal reading of these amendments is that the Superintendent (as independent certifier) must ignore the prior agreement of the parties and price the Variation pursuant to the Valuation Rules.</p> <p><b><u>4<sup>th</sup> Paragraph of clause 36.4</u></b></p> <p>The new 4<sup>th</sup> paragraph of then clause 36.4 states:</p> <p style="padding-left: 40px;"><i>“The reference to applicable rates or prices in paragraph (b) of Subclause 36.4 includes, <b>at the discretion of the Superintendent</b>, the rates or prices in the following (in the following order of precedence):</i></p> <ul style="list-style-type: none"> <li>(e) <i>the Contractor's Rates Schedule (if any);</i></li> <li>(f) <i>the Contract Sum Breakdown Schedule (if any); and</i></li> <li>(g) <i>any other Pricing Reference Document.</i></li> </ul> <p>In effect, this paragraph amends clause 36.4(b) by giving the Superintendent the absolute discretion to adopt the types of documents referred to in paragraph (c) of clause 36.4, but without the important qualification in clause 36.4(c) that they are only to be used “<i>to the extent that it is reasonable to use them</i>”.</p> <p>As discussed elsewhere, it is not reasonable that the Superintendent have the discretion to adjust the pre-agreed methodology for valuing variations.</p> <p>These amendments to clause 36.4 create uncertainty and are unreasonable.</p>	<p>Delete all amendments to clause 36.4 and revert to the unamended drafting.</p> <p>Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopt the applicable drafting in the Old Government Standard Form.</p> <p>Ensure that the Superintendent’s responsibilities with respect to the provisions covered by section 8 of Annexure Part K are Certifying Functions.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
80.	Valuation Rules - Variations (and deemed Variations) – Additions: Allowance	Sect 8.2(a)	<p>Section 8.2(a) of the Valuation Rules applies where there is to be an addition to the amount payable to the Contractor for a Variation under clause 36.4. It states:</p> <p><i>“where there is to be an addition to the amount payable to the Contractor and, pursuant to Subclause 36.4 an amount or percentage is to be included by way of an Allowance (however described in Subclause 36.4 or elsewhere) the amount shall be determined through the application of a percentage and the percentage shall be 12.5% of the relevant Direct Costs (subject to ‘Profit and Overhead Allowance’ in Item 15)”</i></p> <p>It appears from this drafting that the only aspect of the valuation of Variations that is to be valued in accordance with section 8.2(a) is <i>“an amount or percentage is to be included by way of an Allowance (however described in Subclause 36.4 or elsewhere)”</i>.</p> <p>As discussed above, the definition of “Allowance” includes real and actual costs that will be incurred by the Contractor due to the Variation and should be recoverable by the Contractor.</p> <p>The apparent objective of this provision is to <b>limit</b> the total amount to be included in the valuation of any Variation <i>“in relation to profit, overhead, attendance, preliminaries, administration, risk or any other allowance in addition to the actual direct cost incurred by the Contractor”</i> to <b>12.5% of the Direct Cost</b> (subject to a different percentage in Item 15).</p> <p><b>As discussed above, such an amount is likely to result in the Contractor incurring material losses when required to perform unilaterally directed Variations or address those risks that the Principal have agreed are to be dealt with as deemed Variations.</b></p> <p>There are three further issues with the approach adopted:</p> <ul style="list-style-type: none"> <li>• See the discussion above regarding it being inappropriate for both parties to apply a fixed percentage allowance for onsite overheads / preliminaries and delay costs associated with Variations. It is not possible to reasonably determine what these may be as a percentage of direct costs at the time of tendering, as the actual costs will vary significantly depending on the nature and timing of any Variation direction.</li> <li>• As section 8.2(a) only applies to the “Allowance” component of the valuation, it is necessary to rely on clause 36.4 to determine the balance of the “price” of a Variation. It is presumed that this requires the rates in clauses 36.4(b) or 36.4(c) to be adopted excluding the portion that relates to the “Allowance”. It is not obvious how this is to be done in practice, since these rates are rarely broken down in such a manner.</li> </ul> <p>In this respect, note that “Allowance” is not simply the <i>“reasonable amount for profit and overheads”</i> referred to in clause 36.4(d).</p>	<p>Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopt the applicable drafting in the Old Government Standard Form.</p> <p>State to consider an amendment to clause 36.4(d) as follows:</p> <p><i>“reasonable rates or prices, which shall include in the amount payable the additional allowance for risk, offsite overheads and profit calculated by applying the rate of 15% or such different percentage”</i></p> <p>Ensure that the Superintendent’s responsibilities with respect to the provisions covered by section 8 of Annexure Part K are Certifying Functions.</p> <p>See separate discussion on delay damages (clause 34.9).</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>The percentage to be applied for Allowances is 12.5% “of the relevant Direct Costs”. As discussed above, this is stated to be the costs actually expended by the Contractor, which implies that it can only be calculated after the relevant works have been completed. This is a completely different methodology that is adopted for “pricing” or “valuing” Variations.</li> </ul> <p>Finally, I accept that there may be benefits, in terms of certainty and ease of contract administration, in pre-agreeing a percentage mark-up or margin for the purposes of clause 36.4(d) to cover <b>offsite overheads, risk and profit</b>, a more reasonable percentage is 15%. This can be addressed by a simple amendment to clause 36.4(d) and Item 15 following the approach proposed by Australian Standards in the draft AS 11000.</p>	
81.	Valuation Rules - Variations – Omissions: Allowance	Sect 8.2(b)	<p>Section 8.2(b) of the Valuation Rules applies where there is to be a <b>deduction</b> from the amount payable to the Contractor for a Variation under clause 36.4. It states:</p> <p><i>“where there is to be a deduction from the amount payable to the Contractor and, pursuant to Subclause 36.4 an amount or percentage is to be included in that deduction by way of an Allowance (however described in Subclause 36.4 or elsewhere) the amount shall be determined through the application of a percentage and the percentage shall be 5% of the relevant Direct Costs (subject to ‘Profit Allowance’ in Item 15).”</i></p> <p>It is presumed that this is to address the statement in clause 36.4 that “any deductions shall include a reasonable amount for profit but not overheads”. That is, the Contractor is entitled to keep its overheads notwithstanding the omission of the work.</p> <p>The drafting of section 8.2(b) is the mirror of section 8.2(a) discussed above, except that the applicable percentage to be used calculate the “Allowance” to be deducted is 5% of the relevant Direct Costs to be deducted.</p> <p>Accordingly, section 8.2(b) suffers from the same concerns as section 8.2(a) discussed above.</p> <p>Further, the inference from this drafting is that the Contractor’s “profit” on Variations is expected to be only 5% of the applicable Direct Costs. As noted above, as Direct Costs are often only about 60% of the selling price, this suggests that a reasonable profit on Variations should be limited to 3% of selling price, which is not consistent with the reasonable expectations in the market.</p>	<p>Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopt the applicable drafting in the Old Government Standard Form.</p> <p>Ensure that the Superintendent’s responsibilities with respect to the provisions covered by section 8 of Annexure Part K are Certifying Functions.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
82.	Progress Certificates – Valuation Rules	37.2(d) Sect 9	<p>Clause 37.2(d) requires the Superintendent to determine the amount of each progress certificate in accordance with Valuation Rules.</p> <p>It is unclear why it is necessary to amend the process contained in clauses 37.1 and 37.2 of AS4000-1997, which provides the Superintendent with sufficient flexibility to deal with the practicalities of construction projects, whilst ensuring the Contractor receives sufficient cashflow to deliver the project, particularly as clause 37.2B makes clear that all progress certificates are interim and all payments pursuant to them are only on account.</p> <p>Section 9 of the Valuation Rules is titled “Progress Certificate” and contains a complicated formula:</p> $((A - C) * B) - E + D + F - G$ <p>Further specific comments on section 9 include:</p> <ul style="list-style-type: none"> <li>As drafted, it appears that all of A to G are defined as negative numbers. It seems unlikely that is the intention.</li> <li>Section 9.1(a)(ii) defines “B” as the percentage of the WUC completed in accordance with the Contract, ignoring all Milestones and any “<i>any WUC which is not in accordance with the Contract</i>”.</li> </ul> <p>This is limited to the WUC completed and so does not take into account adjustments to the Contract Sum pursuant to the Contract (such as Variations, suspension costs, latent conditions costs etc). As shown below, the effect is to delay receipt of these payments.</p> <p>Further, the exclusion of any payment for “<i>any WUC which is not in accordance with the Contract</i>” is both unreasonable (given the other mechanisms in the Contract and at law for dealing with such matters) and creates uncertainty as to how it is to be applied. For example, assume that an item of the WUC requires painting. Does that mean that no payment is permitted for the whole item until it has been painted?</p> <p>Another example might be an item valued at \$100,000 has a minor defect that will cost less than \$1,000 to rectify. Does this mean that the Contractor cannot claim any payment for item until the \$1,000?</p> <ul style="list-style-type: none"> <li>Section 9.1(a)(iii) defines “C” as the total amount of all Milestone Payments provided for in the Contract.</li> </ul> <p>Accordingly, <math>((A - C) * B)</math> is the adjusted Contract Sum less the amount referable to Milestones, multiplied by the percentage of the WUC completed in accordance with the Contract (excluding Milestones).</p> <p>That is, the portion of the adjusted Contract Sum completed excluding Milestones. This distorts the effects of the adjustments to the Contract Sum pursuant to the Contract (such as Variations, suspension costs, latent conditions costs etc) as these are then spread out over the life of the Project, rather than being paid as they are incurred and assessed.</p>	<p>Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopt the applicable drafting in the Old Government Standard Form.</p> <p>Delete clause 37.2(d) and all references to the Valuation Rules in the Contract (including section 9 of Annexure Part K).</p> <p>See separate discussions on clauses 32A, 37.1 and 37.2.</p> <p>Ensure that the Superintendent’s responsibilities with respect to the provisions covered by section 9 of Annexure Part K are Certifying Functions.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>Section 9.1(a)(iv) defines “D” as the total amount of the Milestone Payments in respect of Milestones which have been completed in accordance with the Contract. See the discussion elsewhere regarding Milestones and clause 32A.</li> <li>Section 9.1(a)(vi) defines “F” as the value of any amounts which, in the opinion of the Superintendent, are due from the Principal to the Contractor. Given the comments above in relation to ((A – C) * B), it is unclear what is intended to be included here. If this are specific adjustments to the Contract Sum, then it seems that this would result in double-recovery by the Contractor.</li> <li>Section 9.1(c) then provides that the moneys due from the Principal to the Contractor or from the Contractor to the Principal shall be the amount resulting from the calculation described in Subclause 9.1(b). This drafting is inconsistent with clauses 37.2 and 37.2B which requires payment of the certified amount. This creates uncertainty if the amount certified differs from the calculation in Section 9.</li> </ul> <p>In summary, this is both unduly complex and will unreasonably delay payments of amounts that the Contractor would otherwise be entitled to receive under clause 37.</p>	
83.	Valuation Rules – Contractor’s Delay Damages	34.9 Sect 10	<p>Clause 34.9 recognises that the delay damages should be the “<i>cost to the Contractor of the delay</i>”, but then applies section 10 of the Valuation Rules to <b>unreasonably limit</b> the amount recoverable.</p> <p>Section 10.1(a) repeats the reference in clause 34.9 to the daily limit in Item 142. As discussed elsewhere, I do not consider that imposing a daily limit on a Contractor’s entitlement to recover its delay losses caused by Compensable Causes is reasonable.</p> <p>Section 10.1(b) contains a material limitation on the amount recoverable by the Contractor for delay damages (up to the daily limit) to the “Direct Costs” (as defined) plus an “Allowance” (as defined) equal to 7.5% of the Direct Costs (subject the “Overhead Allowance” in Item 15).</p> <p>Consequently, the amount of compensation under section 10 is limited to:</p> <ul style="list-style-type: none"> <li>Direct Cost - Actual time-related costs incurred by the Contractor with respect to materials, plant, labour and subcontractors, excluding amounts that fall within the definition of “Allowances” (ie. attendances, preliminaries and project administration costs). This is likely to be a small amount relative to the Contractor’s total time-related costs on a project.</li> <li>Allowance - 7.5% of the relatively small amount for Direct Cost as compensation for all onsite overheads, preliminaries and project administration costs (see discussion above as to the types of costs that are likely to be covered).</li> </ul>	<p>Delete all references to “Valuation Rules” and Annexure Part K, and either revert to the unamended AS4000-1997 or adopt the applicable drafting in the Old Government Standard Form.</p> <p>Delete the new 2<sup>nd</sup> paragraph of clause 34.9 and rely on the unamended clause 34.9.</p> <p>Ensure that the Superintendent’s responsibilities with respect to clause 34.9 are Certifying Functions.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><b>This will likely result in significant losses for the Contractor where it is delayed by Compensable Causes.</b></p> <p>For example, assume that the project has been suspended for the Principal’s convenience for 1 day and the total costs incurred by the Contractor on site is \$12,000, broken down as follows:</p> <ul style="list-style-type: none"> <li>• Supervision - \$5,50</li> <li>• Site Compound (including services, small tools and materials, ITC etc)- \$1,000</li> <li>• Insurances, guarantees &amp; miscellaneous preliminaries - \$500</li> <li>• Plant (Stand down) - \$3,000</li> <li>• Subcontractors - \$2,000</li> </ul> <p>Based on my understanding of how the definitions of Direct Cost and Allowance may be interpreted, the Direct Cost are only \$5,000.</p> <p>Consequently, the total amount recoverable under section 10 for the 1 day of delay damages would be \$5,525 as follows:</p> <p>= \$5,000.00 + (7.5% of \$7,000.00).            = \$5,000.00 + \$525            = \$5,525.</p> <p><b>As can be seen, in this example, the Contractor has under-recovered by \$6,475 (more than 50% of its costs) because it is only entitled to recover \$525 as compensation for \$7,000 of real costs that it incurred.</b></p> <p>On many civil projects, the proportion of Direct Costs to onsite overheads is even less than the above example, as it includes a relatively large proportion of plant and subcontract costs, which are assumed as Direct Costs.</p>	
<b>Payment Terms</b>				
84.	Progress Payments – General	37	<p>It is well understood across the industry that the commercial purpose that underpins clause 37 of AS4000-1997:</p> <p><i>“is the need to ensure that the builder has sufficient liquidity throughout the course of the work to make payments as they became due to suppliers and sub- contractors, and otherwise maintain its financial viability until the completion of the works” (see Digga Excavations Tas Pty Ltd v Linear Capital Pty Ltd [2023] TASSC 22 per Brett J at [51]).</i></p> <p>This is important when considering the changes to the progress payment regime from AS4000-1997 and the Old Government Standard Form i.</p>	Note

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
85.	Progress claims Milestone Payments	32A 37.1	<p>Clause 37.1 contains two new paragraphs:</p> <ul style="list-style-type: none"> <li>2<sup>nd</sup> paragraph – Refers to Milestone Payments. See separate discussion below (under “Time &amp; Completion”) with respect to Milestones and Milestone Payments.</li> <li>5<sup>th</sup> paragraph – Specifies additional content and obligations with respect to each “progress claim” (cf. the amended clause 42.1 of the Old Government Standard Form).</li> </ul> <p>I have the following concerns with the new 5<sup>th</sup> paragraph:</p> <ul style="list-style-type: none"> <li>Clause 37.1(a) – It is unclear what further information would ever be reasonable in these circumstances. There also appear to be words missing at the end, as it does not specify where the required information is set out. It is presumed that it is intended to refer to Item 149.</li> <li>Clause 37.1(b) – It is also unclear why it is necessary to give the Superintendent the right to approve the form of progress claim. If the Principal has a preferred form for payment claims, it can be incorporated as another Annexure. This provision adds further unnecessary administration and potential constraints on the Contractor with respect to progress claims, which must also be understood in the context of clauses 1.2(m), 1.2(n), 20.1(b) and 45.5 impacting approvals of the Superintendent, which are addressed elsewhere.</li> <li>Clauses 37.1(c) and (e) – These repeat the (now) 4<sup>th</sup> paragraph, but clause 37.1(e) uses “shall”, whilst the 4<sup>th</sup> paragraph uses “may”.</li> <li>Clause 37.1(d) provides that “<i>if indicated at Item 150, or if otherwise Directed by the Superintendent, be accompanied by a Statutory Declaration</i>”.</li> </ul> <p>Clause 38.1 already contains a requirement to provide documentary evidence of payment of workers and subcontractors. Clause 37.1(d) should be moved to clause 38.1 so that the Statutory Declaration is stated to satisfy the documentary evidence requirement.</p> <p>Further, Annexure Part HH is stated to include an approved form of Statutory Declaration, although in DSG RFT 3449 it is Annexure Part Z That form is generally reasonable, although I have difficulty understanding what is intended by the following phrase in paragraph 6 in the broader context of the Statutory Declaration (particularly paragraph 5):</p> <p style="padding-left: 40px;"><i>“in in respect of invoices rendered up until and forming part of the Progress Claim before the present Progress Claim”</i></p> <p>As it is not clear and appears to be unnecessary to achieve the purpose of the Statutory Declaration, it should be clarified or deleted.</p>	<p>Amend the 1<sup>st</sup> paragraph of clause 37.1 as follows:</p> <p style="padding-left: 40px;"><i>“Subject to clause 37.1A, the Contractor shall claim payment progressively in accordance with Item 146”.</i></p> <p>Delete the 2<sup>nd</sup> paragraph of clause 37.1 and replace clause 37.1A (which I discuss elsewhere) with:</p> <p style="padding-left: 40px;"><b>“37.1A Milestone Payments</b> <i>Upon the issue of a Certificate of Milestone Completion with respect to a Milestone, the Contractor may immediately submit a progress claim for the applicable Milestone Payment in writing to the Superintendent”.</i></p> <p>Delete clauses 37.1(a), 37.1(b), 37.1(c) and 37.1 (e).</p> <p>Move clause 37.1(d) to clause 38.1 and amend clause 38.1 appropriately to make it clear that the Statutory Declaration satisfies clause 38.1.</p> <p>Clarify or delete the phrase “<i>in in respect of invoices rendered up until and forming part of the Progress Claim before the present Progress Claim</i>” in paragraph 6 of the form of Statutory Declaration in Annexure Part Z.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
86.	Payment Claim warranties	37.1A	<p><b>This entirely new provision, with no equivalent in the Old Government Standard Form, is an unreasonable exclusion clause (time-bar).</b></p> <p>It provides that every time the Contractor makes a “progress claim”, it <b>automatically</b>:</p> <ul style="list-style-type: none"> <li>• Provides the contractual warranties to the Principal set out in clause 37.1A(a) (as discussed below).</li> </ul> <p>As discussed above, a “warranty” in this context is a contractually binding statement of present fact (as at the time of entry into the Contract) and of future intention that gives the other party various remedies (ranging from common law damages to a right to terminate the contract) should either prove to be incorrect.</p> <ul style="list-style-type: none"> <li>• Releases the Principal from “<b>any Claims</b>” that are then known by the Contractor, but which are not disclosed in the progress claim or in previous progress claims.</li> </ul> <p>The warranties in clause 37.1(a) are:</p> <ul style="list-style-type: none"> <li>• Clause 37.1A(a)(i) – “<i>WUC the subject of the progress claim has been carried out and completed in accordance with the Contract</i>”.</li> </ul> <p>This is inconsistent with the following important principles reflected in the Contract:</p> <ul style="list-style-type: none"> <li>○ The Contractor has until the Date for Practical Completion to achieve Practical Completion of the Works (ie. when the Works are complete except for minor Defects).</li> <li>○ Neither a Progress Certificate nor a payment of moneys shall be evidence that the subject WUC has been carried out satisfactorily and all payments other than Final Payment shall be payment on account only (clause 37.2B).</li> <li>○ The Principal already has express remedies with respect to defects (in particular clauses 29.3 to 29.5).</li> </ul> <p>Further, the warranty is absolute - the Contractor will breach it even if it is unaware that there are Defects (ie. latent defects).</p> <ul style="list-style-type: none"> <li>• Clause 37.1A(a)(ii) – “<i>the Contractor has complied with all of its obligations in relation to payment of suppliers, subcontractors and employees in respect of the work and materials incorporated in the WUC or on the Site</i>”.</li> </ul> <p>This is already addressed by the requirement to provide a Statutory Declaration and clause 38.1 (discussed above).</p> <ul style="list-style-type: none"> <li>• Clause 37.1A(a)(iii) – “<i>the Contractor shall not have any Claim against the Principal (which claims are then known to the Contractor) which are not disclosed in the progress claim (or in any previous progress claim)</i>”.</li> </ul> <p>The purpose of this warranty is to “backstop” the release and exclusion (time bar) in clause 37.1A(b) so that, if for some reason that is unenforceable, the</p>	Delete clause 37.1A in its entirety.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>Principal has a right to claim damages from the Contractor to the value of the Claim.</p> <p>The “release” in clause 37.1A then operates as <b>an additional exclusion (time-bar)</b> with respect to <b>any “Claims”</b> against the Principal which are:</p> <ul style="list-style-type: none"> <li>• “then known to the Contractor (or could have been known by reasonably competent contractor)”; and</li> <li>• “not disclosed in the progress claim (or have not been disclosed in any previous progress claim)”.</li> </ul> <p>Claim” is defined in clause 1.1 in an exceptionally broad manner to mean:  <i>“any allegation, debt, cause of action, liability, claim, proceeding, suit or demand of any nature however arising and whether present or future, fixed or unascertained, actual or contingent, and whether at law, in equity, under statute or otherwise”.</i></p> <p>This is likely to include non-financial claims, such as EOT, which makes it difficult to reconcile with the drafting of clause 37.1A. It may also include claims for payment for WUC completed to the date of the progress claim (depending on whether the contract is interpreted as an entire contract or not for these purposes).</p> <p>Given the other provisions in the Contract dealing with notification of Claims, there is no reasonable justification for this provision.</p> <p>Finally, it is to be noted that there is no equivalent exclusion on the Principal, barring it from claiming amounts from the Contractor that the Superintendent has not identified in clause 37.2(b).</p>	
87.	Certificates	37.2	<p>Clause 37 includes two changes to clause 37.2 of AS4000-1997 and the equivalent clause 42.1 of the Old Government Standard Form:</p> <ul style="list-style-type: none"> <li>• An entirely new 2<sup>nd</sup> paragraph has been inserted incorporating new clauses 37.2(c) and 37.2(d): <ul style="list-style-type: none"> <li>○ Clause 37.2(c) is essentially the same as the 6<sup>th</sup> paragraph of clause 32A dealing with Milestone Payments. As discussed elsewhere, this is unclear and unnecessary.</li> <li>○ Clause 37.2(d) requires the Superintendent to make its determinations in accordance with the Valuation Rules.  The specific concerns with the Valuation Rules, including section 9 of Annexure Part K, are addressed in detail above.</li> </ul> </li> <li>• The last paragraph of clause 37.2 has been deleted (the equivalent provision was in clause 42.1 of the Old Government Standard Form), which ordinarily provides:</li> </ul>	<p>All amendments to clause 37.2 should be reversed such that this provision reflects the unamended provision of AS4000-1997.</p> <p>Ensure that the Superintendent’s responsibilities with respect to clause 37.2 are Certifying Functions</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><i>“If the Superintendent does not issue the Progress Certificate within 14 days of receiving a progress claim in accordance with Subclause 37.1, that progress claim shall be deemed to be the relevant Progress Certificate”.</i></p> <p>Given the importance of cashflow to a Contractor (including impacting its ability to pay its workers and subcontractors), this provision provides an important protection against a failure of the Superintendent to comply with clause 37.2. It is also consistent with the Security of Payment Act. See also the discussion below regarding clause 37.2A.</p>	
88.	Tax Invoice	37.2A	<p>Clause 37.2A is a new provision (no equivalent in the old Government Standard Form) which states:</p> <p><i>“Following the provision of the certificate under paragraph (a) of Subclause 37.2 (and if there is such a certificate, a certificate under paragraph (b) of Subclause 37.2) the Contractor shall provide to the Superintendent and the Principal a tax invoice in the amount of the certificate under paragraph (a) of Subclause 37.2 (or, if relevant, the net amount of the two certificates) (certified amount).”</i></p> <p>Its purpose (when read in conjunction with the new clause 37.2B) is to make the Principal’s payment obligation now conditional upon receipt of a tax invoice, rather than just a progress certificate.</p> <p>Nevertheless, this provision is unworkable if the Superintendent fails to either certificate or only issues a certificate pursuant to clause 37.2(b). This is part of the problem with the deletion of the last paragraph of clause 37.2 (above).</p> <p>Clause 37.2A should be amended to reflect this scenario.</p>	Amend clause 37.2A to address the scenario where the Superintendent fails to either certificate or only issues a certificate pursuant to clause 37.2(b).
89.	Payment	37.2A (37.2B)	<p>The Contract currently includes two clauses 37.2A. This provision should be re-numbered as clause 37.2B. Clause 37.2B replaces the 4<sup>th</sup> paragraph of clause 42.1 of the Old Government Standard Form.</p> <p>For current purposes, the first two paragraphs state:</p> <p><i>“If the certified amount is positive, the Principal shall within 10 Business Days after receiving a tax invoice in the certified amount, pay to the Contractor the certified amount <b>(less any deductions or set offs the Principal is entitled to make)</b>.</i></p> <p><i>If the certified amount is negative, the Contractor shall pay the certified amount to the Principal within 10 Business Days of receiving the certificates.”</i> (emphasis added)</p> <p>The highlighted wording in the 1<sup>st</sup> paragraph is unreasonable and may create uncertainty.</p>	<p>Re-number as clause 37.2B.</p> <p>Delete the phrase <i>“(less any deductions or set offs the Principal is entitled to make)”</i> in the 1<sup>st</sup> paragraph of clause 37.2B.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			The amount payable should be as certified (as recognised by the caselaw), particularly as any moneys due from the Contractor to the Principal pursuant to the Contract a may be included in the certificate under clause 37.2(b).	
90.	Adjustment of certificates	37.7	<p>Clause 37.7 states:</p> <p><i>“If the Superintendent becomes aware of an error in any certificate issued under Clause 37 or comes to the view that any such certificate is based on incorrect or incomplete information the Superintendent may issue a further certificate which shall stand in place of the original certificate.”</i></p> <p>This is to be contrasted with clause 42.2 of the Old Government Standard Form, which stated:</p> <p><i>“At any time and from time to time, the Superintendent may by a further certificate correct any error which has been discovered in any previous certificate, other than a Certificate of Practical Completion or Final Certificate.”</i></p> <p>The different form of clause 37.7 creates is unreasonable and will have unintended consequences, including:</p> <ul style="list-style-type: none"> <li>• The failure to expressly exclude the Final Certificate (which is issued under clause 37), means that the Superintendent is given the authority to issue a further Final Certificate despite the operation of clause 37.4.</li> <li>• Clause 37.7 also permits the Superintendent to issue a further certificate simply if it <i>“comes to the view that any such certificate is based on incorrect or incomplete information”</i>. This goes far beyond correcting an error, particularly given the effect of clause 37.2B.</li> <li>• Finally, it is unclear whether the phrase <i>“which shall stand in place of the original certificate”</i> has the effect of deeming the earlier certificate to have never existed. This is likely to create uncertainty for those administering the contract.</li> </ul> <p>Finally, note the effect of clauses 1.2(m), 1.2(n), 20 and 45.5 on the Superintendent’s discretion to issue a corrected certificate.</p>	<p>Amend clause 37.7 to read:</p> <p><i>“If the Superintendent becomes aware of an error in any certificate issued under Clause 37 (other than the Final Certificate) the Superintendent may issue a further certificate to correct the error.”</i></p> <p>Make the necessary changes to reflect the deletion of clauses 1.2(m), 1.2(n) and 45.5 and the discussion with respect to clause 20.1(b) and the Certifying Functions above.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Other</b>				
91.	Interest on Overdue Payments	37.5 & Item 153	<p>Clause 37.5 is the unamended AS4000-1997. Item 153 provides that the default interest rate is <b>18% per annum</b>.</p> <p>This appears excessive as a default position. For example, the current post-judgment interest rate pursuant to rule 5A(3) of the <i>Supreme Court Rules 2000</i> (Tas) is currently 10.35%.</p> <p>The previous approach adopted by DSG was usually:  <i>“The applicable small business “small overdraft” rate published by the Reserve Bank of Australia or \$50 (whatever is the greater).”</i></p>	Adopt a fixed interest rate based on the amount for post-judgment interest rate pursuant to rule 5A(3) of the <i>Supreme Court Rules 2000</i> (Tas)
92.	Principal’s rights of Set Off	37.6	<p>Whilst this is the unamended provision from AS4000-1997, it does permit the Principal to set off amounts due and owing to it by the Contractor under other contracts or otherwise.</p> <p>This is a rare example of the unamended AS4000-1997 containing unreasonable provisions.</p>	Note
93.	GST	11F	<p>This provision is materially the same as clause 14.5 of the old Government Standard Form Contract, except that the definition of “Additional Amount” is missing the word “GST” before “payable”.</p> <p>It would also be preferable to also include the usual “Tax Adjustment Amount” provision to the following effect:  <i>“If the Additional Amount paid to the Supplier (whether because of an adjustment or otherwise):</i>                      (c) <i>is more than the GST on the supply, then the Supplier must refund the excess to the recipient; or</i>                      (d) <i>is less than the GST on the supply, then the recipient must pay the deficiency to the Supplier.”</i></p>	<p>Amend the definition of “Additional Amount” by adding the word “GST”.</p> <p>Add the usual “Tax Adjustment Amount” provision.</p>
94.	Payment of workers and subcontractors	38	<p>As discussed above, clauses 38.1 and 38.2 appear to overlap (in an inconsistent manner) with clause 37.1(d).</p> <p>Further, as discussed below, clause 38.3 also overlaps with clause 37A.5 (in an inconsistent manner).</p>	Move clause 37.1(d) to clause 38.1 and amend clause 38.1 appropriately to make it clear that the Statutory Declaration satisfies clause 38.1.
<b>Security of Payment Legislation</b>				
95.	Security of Payment Service of Notices	37A.1 37A.2	<p>Clause 37A deals with various aspects of the impact of the <i>Building and Construction Industry Security of Payment Act 2009</i> (Tas) defined in section 37A.1 as “Security of Payment Act”.</p>	Delete clause 37A.2(b)

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
	Payment Claim Sub-contractor Suspension	37A.3 37A.5	<p>Only clauses 37A.4 and 37A.6 have equivalent provisions in the Old Government Standard Form.</p> <p>With respect to clauses 37A.1 to 37A.3:</p> <ul style="list-style-type: none"> <li>Clause 37A.2 deals with service of all written communications in relation to the Security of Payment Act.</li> </ul> <p>Clause 37A.2(b) should be deleted as it covers information that the Principal / Superintendent already has, information associated with routine contract administration and information that is confidential (such as correspondence between the Contractor and a subcontractor, including payment claims and payment schedules).</p> <ul style="list-style-type: none"> <li>Clause 37A.3 deals with “payment claims” for the purposes of the Security of Payment Act.</li> </ul> <p>The 2<sup>nd</sup> paragraph in relation to retention should not be in clause 37A, as the deduction of retention (if any) from progress claims should be certified by Superintendent as per clause 37.2(b) and the Principal must pay the amount certified.</p> <ul style="list-style-type: none"> <li>Clause 37A.5 overlaps in an inconsistent manner with clause 38.3, in particular, the limitations in the first paragraph and the last paragraph.</li> </ul>	<p>Delete the 2<sup>nd</sup> paragraph of clause 37.2A, and if necessary, clarify clause 37.2(b) by reference to Item 42.</p> <p>Delete clause 37A.5</p>
96.	Suspension of Works under the Security of Payment Act	37A.4	<p>Clause 37A.4 is essentially the same as clause 50.4 of the Old Government Standard Form, including the exclusion clause in the 2<sup>nd</sup> paragraph, which states:</p> <p><i>“Except where otherwise required by the Security of Payment Act, the Principal shall not be liable for any costs, expenses, damages, losses or other liability suffered or incurred by the Contractor as a result of the suspension.”</i></p> <p>Section 29 of the Security of Payment Act deals with suspension of the WUC where the Principal fails to make a payment to the Contractor as required by sections 19, 20 or 26. Only section 29(3) makes the Principal liable to the Contractor as a result of the suspension. The equivalent provision in the NSW legislation is section 27(2A).</p> <p>Significantly, section 29(3) does not provide for statutory compensation in all cases of suspension pursuant to the Act, only where the Contractor <i>“incurs loss or expenses as a result of the removal [by the Principal] from a contract, of a part of the work or supply”</i>.</p> <p>As noted in the Second Reading Speech in the NSW Parliament for the bill that introduced the equivalent provision:</p> <p><b><i>“if, as a consequence of the suspension, the respondent removes from the construction contract any part of the work or the supply of goods or services, the respondent is liable to pay the claimant’s loss or expense arising from such removal. That loss or expense can be included in a progress claim”</i></b>. (emphasis added)</p>	<p>Delete the 2<sup>nd</sup> paragraph and ensure that the rights to compensation pursuant to clauses 33.4 and 34.9 be extended to include suspension by the Contractor pursuant to the Security of Payment Act</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>The purpose was further explained by McDougall J in <i>Urban Traders v Paul Michael</i> [2009] NSWSC 1072 at [77]:</p> <p><i>“The remedy of suspension of work is part of the panoply of remedies given by the Act to builders and subcontractors to enforce their statutory right to prompt payment of progress claims. The right to suspend work would lose much of its efficacy if a proprietor could, with impunity and without cost, react to the suspension by withdrawing the work from the builder. Thus, s 27(2A) gives the builder a right to recover losses or expenses incurred as a result of the removal of any work; and s 13(3)(a) means that those losses or expenses can be made the subject of a payment claim and, in the event of dispute, an adjudication application.”</i> (emphasis added)</p> <p>Accordingly, the entitlement to compensation under the Security of Payment Act following suspension by the Contractor pursuant to its statutory right is very limited and as such, it is unreasonable to limit the Contractor’s rights with respect to suspension to the remedy available under the Act.</p>	
97.	Security of payment – Indemnity	37A.6	<p>Clause 37A.6 is essentially the same as clause 50.6 of the Old Government Standard Form.</p> <p>It is unclear why this indemnity is reasonably necessary in order to protect any legitimate interests of the Principal that are not otherwise already addressed under the Contract.</p> <p>The Contractor is already fully responsible for the performance of all of its subcontractors. If a subcontractor suspends the performance of its works and that causes the Contractor to fail to achieve Practical Completion by the Date for Practical Completion, the Principal is entitled to liquidated damages. If the suspension causes the Contractor to breach any other obligations of the Contract, the Principal already has its remedies.</p> <p>As such, there is also a potential conflict with the other remedies of the Principal (such as delay liquidated damages).</p>	Delete clause 37A.6.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Final Completion &amp; Release</b>				
98.	Final Payment Claim and certificate - general	37.4	<p>The amendments to clause 37.4 materially change the Contractor’s substantive and procedural risk position compared with the equivalent provisions in the Old Government Standard Form (clauses 42.7 and 42.8).</p> <p>The changes include:</p> <ul style="list-style-type: none"> <li>New 2<sup>nd</sup> and 3<sup>rd</sup> paragraphs – Similar to the changes to clause 34.6 (Practical Completion) discussed elsewhere, these paragraphs are alternatives that seek to achieve the same outcome by different avenues (ie. by way of a Deed of Release (Final Certificate) or where no Deed of Release is required, by express contractual warranties and releases).</li> <li>New 4<sup>th</sup> paragraph – This specifies the Superintendent’s obligation to issue the Final Certificate, including timing and conditions.</li> <li>New 5<sup>th</sup> paragraph – This deals with Defects that have not been rectified when the Final Payment Claim has been issued by the Contractor.</li> <li>New clause 37.4(j) – This introduces a new exception to the accord and satisfaction recorded by the Final Certificate.</li> </ul> <p>Each of these is addressed below.</p>	See proposed changes to clause 37.4 addressed below.
99.	Final Payment Claim and certificate – Deed of Release (Final Certificate) and Warranties	37.4 2 <sup>nd</sup> & 3 <sup>rd</sup> paragraphs	<p>As noted, the entirely new 2<sup>nd</sup> and 3<sup>rd</sup> paragraphs of clause 37.4 (which have no equivalent in the Old Government Standard Form) seek to achieve the same outcome (<b>exclusion</b> of potential Claims by the Contractor) by different avenues as follows:</p> <ul style="list-style-type: none"> <li>2<sup>nd</sup> paragraph - If indicated at Item 152, the Contractor must provide to the Superintendent a duly completed Deed of Release (Final Certificate) as a condition of giving the Final Payment Claim. The default position under Item 152 is “<i>If no selection is made, ‘Deed Required’ is taken to be selected.</i>”</li> <li>3<sup>rd</sup> paragraph - If the Contractor is not required to provide a Deed of Release (Final Certificate), then by submitting a Final Payment Claim it <b>automatically</b>: <ul style="list-style-type: none"> <li>Provides the contractual <b>warranties</b> to the Principal set out in clauses 37.4(a) and (b) (as discussed below).</li> </ul> <p>As discussed above, a “warranty” in this context is a contractually binding statement of present fact (as at the time of entry into the Contract) and of future intention that gives the other party various remedies (ranging from common law damages to a right to terminate the contract) should either prove to be incorrect.</p> </li> </ul>	<p>Delete 2<sup>nd</sup> and 3<sup>rd</sup> paragraphs of clause 37.4, Item 152 and Annexure Part V.</p> <p>As an alternative, it would not be unreasonable to insert the drafting from the last paragraph of clause 42.7 of the Old Government Standard Form should be inserted as follows:</p> <p><i>“After the expiration of the period for lodging a Final Payment Claim, any claim which the Contractor could have made against the Principal and has not been made shall be barred.”</i></p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>○ <b>Releases</b> the Principal from “<i>all Claims which the Contractor has in connection with the Contract other than those claims identified in the Final Payment Claim</i>”.</li> </ul> <p>In my opinion, there is no reasonable basis for incorporating these paragraphs. In particular, I note:</p> <ul style="list-style-type: none"> <li>• They operate as another new, one-sided, exclusion clause (time bar).</li> <li>• They operate at the time of the Final Payment Claim. However, at that stage, it may not be possible to know what claims need to be preserved or the maximum amount of such amounts until the Superintendent issues the Final Certificate.</li> <li>• In my opinion, the unamended part of clause 37.4 of the Contract already adequately addresses most of the State’s legitimate interests, including: <ul style="list-style-type: none"> <li>○ 1<sup>st</sup> paragraph requires the Final Payment Claim to be “<i>a progress claim together with all other claims whatsoever in connection with the subject matter of the Contract</i>”.</li> <li>○ The Final Certificate is conclusive evidence of accord and satisfaction, and in discharge of each party’s obligations in connection with the subject matter of the Contract except for the specific matters listed under the last paragraph.</li> </ul> </li> <li>• With respect to the form of Deed of Release in Annexure Part V (not Part DD), the warranties (clause 2) and the Indemnity (clause 4) create entirely new rights for the Principal which it does not otherwise have under the Contract and undermines the effect of last paragraph of clause 37.4. Accordingly, the Deed has two effects: <ul style="list-style-type: none"> <li>○ It requires the Contractor to give up all rights and entitlements, notwithstanding the exceptions listed in the last paragraph of clause 37.4.</li> <li>○ It preserves all of the Principal’s rights and entitlements, notwithstanding the accord and satisfaction in clause 37.4.</li> </ul> </li> </ul> <p>With respect to the alternative warranties in the 3<sup>rd</sup> paragraph:</p> <ul style="list-style-type: none"> <li>• Clauses 37.4(a)(i) and (ii) – Given that clause 37.4(i) (unamended) acknowledges that there may be Defects or omissions in The Works which are not apparent at the time of the Final Certificate, it is unreasonable for the Contractor to provide an absolute warranty that none exists. Further, it is unclear why these provisions are reasonably necessary to protect any legitimate interests of the State.</li> <li>• Clause 37.4(a)(iii) – This is a “back stop” to the release in clause 37.4(b) and thus, is unreasonable for the same reasons.</li> <li>• Clause 37.4(b) – Whilst the current form of clause 37.4(b) is not reasonable in its breadth, it is acknowledged that the last paragraph of clause 42.7 of the Old Government Standard Form stated:</li> </ul>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><i>“After the expiration of the period for lodging a Final Payment Claim, any claim which the Contractor could have made against the Principal and has not been made shall be barred.”</i></p> <p>This wording reflects the possibility that claims may have been made by the Contractor before the Final Payment Claim and for which a Notice of Dispute may have already been served (which is reflected in the drafting of the (now) clause 37.4(l)). These should not be barred simply because the Contractor inadvertently failed to include them in the Final Payment Claim.</p>	
100.	Final Payment Claim and Certificate – Provision of the Final Certificate	37.4 4 <sup>th</sup> para	<p>The new 4<sup>th</sup> paragraph of clause 37.4 states:</p> <p><i>“Within 42 days after the later of:</i></p> <p><i>(c) the receipt by the Superintendent of:</i></p> <p style="padding-left: 20px;"><i>(i) the Final Payment; and</i></p> <p style="padding-left: 20px;"><i>(ii) the Deed of Release (Final Certificate) (if required); and</i></p> <p><i>(d) the Superintendent being satisfied that:</i></p> <p style="padding-left: 20px;"><i>(i) all Defects have been rectified; or</i></p> <p style="padding-left: 20px;"><i>(ii) any Defects which have not been rectified have been dealt with through the application of Clause 29,</i></p> <p><i>the Superintendent shall issue to both the Contractor and the Principal a Final Certificate evidencing the moneys finally due and payable between the Contractor and the Principal on any account whatsoever in connection with the subject matter of the Contract.”</i></p> <p>This replaces the 1<sup>st</sup> paragraph of the Old Government Standard Form and the 2<sup>nd</sup> paragraph of the unamended AS4000-1997. As noted already, neither of these provisions contain as conditions to the issue of the Final Certificate the following conditions in the new 4<sup>th</sup> paragraph of clause 37.4:</p> <ul style="list-style-type: none"> <li>• A requirement for a Deed of Release (Final Certificate) or the warranties and release referred to above.</li> </ul> <p>Given the comments above regarding the Deed of Release, clause 37.4(c)(i) should be deleted.</p> <ul style="list-style-type: none"> <li>• A requirement that the Superintendent is satisfied that all Defects (whether patent or latent) have been rectified or have been dealt with through clause 29 (Clause 37.4(d)).</li> </ul> <p>This requirement is both unreasonable and unworkable, including because:</p> <ul style="list-style-type: none"> <li>○ The choice of alternatives in clauses 34.7(d)(i) and (ii) is entirely within the Superintendent and Principal’s control.</li> <li>○ The rights of the Superintendent under clauses 29.3 and 29.4 can only be exercised <b>before</b> the expiry of the last Defects Liability Period, and the</li> </ul>	The new 4 <sup>th</sup> and 5 <sup>th</sup> paragraphs should be deleted and returned to the 2 <sup>nd</sup> paragraph of the unamended AS4000-1997.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>Contractor’s rights and obligations under clause 35 also are limited to the Defects Liability Period.</p> <p>Accordingly, if these conditions are not met by the end of the last Defects Liability Period, they can never be met.</p> <ul style="list-style-type: none"> <li>○ Whether the Superintendent is “<i>satisfied</i>” is a matter of “absolute discretion” due to clauses 1.2(m), 1.2(n), 20 and 45.5, noting that clause 37.4 is not a “Certifying Function”. In fact, there is no requirement for the Superintendent to even consider whether it is so satisfied, meaning that they may delay the Final Certificate indefinitely.</li> <li>○ How could the Superintendent ever be satisfied that are no latent defects, given by definition they are not apparent at the relevant time? In fact, the possibility of Defects remaining after the issue of the Final Certificate is expressly contemplated in the last paragraph of clause 37.4 (particularly “latent defects” in the current clause 37.4(i)). How could the Superintendent ever be sufficiently satisfied?</li> <li>○ For the reasons discussed in more detail with respect to the new 5<sup>th</sup> paragraph (below), the Principal already has adequate and reasonable protection with respect to Defects that are not rectified at the end of the Defects Liability Period.</li> </ul> <p>Finally, assuming clauses 37.4(c)(ii) and 37.4(d) are deleted, the timing of when the Superintendent must issue the Final Certificate is now 42 days after the receipt by the Superintendent of the Final Payment Claim (clause 37.4(c)(i)). This should be compared with:</p> <ul style="list-style-type: none"> <li>• 1<sup>st</sup> paragraph of clause 42.8 of the Old Government Standard Form:  <i>“Within <b>14 days</b> after receipt of the Contractor's Final Payment Claim or, where the Contractor fails to lodge such claim, the expiration of the period specified in Clause 42.7 for the lodgement of the Final Payment Claim by the Contractor ...”</i></li> <li>• 2<sup>nd</sup> paragraph of unamended clause 37.4 of AS4000-1997:  <i>“Within 42 days after the expiry of the last Defects Liability Period</i></li> </ul> <p>The timing of the Final Certificate is important for many reasons including the return of the balance of Security (Clause 5.4B), payment of the Final Payment Claim (clause 37.4) and the mutual accord and satisfaction in the last paragraph of clause 37.4.</p> <p>Given that the period for issuing the Final Payment Claim is 28 days after the expiry of the last Defects Liability Period, clause 37.4(a)(i) unreasonably <b>delays the issue of the Final Certificate by 28 days</b>, leading to knock-on effects to the Contractor’s other rights under the Contract.</p>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
101.	Final Payment Claim and certificate - Defects	34.7 5 <sup>th</sup> para	<p>The entirely new 5<sup>th</sup> paragraph of clause 37.4 (with no equivalent in the Old Government Standard Form) states:</p> <p><i>“If, upon receipt of the Final Payment Claim, the Superintendent is of the view that not all Defects have been rectified or dealt with through the application of Clause 29:</i></p> <p><i>(e) the Superintendent shall, as soon as practicable, advise the parties of those Defects;</i></p> <p><i>(f) subject to paragraph (g) of this Subclause 37.4:</i></p> <p><i>(i) Clause 35 shall apply to those Defects;</i></p> <p><i>(ii) the Defects Liability Period shall be extended until those Defects have been rectified;</i></p> <p><i>(iii) this Subclause 37.4 shall again apply and continue to apply until the Superintendent is obliged to issue the Final Certificate;</i></p> <p><i>(g) the Principal may elect to preserve its rights in relation to the Defect and instruct the Superintendent to issue the Final Certificate (whereupon the Superintendent shall issue the Final Certificate and identify the Defect in the Final Certificate).”</i></p> <p>For similar reasons as discussed above regarding the new 4<sup>th</sup> paragraph, the new 5<sup>th</sup> paragraph is also unreasonable, unnecessary and unworkable.</p> <p>In particular, this is inconsistent with the framework for addressing Defects in the other provisions of the Contract as it applies upon receipt by the Superintendent of the Final Payment Claim, which is up to <b>28 days after the Defects Liability Period</b>. In this respect note:</p> <ul style="list-style-type: none"> <li>• Clauses 29.3 and 35 give both the Superintendent and the Contractor rights with respect to the rectification of defects up <b>until</b> the end of the last Defects Liability Period.</li> <li>• Clause 29.4 gives the Principal the right to accept defective works and deem a Variation as an alternative to having the defect rectified by on behalf of itself where the Contractor failed to do so <b>until</b> the end of the last Defects Liability Period.</li> </ul> <p>Once the Defects Liability Period has ended these provisions no longer have any operation. Despite this, the 5<sup>th</sup> paragraph of clause 37.4 seeks to re-enliven the Defects Liability Period 28 days after it has ended under the Contract.</p> <p>Further, the Principal has adequate and reasonable protection with respect to Defects that are not rectified at the end of the Defects Liability Period, including its rights to common law damages for breach, which can be prosecuted through the Dispute Resolution provisions of the contract, subject to the last paragraph of clause 37.4.</p>	Delete the new 5 <sup>th</sup> paragraph of clause 37.4.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			Of course, the parties are always free to agree (on an ad hoc basis) to resolve such a dispute by having the Contractor rectify such defects even after the end of the last Defects Liability Period.	
102.	Final Payment Claim and certificate – Accord and satisfaction	37.4(j)	<p>The last change to clause 37.4 is the addition of (the now) clause 37.4(i), which <b>excludes</b> from the mutual accord and satisfaction:</p> <p style="padding-left: 40px;"><i>“any Defect which was expressly identified in the Final Certificate or in respect of which the parties agreed their rights and obligations would not be altered by the issue of a Final Certificate”.</i></p> <p>The last paragraph of clause 34.7 is an important provision as it confirms that the Final Certificate creates finality and certainty for the parties, subject to limited exceptions.</p> <p>In my view, it is unreasonable to insert another exception in the form of clause 37.4(i) as the Principal already has adequate and reasonable protection with to defects:</p> <ul style="list-style-type: none"> <li>• Clause 37.4(i) excludes from the accord and satisfaction in the last paragraph of clause 37.4 “latent defects”.</li> <li>• Clause 37.4(l) permits the Principal to keep alive its rights in relation to such Defects by issuing a Notice of Dispute pursuant to clause 42 within 7 days after the Final Certificate (ie. 49 days after the expiry of the last Defects Liability Period).</li> </ul>	Delete (the now) clause 37.4(l).

CIVIL CONTRACTORS  
FEDERATION  
TASMANIA

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

### PART 5 – SECURITY, INSURANCE, RISK OF HARM & CONTRACTOR LIABILITY

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Security</b>				
<b>Performance Security</b>				
103.	Security – Definition	1.1	<p>The definition of “Security” in clause 1.1 includes three types of security:</p> <ul style="list-style-type: none"> <li>an unconditional undertaking from a financial institution (a “bank guarantee”) (paragraph (a));</li> <li>an unconditional undertaking issued by an insurer (an “insurance bond or unconditional performance bond”) (paragraph (b)); and</li> <li>retention monies (paragraph (c)).</li> </ul> <p>I have the following key concerns with this definition:</p> <ul style="list-style-type: none"> <li>Paragraphs (a), (b)(iii) &amp; (b)(iv) include references to approval by the Principal. Given clauses 1.2(m) and 45.5, the Principal may currently withhold or condition its approval in its “absolute discretion”.</li> <li>Paragraph (b) – It is unclear why the form in Annexure Part C (see comments below) is also the “approved form” for the insurance bonds. Is this a drafting oversight?</li> <li>Paragraph (b)(i) – The full meaning of the phrase “<i>is couched in terms that do not expose the Principal to any risk that it might be terminated for any reason during its term</i>” is unclear, but seems to be very wide in its potential application.</li> </ul> <p>The Principal should not expect to be indemnified against <b>any</b> risk where the Contract is terminated for “<i>any reason</i>”, which would include termination for Principal default, frustration and Principal’s convenience. This should be deleted.</p> <ul style="list-style-type: none"> <li>Paragraph (b)(ii) – It is unclear why this paragraph refers to “<i>the underwriter</i>” and whether that is intended to be an entity other than the issuer. The Principal’s rights of recourse must be limited to the issuer of the bond in accordance with its terms.</li> <li>Paragraph (b)(v) – The paragraph is ambiguous in its requirements. It would be unreasonable if it required the bond’s governing law to be Tasmania and it to be subject to the exclusive jurisdiction of the Tasmanian courts. This should be amended to refer to any laws and courts of any Australian jurisdiction.</li> <li>Annexure Part C – Whilst the specific form of guarantee or bond will usually depend on the issuer, the version in Annexure Part C is generally reasonable.</li> </ul>	<p>Amend the definition of “security”:</p> <ul style="list-style-type: none"> <li>Amend paragraphs (a), (b)(iii) and (b)(iv) to include “<i>(not to be unreasonably delayed, withheld or conditioned)</i>” after each reference to “approved by the Principal”.</li> <li>Amend paragraph (b)(i): <ul style="list-style-type: none"> <li>to include the form in Annexure Part C as the approved form; and</li> <li>delete the phrase “<i>is couched in terms that do not expose the Principal to any risk that it might be terminated for any reason during its term</i>”</li> </ul> </li> <li>Paragraph (b)(ii) – Replace the phrase “<i>the underwriter</i>” with “<i>the insurer</i>”.</li> <li>Paragraph (b)(v) – Replace with “<i>it is subject to the laws of, and legal action in, any State or the Commonwealth of Australia</i>”.</li> </ul> <p>Annexure Part C – The 3<sup>rd</sup> paragraph of the form of bond specifies three circumstances where the undertaking ceases to operate. For clarity and certainty, this should be specified as “<i>the earlier of</i>”.</p> <p>Make the necessary changes to reflect the deletion of clauses 1.2(m), 1.2(n) and 45.5 and the discussion with respect to clause 20.1(b) and the Certifying Functions above.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
104.	Security – Provision	5.1 Items 42, 43, 44, 45 & 49	<p>Note that, despite suggestions throughout clause 5 that Security might be provided by both parties, Item 49 states “<i>The Principal is not required to provide Security.</i>”</p> <p>The drafting of clause 5.1 and the applicable Items in Annexure part A are unnecessarily complex. Note:</p> <ul style="list-style-type: none"> <li>• There may be an opportunity to combine Items 42, 43, 44 and 45 in Annexure Part A.</li> <li>• Item 48 refers to “Contractor’s Security - Trigger for extra Security (Subclause 5.3B)”, but there is no clause 5.3B in the BAU version (and if there were, it would be unreasonable).</li> </ul> <p>Nonetheless, in DSG RFT 3449 this Item has been filled out, creating uncertainty and potential confusion.</p>	<p>Consider simplifying Items 42 to 45.</p> <p>Delete Item 48.</p>
105.	Security – Purpose	5.1A	<p>The entirely new clause 5.1A states:</p> <p><i>“The purpose of Security is to allocate to the Contractor the risk of being out of pocket in respect of any Claim by the Principal under or in connection with the Contract pending resolution of any dispute in relation to such Claim.”</i></p> <p>It is apparent from the caselaw makes that the effect of clause 5.1A is to undermine the clear precondition to recourse to security set out in clause 5.2, such that the Contractor’s ability to prevent the Principal from having recourse to the security where the precondition in clause 5.2 has not been satisfied will be limited.</p>	Delete clause 5.1A
106.	Security – Recourse	5.2	<p>The only changes from clause 5.2 of the unamended AS4000-1997 is the removal of the requirement for notification to the Contractor before recourse is had to the security.</p> <p>Whilst this aligns with the position under the Old Government Standard Form, that contract did not include the equivalent of clause 5.1A.</p> <p>Whilst most contractors would prefer notification before a Principal has recourse to security, the risk is usually low where the principal is a government because, in my experience, governments do not indiscriminately have recourse to security.</p>	Note

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
107.	Security – Change of Security	5.3	<p>The entirely new 2<sup>nd</sup> paragraph requires the Contractor to obtain the Principal’s consent to substitute retention money and other cash security held by the Principal with another approved form of Security, whereas clause 5.6 of the Old Government Standard Form left this to the Contractor’s discretion.</p> <p>In my view, this change is unnecessary and unreasonable:</p> <ul style="list-style-type: none"> <li>• It is unclear how the Principal would ever be any worse off as long as the form of Security satisfies the requirements of the defined term “Security”.</li> <li>• As the Contract is currently drafted (see clauses 1.2(m) and 45.5), the Principal may withhold its consent or give its consent subject to conditions in its “absolute discretion”.</li> </ul>	Delete the new 2 <sup>nd</sup> paragraph to clause 5.3.
108.	Security - Partial Return of Security – Separable Portions	5.4	<p>Clause 8(3) of the FIA in DSG RFT 3449 amends clause 5.4 so that it reads:  <i>“Subject to Subclause 5.4C, within 14 days of the issue of the Certificate of Practical Completion (not being a Conditional Certificate of Practical Completion) in relation to the last Separable Portion, the Principal’s entitlement to Security (other than in Item 46) shall be reduced by the percentage or amount in Item 47 as applicable and the reduction shall be released to the Contractor.”</i></p> <p>This is a significant change to the approach to release of the first part of Security where there are Separable Portions compared with the Old Government Standard Form.</p> <p>As discussed elsewhere in this table, the standard approach (as reflected in the Old Government Standard Form) is that the amount of Security is to be pro-rated based on the value of Separable Portions. The first part of the Security is then released when each relevant Separable Portion reaches Practical Completion.</p> <p>However, this drafting specifies that no Security is released and returned until the last Separable Portion reaches Practical Completion. The effect of this change can best be illustrated with an example:</p> <ul style="list-style-type: none"> <li>• Assume that there are 4 Separable Portions, each achieving Practical Completion 6 months apart. For ease, assume that the value of each Separable Portion is the same (ie. 25% of the total value).</li> <li>• Under the Old Government Standard Form, upon the achievement of Practical Completion of each Separable Portion, the Contractor would be entitled to receive back Security to the value of 25% of 50% of the Security held (ie. 12.5%).</li> <li>• So, the day before when the last Separable Portion reaches Practical Completion (18 months after the first Separable Portion), the total Security held by the Principal is only 62.5% of the total Security. This is to be compared with the current drafting, whereby the Principal still holds 100% at this time.</li> </ul>	Revert to the position under AS4000-1997 and the Old Government Standard Form regarding Security and Separable Portions, including the release and return of that Security.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			Further, see the separate discussion regarding “Conditional Certificates of Practical Completion” and clause 5.4C, both of which are unreasonable and should be deleted.	
109.	Security – Retention of Security	5.4C	<p>Clause 5.4C is an entirely new provision (no equivalent in the Old Government Standard Form) which states:</p> <p><i>“A party holding security may continue to hold that security where the Contract otherwise requires it to be released or following termination of the Contract for any reason, to the extent of the estimated value of any bona fide claim by the party under or in connection with the Contract.”</i></p> <p>This provision involves a material and unreasonable shift in the position with respect to the release of the performance security. As drafted, it permits the Principal to hold on to security indefinitely, simply because it considers that it has a “bona fide claim” (ie. a genuine claim which is not fraudulent or untenable), even if it has no entitlement to recourse to the security under clause 5.2 of the Contract (ie. where it “remains unpaid after the time for payment”).</p> <p>This leaves the release and return of security essentially within the hands of the Principal, causing increased risk and cost to the Contractor, in circumstances where the Contractor has no right to any recompense should the Principal’s “bona fide claim” not succeed.</p> <p>If the Principal has a right to recourse before the date for release and it chooses not to exercise that right, that is a matter for the Principal.</p> <p>Finally, whilst it appears to apply to Security provided by either party, as noted above, the Principal does not Security.</p>	Delete clause 5.4C and all other references in the Contract.
<b>Parent Company Guarantee</b>				
110.	Deed of Guarantee, Undertaking and Substitution	5.6	<p>The drafting of clause 5.6 is not sufficiently clear to achieve the parties’ commercial purpose (AS2124-1992 and AS4000-1997 have similar issues). For example:</p> <ul style="list-style-type: none"> <li>Clause 5.6 does not say who is to be the guarantor, although it might be inferred that it will be either the holding company or a related entity of the relevant party (which includes subsidiaries). Section 46 of the Corporations Act 2001 (Cth) defines “subsidiary” and section 50 defines “related body corporate” and section 50AAA defines “associated entity”.</li> <li>The amendment to clause 5.6(b) states:                     <p><i>“Where ... a form of Deed of Guarantee, Undertaking and Substitution was included in the tender documents or is included as Annexure Part GG to these Conditions of Contract, or it is so indicated at Item 50”.</i></p>                     Thus, a guarantee is required if one of the three conditions is satisfied. This can result in unintended consequences. For example, the DSG RFT 3449</li> </ul>	Replace clause 5.6 with a simple provision which provides that if Item 50 requires a Guarantee from a related body corporate identified in that item, the Contractor must provide it within 10 Business Days of the Date of Contract in the form set out in Annexure Part Y or as agreed between the parties.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>inserted “No” in Item 50, but contained a form of PCG in Annexure Part Y (not GG), creating an obvious conflict.</p> <p>I have not reviewed the Deed of Guarantee and Indemnity in Annexure Part Y</p>	
<b>Contractor Exclusions &amp; Limits of Liability</b>				
111.	Aggregate cap or limit on liability	N/A	<p>The Contract contains no mechanism for inserting an overall limit of liability for the Contractor. Thus, the liability of the Contractor is uncapped.</p> <p>This is the same as the Old Government Standard Form and is common where the Principal is a government body.</p>	Note
112.	Exclusion of Consequential loss	N/A	<p>The Contract contains no exclusion of liability to the Principal of consequential loss. This is the same as the Old Government Standard Form and is common where the Principal is a government body.</p>	Note
<b>Delay (Liquidated) Damages</b>				
113.	Liquidated damages – Practical Completion	34.7 & Item 138	<p>Clause 34.7 contains the unamended wording from AS4000-1997 providing for liquidated damages (at the rate in Item 138) for each day that the WUC does not reach Practical Completion by the Date for Practical Completion.</p> <p>Note that there will be separate liquidated damages for each Separable Portion (see discussion elsewhere), and there is no express statement that delay liquidated damages are the Principal’s sole remedy for delay.</p>	Note
114.	Liquidated damages – Other	32A, 34A.5 & 34B.4 Item 124	<p>See separate discussions with respect to liquidated damages for Milestones (clause 32A) and adjusted liquidated damages for Conditional Practical Completion (clause 34A.5) and Post Practical Completion Work and Documentation (clause 34B.4).</p>	Note
115.	Cap or limit on liquidated damages	N/A	<p>The Contract contains no mechanism for inserting a limit of liability for liquidated damages under clause 34.7 (cf. clause 35.7 of the Old Government Standard Form). Thus, the liability of the Contractor is uncapped.</p> <p>The risk will depend on the size of the daily liquidated damages rates, which are usually reasonably low on government projects.</p>	Note

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Risk of Harm</b>				
<b>Care of Works</b>				
116.	Care of WUC	14.1	<p>The only amendment to clause 14.1 is the entirely new last paragraph (no equivalent in the Old Government Standard Form) which states:</p> <p style="padding-left: 40px;"><i>“This Subclause shall apply to The Works and to the Existing Utilities in the same way as it applies to WUC.”</i></p> <p>It is unclear why it is necessary to state that Clause 14.1 applies to “The Works” as it appears to me that “The Works” is a subset of the “WUC”. See also amendment to clause 14.2.</p> <p>The more significant change, which involves a material shift in the substantive risk allocation under the Contract is the inclusion of “Existing Utilities” (defined in clause 1.1 as <i>“the Utilities existing as at the Date of Contract”</i>). There is no definition of “Utilities” in the Contract).</p> <p>In my opinion, there is no legitimate justification for extending the operation of clause 14.1 to any property that does not form part of the WUC.</p> <p>Pursuant to clause 14, the Contractor is responsible for damage and loss to the WUC <b>due to any cause</b>, other than the limited (and largely uninsurable) Excepted Risks.</p> <p>The commercial justification is that the Contractor has been engaged to deliver at Practical Completion the whole of the Works in a form that is reasonably capable of being used for their stated purpose. Any damage or loss to the Works before Practical Completion will prevent this from be satisfied.</p> <p>The same cannot be said for the Principal’s property or third party property that is not part of the WUC / The Works. This is why the indemnity in clause 15.1 is limited to loss and damage to property <b>caused by the Contractor</b>.</p> <p>Further, different insurances apply to the different obligations under clause 14.1 (Contract Works Insurance) and clause 15.1 (Public Liability Insurance).</p>	Delete the entire new last paragraph of clause 14.1
117.	Care of the Work in the absence of the Contractor	14.1A	<p>Clause 14.1A is an entirely new provision no equivalent in the Old Government Standard Form) which permits the Superintendent to act if it <i>“becomes aware of an emergency situation, or a situation which may give rise to loss of or damage to WUC or The Works or any part of WUC or The Works, or to loss of or damage to any property or to injury to any person”</i>.</p> <p>As this issue is already addressed by clauses 12 and 13 of the Contract (in an inconsistent manner), clause 14.1A should be deleted.</p>	Delete clause 14.1A.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
118.	Reinstatement	14.2 & Sect 8.3, Ann Part K	<p>Clause 14.2 is unamended from AS4000-1997. The 2<sup>nd</sup> paragraph includes:  <i>“In the event of loss or damage being caused by any of the Excepted Risks (whether or not in combination with other risks), the Contractor shall to the extent directed by the Superintendent, rectify the loss or damage and such rectification shall be a deemed Variation. ...”</i> (emphasis added)</p> <p>Key points to note:</p> <ul style="list-style-type: none"> <li>• Deemed Variation – As a “deemed Variation”, the impact is to be priced pursuant to clause 36.4 and section 8.3 of Annexure Part K (Valuation Rules). The issues with these provisions are dealt with in detail elsewhere and are repeated here.</li> <li>• EOT - Due to the amendments to the definition of “Qualifying Cause of Delay”, there is no EOT for delays caused by loss and damage to the WUC from Excepted Risks.</li> <li>• Delay damages – Delays caused by loss and damage to the WUC from Excepted Risks are also not a Compensable Cause and due to the introduction of the 3<sup>rd</sup> paragraph in clause 34.9 is to be excluded from recovery under clauses 14.2 and 36.4.</li> <li>• Certifying Function – The Superintendent’s valuation of the deemed Variation may not be a Certifying Function.</li> </ul>	Ensure necessary amendments are made to other provisions of the Contract including the definitions of “Qualifying Cause of Delay”, “Compensable Cause”, “Certifying Function” to ensure that the issues highlighted in the previous column are addressed.
<b>Indemnities from Contractor</b>				
119.	Indemnities	Various	<p>The Contract includes various provisions which contain express references to “indemnities” from the Contractor (these are in addition to the quasi-indemnities creating a debt due to the Principal such as clause 35).</p> <p>As discussed elsewhere, I consider the following to be unreasonable:</p> <ul style="list-style-type: none"> <li>• Clause 29.1C(iv) - Third party warranties.</li> <li>• Clause 37A.6 - Security of payment - As discussed elsewhere in this table, this indemnity is unreasonable.</li> </ul> <p>Further, as a general statement, the exception in the 3<sup>rd</sup> paragraph of clause 15.1 should be applied to all indemnities given by the Contractor.</p>	<p>Delete clauses 29.1C(iv) and 37A.6.</p> <p>Insert into each provision in which the Contractor provides an indemnity, word to the effect of:  <i>“but the indemnity shall be reduced proportionally to the extent that the act or omission of the Superintendent, the Principal or its consultants, agents or other contractors (not being employed by the Contractor) may have contributed to the ... loss or damage”</i></p>
<b>Other Liabilities of Contractor</b>				
120.	Proportionate Liability	41A	<p>Clause 41A is materially the same as clause 17A of the Old Government Standard Form.</p> <p>Part 9A of the <i>Civil Liability Act 2002</i> (Tas) provides that where the legislation applies each concurrent wrongdoer is generally only liable to the claimant for its</p>	<p>Delete clause 41A.</p> <p>As an alternative, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> paragraphs should be redrafted so that limitations, indemnity and obligations apply equally to both parties.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>share of responsibility for the loss (as determined by the courts). In Tasmania, it is possible to exclude the operation of the legislation by contract.</p> <p>A number of other provisions of the Contract will have the effect of excluding the legislation in the specific circumstances covered by the provision (for example, see clause 9.5 and the indemnities in clauses 10.1 and 15.1). In my view, it is reasonable to exclude the legislation in these circumstances.</p> <p>However, clause 41A is a “catch-all” provision that excludes the protection of the legislation to the Contractor where the Principal suffers applicable loss beyond that caused by subcontractors or otherwise covered by the indemnities under the Contract (eg. clauses 10.1 and 15.1).</p> <p>In my view, “catch-all” provisions such as clause 41A go beyond what is reasonable for the State Government as a principal under a construction contract.</p> <p>Further, I can see no legitimate reason why the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> paragraphs are limited to the Contractor, particularly where the 1<sup>st</sup> and 2<sup>nd</sup> paragraphs are drafted as applying to both parties, and where the State generally procures the third party liability insurance.</p>	
<b>Insurances</b>				
121.	Insurance of The Works – Principal to insure	16 Alternative 2	<p>Alternative 2 (Principal to insure) of clause 16 of As4000-1997 has been replaced with drafting which generally reflects the amended clauses 18.1 and 18.2 of the Old Government Standard Form. This is essentially the default position on DSG projects.</p> <p>A Contractor has 3 primary considerations with respect to works insurance:</p> <ul style="list-style-type: none"> <li>• It is essential that it that covers its responsibility under clause 14.1 (Care of the Works) for the period of those responsibilities.</li> <li>• That the Contractor recovers the costs that it incurs in procuring works insurance under the Contract (including extensions).</li> <li>• That any excess or deductible under the policy (being the portion of losses not recoverable from the insurers) are reasonable relative to the risk contingency built into the contract price.</li> </ul> <p>The presumption behind Alternative 2 is that a Principal may have greater purchasing power in the insurance industry than Contractors resulting in lower cost to the Principal if it procures the works insurance and “free issues’ it to the Contractor.</p> <p>With the above in mind, it is apparent that the amended Alternative 2 drafting places significant risk on the Contractor including:</p> <ul style="list-style-type: none"> <li>• The current drafting provides the Contractor with no certainty as to the terms of the policy before it enters into the Contract. In particular:</li> </ul>	<p>Replace the Alternative 2 drafting as follows:</p> <p><b><i>Alternative 2: Principal to insure</i></b></p> <p><i>Before the Date of Contract the Principal shall insure WUC in the terms of the policy or proposed policy which are identified at <u>Annexure Part W</u> and the Principal shall maintain such insurance until the Contractor ceases to be responsible under Subclause 14.1 for the care of anything.</i></p> <p><i>The policy number of the relevant policy is identified at Item 74, or will be advised to the Contractor, by the Principal as soon as practicable.</i></p> <p><i>If the terms of the final policy differ from the proposed policy, the Principal shall advise the Contractor of the terms of the final policy as soon as practicable.</i></p> <p><i>“If the terms of the policy procured by the Principal differs at any time from the terms of the proposed policy contained in the tender documents, and that causes the Contractor to incur more or less cost than otherwise would have been incurred, the difference shall be</i></p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>○ Item 73 includes the permanent statement that <i>“If no terms or proposed terms are identified here, the terms or proposed terms will be advised to the Contractor, by the Principal as soon as practicable.”</i> The baseline terms of the policy must be known and included in Annexure W (delete Item 73).</li> <li>○ 2<sup>nd</sup> sentence of 1<sup>st</sup> paragraph makes it clear that the Principal is free to change the terms of the “proposed policy” at its discretion. If the terms change after the Contractor submits its tender to materially reduce coverage or increase the deductible, causing the Contractor to take out additional coverage (as recognised by the 2<sup>nd</sup> paragraph), the additional costs cannot be recovered by the Contractor.</li> <li>• There is no certainty that the Principal will maintain the insurance the period of the Contractor’s responsibilities under clause 14.1 as the Principal’s obligation is simply to maintain the insurance is limited to <i>“the period provided for in the policy”</i> (cf. the last paragraph of Alternative 1 of clause 16 and the deleted wording in Alternative 2).</li> <li>• 3<sup>rd</sup> paragraph misunderstands the nature of a deductible / excess in the context of a contract works insurance policy - an excess or deductible is the amount of any insurance claim that the insurer’s indemnity does not cover. Excess clauses do <b>not</b> require actual payment of the excess by the insured, but are simply set off against the amount payable by the insurer (see Kelly &amp; Ball Principles of Insurance Law at [8.0130]) For example, if the damage to the works is \$10m and the deductible is \$50,000, whilst the Contractor will incur \$10m rectifying the damage, it will only receive \$9,950,000 from the insurer. As such, the 3<sup>rd</sup> paragraph must be deleted.</li> </ul>	<p><u>assessed by the Superintendent and added to or deducted from the Contract Sum.</u> <i>If the Contractor considers that the insurance cover taken out by the Principal is not sufficient to cover the Contractor’s liabilities, then the Contractor shall take out and pay for additional insurance as the Contractor considers necessary.”</i></p> <p>Delete Item 73 of Annexure Part A.</p>
122.	Public Liability Insurance	17 Alternative 2	<p>Alternative 2 (Principal to insure) of clause 17 of As4000-1997 has been replaced with drafting which generally reflects the amended clauses 19.1 and 19.2 of the Old Government Standard Form.</p> <p>The purpose of this policy is to primarily cover the Contractor for any liability to the Principal or third parties for the types of losses covered by the indemnity in clause 15.1.</p> <p>The wording adopted is materially the same as for Alternative 2 of clause 16, discussed above. Consequently, it has the same concerns.</p> <p>With respect to the period that the Principal must maintain the Public Liability Policy, A reasonable period for the Principal to maintain this policy is up to the issue of the Final Certificate.</p>	Amend Alternative 2 in a similar manner to Alternative 2 of clause 16.1 above.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
123.	Other Insurances	18A	<p>Clause 18A is a new provision which states:  <i>“Before commencing WUC, the Contractor shall take out the insurances referred to at item 83 or Annexure Part FF. The Contractor must maintain these insurances until the Date of Practical Completion.”</i></p> <p>Key issues with this provision:</p> <ul style="list-style-type: none"> <li>• There appears to be no Annexure Part FF in the BAU version – the correct reference appears to be Annexure Part X.</li> <li>• In DSG RFT 3449 the information in Annexure Part X also includes a section dealing with additional insurances <b>to be procured by the Principal</b>. This creates uncertainty. If the intention is to permit the Principal to provide additional insurances, a separate provision similar to Alternative 2 of clauses 16.1 and 16.2 will be required.</li> <li>• It also may be the case that it is not necessary to maintain the additional insurances until the Date of Practical Completion. This should be addressed in the relevant Annexure and the 2<sup>nd</sup> sentence of clause 18A should be deleted.</li> </ul>	<p>Insert a separate provision to deal with additional Principal-procured insurances.</p> <p>Delete the 2<sup>nd</sup> sentence of clause 18A and address the period that each additional insurance must be maintained in the relevant Annexure.</p>
124.	Proof of insurance	19.1	<p>The only amendment to clause 19.1 is the new 3<sup>rd</sup> paragraph which states:  <i>“The provision of evidence by the Contractor is an Access Precondition.”</i></p> <p>See the separate discussion with respect to “Access Preconditions”, Mobilisation Preconditions” and “Commencement Preconditions”.</p> <p>Given that the 1<sup>st</sup> paragraph commences with “Before the Contractor commences WUC”, it seems that it is more appropriate that it be a “Mobilisation Precondition”.</p> <p>The more important concern is that there is presently no equivalent with respect to whether the Principal has provided sufficient evidence of its insurances (which is significant given the likelihood of the State providing Contract Works and Public Liability insurances) In this case, it is my opinion that:</p> <ul style="list-style-type: none"> <li>• the Contractor should not be required to mobilise to Site or commence the WUC until the evidence is provided; and</li> <li>• any delay caused by the Principal’s failure must be a Qualifying Cause of Delay and a Compensable cause.</li> </ul>	<p>Replace the new 3<sup>rd</sup> paragraph with the following:  <i>“The provision of evidence by the Contractor is a Mobilisation Precondition.  The Contractor is not obliged to commence WUC on Site until the Principal has complied with its obligations under this clause 19.1 and, for the avoidance of doubt, any delay caused by the Principal’s will be a Qualifying Cause of Delay.”</i></p>
125.	Failure to produce proof of insurance	19.2	<p>It is essential that the certification of costs by the Superintendent pursuant to this clause are covered by clause 20.1(b) as “Certifying Functions.”</p>	<p>See discussion elsewhere.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
126.	Notices from or to insurer	19.3	<p>The amended wording of clause 19.3 of the Contract now states:</p> <p><i>“The party effecting insurance under Clauses 16, 17 or 18A, shall ensure that the other party receives at least 30 days’ notice of any cancellation or material change of any insurance policy effected under Clauses 16, 17 or 18A.”</i></p> <p>This is to be compared with the unamended clause 19.3 of AS4000-1997 and clause 21.3 of the Old Government Standard Form.</p> <p>This amendment is unreasonable when it is understood that most of the time the State will be the party procuring the insurances under clauses 16 and 17.</p> <p>Further, the amendment requiring 30 days’ notice of any cancellation or material change of any insurance policy may not be possible to obtain from insurers, particularly where cancellation is due to default.</p>	Revert to the unamended clause 19.3 of AS4000-1997 or clause 21.3 of the Old Government Standard Form.



## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

### PART 6 – CONSTRAINTS ON PERFORMING WUC

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Commencement of Work and Site Access</b>				
127.	“Site” “Site Plan”	1.1 24.3A	<p>The definition of “Site” is critical to the effective operation of the Contract. It is essential that it covers, at a minimum, all of the land upon which the permanent works are to be constructed.</p> <p><b>Definition of “Site”</b></p> <p>In this respect, the Old Government Standard Form defines the “Site” as:</p> <ul style="list-style-type: none"> <li>• “the lands and other places <b>to be made available</b>” to the Contractor by the Principal for the purpose of the Contract – this covers the land that is essential for the construction of the permanent works; and</li> <li>• “any other lands and places made available to the Contractor by the Principal for the purpose of the Contract” – this covers other lands and places that have been made available for that purpose (in addition to the land upon which the permanent works will be constructed).</li> </ul> <p>In contrast, the new definition in clause 1.1 is:</p> <p>“<b>Site</b> means the area described as such at Item 20, together with the lands and other places nominated by the Superintendent as forming the site and which are made available to the Contractor by the Principal for the purpose of the Contract”.</p> <p>Accordingly, the “Site” is now defined as being limited to:</p> <ul style="list-style-type: none"> <li>• The “area described as such at Item 20”, whilst Item 20 contains a text box and the following permanent statement:                      “If there is a Site Plan the area identified as such in the Site Plan, together with the other areas identified in the definition of the ‘Site’.”</li> <li>• “Site Plan” is defined in clause 1.1. as “the plan described as such at Item 19 or as described in or contained at Annexure Part R” (although the correct Annexure appears to be Part P),</li> <li>• Any other lands and places nominated by the Superintendent in its discretion.</li> </ul> <p>There is unnecessary complexity in having two separate definitions, two Items in Annexure Part A and Annexure Part P to describe the Site.</p> <p>However, the more significant issue is that if the “Site” is not adequately or appropriately identified in Items 19 and 20 and Annexure Part P, the Principal may not be obliged to provide the necessary access, possession and use of the lands upon which the permanent works are to be constructed.</p> <p><b>Unilateral right to amend the Site Plan</b></p> <p>The entirely new clause 24.3A (no equivalent in the Old Government Standard Form permits the Principal (in its absolute discretion given the effect of clauses 1.2(m) and 45.5) to amend and re-issue the Site Plan.</p>	<p>Amend the definition of “Site” as:</p> <p><b>“Site</b> means the lands and other places to be made available to the Contractor by the Principal for the purpose of the Contract, which includes the lands and places identified on the Site Plan (if any), together with the lands and other places which are made available to the Contractor by the Principal for the purpose of the Contract”</p> <p>Delete Items 19 and 20 of Annexure Part A.</p> <p>Amend the definition of “Site Plan” as:</p> <p><b>“Site Plan</b> means the plan (if any) described in or contained at Annexure Part P”.</p> <p>Delete clause 24.3A in its entirety.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>It is unclear why this is necessary given that:</p> <ul style="list-style-type: none"> <li>the Principal is free to provide additional land to the Contractor at any time without a provision such as clause 24.4A; and</li> <li>the Principal’s obligation in clause 24.1 is not to provide access, possession and use of all of the Site all of the time, but only to those parts of the Site necessary for carrying out the WUC.</li> </ul> <p>In the circumstances, it appears that the purpose of this provision is to permit the Principal to unilaterally amend its obligations in clause 24.1 after the parties have entered into the Contract. This is neither appropriate nor reasonable.</p> <p>Further, as discussed elsewhere, it seems likely that an amendment of the Site Plan pursuant to clause 24.3A is not a Qualifying Cause of Delay nor a Compensable Cause (thus, no right to EOT and delay damages) and see previous discussion with respect to the Valuation Rules.</p>	
128.	Access, Use and Possession of Site – General	24.1	<p>The new clause 24.1 (which is materially different from AS4000-1997 and clause 27.1 of the Old Government Standard Form) has 3 parts:</p> <ul style="list-style-type: none"> <li>1<sup>st</sup> paragraph – <i>“The Contractor is not entitled to access, use or possess the Site or to commence WUC on the Site other than in accordance with this Clause. The Principal shall permit the Contractor to access, use and possess the Site as provided for in this Clause.”</i></li> </ul> <p>It is presumed this is intended to cover the whole of clause 24, not just clause 24.1. To avoid any doubt for users, this should be clarified.</p> <p>Blanket statements like the one in the 1<sup>st</sup> sentence are dangerous as they will exclude implied terms necessary for the effective operation of the Contract and may inadvertently conflict with other provisions.</p> <ul style="list-style-type: none"> <li>2<sup>nd</sup> paragraph address different types of access to the Site: <ul style="list-style-type: none"> <li>Clause 24.1(a) - “access” to those areas of the Site made available to it (but not to commence carrying out of WUC) subject to satisfaction of the “Access Preconditions”. Discussed further below.</li> <li>Clause 24.1(b) – “access” to sufficient parts of the Site for the purpose of site establishment (but not for the purpose of carrying out of WUC other than site establishment) subject to satisfaction of the “Mobilisation Preconditions”. Discussed further below.</li> <li>Clause 24.1(c) – “possession” of sufficient of the Site for commencement of WUC on Site subject to satisfaction of the “Commencement Preconditions”. Discussed further below.</li> </ul> </li> </ul> <p>Whilst it is clear that the drafter intended to make a distinction in clause 24.1 between “access”, “possession” and “use”, the latter word is not used in these provisions at all. As discussed below, clauses 24.1(a) to (c) are unnecessarily and unreasonably complex.</p>	<p>Delete the 1<sup>st</sup> sentence of the 1<sup>st</sup> paragraph.</p> <p>See discussion below regarding clauses 24.1(a) to (c).</p> <p>Amend the last paragraph of clause 24.1 to read as follows:</p> <p><i>“Provided that the time in clause 24.1(c)(i) has expired and the Commencement Preconditions have been satisfied, if the Principal has not given the Contractor access to, use or possession of the whole Site, the Principal shall give the Contractor access to, use or possession of such further portions of the Site as may, from time to time, be necessary for carrying out of WUC”</i></p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>3<sup>rd</sup> paragraph - <i>“Subject to this Clause, if the Principal has not given the Contractor access to, use or possession of the whole Site, the Principal shall give the Contractor access to, use or possession of such further portions of the Site as may, from time to time, be necessary for carrying out of WUC”</i></li> </ul> <p>The words <i>“Subject to this Clause”</i> create a circularity with the 1<sup>st</sup> paragraph of clause 24.1. This can be resolved with the proposed drafting in the next column.</p> <p>Finally, given the introduction of the concept of <i>“Contractor’s Activities”</i> as distinguished from <i>“WUC”</i>, if this remains in the next draft, the reference to <i>“WUC”</i> should be replaced with <i>“Contractor’s Activities”</i>.</p>	
129.	<p>“Access Preconditions”</p> <p>“Mobilisation Preconditions”</p> <p>“Commencement Preconditions”</p>	<p>1.1</p> <p>24.1(a)</p> <p>24.1(b)</p> <p>24.1(c)</p>	<p>The process created by these provisions is very complex, and in my view, unnecessarily so (not the least because of the multiple places that a reader must look to identify what these conditions may be).</p> <p>Key points:</p> <ul style="list-style-type: none"> <li>To identify what comprises the applicable preconditions, the parties must consult Items 89, 91 and 93 in Annexure Part A, search all other Contract Documents to identify <i>“any other conditions nominated as such”</i>, and finally, consider whether there are any other <i>“circumstances”</i> identified in the Contract Documents <i>“which the Contractor is required to satisfy before being entitled to access the Site”</i>.</li> </ul> <p>The definitions can and should be simplified. Similarly, the permanent part of the applicable Items in Annexure Part A (<i>“Together with any other conditions nominated as such in the Contract Documents or any circumstance which the Contractor is required to satisfy before ...”</i>) should be deleted.</p> <ul style="list-style-type: none"> <li>It is unclear why clause 24.1(a) is necessary as it simply provides the Contractor with a bare licence to <i>“access”</i> <i>“those areas of Site made available to it”</i>. It is expressly prohibited from carrying out any of the WUC. This can be deleted, along with the definition of <i>“Access Preconditions”</i> and Items 88 and 89 (especially if the 1<sup>st</sup> sentence of the 1<sup>st</sup> paragraph is deleted as per above). The conditions specified in the template Item 89 should be transferred to Item 91 (<i>“Mobilisation Preconditions”</i>).</li> <li>I recognise that there may be some benefit in the terms of the Contract distinguishing between <i>“Mobilisation Preconditions”</i> and <i>“Commencement Preconditions”</i>, although this does create additional complexity, including potential difficulties in defining the specific rights that the Contractor is provided.</li> <li>I have specific concerns with the drafting of clauses 24.1(b) and (c): <ul style="list-style-type: none"> <li>The chapeau of each should be amended to make them consistent with the wording in the balance of the clause for consistency and certainty –</li> </ul> </li> </ul>	<p>Delete clause 24.1(a), Items 88 and 89 and the definition of <i>“Access Preconditions”</i>, and move the conditions from Item 89 to Item 91.</p> <p>Amend the other definitions to read as follows:</p> <p><b><i>“Commencement Preconditions means the Mobilisation Preconditions and the conditions set out at item 93 and which are the subject of paragraph (c) of Subclause 24.1”.</i></b></p> <p><b><i>“Mobilisation Preconditions means the conditions set out at Item 91 and which are the subject of paragraph (b) of Clause 24.1”</i></b></p> <p>Delete the permanent wording at the bottom of Items 91 and 93.</p> <p>Amend the 2<sup>nd</sup> paragraph of clause 24.1:</p> <p><b><i>“The Contractor shall be entitled to access to, use of and possession of those portions of the Site necessary:</i></b></p> <p>(a) <i>for the purpose of site establishment (but not for the purpose of carrying out of WUC other than site establishment) at the later of the expiry of the time in Item 90 from the Date of Contract and when the Mobilisation Preconditions have been satisfied; and</i></p> <p><b><i>“(b) to commence WUC on Site at the later of the expiry of the time in Item 92 from the Date of Contract and when the Commencement Preconditions have been satisfied”</i></b></p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>ie. “the Contractor shall be entitled to access to, use of and possession of those portions of the Site necessary for the purpose of site establishment ...</p> <ul style="list-style-type: none"> <li>○ Clauses 24.1(b)(ii) and 24.1(c)(ii) qualifies the time identified in Items 90 and 92 respectively by reference to any other “time period nominated in the Contract Documents in relation to ...”</li> </ul> <p>It would improve the clarity of the Contract if the only place to identify the relevant time was in the applicable Item. It should be incumbent on the State to ensure that its Contract Documents do not contain inconsistencies.</p> <ul style="list-style-type: none"> <li>• Given that the commencement of the WUC pursuant to clause 24.1(c) cannot commence without both the “Mobilisation Preconditions” and the “Commencement Preconditions”, the permanent wording in Item 93 can be removed by defining the “Commencement Preconditions” as including the “Mobilisation Preconditions”.</li> </ul>	
130.	Delay	24.2	<p>This entirely new exclusion clause (no equivalent in the Old Government Standard Form) <b>excludes</b> any “Claim” of the Contractor where any “<i>delay in the Contractor having access to, use of or possession of the Site by reason of a delay in the satisfaction of the Access Preconditions, the Mobilisation Preconditions or the Commencement Preconditions.</i>”</p> <p>As discussed elsewhere, the definition of “Claim” is very wide and includes claims for damages for breach of Contract, express entitlements to compensation under the Contract and other relief (including EOTs).</p> <p>At first blush, this appears to be a reasonable provision, although unnecessary as clause 24.1 already appears to cover this issue.</p> <p>However, when considered carefully, its apparent intent is to unreasonably widen the exclusion that would otherwise apply and limit the Contractor’s entitlements to an EOT where such delay was “<i>caused by the Principal or the Superintendent.</i>”</p>	<p>Either delete clause 24.2 or amend to read as follows:</p> <p><i>“Any delay in the Contractor having access to, use of or possession of the Site by reason of a delay in the satisfaction of the Access Preconditions, the Mobilisation Preconditions or the Commencement Preconditions:</i></p> <ul style="list-style-type: none"> <li>(a) <i>shall not be a breach of contract by the Principal;</i></li> <li>(b) <i>shall not be a Qualifying Cause of Delay; and</i></li> <li>(c) <i>the Contractor shall not have any Claim against the Principal by reason of the delay,</i></li> </ul> <p><i>except to the extent that the delay in the satisfaction of the Access Preconditions, the Mobilisation Preconditions or the Commencement Preconditions is caused by the Principal or the Superintendent.”</i></p>
131.	Nature of right	24.2A	<p>Given the introduction of the concept of “Contractor’s Activities” as distinguished from “WUC”, if this remains in the next draft, the reference to “WUC” should be replaced with “Contractor’s Activities”.</p>	Note

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
132.	Site Rules	1.1 & 24.3B	<p>This entirely new clause (no equivalent in the Old Government Standard Form) primarily deals with two matters:</p> <ul style="list-style-type: none"> <li>A new obligation on the Contractor to comply with a new concept described as the “Site Rules”.</li> <li>A right of the Principal, from time to time, to amend the Site Rules and the consequences that flow from such an amendment.</li> </ul> <p><b>“Site Rules”</b></p> <p>“Site Rules” is defined in clause 1.1 as <i>“any rules or conditions regarding access to or behaviour on the Site set out in the Contract Documents”</i>.</p> <p>As they form part of the Contract Documents, the Contractor is already bound to comply with them. Accordingly, there is no apparent benefit in having a separate definition or express obligation to comply, noting that the definition does not create any greater clarity as to what these rules or conditions might be.</p> <p><b>Unilateral right to amend the Site Rules</b></p> <p>The apparent reason is for doing so is to give the Principal the absolute and unlimited right (clauses 1.2(m) and 45.5) to unilaterally amend Contractor’s contractual obligations and conditions on access etc to Site after the parties have entered into the Contract.</p> <p>As discussed elsewhere, only in very limited circumstances (such as the right to direct Variations to the WUC) are such unilateral rights reasonable and appropriate. This is not one of those circumstances.</p> <p>For completeness, as discussed elsewhere, even if such a unilateral right were reasonable and appropriate, the Contractor currently has no entitlement to an EOT or delay damages and the its likely compensation pursuant to the Valuation Rules is unlikely to cover its losses.</p> <p>Finally, with respect to the 3<sup>rd</sup> paragraph, the Principal’s rights and the Contractor’s liabilities for breach of the Contract are adequately addressed by other terms of the Contract and the common law.</p>	Delete clause 24.3B.
133.	Access and Construction Constraints	1.1 & 24B	<p>Clause 24B is an entirely new provision (no equivalent in the Old Government Standard Form) which sets out <b>further conditions and constraints</b> which <b>limit</b> the Contractor’s ability to access, possess and use the Site and carry out the WUC (without any right to EOT or additional compensation), in addition to those contained in clauses 24, 31 and 31A, and the balance of the Contract Documents, including the Specification.</p> <p><b>Access and Construction Constraints</b></p> <p>Without knowing what types of conditions and constraints might be included, it is impossible to assess the reasonableness of such additional conditions and constraints.</p>	<p>It is unclear why it is necessary to include another set of conditions and constraints which <b>limit</b> the Contractor’s ability to access, possess and use the Site and carry out the WUC.</p> <p>If the State it is necessary, the 1<sup>st</sup> and 3<sup>rd</sup> paragraphs of clause 24B should be deleted and the drafting should be simplified to make it easier to follow for users.</p> <p>For example, delete Item 94 and amend the definition of “Access and Construction Constraints” as follows:</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>As such, I can only focus on the complexity of the drafting causing difficulty for users to easily understand what is required.</p> <p>The definition of “Access and Construction Constraints” in clause 1.1 “<i>means the constraints and conditions set out at item 94</i>”, and incorrectly refers to clause 24F. The 1<sup>st</sup> paragraph of clause 24B provides that it only applies if one or more of the List of Optional Clauses, Item 94 or Annexure Part T contains content. Item 94 also contains the statement “<i>Or as described in (or in addition to those described in) Annexure Part T</i>”.</p> <p>It is unclear why all of these constraints and conditions cannot be specified in one place. Note also that Annexure Part T is not the correct Annexure reference.</p> <p><b>Unilateral right to amend</b></p> <p>The 3<sup>rd</sup> paragraph of clause 24B gives the Principal the absolute and unlimited right (clauses 1.2(m) and 45.5) to unilaterally amend these conditions and constraints affecting the Contractor’s ability to access, possess and use the Site and carry out the WUC after the parties have entered into the Contract.</p> <p>As discussed elsewhere, only in very limited circumstances (such as the right to direct Variations to the WUC) are such unilateral rights reasonable and appropriate. This is not one of those circumstances.</p> <p>For completeness, as discussed elsewhere, even if such a unilateral right were reasonable and appropriate, the Contractor currently has no entitlement to an EOT or delay damages and the its likely compensation pursuant to the Valuation Rules is unlikely to cover its losses.</p>	<p><b>“Access and Construction Constraints means the constraints and conditions set out at Annexure Part Q (if any) and which are the subject of Clause 24B”.</b></p>
134.	Working hours “Non-Working Time” and “Prohibited Working Time”	1.1 & 31 Item 119	<p>Clause 31 is materially different to AS4000-1997 and the equivalent provision in the Old Government Standard Form (amended clause 32). It prohibits the carrying out work on Site during “Non-Working Time” except in the following two circumstances:</p> <ul style="list-style-type: none"> <li>• The Contractor receives prior written approval from the Superintendent.</li> <li>• When, “<i>in the interests of safety of persons or property, the Contractor finds it necessary to carry out WUC</i>” during the “Non-Working Time”.</li> </ul> <p>As with the similar provisions addressed above, the specific comments on clause 31 and the associated definitions fall within two categories:</p> <ul style="list-style-type: none"> <li>• Issues of substance affecting the Contractor’s ability to perform its contractual obligations and earn a fair and reasonable return.</li> <li>• The unnecessary complexity created by the drafting of these provisions.</li> </ul> <p><b>Unilateral right to amend</b></p> <p>The 2<sup>nd</sup> paragraph of clause 31 gives the Superintendent (as the Principal’s agent) the absolute and unlimited right (clauses 1.2(m), 1.2(n), 20.1 and 45.5) to unilaterally amend the times and dates when the Contractor must not carry out</p>	<p>Delete the definition of “Prohibited Working Time” and amend the definition of “Non-Working Time” to read:</p> <p><b>“Non-Working Time means any time when WUC cannot be carried out by reason of a Legislative Requirement and any other times described as such at Item 119 and (which is the subject of Clause 31)”</b></p> <p>Delete the phrase “<i>any Availability Program and any other period nominated as such in the Contract Documents</i>” in Item 119.</p> <p>Amend clause 31 as follows:</p> <ul style="list-style-type: none"> <li>• Insert the phrase “(not be unreasonably delayed, conditioned or withheld)” after “<i>prior written approval</i>”.</li> <li>• Delete the 2<sup>nd</sup> paragraph.</li> </ul>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>work on the Site after the parties have entered into the Contract. No such right is in AS4000-1997 or the Old Government Standard Form.</p> <p>As discussed elsewhere, only in very limited circumstances (such as the right to direct Variations to the WUC) are such unilateral rights reasonable and appropriate. This is not one of those circumstances.</p> <p>For completeness, as discussed elsewhere, even if such a unilateral right were reasonable and appropriate, the Contractor currently has no entitlement to an EOT or delay damages and the its likely compensation pursuant to the Valuation Rules is unlikely to cover its losses.</p> <p><b>Superintendent’s Discretion</b></p> <p>The 1<sup>st</sup> paragraph of clause 31 permits the Contractor to carry out work on the Site during the Non-Working Hours only with the Superintendent’s prior written approval. There may be legitimate reasons why the Contractor needs to undertake WUC during the “Non-Working Times” where it would be reasonable for the Superintendent to give its approval.</p> <p>As discussed elsewhere, clauses 1.2(m), 1.2(n), 20.1 and 45.5 permitting the Superintendent to withhold or condition its approval in its absolute discretion are unreasonable.</p> <p><b>Complexity and other drafting and issues</b></p> <p>With respect to the issues of drafting and complexity:</p> <ul style="list-style-type: none"> <li>• “Non-Working Time” is defined in clause 1.1 as <i>“includes any Prohibited Working Time and is otherwise the time of times described as such at Item 119 (and which is the subject of Clause 31)”</i>.</li> </ul> <p>As the defined term “Prohibited Working Time” is only used in the definition of “Non-Working Time”, it is unclear why these definitions cannot be combined (particularly as the definitions are circular).</p> <ul style="list-style-type: none"> <li>• The permanent note in Item 119 states <i>“together with any periods during which work cannot be undertaken by reason of a Legislative Requirement, any Availability Program and any other period nominated as such in the Contract Documents”</i>.</li> </ul> <p>The wording <i>“any Availability Program and any other period nominated as such in the Contract Documents”</i> is inconsistent with the definition of “Non-Working Time” and creates uncertainty as to when the Contractor is not permitted to carry out the WUC on the Site.</p> <p>If the times are set out in the Specification or other Contract Documents, then Item 119 should simply cross-reference the relevant section of the Specification or other Contract Document.</p> <p>See discussion below regarding the “Availability Program”. Should clause 31A be necessary, any concerns with respect to conflict between clauses 31 and 31A can be solved by inserting at the beginning of Clause 31 the words <i>“Without prejudice to clause 31A,”</i>.</p>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>Finally, Item 119 of DSG RFT 3449 was completed with “Not used”. This suggests a lack of understanding of how the Annexure should be completed.</li> </ul>	
135.	Availability Program	1.1 31A Items 120	<p>Clause 31A is an entirely new provision (no equivalent in the Old Government Standard Form) which appears to be <b>another</b> new mechanism in the Contract for identifying constraints on the availability of some or all of the Site and further conditions on such availability (in addition to clauses 24, 24B and 31).</p> <p>Again, it is unclear why it is necessary for such additional mechanism to be incorporated. That is, why is it not possible for this to be addressed in the other provisions dealing with the same subject matter?</p> <p>As with the similar provisions addressed above, the specific comments on clause 31A and the associated definitions fall within two categories:</p> <ul style="list-style-type: none"> <li>Issues of substance affecting the Contractor’s ability to perform its contractual obligations and earn a fair and reasonable return.</li> <li>The unnecessary complexity created by the drafting of these provisions.</li> </ul> <p><b>Interaction with Clause 24.1</b></p> <p>It is unclear how clause 31A is intended to operate with clause 24.1, and the fundamental principle discussed above that a contractor cannot undertake the WUC and complete the Works if it is not given access to the parts of the site upon which those Works are to be constructed.</p> <p><b>3<sup>rd</sup> paragraph of clause 31A</b></p> <p>It is unclear what is intended by the phrase “<i>Subject to any EOT</i>” in this context. Put another way, it is unclear how any EOT can impact the Contractor’s obligations under this clause. This should be clarified with the State.</p> <p><b>4<sup>th</sup> paragraph of clause 31A</b></p> <p>The meaning of referring to restrictions that are “<i>capable of inference from the Availability Program</i>” is difficult to understand. Nevertheless, given the importance of certainty with respect to these issues, it is reasonable that any restrictions must be limited to those shown on or referred to in the Availability Program.</p> <p><b>5<sup>th</sup> paragraph of clause 31A</b></p> <p>This paragraph states:</p> <p><i>“If, in the Availability Program, there are conditions and times prescribed in relation to the handing back to the Principal of areas the subject of comment in the Availability Program then the Contractor must handback those areas to the Principal in the condition prescribed and at, or by the times prescribed.”</i></p>	<p>It is unclear why it is necessary to include another set of conditions and constraints which <b>limit</b> the Contractor’s ability to access, possess and use the Site and carry out the WUC.</p> <p>Further, the State should clarify its intention for how it will provide the necessary access, possession and use of the Site pursuant to clause 24.1 if the Availability Program provides that the Contractor no longer has access to some or all of the Site after a particular date and The Works are not complete.</p> <p>Subject to the above, if such a provision is necessary, then:</p> <ul style="list-style-type: none"> <li>1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> paragraphs of clause 31A should be deleted.</li> <li>Delete the defined term “Initial Availability Program”.</li> <li>Amend the definition of “Availability Program” to read:  <i>“Availability Program means the program set out in Annexure part O (if any) that sets out times and dates when the Site or parts of the Site will be available to the Contractor and the conditions in relation to such availability (if relevant)”</i></li> <li>The State should clarify what is intended by the words “<i>Subject to any EOT</i>” in the 3<sup>rd</sup> paragraph of clause 31A.</li> </ul>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>If the Contractor is required to hand back parts of the Site at a particular time and the works in that area are not complete, how will the Contractor be able to complete the Works?</p> <p>Further, it is unreasonable to require the Contractor to hand over completed Works for the Principal’s use without the certification of Practical Completion (which may require the creation of a Separable Portion pursuant to clause 4).</p> <p><b>Unilateral right to amend</b></p> <p>The 6<sup>th</sup> and 7<sup>th</sup> paragraphs of clause 31A gives the Principal the absolute and unlimited right (clauses 1.2(m) and 45.5) to unilaterally amend the times and dates when the Site or parts of the Site will be available or unavailable to the Contractor and/or the conditions in relation to such availability after the parties have entered into the Contract.</p> <p>As discussed elsewhere, only in very limited circumstances (such as the right to direct Variations to the WUC) are such unilateral rights reasonable and appropriate. This is not one of those circumstances.</p> <p>For completeness, as discussed elsewhere, even if such a unilateral right were reasonable and appropriate, the Contractor currently has no entitlement to an EOT or delay damages and the its likely compensation pursuant to the Valuation Rules is unlikely to cover its losses.</p> <p><b>Complexity and other drafting and issues</b></p> <p>With respect to the issues of drafting and complexity:</p> <ul style="list-style-type: none"> <li>• “Initial Availability Program” is defined as <i>“the Availability Program identified at Item 120”</i>. Given that the definition of “Availability Program” includes the “Initial Availability Program” these definitions are circular. In any event, given my opinion that the Principal should not be permitted to amend the conditions and restrictions of availability to Site, these definitions should be combined.</li> <li>• Item 120 is described as <i>“Availability Program – where is it (Clause 31A &amp; Annexure Part Q)”</i> and the note forming part of that Item states <i>“If nothing stated, the relevant information may be found at Annexure Part Q.”</i> It is clear that Item 120 is not intended to actually incorporate any “Availability Program”, but simply refer to where it can be found. It is unclear why Item 120 is required at all. Further, it appears that Annexure Part O is the correct reference.</li> <li>• The 1<sup>st</sup> and 2<sup>nd</sup> paragraphs of clause 31A are unnecessary, require the user to go to multiple parts of the Contract to determine whether clause 31A applies and refers to the incorrect Annexure (it appears that Annexure Part O is the correct reference).</li> </ul>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Separate Contractors</b>				
136.	Access for Principal and others / Work by other contractors - General	24.3 & 24.3C	<p>Clause 24.3 states:</p> <p><i>“The Principal and the Principal’s employees, consultants and agents may at any time after reasonable written notice to the Contractor, have access to any part of the Site for any purpose. The Contractor shall permit persons engaged by the Principal to carry out work on the Site other than WUC and shall cooperate with them. The Principal shall give to the Contractor the names and roles of the persons so engaged.</i></p> <p><i>The Contractor shall at all reasonable times give the Superintendent access to WUC.</i></p> <p><b><i>The Principal shall ensure that none of the persons referred to in this Subclause impedes the Contractor.</i></b>” (emphasis added)</p> <p>No Contractor has no ability to manage or control the acts of any of the Principal’s other contractors, consultants, employees or agents and, as the contractor has no legal relationship with any of them (compared with the Principal), it has no direct rights by which it can recover its losses from them. It is also impossible for a contractor to assess the risks of such people impeding the performance of its obligations at tender time.</p> <p>As such, clause 24.3 reflects the well-known principle that risks should be allocated (not transferred) to the party or parties best placed to manage them, this risk should entirely remain with the Principal (see the discussion in section 3.5.2 of the Delivering Outcomes Report (Infrastructure Australia, 2022).</p> <p>In direct contrast with clause 24.3 and the above principle, the new clause 24.3C passes on to the Contractor significant risks with respect to the activities of other contractors engaged by the Principal to carry out work on in the vicinity of the Site.</p> <p>I accept that may be reasonable to require the Contractor to not “unreasonably” interfere with or disrupt, delay or hinder the other contractors, in addition to the obligation in clause 24.3 to co-operate with them.</p> <p>However, clause 24.3C goes far further than this and thus, is unreasonable. For example:</p> <ul style="list-style-type: none"> <li>• Clauses 24.3C(a) and (b) – These are wider than an obligation to not “unreasonably” interfere with or disrupt, delay or hinder the other contractors and clause 24.3 already addresses the obligation to co-operate with them.</li> <li>• Clause 24.3C(c) - It is not reasonable for the Contractor to have an obligation to allow the other contractors <b>free use</b> of the sanitary accommodation and other messing facilities provided in connection with WUC as it is impossible to assess such costs at tender time.</li> <li>• Clause 24.3C(d) - It is not reasonable to require the Contractor to co-ordinate its work with other contractors – its price, program and methodology are all</li> </ul>	<p>Delete clause 24.3C and amend the 2<sup>nd</sup> sentence of the 1<sup>st</sup> paragraph of clause 24.3 to read:</p> <p><i>“The Contractor shall permit persons engaged by the Principal to carry out work on the Site other than WUC, shall cooperate with them and shall not unreasonably interfere with or disrupt, delay or hinder them.</i></p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>based on the conditions and constraints known at the time of tender. It cannot be expected to have such an obligation imposed upon it after the contract has been executed.</p> <ul style="list-style-type: none"> <li>3<sup>rd</sup> to 6<sup>th</sup> paragraphs – It is unreasonable to expect the Contractor to take any risk or responsibility for the performance of work undertaken by the Principal’s other contractors.</li> </ul> <p>As discussed elsewhere in this table, these paragraphs also create an entirely new exclusion (time bar) provision.</p> <p>Further, any Direction by the Superintendent must be pursuant to another provision under the contract (such as clause 32.7 or 36.1) which gives the Contractor specific relief and remedies.</p> <ul style="list-style-type: none"> <li>7<sup>th</sup> paragraph – <i>“The Principal shall seek to ensure that the other contractors do not unreasonably impede the Contractor in carrying out of WUC.”</i></li> </ul> <p>This directly conflicts with the Principal’s absolute obligation in the 3<sup>rd</sup> paragraph of clause 24.3. As discussed above, the Contractor should not be expected to bear the risk of any impedance by the Principal’s contractors.</p> <ul style="list-style-type: none"> <li>8<sup>th</sup> paragraph – It is not entirely clear the full effect of this entirely new provision limiting the Contractor’s entitlements to contractual and common law relief with respect to the acts or omissions of the Principal’s other contractors. Any limitation on these entitlements beyond what is provided in the applicable provisions of the Contract (eg. clause 34) is unreasonable.</li> </ul>	

# CIVIL CONTRACTORS FEDERATION TASMANIA

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

### PART 7 – TIME & COMPLETION

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Commencement of Contract</b>				
137.	Evidence of Contract	6	<p>The amended clause 6 (which is the same as amended clause 6.1 in the Old Government Standard Form) states:</p> <p style="padding-left: 40px;"><i>“The evidence of the Contract shall be the exchange of a Formal Instrument of Agreement signed by both parties, or the exchange of signed counterparts of a Formal Instrument of Agreement, and no contract shall arise until either such exchange has occurred”.</i></p> <p>This ties in with clause 4.2 of the template RFT, which expressly requires the successful Tenderer to duly execute and exchange the Contract with the Principal within 20 Business Days of the date on which the Principal it gives a copy.</p> <p>The risk for the Contractor is that after it send back the executed counterpart, the Principal delays the execution and exchange of its counterpart. This may be significant as a Tenderer’s program and price are intended to be valid for the Tender Validity Period (set out in the RFT) on the assumption that the Principal’s acceptance of the Tender during that period will create a binding contract.</p> <p>For example, a Tender might be accepted on the last day of the Tender Validity Period, and after the Contractor executes its counterpart the Principal significantly delays the execution of its counterpart, meaning that no contract comes into force until well after the Tender Validity Period has expired or not at all.</p> <p>In such a case, the Contractor’s price and program may be seriously compromised. For example, a minor road project due to commence in September and complete in March will take far longer than 6 months if the start of the Contract is delayed so that asphaltting cannot be completed before the “winter shut down period” where the weather is too cold to asphalt.</p> <p>The position in the Contract is to be contrasted with clause 6 of unamended AS400-1997, which provides a far more reasonable approach as follows:</p> <p style="padding-left: 40px;"><i>“Until a formal instrument of agreement is executed by the parties, documents evidencing the parties’ consensus shall constitute the Contract. If such Contract requires a formal instrument of agreement, the Principal shall, within 28 days of the Date of Acceptance of Tender, send it in duplicate for execution by the Contractor. Within 14 days after receiving them, the Contractor shall (if they are correct) properly execute both copies and return them.</i></p> <p style="padding-left: 40px;"><i>Within 14 days after receiving them, the Principal shall execute both copies, have them stamped as necessary and send one copy to the Contractor.</i></p> <p style="padding-left: 40px;"><i>The Superintendent may extend the time under this Clause by written notice to the parties.”</i></p>	<p>Revert to the unamended clause 6 of AS4000-1997.</p> <p>The terms of the template RFT will need a similar amendment.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
138.	“Date of Contract” “Date of Acceptance of Tender”	1.1	<p>Clause 1.1 contains an entirely new definition of “Date of Contract”:</p> <p><b>“Date of Contract</b> <i>means the date shown on the Formal Instrument of Agreement (as inserted by the Principal) but if there is no such date, the date nominated by the Principal as the date the Principal executed the Formal Instrument of Agreement”.</i></p> <p>Clause 1.1 and 1.2(g) also amends “Date of Acceptance of Tender” (in the same manner as in the Old Government Standard Form) as:</p> <p><i>“the date of the signed Formal Instrument of Agreement”.</i></p> <p>Whilst these defined terms do not determine when the Contract becomes effective (see clause 6 above), it is important as it determines the timing of many obligations and rights of the parties under the Contract, including clauses 8B.1, 8A.2(b), 8B.7, 9.1B, 11B.8, 16, 17, 22A, 24.1(a)(i), 24.1(b)(i), 24.1(c)(i), and 32.2, and Items 36 and 45.</p> <p>The most significant from a risk perspective are likely to be the timing of when access, use and possession of the Site will be given to the Contractor and the possibility that the Date for Practical Completion may be a period from the “Date of Contract”.</p> <p>This definition is unreasonable as it effectively gives the Principal the discretion to determine the “Date of Contract”, potentially long after the Contract has actually been entered into by the parties.</p> <p>It is sensible and reasonable for the defined term “Date of Contract” be consistent with the timing of when the Contract becomes effective under clause 6, being the date that the Principal accepted the Contractor’s Tender pursuant to the RFT.</p>	<p>Amend the definition of follows:</p> <p><b>“Date of Contract</b> <i>means the earlier of:</i></p> <p>(a) <i>the date of execution of the formal instrument of agreement (if any) by the last of the parties to execute that document; or</i></p> <p>(b) <i>the date which the Principal notified the Contractor in writing that it had accepted the Contractor’s offer to execute the WUC and perform the Contractor’s Activities on the agreed terms.</i></p>
<b>Completion Obligations</b>				
<b>Separable Portions</b>				
139.	Creation of Separable Portions	4.1	<p>Clause 4.1 provides that “<i>Separable Portions may be directed by the Superintendent</i>” and it must “<i>clearly identify for each</i>” Separable Portion the impact on the specified concepts under the Contract.</p> <p>The primary change to clause 4.1 is the amended clause 4.1(c) as follows:</p> <p><i>“Separable Portions may be directed by the Superintendent, who shall clearly identify for each, the:</i></p> <p>(c) <i>respective amounts for bonus, liquidated damages and delay damages (all calculated in accordance with the Valuation Rules, and in the absence of a relevant Valuation Rule, pro-rata according to the ratio of the Superintendent’s valuation of the Separable Portion to the Contract Sum)”.</i></p> <p>There are two changes of substance from AS4000-1997 and the Old Government Standard Form that are unreasonable:</p>	<p>Clause 4.1(c) should revert to the unamended clause 4.1(c) of AS4000-1997.</p> <p>Make the necessary changes to reflect the deletion of clauses 1.2(m), 1.2(n) and 45.5 and the discussion with respect to clause 20.1(b) and the Certifying Functions above.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>As discussed elsewhere, the creation of Separable Portions has no impact on the treatment of Security.</li> <li>The Superintendent is required to value the amounts referred to in clause 4.1(c) pursuant to the Valuation Rules (Section 7.1 of Annexure Part K), instead of a “<i>pro-rata according to the ratio of the Superintendent’s valuation of the Separable Portion to the Contract Sum</i>”.</li> </ul> <p>The effect of the introduction of section 7.1 of the Valuation Rules with respect to clause 4.1 has been addressed elsewhere.</p> <p>Further, the exercise of the discretion to create Separable Portions and the determination of the impact of doing so on the respective Dates for Practical Completion, Security, bonus, liquidated damages and delay damages by the Superintendent can have a material impact on the Contractor’s obligations, rights and liabilities under the Contract.</p> <p>As such, it is critical that the Superintendent complies with its duties under clause 20.1(b) (as discussed above) in respect of the whole of clause 4.1 (not just clause 4.1(c)).</p>	
140.	Deletion and Merger of Separable Portions	4.2	<p>Clause 4.2 expressly permits the Superintendent to direct:</p> <ul style="list-style-type: none"> <li>the deletion of one or more Separable Portions (clause 4.2(a)); and</li> <li>the merger of one or more Separable Portions with another Separable Portion (clause 4.2(b)).</li> </ul> <p>This is an entirely new provision (ie. not in the Old Government Standard Form). In fact, I have not seen a similar provision in almost 30 years of dealing with construction contracts.</p> <p>I believe that this provision is unreasonable, including because:</p> <ul style="list-style-type: none"> <li>The meaning and purpose of clause 4.2(a) is ambiguous. Is it intended to permit the omission of the WUC that comprises a Separable Portion or simply “reverse” the previous creation of a Separable Portion so that two or more Separable portions are combined into a single portion of work?</li> </ul> <p>If it is the former, this is not the appropriate way to do this, as omitting works is to be dealt with as a Variation pursuant to clause 36. If it is the latter, why is this not covered by clause 4.2(b)?</p> <p>Either way, clause 4.2(a) is not appropriate nor reasonable.</p> <ul style="list-style-type: none"> <li>With respect to the merger of Separable Portions pursuant to clause 4.2(b), why would it ever be reasonably necessary or appropriate to merge Separable Portions?</li> </ul> <p>For example, if two Separable Portions with different Dates for Practical Completion are merged, then the WUC covered by the merged Separable</p>	Delete clause 4.2

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>Portions must have a single Date for Practical Completion. The issue then, which date is to be adopted?</p> <ul style="list-style-type: none"> <li>○ If it is the <b>later</b> date, the period for completion of one portion of the WUC is extended. It is unclear why a Principal would want to do this, but in any event, it can be achieved by a discretionary grant of an EOT under clause 34.5B.</li> <li>○ If it is the <b>earlier</b> date, this accelerates the completion of one portion of the WUC. The appropriate and reasonable method for acceleration is pursuant to clause 32.7 which contains appropriate constraints.</li> </ul> <ul style="list-style-type: none"> <li>• Due to clauses 1.2(m), 1.2(n), 20.1 and 45.5, the Superintendent may exercise its discretion under clause 4.1 in its absolute and unlimited discretion.</li> <li>• The effect of the introduction of section 7.2 of the Valuation Rules with respect to clause 4.2 has been addressed elsewhere.</li> </ul>	
<b>Milestones</b>				
141.	Milestones - General	32A	<p>Clause 32A is an entirely new “optional” provision (no equivalent in the Old Government Standard Form) permitting the adoption of Milestones, potentially in conjunction with Separable Portions.</p> <p>Clause 32A has three parts:</p> <ul style="list-style-type: none"> <li>• The mechanism for determining whether clause 32A applies (1<sup>st</sup> paragraph).</li> <li>• An obligation to satisfy the Milestones by the relevant Milestone Date and consequences of failure to do so (2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> paragraphs).</li> <li>• Milestone Payments and impact of Milestone Payments on other entitlements under the Contract (4<sup>th</sup> and 6<sup>th</sup> paragraph).</li> </ul> <p>It appears from the drafting of clause 32A that the intention is that:</p> <ul style="list-style-type: none"> <li>• The option available is either to adopt Milestones to define stages of completion (in the same way that the Separable Portions do) <b>and</b> to specify the amount and timing of progress payments by reference to the Milestones <b>or</b> not at all. That is, it does not appear possible to adopt them for only one of these purposes.</li> <li>• Milestones and Separable Portions may co-exist under the Contract (but with different mechanisms).</li> <li>• Progress payments for the WUC could assessed on the basis of all Milestone Payments or a mix of the traditional value performed basis and Milestone Payments (which in theory is possible, but careful drafting is necessary).</li> </ul> <p>Consequently, the Contract is confusing and unworkable in many respects with respect to Milestones. I have addressed each of these aspects separately below.</p>	Delete the whole of clause 32A.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
142.	Milestones – Applicability “Milestones” “Milestone Requirements” “Milestone Dates” “Milestone Payments”	1.1 32A	<p>This is apparent from the 1<sup>st</sup> paragraph of clause 32A, each of the definitions of “Milestone”, “Milestone Requirements”, “Milestone Date” and “Milestone Payment” in clause 1.1, Item 124 in Annexure Part A and Annexure Part L, there are 3 potential ways of determining whether clause 32A has any application:</p> <ul style="list-style-type: none"> <li>• If ‘Yes’ is selected in the List of Optional Clauses.</li> <li>• If there is relevant content inserted at Item 124, which contains the note:  <i>“only relevant if ‘Yes’ is selected in the List of Optional Clauses at page 133 in relation to Clause 32A or if a relevant entry is made at this Item 124.”</i></li> <li>• Item 124 further states <i>“If nothing stated, the relevant information may be found in a relevant Annexure (if so listed in the Table of Annexures).”</i></li> <li>• If there is relevant content inserted at Annexure Part L. This Annexure commences with <i>“This Annexure Part L is only relevant if ‘Yes’ is selected in relation to the Annexure at the List of Optional Annexures at page 135 or if relevant content appears in this Annexure Part L.”</i></li> </ul> <p>It is unclear why it is necessary to address the applicability of clause 32A and the necessary details in such a complex and inconsistent manner.</p> <p>More significantly, given the way clause 32A is drafted, it can only apply in accordance with its terms if the Contract contains details of each applicable “Milestone” and associated “Milestone Requirements”, “Milestone Dates” (as noted below, this should be amended to be “Date for Milestone Completion”) and “Milestone Payments” (as a minimum). That is, unless all are present, clause 32A is unworkable.</p> <p>Thus, a simple “Yes” in the List of Optional Clauses or only part of this required content in Item 124 or Annexure Part L is not sufficient.</p>	<p>It is my opinion that the following changes should be made:</p> <ul style="list-style-type: none"> <li>• Delete the 1<sup>st</sup> paragraph of clause 32A and the “List of Optional Clauses”.</li> <li>• Delete Item 124 and all references in the Contract to that Item, and replace each with a reference to Annexure Part L</li> <li>• Amended Annexure Part L to include something like the following:  <b><i>“Does this Annexure apply?”</i></b>  <i>This Annexure Part L is only applicable if content appears under the “Contents of this Annexure” below.</i></li> </ul> <p>...</p> <p><b><i>Reference to this Annexure</i></b>  <i>This Annexure is called up by Clauses 32A and 37.1</i></p> <p><b><i>Contents of this Annexure</i></b>  <i>The following table sets out the Milestones relevant to the Project and other information relevant to those Milestones.</i>  <i>It is essential that for each Milestone all of the columns in the table are completed otherwise clause 32A can have no operation.</i></p> <ul style="list-style-type: none"> <li>• The columns of the table in Annexure part L should be: <ul style="list-style-type: none"> <li>○ Milestone</li> <li>○ Milestone Requirements</li> <li>○ Date for Milestone Completion</li> <li>○ Milestone Payment</li> <li>○ Milestone Liquidated Damages Rate (per day)</li> </ul> </li> </ul>
143.	Milestones – Completion Obligations	32A	<p>The 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> paragraphs of clause 32A deal with the Contractor’s obligations to complete Milestones. These state:  <i>“The Contractor must satisfy the Milestone Requirements by the relevant Milestone Date.</i></p>	<p>Clause 32A should be deleted and replaced with a process similar to Practical Completion:  Replace the 2<sup>nd</sup> paragraph with the equivalent of the 1<sup>st</sup> paragraph of clause 34.1 as follows:</p>

**INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT**

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><i>Upon satisfaction of a Milestone:</i></p> <p>(a) <i>the Contractor shall advise the Superintendent in writing that the Milestone has been satisfied; and</i></p> <p>(b) <i>the Contractor provide evidence to the Superintendent, to the reasonable satisfaction of the Superintendent, that the Milestone has been satisfied.</i></p> <p>...</p> <p><i>If the Contractor does not achieve a Milestone by the Milestone Date the Superintendent shall certify, as due and payable to the Principal, liquidated damages in Item 124 for every day after the Milestone Date to and including the earliest of the date when the Milestone is achieved or termination of the Contract or the Principal taking WUC out of the hands of the Contractor.”</i></p> <p>There are a number of concerns with these paragraphs of clause 32A, including:</p> <p><b><u>Meaning of “satisfy”</u></b></p> <p>There is no clarity on what is meant by “satisfy” the Milestone Requirements of a particular Milestone (cf. the definition of “Practical Completion”).</p> <p>In this respect, it is apparent from clause 1.1, Item 124 and Annexure Part L that “Milestone Requirements” is only intended to define the portion of the WUC that forms the specific Milestone.</p> <p><b><u>No EOT mechanism for Milestones</u></b></p> <p>The definition of “Milestone Date” is:</p> <p><i>“Milestone Date means the date nominated as such in Item 124 in respect of a Milestone but if any extension of time for reaching the Milestone is granted by the Superintendent (as contemplated by Clause 34) or allowed in any litigation or arbitration, it means the date resulting therefrom (and which is the subject of Clause 32A)”</i></p> <p>This suggests that the applicable date for satisfying each Milestone can be extended by an EOT granted by the Superintendent pursuant to clause 34. However, clause 34 has no application to Milestones as it only applies if “<i>the Contractor is or will be delayed in reaching Practical Completion</i>”.</p> <p>Further, to promote greater clarity and certainty, it is suggested that the current definition of “Milestone Date” be renamed as “Date for Milestone Completion” (ie. the equivalent of “Date for Practical Completion”), and a new defined term titled “Date of Milestone Completion” be inserted (ie. the equivalent of “Date of Practical Completion”).</p> <p><b><u>No real process for certifying completion</u></b></p> <p>The process in the 3<sup>rd</sup> paragraph for “certifying” satisfaction of a Milestone is unclear and uncertain.</p> <p>Given the importance of this issue with respect to liquidated damages and payment, in my view it should mirror the process for Practical Completion in clause 34.6, including the issue of a “Certificate of Milestone Completion” by the</p>	<p><i>“The Contractor shall ensure that each Milestone reaches Milestone Completion by the applicable Date for Milestone Completion.”</i></p> <p>Introduce a new definition in clause 1.1 to describe the stage of “practical completion” for Milestones:</p> <p><b><i>“Milestone Completion means, in respect of a Milestone, that stage when the Milestone Requirements are complete except for minor omissions and defects.”</i></b></p> <p>Also add new definitions of “Certificate of Milestone Completion” and “Date of Milestone Completion”, and rename “Milestone Date” to “Date for Practical Completion”.</p> <p>Replace the 3<sup>rd</sup> paragraph with the equivalent of clause 34.6, with a shorter period (7 days).</p> <p>Introduce drafting that reflects clauses 34.3, 34.4, 34.5 and 34.5B with respect to EOTs (subject to my comments elsewhere) replacing all references to “Practical Completion” with “Milestone Completion”.</p> <p>Replace the 5<sup>th</sup> paragraph with the equivalent of the whole of clause 34.7:</p> <p><i>“If a Milestone does not reach Milestone Completion by its Date for Milestone Completion, the Superintendent shall certify, as due and payable to the Principal, the applicable liquidated damages in Annexure Part L for every day after the Date for Milestone Completion to and including the earliest of the Date of Milestone Completion or termination of the Contract or the Principal taking WUC out of the Contractor.</i></p> <p><i>If an EOT is directed after the Contractor has paid or the Principal has set off liquidated damages, the Principal shall forthwith repay to the Contractor such of those liquidated damages as represent the days the subject of the EOT.”</i></p> <p>Amend clause 20.1 to make it clear that the Superintendent’s functions under clause 32A must be subject to clause 20.1(b) (Certifying Functions).</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>Superintendent, but with a shorter period (7 days) because Milestones are of a lesser importance than Practical Completion.</p> <p>The Superintendent’s functions under clause 32A must be subject to clause 20.1(b) (Certifying Functions).</p> <p><b>Liquidated damages</b></p> <p>Whilst the 5<sup>th</sup> paragraph dealing with liquidated damages is similar to the 1<sup>st</sup> paragraph of clause 34.7, it does not include the 2<sup>nd</sup> paragraph of that clause.</p>	
144.	Milestones – Milestone Payment Claims	32A 37.1	<p>The 4<sup>th</sup> paragraph of clause 32A and the 2<sup>nd</sup> paragraph of clause 37.1 deal with claiming Milestone Payments.</p> <p>As a preliminary point, great care must be taken with milestone payments to ensure that it does not lead to serious cashflow issues for Contractors, which will occur if the whole Contract Sum is split into a small number of milestones which have long forecast periods for completion.</p> <p>The 4<sup>th</sup> paragraph of clause 32A states:</p> <p><i>“Following the Contractor complying with paragraphs (a) and (b) of Clause 32A (provided the Superintendent is satisfied that the Milestone Requirements have been satisfied) the Contractor may include a claim for payment of the relevant Milestone Payment in the next claim for payment.”</i></p> <p>This drafting suggests that the Contractor is not permitted to submit a progress claim for a Milestone Payment immediately upon completion of it, but only at the time specified in Item 146 of Annexure Part A (the default being the 25th day of each month).</p> <p>Consequently, the Contractor may have to wait a further month to claim the applicable Milestone Payment. This will have significant impacts on the Contractor’s cashflow and is unreasonable.</p> <p>Further, it is unclear how the 2<sup>nd</sup> paragraph of clause 37.1 is to operate given that Item 124 defines the various attributes of Milestones, but says nothing about claiming Milestone Payments.</p> <p>Finally, it is suggested that the more appropriate place in the Contract for the 4<sup>th</sup> paragraph of clause 32A is clause 37 (Payment), and drafting will need to be amended to be consistent with the changes to the milestone regime referred to above.</p>	<p>Amend the 1<sup>st</sup> paragraph of clause 37.1 as follows:</p> <p><i>“Subject to clause 37.1A, the Contractor shall claim payment progressively in accordance with Item 146”.</i></p> <p>Delete the 2<sup>nd</sup> paragraph of clause 37.1.</p> <p>Replace clause 37.1A (which I discuss elsewhere) with:</p> <p><b>“37.1A Milestone Payments</b></p> <p><i>Upon the issue of a Certificate of Milestone Completion with respect to a Milestone, the Contractor may immediately submit a progress claim for the applicable Milestone Payment in writing to the Superintendent”.</i></p>
145.	Milestones – Milestone Payments	32A 37.2	<p>The 6<sup>th</sup> paragraph of clause 32A and the 2<sup>nd</sup> paragraph of clause 37.2 deal with the same issue with respect Milestone Payments.</p> <p>The 6<sup>th</sup> paragraph of clause 32A states:</p> <p><i>“Where the Superintendent is required to assess a payment which might be due to the Contractor or make a valuation of WUC carried out by the Contractor the Superintendent shall first exclude, from the Contract Sum, the</i></p>	Delete the 6 <sup>th</sup> paragraph of clause 32A and the 2 <sup>nd</sup> paragraph of clause 37.2.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><i>amount of all Milestone Payments in respect of Milestones which have not been achieved”.</i></p> <p>Whereas clause 37.2(c), discussed elsewhere, states:</p> <p><i>“In coming to an opinion as to the moneys due from the Principal to the Contractor, and in assessing the retention moneys and moneys due from the Contractor to the Principal, the Superintendent shall:</i></p> <p><i>(c) if Milestones are relevant (as indicated at Item 124), exclude, from the Contract Sum, the amount of all Milestone Payments in respect of Milestones which have not been achieved;”</i></p> <p>With respect to these provisions:</p> <ul style="list-style-type: none"> <li>• The wording of both these provisions apply in all cases when assessing any amount payable to the Contractor. This is very wide and difficult to understand how it is intended to operate.</li> <li>• As discussed above, the “Contract Sum” should be the original amount of the contract price included in the Contract, which must include the full amount of Milestone Payments.</li> <li>• As also noted above, the Contract does not create an obligation on the Principal to pay the Contract Sum, and the Contract is clear that the Contractor’s entitlement to be paid any Milestone Payments is conditional upon certification of “Milestone Completion”.</li> </ul> <p>Finally, it is suggested that the 6<sup>th</sup> paragraph of clause 32A and clause 37.2(c) should be combined and addressed in clause 37.2 (if the retained at all).</p>	
<b>Commissioning &amp; Testing</b>				
146.	Examination and testing	30	<p>Clause 30 and the definition of “Tests” in clause 1.1 largely follows the unamended AS4000-1997. The only changes are:</p> <ul style="list-style-type: none"> <li>• A new clause 30.1A (Specified Tests) and associated change to the definition of “Tests” in clause 1.1.</li> <li>• A new clause 30.1B (Testing authority)</li> <li>• The addition of the new 3<sup>rd</sup> and 4<sup>th</sup> paragraphs in clause 30.6 (Completion and results).</li> </ul> <p>The effect of these changes differs from the position in the Old Government Standard Form and creates unnecessary complexity and uncertainty (including circularity) and unreasonable outcomes for the Contractor. In summary:</p> <ul style="list-style-type: none"> <li>• The sole purpose of clause 30 of AS4000-1997 is to create rights for the Superintendent to direct <b>additional testing</b> and address the consequences of the Superintendent exercising those rights.</li> </ul>	<p>Delete <i>“and Subclause 30.1A”</i> in the definition of “Tests” in clause 1.1.</p> <p>Delete clause 30.1A, 30.1B and the amendments to clause 30.6.</p> <p>Make the necessary changes to reflect the deletion of clauses 1.2(m), 1.2(n) and 45.5 and the discussion with respect to clause 20.1(b) and the Certifying Functions above.</p> <p>Ensure that the amendments to the definition of “Qualifying Cause of Delay” discussed elsewhere do not preclude an entitlement to EOT and delay costs arising out of the Directions by the Superintendent pursuant to clause 30.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>It is not intended to have any application with respect to tests that are already a part of the Contractor’s obligations set out in the other Contract Documents (primarily the Specification).</p> <p>This is clear from how the balance of clause 30 operates. Further, as a matter of contract, it is unnecessary to specify that the contractor must do something that another provision already requires it to (and which is already included in the contract price&gt;</p> <p>By amending the definition of “Test” in clause 1.1 to cover <b>both</b> additional ad hoc testing directed by the Superintendent and the tests specified in the Specification, the balance of the unamended provisions in clause 30 are affected in a manner that will have unintentional consequences. The definition is also now circular, as the amendment incorporates the defined term in its own definition.</p> <ul style="list-style-type: none"> <li>• Clause 30.1A is unnecessary and creates an inconsistency with clause 30.7 and should be deleted (see discussion below).</li> <li>• Clause 30.1B creates an absolute obligation which is likely to be excessive and impractical in many cases, removing the usual flexibility that ensures appropriate testing methodologies are adopted (see discussion below).</li> <li>• The amendments to clause 30.6 unreasonably change the allocation of risk and responsibility with respect to repeating tests and the costs associated with failed tests (see discussion below).</li> </ul> <p>Further, changes to other parts of the Contract (particularly the definition of “Qualifying Cause of Delay” and clauses 1.2(m), 1.2(n), 20 and 45.5) materially increase the Contractor’s risk position with respect to clause 30 that is not apparent from the terms of this provision (particularly the discretions in clause 30.1, 30.3 and 30.5).</p>	
147.	Specified Tests	30.1A	<p>This entirely new clause states:</p> <p><i>“The Contractor must procure the carrying out of any Tests specified in the Specification.</i></p> <p><i>The cost of the Tests specified in the Specification shall be borne by the Contractor, except where the Test is directed under Subclause 30.1 and the Test reveals the Contractor has complied with the Contract.”</i></p> <p>As noted above, it is my opinion that this provision be deleted:</p> <ul style="list-style-type: none"> <li>• 1<sup>st</sup> paragraph - Whilst it goes without saying that the Contractor must carry out all testing required by the Specification, as it is a Contract Document.</li> </ul> <p>If it is necessary to include something to avoid any doubt, then the defined term “Tests” should be changed to “tests” to avoid overlapping with clause 30.1.</p>	Delete clause 30.1A.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>2<sup>nd</sup> paragraph – Given that, by definition, a Test directed under clause 30.1 is not specified in the Specification, it is unclear when this paragraph can ever apply.</li> </ul> <p>However, more importantly, this paragraph currently overlaps and conflicts with clauses 30.6 and 30.7 (discussed below).</p>	
148.	Testing authority	30.1B	<p>This entirely new provision states:</p> <p><i>“All Tests shall be undertaken by an independent testing authority registered with the National Association of Testing Authorities Australia (NATA) to perform the specified testing and approved by the Superintendent.”</i></p> <p>This is to be contrasted with section 160.76 of the DSG Specification (June 2024) titled “Examination and Testing of Materials and Work”, particularly section 160.76(c).</p> <p>Clause 30.1B differs from section 160.76 in two critical respects:</p> <ul style="list-style-type: none"> <li>Clause 30.1B is an <b>absolute</b> obligation and operates regardless of whether independent testing with NATA laboratory is appropriate or reasonably necessary for the particular test specified by the Superintendent under clause 30.1 or (<i>cf.</i> section 160.76(c)(ii)).</li> </ul> <p>Further, there is nothing preventing the Superintendent including in a direction given pursuant to clause 30.1 that the particular test must be undertaken by a NATA tester.</p> <ul style="list-style-type: none"> <li>Clause 30.1B requires the approval the particular NATA laboratory selected by the Contractor to be approved by the Superintendent. This creates further administrative constraints and likely delays. See also the discussion of the effect of clauses 20.1 and 45.5 on such approvals.</li> </ul>	Delete clause 30.1B. Any testing requirements, including those who must undertake specific testing should be addressed in the Specification Eg. section 160.76 of the DSG Specification (June 2024)).
149.	Completion and results and Costs	30.6 & 30.7	<p>The entirely new 3<sup>rd</sup> paragraph of clause 30.6 states:</p> <p><i>“If a Test reveals a failure of the Contractor to comply with the Contract or satisfy the requirements in relation to that Test, the Test must be repeated and the cost of the repeated shall be borne by the Contractor.”</i></p> <p>There are two parts to this paragraph:</p> <ul style="list-style-type: none"> <li>All failed tests must be repeated - This is an unreasonable and inappropriate requirement because every case must be assessed on its merits. If the non-conformance is minor and easily rectified, it may not be reasonable to require the Contractor to incur cost and delay to repeat the test.</li> </ul> <p>Further, where repeating a test is a reasonable requirement or is desired by the Superintendent, it can direct the test to be repeated in accordance with clause 30.1 and the costs will be addressed pursuant to clause 30.7.</p>	Delete the entirely new 3 <sup>rd</sup> and 4 <sup>th</sup> paragraphs of clause 30.6.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>• The cost of repeating the test is to be borne by the Contractor - This is inconsistent with the overall framework of clause 30.            Clause 30.7 states:  <i>“Costs in connection with testing pursuant to this Clause shall be borne by the Principal except where the Contract otherwise provides or the Test is consequent upon, or reveals a failure of the Contractor to comply with the Contract (including this Clause).”</i>             Accordingly, the Contractor only bears the costs of a Test where the <i>“Test is consequent upon, or reveals a failure of the Contractor to comply with the Contract”</i>.             Assume two different scenarios, both involving a successful test:           <ul style="list-style-type: none"> <li>○ If the first Test is successful, the Principal bears the cost pursuant to clause 30.7.</li> <li>○ But, if the first Test is unsuccessful and the second test is successful, the Contractor now bears the cost of <b>both</b> Tests because of the introduction of the 3<sup>rd</sup> paragraph in clause 30.6.</li> </ul>           Consequently, the 3<sup>rd</sup> paragraph of clause 30.6 unreasonably changes the responsibility for the costs of a re-test which demonstrates that the WUC complies with the Contract.             The entirely new 4<sup>th</sup> paragraph of clause 30.6 contains an unreasonable restriction on the Contractor progressing any WUC that has a connection with a Test <b>until</b> 3 specified conditions have been satisfied.             The first two conditions require a successful test (including re-testing), and the 3<sup>rd</sup> condition is that <i>“5 days has expired following the provision of the results of the relevant Test to the Superintendent”</i>.             The Contractor already has clear obligations, and the Principal / Superintendent has clear rights and remedies, with respect to the rectification of Defects in the Contract.             Further, the hold points and other limitations on progressing the WUC for testing and quality management are always specified in the Specification. Inserting this paragraph here will inevitably create unintended consequences.             It is also unclear why it is necessary for the Contractor to wait 5 days, particularly as there is no requirement under the Contract (nor should there be) that the Superintendent approve Test results.             This will inevitably create unnecessary delay in the progress of the works, which cannot be built into the program with respect to Tests directed by the Superintendent after the Contract is executed.             The Contractor should be permitted to proceed with WUC (subject to the Superintendent’s rights under clauses 29 and 30.3) at its own risk.         </li> </ul>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Completion</b>				
150.	“Date for Practical Completion”	1.1 34.1 Item 29	<p>Clause 34.1 requires that <i>“The Contractor shall ensure that WUC reaches Practical Completion by the Date for Practical Completion”</i>.</p> <p>Clause 1.1 defines “Date for Practical Completion” by reference to the date or period of time specified in Item 29. In this respect note:</p> <ul style="list-style-type: none"> <li>Item 29 provides that <i>“If no selections is made, then a reasonable date as determined by the Superintendent”</i>.</li> </ul> <p>This note should be deleted. There is no certainty as to when the Superintendent is to make this determination (on day 1 or at Practical Completion or any time in between) or the matters that the Superintendent should take into account. This will have a profound impact on the determination and the Contractor’s ability to dispute any such determination.</p> <p>If no fixed date is agreed, the common law will always imply a term addressing the timing of the Contractor’s completion obligation. Given the importance to the Contractor of this timing and the consequences that flow, this is the only reasonable solution should the Principal fail to complete, either inadvertently or intentionally, Item 29.</p> <ul style="list-style-type: none"> <li>I suggest that guidance be included in the template with respect to the commencement of the “Period of Time” if adopted. This must be identified with sufficient clarity and certainty to ensure that the contractual mechanisms are workable, and all people involved with the Contract have a clear understanding of when is the original Date for Practical Completion.</li> </ul> <p>As an example, DSG RFT 3449 adopted the “Period of Time”, which commenced at the “Commencement of the WUC”. This creates uncertainty as there is no certificate or other method of clearly determining when this might be. Greater clarity would be to have stated “Commencement of the WUC on Site following satisfaction of the Commencement Preconditions”.</p>	Delete the note in Item 29 and insert further guidance in the with respect to the commencement of the “Period of Time”.
151.	Resources	32B	<p>This new provision (no equivalent in the Old Government Standard Form) states:</p> <p><i>“The Contractor shall deploy the resources necessary to ensure that WUC reaches Practical Completion by the Date for Practical Completion and to otherwise comply with its obligations under the Contract. In considering whether the Contractor has complied with this obligation no regard will be had to the resources the Contractor may have assumed would be sufficient to comply with its obligations or to the resources which the Contractor may have planned to deploy.”</i></p> <p>The 2<sup>nd</sup> sentence should be deleted as it unreasonably seeks to define what a breach of this obligation will involve. Whether the Contractor has complied with its obligation should be left to the general principles. Note also that clause 32B is referred to in clause 34.4, which is addressed below.</p>	Delete the 2 <sup>nd</sup> sentence in clause 32B.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
152.	“Practical Completion”	1.1 Item 30	<p>Possibly the most important definition in the Contract is “Practical Completion” given all of the things that follow satisfaction of its conditions.</p> <p>The definition in clause 1.1 contains 6 conditions and 1 exclusion:</p> <ul style="list-style-type: none"> <li>• Paragraphs (a) to (c) are unamended from AS4000-1997. The most important issue with respect to these conditions is to ensure that the Superintendent’s determinations in paragraph (a)(ii) and opinion to be formed pursuant to paragraph (c) are covered by clause 20.1(b) and that clauses 1.2(m), 1.2(n) and 45.5 does not operate.</li> <li>• Paragraph (d) states: <ul style="list-style-type: none"> <li>“<i>all of the Contractor’s Activities have been undertaken in accordance with the Contract (where the time for that activity to have been undertaken has passed) and all of the Contractor’s Activities which have been undertaken, or the results of those activities comply with the Contract</i>”</li> </ul> </li> </ul> <p>This is unreasonable and should be deleted, as it requires that as a condition of Practical Completion” of the WUC, the Contractor must not have breached at any time any obligation under the Contract other than those involving “<i>the carrying out of WUC and the completion of The Works</i>”.</p> <p>The purpose of the stage of “Practical Completion” is to ensure that The Works are completed and in a sufficient state to permit them to be used by the Principal for their stated purpose. This benefits both parties, including giving the Principal access to the Works for its use, and ending the Contractor’s exposure to liquidated damages.</p> <p>Further, from both a legal and practical purpose it is unclear how this requirement could be assessed by the Superintendent or how it could ever be satisfied if the Contractor has previously breached (no matter how minor) an obligation involving the “Contractor’s Activities”.</p> <ul style="list-style-type: none"> <li>• Paragraph (e) states: <ul style="list-style-type: none"> <li>“<i>all matters referred to in the Specification as being required to be attended to or completed prior to Practical Completion have been attended to or completed</i>”</li> </ul> </li> </ul> <p>Given the importance of this definition, it is critical that the Contractor and the Superintendent have absolute clarity as to what is required to achieve Practical Completion.</p> <p>The drafting adopted here is not, in my opinion, sufficiently clear (eg. it does not specify that such matters are expressly identified in the Specification as being a condition precedent to Practical Completion being reached). Further, this should not be used to avoid the limitations in paragraph (a).</p> <p>Any additional conditions can and should be included in Item 30 referred to in paragraph (f).</p>	Delete paragraphs (d) and (e) of the definition of “Practical Completion” in clause 1.1.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>With respect to the exclusion in the chaussette, see the separate discussions on definitions of “Post Practical Completion Work” and “Post Practical Completion Documentation” and clause 34B.</li> </ul>	
153.	Practical Completion	34.6 Item 137	<p>Clause 34.6 is amended by the introduction of the entirely new 4<sup>th</sup> to 7<sup>th</sup> paragraphs (no equivalent in the Old Government Standard Form). The 4<sup>th</sup> and 5<sup>th</sup> paragraphs are alternatives that seek to achieve the same outcome (<b>exclusion</b> of potential claims by the Contractor) by different avenues as follows:</p> <ul style="list-style-type: none"> <li>4<sup>th</sup> paragraph - If indicated at Item 137, the Contractor must provide to the Superintendent a duly completed Deed of Release (Practical Completion) as a condition of making the request for the issue of a Certificate of Practical Completion. The default position under Item 137 is “<i>If no selection is made, ‘Deed Required’ is taken to be selected.</i>”</li> <li>5<sup>th</sup> paragraph - If the Contractor is not required to provide a Deed of Release (Practical Completion), then by making a request for the issue of a Certificate of Practical Completion it <b>automatically</b>: <ul style="list-style-type: none"> <li>Provides the contractual <b>warranties</b> to the Principal set out in clauses 34.6(a). As discussed above, a “warranty” in this context is a contractually binding statement of present fact (as at the time of entry into the Contract) and of future intention that gives the other party various remedies (ranging from common law damages to a right to terminate the contract) should either prove to be incorrect.</li> <li><b>Releases</b> the Principal from “<i>all Claims which the Contractor has in connection with the WUC and the Contract other than those claims identified in the request.</i>”</li> </ul> </li> </ul> <p>In my opinion, there is no reasonable basis for incorporating these paragraphs. In particular, I note:</p> <ul style="list-style-type: none"> <li>They operate as another new, one-sided, exclusion clause (time bar)</li> <li>They are in conflict with the specific provisions of the Contract dealing with Practical Completion. For example: <ul style="list-style-type: none"> <li>Clause 34.6(a)(i) – The 2<sup>nd</sup> paragraph of clause 34.6 permits the Contractor to request a Certificate of Practical Completion when it “<i>is of the opinion that Practical Completion has been reached.</i>” This is important as only the Superintendent can determine whether Practical Completion has actually been reached given that paragraph (a)(ii) of the definition is subject to the Superintendent’s determination, paragraph (b) is subject to the Superintendent’s directions under clause 30, and paragraph (c) is subject to the Superintendent’s opinion.</li> </ul> </li> </ul>	<p>Delete:</p> <ul style="list-style-type: none"> <li>The 4<sup>th</sup> paragraph of clause 34.6, Item 137, the relevant Annexure containing the Deed of Release (Practical Completion) and all other references in the Contract to “Deed of Release (Practical Completion)”.</li> <li>Delete the 5<sup>th</sup> and 6<sup>th</sup> paragraphs of clause 34.6.</li> <li>Delete Annexure Part U</li> </ul>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>○ Clause 34.6(a)(ii) – This directly conflicts with paragraph (a) of the definition of “Practical Completion”.</li> </ul> <p>With respect to the new 6<sup>th</sup> and 7<sup>th</sup> paragraphs see the comments below in relation to clause 34A (Conditional Practical Completion) and clause 34B (Post Practical Completion Work and Documentation).</p>	
154.	Conditional Practical Completion	34A	<p>This is an entirely new provision (no equivalent in the old Government Standard Form), which unreasonably undermines the purpose of the Contract for the benefit of the Principal.</p> <p>The effect of this provision is to give the Principal all of the rights and benefits as if Practical Completion has been certified (including the right to occupy and use the Works), whilst in return, the Contractor “may” (in the Superintendent’s absolute and unlimited discretion) receive some reduction in liquidated damages (up to a maximum of 50%).</p> <p>All other obligations of the Contractor that would ordinarily be completed and risks that would be transferred to the Principal at Practical Completion (including care of the works, insurance, Security etc) are unchanged.</p> <p>Further, I note that the Contract already provides an adequate and fairer framework for dealing with the situation where only part of the works have achieved Practical Completion and the Principal wishes to take over that part before the balance is completed – clause 4 and Separable Portions (see also clause 35.4 of the Old Government Standard Form).</p>	Delete the whole of clause 34A, the definition of “Conditional Certificate of Practical Completion” and all other references to these in the Contract.
155.	“Post Practical Completion Work” and “Post Practical Completion Documentation”	1.1 34B Items 143 & 144	<p>The definitions of “Post Practical Completion Work” and “Post Practical Completion Documentation” are used in the definition of “Practical Completion” and clauses 34.6 and 34B, and Items 143 and 144, to identify work to be performed and documentation to be provided by the Contractor <b>after</b> Practical Completion.</p> <p>This work and documentation falls into two categories:</p> <ul style="list-style-type: none"> <li>• Work and documentation pre-agreed by the parties which is described in Items 143 and 144 and any other work nominated as such in the Contract Documents.</li> <li>• Work and documentation nominated as such by the Superintendent at any time and subject to any conditions in its absolute and unlimited discretion (given the effect of clauses 12.2(m), 1.2(n), 20 and 45.5).</li> </ul> <p>Importantly, the definition of “Practical Completion” excludes such work and documentation.</p> <p>The 1<sup>st</sup> category reflects what commonly occurs in construction projects, such as the provision of final as-built drawings. The key is how these are to be treated in clause 34B (as discussed below).</p>	<p>Amend the definitions in clause 1.1 as follows:</p> <p><b>“Post Practical Completion Work means:</b></p> <ul style="list-style-type: none"> <li>(a) the work identified in Item 143;</li> <li>(b) any work identified in the Contract Documents to be completed by the Contractor after Practical Completion; and</li> <li>(c) any other work agreed by the parties in writing to be completed by the Contractor after Practical Completion,</li> </ul> <p>and which is the subject of Clause 34B, but does not include minor Defects existing at Practical Completion falling within the meaning of paragraph (a) of the definition of Practical Completion;</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>The 2<sup>nd</sup> category is more problematic. Whilst I can see benefits for the parties to have flexibility to <b>agree</b> after the Contract has been entered into that certain work and/or documentation will be performed after Practical Completion and be subject to the provisions of clause 34B, it is neither appropriate nor reasonable for this to be a matter of the Superintendent’s absolute discretion (particularly due to clauses 1.(m), 1.2(m) and 45.5).</p> <p>There may also be unintended consequences, depending on the nature of the works, including with respect to insurance, the Contractor being given necessary access and possession of the Site to complete the Works and the effect on the recovery of delay damages under clause 34.9. There may also be a conflict with paragraph (a) of the definition of Practical completion and the operation of the 3<sup>rd</sup> paragraph of clause 35.</p> <p>Further, as noted above, the creation of Separable Portions in clause 4 (which is consistent with the balance of the contract) can be used by the Principal / Superintendent if the former wishes to take possession of and use part of the Works.</p> <p>Finally, it is suggested that these concepts could be simplified by combining Items 143 and 144, and that any pre-agreed works and documents.</p>	<p><b>Post Practical Completion Documentation means:</b></p> <p>(a) the documentation identified in Item 144;</p> <p>(b) any work identified in the Contract Documents to be completed by the Contractor after Practical Completion; and</p> <p>(b) any other documentation agreed by the parties in writing to be provided by the Contractor after Practical Completion, and which is the subject of Clause 34B;”</p> <p>Amend Items 143 and 144 to remove the permanent wording in the shaded boxes.</p> <p>Delete clause 32B.2 in its entirety as it only applies “If the Superintendent nominates work as Post Practical Completion Work or documentation as Post Practical Completion Documentation”.</p>
156.	Post Practical Completion Work and Documentation - Carrying out the work and providing the documentation	34B.1	<p>This is an entirely new provision (not equivalent in the Old Government Standard Form).</p> <p>Clauses 34B.1(a) to (d) deal solely with “Post Practical Completion Work”, whilst clause 34B.1(e) only applies to “Post Practical Completion Documentation”.</p> <p>Clauses 34B.1(a) and (e) deal with the timing for completion of these works and provision of this documentation. In this respect:</p> <ul style="list-style-type: none"> <li>• If there are to be fixed, pre-agreed date(s) or times for completion of these works and provision of this documentation there must be an effective EOT regime to permit these times to be extended for Qualifying Causes of Delay. There is currently no regime in the Contract.</li> </ul> <p>This will be complex to draft and administer as it will need to address two matters:</p> <ul style="list-style-type: none"> <li>○ Delays to the achievement of Practical Completion will need to be addressed. For example, what happens if the Date of Practical Completion is after the date for provision of the Post Practical Completion Documentation?</li> </ul> <p>A solution would be for the applicable date to only be calculated by reference to a fixed period of time after the Date of Practical Completion. This is often how as-built drawings are addressed (eg. 1 month after the Date of Practical Completion).</p> <ul style="list-style-type: none"> <li>○ Delays caused by Qualifying Causes of Delay which prevent the Contractor from completing the Post Practical Completion Works or</li> </ul>	<p>Amend clause 34B.1 to read:</p> <p><i>“The Contractor must:</i></p> <p>(a) complete the Post Practical Completion Work as soon as reasonably practicable;</p> <p>(b) carry out the Post Practical Completion Work at times and in a manner causing as little inconvenience to the occupants or users of The Works as is reasonably possible;</p> <p>(c) comply with any conditions on the carrying out of the Post Practical Completion Work identified in the Contract or as agreed in writing by the parties; and</p> <p>(d) not carry out the Post Practical Completion Work at times or on days identified as such in the Contract or as agreed in writing by the parties;</p> <p>(e) provide the Post Practical Completion Documentation as soon as reasonably practicable”.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>providing the Post Practical Completion Documentation by the fixed date or time.</p> <p>The EOT process in clause 34 does not apply as this does not involve the Contractor being delayed in reaching Practical Completion by a Qualifying Cause of Delay.</p> <ul style="list-style-type: none"> <li>The alternative is that the Contractor’s obligation be specified as one to complete the works and deliver the documentation “<i>as soon as reasonably practicable</i>”, that is, as quickly as all of the circumstances applicable to the Contractor permits. Given the complexity identified above, it is my opinion that this approach should be adopted.</li> <li>See also comments below regarding liquidated damages under clause 34B.4.</li> </ul> <p>Clauses 34B.1(c) and (d) addresses the conditions and constraints applicable to these activities. These should be identified in the Contract Documents, or otherwise subject to agreement of the parties in writing in.</p> <p>Finally, the chapeau to this clause contains unnecessary duplication (ie. “<i>Subject to this Subclause ... subject to paragraph (d) of this Subclause</i>”).</p>	Amend Items 143 and 144 to delete the columns “Date or time for completion” and “Date or time for delivery”.
157.	Post Practical Completion Work and Documentation	34B.2 34B.3 34B.4	<p>As a consequence of the above comments:</p> <ul style="list-style-type: none"> <li>Clause 32B.2 (Payment) – Given that this only applies “<i>If the Superintendent nominates work as Post Practical Completion Work or documentation as Post Practical Completion Documentation</i>”, this should be deleted.</li> </ul> <p>If the parties agree to that the Contractor is to perform additional work or provide additional documentation after Practical Completion, they can address payment implications should they wish.</p> <ul style="list-style-type: none"> <li>Clause 34B.3 (Further Completion) – If clauses 32B.2 and 32B.4 are deleted as discussed, this may be unnecessary (cf. clause 35). In any event, it seems likely that there may be many different items of work and documentation potentially with different times for completion etc, making this process very complex and potentially unworkable.</li> <li>Clause 34B.4 (Adjusted Liquidated Damages) – In my opinion, it is not appropriate to apply liquidated damages to Post Practical Completion Works and Post Practical Completion Documentation, particularly as Separable Portions (clause 4) and Milestones (clause 32A, subject to comments above) each apply liquidated damages for delay.</li> </ul> <p>Further, if the completion obligation is “<i>as soon as reasonably practicable</i>” as discussed, there can be no liquidated damages.</p> <p>Finally, as a matter of principle, it is never reasonable to permit the Superintendent as a matter of its absolute and unlimited discretion to determine the amounts of liquidated damages applicable to the parties.</p>	<p>Delete clauses 34B.2, 34B.3 and 34B.4.</p> <p>Delete definition of “Supplementary Certificate”</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Progress &amp; Program</b>				
<b>Program</b>				
158.	Programming - General		<p>The primary purpose of a construction program is to operate as a management tool to assist the Contractor to satisfy its primary obligation to achieve Practical Completion by the Date for Practical Completion.</p> <p>From the Contractor’s perspective, a secondary purpose is that it may be used to support an entitlement to an EOT, noting that the Contractor bears the onus of proof and ought not be restricted in what it can use to demonstrate its entitlement. I also accept that it is reasonable to require a Contractor to prepare a program in accordance with the form requirements specified in the contract and provide a copy (and any updates) to the Superintendent to enable it to monitor the progress of the WUC against the Contractor’s plan</p> <p>Accordingly, it is essential that the Contractor be permitted to program the works to discharge its primary obligation as it sees fit (noting its liability for liquidated damages should it fail). There are two important corollaries:</p> <ul style="list-style-type: none"> <li>• It is not reasonable or appropriate for the Contractor to be obliged to strictly follow its program, and the Contractor should be free to adjust its programme as it sees fit, so long as it provides a copy of the updated program to the Superintendent.</li> <li>• It is also not reasonable for the Principal or the Superintendent to have a right to reject a Contractor’s program or dictate changes to a contractor’s program (other than pursuant to an express right with appropriate protections to the Contractor, such as clause 32.7 discussed elsewhere).</li> </ul> <p>The following specific comments reflect these general principles.</p>	Note
159.	“Program”	1.1	<p>The definition “Construction Program” in clause 1.1 has been re-named as “Program”, but a number of provisions of the Contract still use the term “Construction Program”, including clauses 36.2(a), and 39.2(c), 39.2(d), and Item 122.</p> <p>A similar inconsistency is adopted with respect to “Initial Program”. There is no defined term, but clause 32.3 refers to “initial Program”, and the List of Optional Annexures and Item 123 and Annexure Part N refers to “Initial Construction Program”.</p>	Rectify the typographical errors.
160.	Program “Program Requirements”	1.1 & 32.3	<p>The definition of “Program” in clause 1.1 is <i>“has the meaning in clause 32”</i>, whilst the 1<sup>st</sup> sentence of Clause 32.3 states:</p> <p><i>“A Program is a written statement showing the dates by which, or the times within which, the various stages or portions of WUC are planned to be carried out or completed”.</i></p>	<p>With respect to the definition of “Program Requirements”:</p> <ul style="list-style-type: none"> <li>• Delete the word “accurate” from paragraphs (b), (c) and (d).</li> </ul>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>I have a number of concerns, including:</p> <ul style="list-style-type: none"> <li>1<sup>st</sup> paragraph makes it clear that a “Program” is not a Contract Document and does not form part of the Contract. This is broadly consistent with the Old Government Standard Form and with the general principles set out above.</li> <li>Clause 32.3(a) requires that a “<i>Program must comply with and satisfy the Program Requirements</i>”.</li> </ul> <p>“Program Requirements” is defined extensively in clause 1.1. I question the need for such a detailed definition, but in any event:</p> <ul style="list-style-type: none"> <li>Paragraphs (a), (b), (c) and (d) adopt the phrase “<i>accurate depiction</i>”. It is unclear what the word “accurate” adds in these circumstances, particularly with respect to forecasts of the future (eg. paragraphs (b), (c) and (d).</li> <li>See separate discussions on “Milestones”, Prohibited Working Times”, “Non-Working Times”, “Programmed Working Days”, “Availability Program” and clause 31A.</li> <li>Paragraphs (i) and (j) – To avoid unnecessary complexity, Item 121 should refer to all requirements in the Specification.</li> </ul> <p>I note that there are currently inconsistent overlapping requirements in the definition of “Program Requirements” and clause 32.3 and Section 160.72(c)(ii) of the DSG Specification (June 2024).</p> <ul style="list-style-type: none"> <li>Clause 32.3(b) should be deleted to avoid confusion and unintended consequences (particularly given clauses 1.2(m), 1.2(n), 20.1 and 45.5).</li> <li>3<sup>rd</sup> paragraph of clause 32.3 states “<i>The initial Program may be described at Item 123 or be included at or referred to at Annexure Part O</i>”. It appears that it should be Annexure Part N.</li> </ul> <p>Further, section 160.72 of the DSG Specification (June 2024) provides that “<i>Within 20 Business Days after the Date of the Acceptance of Tender, the Contractor shall submit a Program to the Superintendent</i>”. It is unclear whether this is intended to be the “initial Program”. This should be clarified.</p> <p>Finally, programs prepared by the Contractor are likely to fall within the meaning of “Contractor’s Materials” (see discussion elsewhere). Accordingly, it is important that the general provisions dealing with those materials do not unintentionally cut across clause 32.</p>	<ul style="list-style-type: none"> <li>Make necessary amendments to reflect separate comments on “Milestones”, Prohibited Working Times”, “Non-Working Times”, “Programmed Working Days”, “Availability Program” and clause 31A.</li> <li>Combine paragraphs (i) and (j) so that any requirements in the Specification are identified in Item 121.</li> </ul> <p>Delete clause 32.3(b).</p>
161.	Updated Programs	32.4	<p>Clause 32.4 has two paragraphs:</p> <ul style="list-style-type: none"> <li>1<sup>st</sup> paragraph – Whilst this paragraph is taken from AS4000-1997, it now potentially conflicts with the detailed requirements of clause 32.3, particularly the reference to the “Program Requirements” and the initial Program. Note also section 160.72 of the DSG Specification (June 2024) mentioned above.</li> </ul>	<p>Combine 3<sup>rd</sup> paragraph of clause 32.3 and the 1<sup>st</sup> paragraph of clause 32.4 (in clause 32.3) as follows:</p> <p><i>“If there is no initial Program included at or referred to in Annexure Part N, and subject to any requirements in the Specification, the</i></p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>In my opinion, this paragraph and the 3<sup>rd</sup> paragraph of clause 32.3 should be combined.</p> <ul style="list-style-type: none"> <li>2<sup>nd</sup> paragraph – “<i>The Contractor must provide the Superintendent with an updated Program as required by the Specification and as soon as practicable after the Contractor departs from a Program or the Contractor makes a claim for an EOT under Subclause 34.3 (but not more frequently than the period nominated at Item 122)</i>”.</li> </ul> <p>The drafting of this paragraph is ambiguous with respect to the application of the limitation in the brackets – does it apply in all three circumstances, or just the last? Further, it is unclear from Item 122 whether the period identified (the default is 21 days) applies only to the 3 circumstances in clause 32.4 occur or if it is intended that there be updated programs every (say) 21 days.</p> <p>Further, it is unclear why merely submitting an EOT claim should be a trigger for an updated program.</p> <p>Note also sections 160.72(b) and (c) of DSG Specification (June 2024) is titled “Updating and Reporting on Construction Program”, which includes requirements for updating programs and review by the Superintendent. As noted elsewhere, I have not been instructed to review and comment on the content of the DSG Specification (June 2024).</p>	<p><i>Superintendent may Direct the Contractor to give to the Superintendent a Program within a reasonable time of the Direction</i>”.</p> <p>Amend the 2<sup>nd</sup> paragraph of clause 32.4 to read:  <i>“Subject to any contrary requirements in the Specification, the Contractor must provide the Superintendent with an updated Program</i>                      (a) <i>if the Contractor proposes to materially depart from a previous Program provided to the Superintendent; and</i>                      (b) <i>otherwise, periodically within the period nominated in Item 122 from the previous Program provided to the Superintendent</i>”.</p> <p>Increase the default period in Item 122 to the more reasonable 28 days.</p>
162.	Departure from a Program	32.5	<p>As discussed, as a general principle, a Contractor ought to be able to depart from a program as it sees fit given that its primary obligation is to achieve Practical Completion by the Date for Practical Completion.</p> <p>Whilst the 1<sup>st</sup> sentence of clause 32.5 is taken from the unamended AS4000-1997, there is a material difference because in AS4000-1997, the program is deemed to be a Contract Document. Accordingly, this provision is necessary in AS4000-1997 to ameliorate the fact that a failure to comply with the program, no matter how reasonable, would otherwise be a breach of contract.</p> <p>As a Program “<i>is not a Contract Document and does not form part of the Contract</i>”, this provision is unnecessary and contains an unreasonable limitation on the Contractor’s ability to comply with its primary obligation.</p>	Delete clause 32.5.
163.	Review of Programs		<p>Clause 32 does not expressly deal with review by the Superintendent of programs, but see the discussion with respect to clause 20A.</p> <p>I have not been instructed to review and comment on the content of the DSG Specification (June 2024), but note that section 160.72(b) of DSG Specification (June 2024) appears to contain unreasonable and excessively wide rights for the Superintendent reject Programs (in its absolute and unlimited discretion) and direct changes.</p>	Note

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
164.	Lagging the Program / Rate of Progress	32.6	<p>Clause 32.6 is an entirely new provision (no equivalent in the Old Government Standard Form) which is inconsistent with the above general principles.</p> <p>It contains two paragraphs:</p> <ul style="list-style-type: none"> <li>1<sup>st</sup> paragraph – <i>“If, in the opinion of the Superintendent, WUC falls behind the current Program”</i> the Contractor must comply with the obligations set out in clauses 32.6(a) and 32.6(b).</li> </ul> <p>As discussed elsewhere, there is <b>no</b> obligation in the Contract that requires the Contractor to ensure that the WUC does not <i>“fall behind the current Program”</i> (cf. clauses 32.1, 34.1 and the current drafting of clause 32.5).</p> <p>Further, the comments on clauses 1.2(m), 1.2(n) and 45.5 above are also relevant here.</p> <ul style="list-style-type: none"> <li>2<sup>nd</sup> paragraph – <i>“If, in the opinion of the Superintendent, the Contractor’s action or proposed action is not satisfactory, the Superintendent may Direct further remedial action. The Contractor shall not have any Claim against the Principal and is not entitled to any relief in connection with or arising out of such a Direction.”</i></li> </ul> <p>In addition to the comments above, again the only basis for determining whether the Contractor’s proposed action “is not satisfactory” is the Superintendent’s subjective opinion.</p> <p>If the Superintendent wishes to direct changes to the Contractor’s timing and/or order of any portion of the WUC, it must comply with clause 32.7.</p> <p>Finally, again I note that section 160.72(d) of DSG Specification (June 2024) appears to cover similar ground, but at least is tied to the Contractor’s obligation in clause 34.1, rather than mere progress of the WUC against a Program. Also, there is no right for the superintendent to direct changes.</p>	Delete clause 32.6.
<b>Acceleration and Resequencing</b>				
165.	Order And timing of Works	32.7	<p>The entirely new 3<sup>rd</sup> paragraph (no equivalent in the Old Government Standard Form) states:</p> <p><i>“The difference shall be assessed in accordance with the Valuation Rules. The difference shall not be assessed where the Direction is caused by or results from a delay or any other breach by the Contractor of its obligations under the Contract.”</i></p> <p>Two points:</p> <ul style="list-style-type: none"> <li>1<sup>st</sup> sentence – There is no express reference in Annexure Part K to clause 32.7. However, due to the 2<sup>nd</sup> paragraph of clause 32.7 it appears that section 5 of the Valuation Rules is intended to apply (More or Less Cost).</li> </ul> <p>I refer to and repeat the comments set out in relation to this section of the Valuation Rules above.</p>	Delete the whole of the new 3 <sup>rd</sup> paragraph. Ensure that the Superintendent’s functions with respect to this provision are Certifying Functions within the meaning of clause 20.1(b).

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>• 2<sup>nd</sup> sentence – This appears to overlap with the phrase “<i>except those pursuant to the Contractor’s default</i>” in the 2<sup>nd</sup> paragraph, although the wording in the 3<sup>rd</sup> paragraph potentially goes far further in excluding the contractor’s entitlement to compensation in two respects:                             <ul style="list-style-type: none"> <li>○ It is unclear how the phrase “<i>caused by or results from a delay</i>” might be interpreted by a court.</li> <li>○ It cannot be that the <b>whole</b> difference is not assessed simply because the Direction has some causal link to a delay or breach by the Contractor. The reasonable position could only be those costs which are incurred because of the default (ie. “to the extent that the difference ...”. In my view, that is already covered by the 2<sup>nd</sup> paragraph.</li> </ul> </li> </ul> <p>Finally, it is essential that the Superintendent’s functions with respect to this provision are Certifying Functions within the meaning of clause 20.1(b).</p>	



## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

### PART 8– EOT AND DELAY DAMAGES

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Extension of Time (EOT)</b>				
<b>Context</b>				
166.	General		<p>It is important to understand the primary purpose of extension of time provisions in construction contracts – it is a defence to the Contractor’s primary obligation to ensure that WUC reaches Practical Completion by the Date for Practical Completion and the liquidated damages that flow from a breach of that obligation. Whilst delay costs may be limited to extensions of time, that is a separate contractual mechanism.</p> <p>Accordingly, the sole issue addressed by the contractual extension of time regime is whether the Contractor is liable to the Principal for delay liquidated damages in the relevant circumstances.</p>	Note
<b>Qualifying Causes</b>				
167.	“Qualifying Cause of Delay”	1.1	<p>The definition of “Qualifying Cause of Delay” in clause 1.1 of the Contract <b>materially changes the allocation of the substantive risk of delay from the Principal to the Contractor</b> compared with the position in the Old Government Standard Form (despite statements to the contrary at the Industry Briefing on 24 July 2024).</p> <p>Clause 1.1 states:</p> <p><b>“Qualifying Cause of Delay means:</b></p> <ul style="list-style-type: none"> <li>(a) any act, default or omission of the Superintendent, the Principal or its consultants or agents; or</li> <li>(b) any breach of contract by the Principal;</li> <li>(c) subject to Subclause 24.3C, any act of other contractors engaged by the Principal</li> <li>(d) any event nominated as a Qualifying Cause of Delay in the Contract Documents; or</li> <li>(e) any other event stated in item 134;</li> </ul> <p><b>excluding:</b></p> <ul style="list-style-type: none"> <li>(d) a breach or omission by the Contractor;</li> <li>(e) an act of the Superintendent or the Principal which is permitted under the Contract (except where a right to an EoT is explicitly granted in respect of that act);</li> </ul>	<p>Align the definition of “Qualifying Cause of Delay” with the applicable events entitling the Contractor to claim an EOT under the Old Government Standard Form.</p> <p>Paragraph (a) of the definition of “Qualifying Cause of Delay” should be aligned with clause 35.5(b)(i) of the Old Government Standard Form.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>(f) any omission to act by the Superintendent or the Principal where there is no obligation to act under the Contract (except where a right to an EoT is explicitly granted in respect of that circumstance); and</p> <p>(g) any other item stated in Item 135”</p> <p><b>Express Qualifying Causes</b></p> <p>Paragraphs (a) to (e) of the definition set out the specific events and causes that will permit the Contractor to claim an EOT (subject to the express exclusions discussed below).</p> <p>I have the following concerns with the drafting of these paragraphs:</p> <ul style="list-style-type: none"> <li>Paragraph (a) – In comparison with the Old Government Standard Form, the phrase “delays caused by” have been amended to “act, default or omission”, and more significantly the Principal’s employees and other contractors are not included. The omission of “other contractors” is particularly significant (see paragraph (c) below).</li> </ul> <p>This event is further limited by the exclusions in paragraphs (g) and (h) (incorrectly numbered (e) and (f)) discussed below.</p> <ul style="list-style-type: none"> <li>Paragraph (c) – As discussed elsewhere, clause 24.3C should be deleted in its entirety. See also the exclusions in paragraphs (g) and (h) (incorrectly numbered (e) and (f)) discussed below.</li> </ul> <p><b><u>Causes not included</u></b></p> <p>The more significant concern that that there are a significant number of causes of delay in clause 35.5 and other provisions of the Old Government Standard Form that entitled a Contractor to claim an EOT <b>that have been removed from this Contract</b>, including:</p> <ul style="list-style-type: none"> <li>any events occurring on or before the Date for Practical Completion which are <b>beyond the reasonable control of the Contractor</b> including but not limited to industrial conditions and inclement weather (clause 35.5(a)), which includes damage to the WUC caused by Excepted Risks;</li> <li>actual quantities of work being greater than the quantities in the Bill of Quantities or the quantities determined by reference to the upper limit of accuracy stated in the Annexure (otherwise than by reason of a variation directed under Clause 40) (clause 35.5(b)(ii));</li> <li>latent conditions (clauses 12.3 and 35.5(b)(iii));</li> <li>variations directed under Clause 40 (clause 35.5(b)(iv));</li> <li>repudiation or abandonment by a Nominated Subcontractor (clause 35.5(b)(v));</li> <li>changes in the law (clause 35.5(b)(vi));</li> </ul>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>directions by municipal, public or statutory authorities but not where the direction arose from the failure of the Contractor to comply with a requirement referred to in Clause 14.1 (clause 35.5(b)(vii));</li> <li>delays by municipal, public or statutory authorities not caused by the Contractor (clause 35.5(b)(viii));</li> <li>claims referred to in Clause 17.1(v) (clause 35.5(b)(ix)); and</li> <li>if the Contractor suspends all or part of the work under the Contract pursuant to the Security of Payment Act (clause 50.4).</li> </ul> <p>Further, whilst clause 37A.4 of the Contract provides that suspension pursuant to the Security of Payment Act “<i>may be a ground for an extension of time under Subclause 34.5</i>”, this currently meaningless as it is not likely to be an express Qualifying Cause of Delay.</p>	
168.	“Qualifying Cause of Delay” – Express Exclusions	1.1	<p>Each of the events identified in paragraphs (a) to (e) of the definition are subject to the <b>4 express exclusions</b> in paragraphs (f), (g), (h) and (i) (incorrectly numbered (d), (e), (f) and (g)).</p> <p>Those of particular concern are:</p> <p><b><u>Exclusion for acts permitted under the Contract</u></b></p> <p>Paragraph (g) expressly excludes from the definition of “Qualifying Cause of Delay”:</p> <p style="padding-left: 40px;"><i>“an act of the Superintendent or the Principal which is permitted under the Contract (except where a right to an EoT is explicitly granted in respect of that act)”</i></p> <p>This is a <b>major exclusion</b>, meaning that the Contractor now bears the risk of delay (no matter how large) caused by any act of the Superintendent or the Principal permitted under the Contract, except where a right to an EoT is explicitly granted in respect of that act (which appears to be illusory as I am unaware of any provision of the Contract which no “explicitly” grants an EOT with respect to any act of the Superintendent or the Principal).</p> <p>Acts of the Superintendent or Principal that are “<i>permitted under the Contract</i>” which have the potential to cause delay to the Contractor are spread throughout the Contract, including in clauses 4.1, 4.2, 8A.2, 8B.7, 11B.3, 11B.7, 11C.4, 20A.1, 24.3A, 24.3B, 24.3C, 24B, 30, 31, 31A, 32.7, 32A, 33.1, 36.1 and 36.7 (recognizing that it is my opinion that many of these provisions be deleted or amended).</p> <p>By way of illustration only, clause 20A.1 currently permits the Superintendent to give <b>any</b> direction “<i>in relation to the Contract</i>”, clause 33.1 permits the Superintendent to suspend the WUC for its convenience and clause 36.1 gives the Superintendent the power to direct Variations. As currently drafted, the Contractor has <b>no</b> entitlement to EOTs or associated delay damages in any of these circumstances.</p>	, including the deletion of the exclusions in paragraphs (g) and (h) (incorrectly numbered (e) and (f))

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>If there are any specific acts of the Superintendent or Principal that are permitted by the Contract which are reasonable to be excluded from the definition of Qualifying Cause of Delay, they should be clearly and transparently inserted into Item 135 as per paragraph (i).</p> <p><b><u>Exclusion for omissions where no obligation to act</u></b></p> <p>Paragraph (h) expressly excludes from the definition of “Qualifying Cause of Delay”:</p> <p style="padding-left: 40px;"><i>“any omission to act by the Superintendent or the Principal where there is no obligation to act under the Contract (except where a right to an EoT is explicitly granted in respect of that circumstance)”</i></p> <p>As with the previous point, there is <b>no</b> provision of the Conditions of Contract which “explicitly” grants an EOT with respect to any omission of the Superintendent or the Principal.</p> <p>The word “omission” in this context will be interpreted by reference to some duty to act. Importantly, contractual obligations are not the sole source of such duties, as the common law and statute can create duties applicable to the Principal (and its agents).</p> <p>Further, see the separate discussion elsewhere regarding the exclusion of the usual implied duties on the principal of co-operation and not to hinder.</p> <p>Finally, it is also unclear why it is necessary to include an ability to add additional “bespoke” exclusions in Item 135 as per paragraph (g).</p>	
<b>Conditions of Entitlement</b>				
169.	Notice of delay	34.2 & 34.3(c)	<p>Clause 34.2 is unamended and states:</p> <p style="padding-left: 40px;"><i>“A party becoming aware of anything which will probably cause delay to WUC shall promptly give the Superintendent and the other party written notice of that cause and the estimated delay.”</i></p> <p>On its own, clause 34.2 is not a condition precedent to an entitlement to an EOT nor is it a time-bar to such an entitlement. This is an “early warning” notification provision which applies to both parties and is likely to be triggered before the Contractor can reasonably be aware that it is or will be delayed in reaching Practical Completion by the particular event.</p> <p>Should the Contractor fail to comply with clause 34.2 and that failure causes the Principal loss, the Principal has a right to claim damages.</p> <p>However, the inclusion of the new clause 34.3(c) converts compliance with clause 34.2 into a condition of an entitlement to an EOT. This is a new and unreasonable exclusion clause (time-bar) that is not in the Old Government Standard Form and materially increases the Contractor’s contract administration (process) risk.</p>	Delete clause 34.3(c).

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
170.	Other Conditions of Entitlement	34.3(d) & Item 136	<p>Clause 34.3(d) permits the Principal to include additional conditions on an entitlement to an EOT in Item 136.</p> <p>It is difficult to conceive of any further reasonable conditions (that are additional to those contained in the Old Government Standard Form) which are reasonably necessary to protect any legitimate interests of the State with respect to EOTs. Any further conditions will also increase the Contractor’s contract administration (process) risk.</p>	Delete clause 34.3(d) and Item 136.
<b>Entitlement</b>				
171.	Provisional Delay	34.3A & Item 133	<p>Clause 34.3A is another new provision (no equivalent in the Old Government Standard Form), which transfers risk of delay caused by Qualifying Causes of Delay from the Principal to the Contractor.</p> <p>It states:</p> <p><i>“The Contractor has allowed the period or periods nominated at Item 133 by way a provisional allowance for delay in relation to the nominated Qualifying Cause of Delay. The Contractor shall not be entitled to any extension of time in respect of the relevant nominated Qualifying Cause of Delay until any EOT which would otherwise have been given in accordance with Subclause 34.5 equals the period nominated at Item 133 in respect of that Qualifying Cause of Delay and any EOT shall not include that period.”</i></p> <p>For example, say that Item 133 nominates 30 days for Variations. Clause 34.3A then provides that the first 30 days of critical path delay to Practical Completion caused by Variations directed by the Superintendent are to be borne by the Contractor (including delay damages pursuant to clause 34.9).</p> <p>Tenderers will have to decide whether to add to their tender program and tender price the effect of the provisional delay allowance or risk suffering significant losses during the project.</p> <p>If all Tenderers add the time and cost of such provisional delay allowance, the State is likely to be worse off than if clause 34.3A did not exist since the allowance may not need to be used.</p>	Delete clause 34.3A and Item 133.
172.	Programmed Working Days	34.3B	<p>Clause 34.3B is another entirely new and unreasonable provision that is not in the Old Government Standard Form.</p> <p>It states:</p> <p><i>“If the Contractor does not carry out WUC on a Programmed Working Day (for reasons other than a Qualifying Cause of Delay) the next EOT shall be reduced by the number of Programmed Working Days on which the Contractor did not carry out WUC.”</i></p>	Delete clause 34.3A and the definition of “Programmed Working Day”.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>The quantum of the Contractor’s entitlement to an EOT is determined by the extent that <i>“the Contractor is or will be delayed in reaching Practical Completion by a Qualifying Cause of Delay”</i>. This is solely a question of causation (which is a question of fact).</p> <p>However, despite a Qualifying Cause of Delay causing the Contractor to be delayed in reaching Practical Completion by a certain number of days, clause 34.3B may reduce the Contractor’s entitlement simply because the Contractor may not have carried out WUC on a “Programmed Working Day”. This clause should be deleted so that EOTs remain a question of causation, without these artificial limitations and exclusions.</p>	
173.	Assessment	34.4	<p>The only amendment to clause 34.4 is an additional 3<sup>rd</sup> paragraph that has not equivalent in the Old Government Standard Form as follows:</p> <p style="padding-left: 40px;"><i>“In disregarding the matters referred to in paragraphs (a) and (b) of subclause 34.4 the Superintendent shall have regard to the resources the Contractor was obliged to deploy having regard to clause 32B.”</i></p> <p>The issue when assessing an EOT is to determine whether, and by how much, a Qualifying Cause of Delay will cause the Contractor to achieve Practical Completion later than it would otherwise have done. The 2<sup>nd</sup> paragraph of clause 34.4 instructs the Superintendent to disregard whether the WUC can reach Practical Completion without an EOT or whether the Contractor can accelerate when answering this question.</p> <p>Clause 32B requires the Contractor to <i>“deploy the resources necessary to ensure that WUC reaches Practical Completion by the Date for Practical Completion and to otherwise comply with its obligations under the Contract”</i>.</p> <p>With this in mind, the additional paragraph appears to be uncertain, unworkable and unreasonable, including because:</p> <ul style="list-style-type: none"> <li>• The drafting is confusing. It is unclear how the Superintendent is supposed to have regard to the Contractor’s obligation expressed in clause 32B when disregarding the matters in the 2<sup>nd</sup> paragraph of clause 34.4. The words “regard” and “disregard” have opposite meanings.</li> <li>• Whether and by how much a Qualifying Cause of Delay will cause the Contractor to achieve Practical Completion later has nothing to do with whether the Contractor has deployed the necessary resources. If the Contractor has not deployed the necessary resources and that causes concurrent delay, then the 1<sup>st</sup> paragraph of clause 34.4 will apply. Otherwise, the effect of the 3<sup>rd</sup> paragraph will be to reduce the Contractor’s entitlement to a legitimate period of EOT.</li> <li>• The obligation in clause 32B goes further than requiring the deployment of <i>“resources necessary to ensure that WUC reaches Practical Completion by</i></li> </ul>	<p>Ensure that the Superintendent’s obligations in clause 34.4 are covered by the duties in clause 20.1(b).</p> <p>Delete the entirely new 3<sup>rd</sup> paragraph.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><i>the Date for Practical” and includes necessary to comply with all other obligations under the Contract.</i></p> <ul style="list-style-type: none"> <li>The obligation in clause 32B is linked to the “Date for Practical Completion” which is subject to extension by an EOT. Accordingly, the 3<sup>rd</sup> paragraph of clause 34.4 creates an unworkable circularity.</li> </ul> <p>Finally, as the Contract is currently drafted, the Superintendent’s obligation to apportion concurrent delay and to have regard to what prevention and mitigation of the delay has not been effected by the Contractor is not subject to the duties in clause 20.1(b).</p>	
174.	Adjustment of EOT	34.5A	<p>Clause 34.5A is another entirely new provision that is not in the Old Government Standard Form which states:</p> <p><i>“If the Superintendent becomes aware of an error in any EOT assessed under Clause 34 or comes to the view that any such EOT is based on incorrect or incomplete information or is otherwise inappropriate, the Superintendent may assess a substitute EOT which shall stand in place of the original certificate.”</i></p> <p>I have not seen such a provision previously in any construction contract.</p> <p>The parties must be able to proceed with the project with certainty as to the critical Date for Practical Completion at any given time. Once the Superintendent has made an assessment of an EOT within the pre-agreed period for making such determinations, the parties have their respective rights to dispute such a determination.</p> <p>This is an unreasonable provision that is likely to create uncertainty and unintended consequences if the Superintendent may, at any time (including after it has issued a certificate of Practical Completion) to reassess any assessment of an EOT.</p> <p>Further, it is unclear how a party can ever challenge an assessment of an EOT if it is always essentially “provisional”?</p>	Delete clause 34.5A
175.	Discretionary EOT	34.5B	<p>This drafting is not ideal, but sadly has become industry standard over the last 15 years and reflects the amendment to clause 35.5 of the old Government Standard Form.</p>	Note

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Delay Costs – Compensable Causes</b>				
<b>Compensable Causes</b>				
176.	Compensable Causes	1.1 34.9	<p>The definition of “Compensable Cause” in clause 1.1 is the same as AS4000-1997, being limited to the following (plus any additional items listed in Item 141):</p> <p style="padding-left: 20px;"><i>“any act, default or omission of the Superintendent, the Principal or its consultants, agents or other contractors (not being employed by the Contractor)”</i></p> <p>However, unlike AS4000-1997, the Contract includes a new 3<sup>rd</sup> paragraph to clause 34.9 (discussed below), which provides that clause 34.9 is the Contractor’s sole and exclusive remedy in relation to for <i>“any delay, disruption or loss of productivity in connection with the carrying out of the WUC”</i>.</p> <p>The effect is to exclude the recovery of losses associated with delay that would otherwise be recoverable at law (eg. for breach by the Principal) or pursuant to another express provision under the Contract (such as changes in Legislative Requirements, Latent Conditions, suspension directed by the Superintendent, directions to resolve discrepancies, etc).</p> <p>This is a material change in the substantive risk position of the Contractor compared with the Old Government Standard Form.</p>	See discussion below regarding the 3 <sup>rd</sup> paragraph of clause 34.9. If this is not deleted, the definition of “Compensable Cause” will need to be amended to incorporate the express provisions in the Contract and damages for breach that are excluded by that paragraph.
<b>Conditions of Entitlement</b>				
177.	Conditions of Entitlement	34.9	<p>There are two conditions that must be satisfied for the Contractor to be entitled to recover delay damages pursuant to clause 34.9:</p> <ul style="list-style-type: none"> <li>Whilst there is no specific notification (time-bar) requirement in clause 34.9, as discussed elsewhere, there are many other notice requirements (time-bars) throughout the Contract that must be satisfied (depending on the nature of the Compensable Cause), including clause 41.1 (Prescribed Notice).</li> <li>There must be an EOT granted for a Compensable Cause - Consequently, the exceptions in paragraphs (g) and (h) (incorrectly numbered (e) and (f)) of the definition of “Qualifying Cause of Delay” (discussed above) will apply equally to the “Compensable Cause” even though they are not expressly referred to in the definition of “Compensable Cause”.</li> </ul>	As discussed elsewhere, amend / delete applicable notification requirements, and paragraphs
<b>Entitlement</b>				
178.	Valuation Rules	34.9 & Ann Part K	<p>The entirely new 2<sup>nd</sup> paragraph of clause 34.9 states:</p> <p style="padding-left: 20px;"><i>“The delay damages shall be the cost to the Contractor of the delay, as assessed by the Superintendent in accordance with the Valuation Rules (but shall not exceed the amount per day nominated at Item 142).”</i></p>	<p>Delete the new 2<sup>nd</sup> paragraph of clause 34.9 and rely on the unamended clause 34.9.</p> <p>Ensure that the Superintendent’s certification pursuant to clause 34.9 is subject to clause 20.1(b) (Certifying Function).</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>Section 10 of Annexure Part K (Valuation Rules) appears to be applicable to the valuation of delay damages under clause 34.9. The explanation as to why I consider this to be unreasonable is discussed in detail above.</p> <p>Further, must ensure that the Superintendent’s certification pursuant to clause 34.9 is subject to clause 20.1(b) (Certifying Function).</p>	
179.	Daily Limit	34.9 & Item 142	<p>The Contract contains an entirely new daily limit on delay damages recoverable pursuant to clause 34.9 as set out in Item 142 (no equivalent in the Old Government Standard Form), which has the potential to prevent the Contractor from recovering its losses incurred due to delay caused by a “Compensable Cause”, which includes breaches of Contract by the Principal.</p> <p>It should be noted that the default position in Item 142 is stated to be \$5,000 per day. This amount will generally be too low to cover a Contractor’s daily delay costs (see discussion on categories above).</p> <p>Importantly, a Contractor’s losses caused by delay in reaching Practical Completion are likely to vary greatly across the life of a project depending on the nature of the project.</p> <p>It is often thought that an option for Contractors faced with a daily cap on delay damages is to ensure that the amount included in the Tender is many multiples of the maximum expected daily losses to ensure that the limit never applies in practice. Unfortunately for many Contractors, such an approach often underestimates the loss because certain types of losses are not considered by Contractors when forecasting the maximum daily losses.</p>	Delete all references to a daily limit in the Contract, including in clause 34.9 and Item 142.
180.	Exclusive remedy	34.9	<p>As noted above, the entirely new 3<sup>rd</sup> paragraph to clause 34.9 (of which there is no equivalent in the Old Government Standard Form) states:</p> <p><i>“The Contractor does not have any Claim in relation to any delay, disruption or loss of productivity in connection with the carrying out of WUC other than a claim under this Clause.”</i></p> <p>This means that the compensation recoverable pursuant to clause 34.9 is the Contractor’s sole and exclusive remedy in relation to <i>“any delay, disruption or loss of productivity in connection with the carrying out of the WUC”</i>. This is another new exclusion clause.</p> <p>The concerns with this new paragraph include:</p> <ul style="list-style-type: none"> <li>As discussed elsewhere, the definition of “Claim” is exceptionally wide and almost certainly includes a claim for an EOT. Accordingly, the literal meaning is that EOTs are excluded and so clause 34.9 can never operate.</li> <li>Clause 34.9 only provides for compensation where an EOT is granted because there has been critical path delay to the achievement of Practical Completion. It does not include non-critical delay, disruption or loss of productivity.</li> </ul>	Delete the 3 <sup>rd</sup> paragraph.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>However, the new 3<sup>rd</sup> paragraph goes far beyond this, operating as a <b>blanket exclusion clause</b> preventing any recovery by the Contractor for non-critical delay, disruption or loss of productivity where the Contractor would otherwise be entitled to recover, including:</p> <ul style="list-style-type: none"> <li>○ All breaches of Contract by the Principal.</li> <li>○ All express provisions which require the Superintendent to assess the amount of additional costs incurred by the Contractor and add that to the Contract Sum, including clause 8A.2 (Discrepancies), clause 8B.7 (Relied upon Information), clause 11.2 (Legislative Requirements), clause 24.4 (Minerals, Fossils and Relics), clause 26.2 (Errors in Setting Out), clause 26.3 (Survey Marks), clause 32.8 (Order and Timing of WUC), and clause 33.4 (Suspension).</li> <li>○ Valuations of Variations (clause 36) and deemed Variations, including clause 2.5 (Variation in Quantities), clause 14.2 (Reinstatement and Excepted Risks), and 25.3 (Latent Conditions).</li> </ul>	

CIVIL CONTRACTORS  
FEDERATION  
TASMANIA

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

### PART 9 – OTHER COST RELIEF

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Variations</b>				
181.	Variations – General Context	36	<p>The following are some important general principles with respect to variations in construction contracts that provide context for my specific comments on the changes to clause 36 below.</p> <p>Simplistically, a construction contract involves an agreement that the Contractor will construct a defined scope of works in return for a pre-agreed price payable by the Principal, subject to a framework for addressing matters that occur after the parties enter into the contract.</p> <p>Obligations under a contract cannot be varied unless both parties agree. There are two ways that this can be done – a subsequent separate binding contract or a pre-agreed mechanism in the contract itself.</p> <p>As such, neither party has a unilateral right to vary the rights and obligations of the parties, unless the contract expressly provides for this right. A Principal has no implied right to unilaterally add or omit scope.</p> <p>The construction industry recognises that the nature of complex construction projects means that the parties will rarely be able to pre-agree the full scope of the works that the Contractor will be required to build.</p> <p>However, changing the Contractor’s scope can represent significant risks to the Contractor’s profitability and potential liability depending on the nature and timing of the directed changes.</p> <p>Most construction contracts balance these competing interests by including a pre-agreed mechanism permitting the Principal (often acting through its agent, the Superintendent) to make <b>unilateral</b> changes to the Contractor’s obligations, <b>subject to</b> reasonable limitations and appropriate relief for the Contractor (EOT and adjustment to the price).</p> <p>The general guiding principle adopted by most contracts is that it is not reasonable to compel a Contractor to accept changes to its scope where it would be financially worse off than if there had been no change.</p>	Note
182.	Directing Variations	36.1	<p>The entirely new last paragraph (which is not in the Old Government Standard Form) removes important limitations (express and at common law) on the Principal’s unilateral right to vary the Contractor’s obligations.</p> <p>In particular, as discussed below, it is unreasonable to permit the Principal to omit WUC and give it to another contractor.</p>	Delete the new last paragraph.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
183.	Proposed Variations	36.2	<p>Whilst clause 36.2 is unamended from AS4000-1997, as discussed elsewhere,</p> <ul style="list-style-type: none"> <li>It is unclear whether the intention is for the Valuation Rules to apply here. In any event, for the reasons discussed elsewhere, it is my opinion that the Valuation Rules are deleted in their entirety.</li> <li>The Superintendent’s certification must be a “Certifying Function”.</li> </ul>	Ensure that the Superintendent’s certification pursuant to clause 36.2 is subject to clause 20.1(b) (Certifying Function).
184.	Variations for convenience of Contractor	36.3	<p>Variations for the convenience of the Contractor serves an important purpose – it seeks to address situations where it subsequently becomes impossible for the Contractor to perform the WUC entirely in accordance with the terms of the Contract (which may or may not result in frustration) and the proposed Variation is a reasonable solution.</p> <p>As this provision involves the discretion of the Superintendent, the comments on clauses 1.2(m), 1.2(n) and 45.5 above are also relevant here.</p>	Delete clauses 1.2(m), 1.2(n) and 45.5 as discussed above.
185.	Pricing & Valuation Rules	36.4 & Ann Part K	<p>Clause 36.4 has been amended by inserting new 1<sup>st</sup> and 4<sup>th</sup> paragraphs. As discussed above, the apparent purposes of these amendments are:</p> <ul style="list-style-type: none"> <li>1<sup>st</sup> paragraph – To give the Valuation Rules in Annexure part K priority over the methodology in clause 36.4.</li> <li>To amend clause 36.4(b) by giving the Superintendent the absolute discretion to replace the ‘applicable rates or prices in the Contract with: <ul style="list-style-type: none"> <li>the Contractor’s Rates Schedule (if any);</li> <li>the Contract Sum Breakdown Schedule (if any); and</li> <li>any other Pricing Reference Document.</li> </ul> </li> </ul> <p>This goes further than paragraph (c) of clause 36.4 with respect to the types of documents and does not include the essential qualification in clause 36.4(c) that they are only to be used “to the extent that it is reasonable to use them”.</p> <p>The amendments to clause 36.4 and the application of the Valuation Rules for valuing Variations and deemed Variations have been addressed in detail above.</p>	Delete all amendments to clause 36.4 and ensure that the Superintendent’s actions under clause 36.4 are “Certifying Functions”.
186.	Variations after the Date for Practical Completion	36.5	<p>Clause 36.5 is an entirely new provision (not in the Old Government Standard Form) which commences:</p> <p><i>“The Superintendent may Direct a variation <b>after the Date for Practical Completion.</b> ...”</i></p> <p>This will conflict with the 2<sup>nd</sup> paragraph of clause 36.1, which limits the right to unilaterally vary the WUC to “before the Date of Practical Completion”, where the Date of Practical Completion is before the Date for Practical Completion.</p>	To avoid any conflict, insert at the beginning of clause 36.5 the words: <p><i>“Subject to clause 36.1,”</i></p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
187.	Negative Variations	36.6	<p>This entirely new provision (not in the Old Government Standard Form) is unreasonable as it permits the Principal to deprive the Contractor of the benefit of the Contract or effectively walk away from part of the Contract because it may be able to obtain the same work from another contractor at a lower cost.</p> <p>In 1953, the High Court of Australia noted that permitting a Principal (directly or through an agent) <i>“to hand over at will any part of the contract to another contractor <b>would be a most unreasonable power</b>”</i>.</p> <p>This is consistent with the generally held view that the right of a Principal to omit work unilaterally should only apply to “genuine omissions”, in the sense that the Principal no longer requires that work.</p> <p>In the circumstances, it is difficult to align clause 36.6 with the well-known expectations of fair dealing of governments reflected in multiple decisions of the courts in Australia since Federation.</p>	Delete clause 36.6 in its entirety.
188.	Options	36.7	<p>The purpose of the entirely new clause 36.7 (not in the Old Government Standard Form) is to address pre-agreed variations referred to as “Optional Works” (defined as <i>“the potential Variations listed at Item 147 ...”</i>).</p> <p>This provision is poorly drafted, unnecessarily complex and unreasonable.</p> <p>In particular:</p> <ul style="list-style-type: none"> <li>The 1<sup>st</sup> and 2<sup>nd</sup> paragraphs are unnecessary, duplicate the definition of “Optional Works” and create complexity for users. It goes without saying that if there are no Optional Works” identified in Item 147, then clause 36.7 has no operation.</li> <li>Pre-agreeing the impact on the Contract Sum of such Optional Works is reasonable if directed by a pre-agreed date. As such, clause 36.7 should be limited to directions given on or before the relevant date identified at Item 147. After that date has passed, it is reasonable for the Principal to rely upon clause 36.1 to 36.4 to direct such Variations.</li> <li>Further, as there is no certainty as to whether the Principal will exercise its option, it is presumed that the State would prefer that the original program and Contract Sum not take into account the program and delay cost implications of the exercise of these option(s).</li> </ul> <p>Consequently, a direction under clause 36.7 should be a Qualifying Cause of Delay and a Compensable Cause.</p>	<p>Delete the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> paragraphs and amend the 3<sup>rd</sup> paragraph to read:</p> <p><i>“The Superintendent may Direct that any one or more of the Optional Works are to be carried out (or removed from The Works) on or before the relevant date identified at Item 147 and the amount in respect of the relevant Optional Works nominated at Item 147 shall be added to or deducted from the Contract Sum.”</i></p> <p>Amend the definitions of “Qualifying Cause of Delay” and “Compensable Cause” to include directions under clause 36.7.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
189.	Substituted or similar	29A	<p>This is an entirely new provision (not in the Old Government Standard Form). It is unclear why it is necessary to have a separate provision, with separate requirements to clause 36 (Variations). For example:</p> <ul style="list-style-type: none"> <li>1<sup>st</sup> paragraph - repeats the 1<sup>st</sup> paragraph of clause 36.1.</li> <li>2<sup>nd</sup> paragraph - where the Contractor desires to use materials, fixtures, fittings and goods that are different to those required by the Contract, clause 36.3 will apply.</li> <li>3<sup>rd</sup> paragraph – The valuation of Variations is covered by clause 34.4 (including savings).</li> </ul>	Delete clause 29A in its entirety as clause 36 already addresses this subject in a reasonable manner.
<b>Principal’s Acts and Omissions</b>				
190.	Adjustment for actual quantities	2.5 & Items 38 & 39 Sect 8.3 of Ann Part K	Clause 2.5 and the impact of the introduction of Annexure Part K (Valuation Rules) are discussed above in detail.	<p>Delete all amendments to clause 2.5 and revert to the unamended AS4000-1997. Delete Annexure Part K and all references to “Valuation Rules” in the Contract.</p> <p>Ensure that the Superintendent’s responsibilities with respect to clause 2.5 are Certifying Functions.</p>
191.	Valuation Rules – More or Less Cost – Principal’s acts or omissions	Sect 5 of Ann Part K	<p>The impact of the introduction of Annexure Part K (Valuation Rules) with respect to the Contractor’s entitlement to compensation for acts or omissions of (or on behalf of) the Principal under clauses 4.2, 8A.2, 8B.7, 24.3B, 24.3A, 24B, 26.2, 26.3, 31, 31A, 32.7, 33.4, and 36.7 has been dealt with in detail above.</p> <p>It is also necessary to ensure that the Superintendent’s responsibilities pursuant to each of these provisions are Certifying Functions.</p>	<p>Delete Annexure Part K and all references to “Valuation Rules” in the Contract.</p> <p>Ensure that the Superintendent’s responsibilities pursuant to each of these provisions are Certifying Functions.</p>
<b>Neutral Events</b>				
<b>Excepted Risks &amp; Latent Conditions</b>				
192.	Excepted Risks - Reinstatement	14.2 & Sect 8.3, Ann Part K	Clause 14.2 and the impact of the introduction of Annexure Part K (Valuation Rules) are discussed above in detail.	Delete Annexure Part K and all references to “Valuation Rules” in the Contract.
193.	Latent Conditions	25 Item 102 Sect 8 of Ann Part K	<p>The only amendment to clause 25 of AS4000-1997 is the inclusion of the reference to Item 102 in clause 25.1, which enables the State to pass on the risk of certain unforeseen site conditions to the Contractor on an ad hoc basis.</p> <p>Clause 25.3 is unamended from AS4000-1997 such that the effect of a Latent Condition is “a deemed variation”.</p>	Ensure necessary amendments are made to other provisions of the Contract including the definitions of “Qualifying Cause of Delay”, “Compensable Cause”, “Certifying Function” to ensure that the issues highlighted in the previous column are addressed.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>Whilst I have no concerns with the drafting of clause 25.3, there are risks and concerns for Contractors caused by other provision of the Contract, including:</p> <ul style="list-style-type: none"> <li>Deemed Variation – As a “deemed Variation”, the impact is to be priced pursuant to clause 36.4 and section 8.3 of Annexure Part K (Valuation Rules). The issues with these provisions are dealt with in detail elsewhere and are repeated here.</li> <li>EOT - Due to the amendments to the definition of “Qualifying Cause of Delay”, there is no EOT for delays caused by Latent Conditions.</li> <li>Delay damages – Delays caused by Latent Condition is also not a Compensable Cause and due to the introduction of the 3rd paragraph in clause 34.9 is to exclude from recovery under clauses 25.3 and 36.4.</li> <li>Certifying Function – The Superintendent’s valuation of the deemed Variation may not be a Certifying Function.</li> </ul>	
194.	Minerals, fossils and relics	24.4 Sect 5 of Anne Part K	<p>Clause 24.4 is unamended from AS4000-1997 other than the entirely new 3<sup>rd</sup> paragraph provides that the Superintendent’s assessment is to be in accordance with Valuation Rules.</p> <p>As discussed above, it appears that the relevant part of the Valuation Rules is section 5 of Annexure Part K. I refer to and repeat the comments set out in relation to section 5 of Annexure Part K (Valuation Rules) above.</p>	Delete the amendment to clause 24.4 and revert to the unamended AS4000-1997. Delete Annexure Part K and all references to “Valuation Rules” in the Contract. Ensure that the Superintendent’s responsibilities with respect to clause 24.4 are Certifying Functions.
<b>Legal Requirements &amp; Standards, Authorities &amp; Approvals</b>				
195.	Legislative Requirement – Changes – Valuation Rules	11.2 & 11.3 Sect 5 of Anne Part K	<p>Clause 11.2 is unamended from AS4000-1997 other than the entirely new 2<sup>nd</sup> paragraph provides that the Superintendent’s assessment is to be in accordance with Valuation Rules.</p> <p>As discussed above, it appears that the relevant part of the Valuation Rules is section 5 of Annexure Part K. I refer to and repeat the comments set out in relation to section 5 of Annexure Part K (Valuation Rules) above.</p> <p>Further, as discussed elsewhere, the entirely new clause 11.3 appears to overlap in an inconsistent manner with clause 11.1 and 11.2 with respect to responsibility for approvals and risk of changes to the legislative requirements for those approvals and should be deleted.</p>	Delete the amendment to clause 11.2 and revert to the unamended AS4000-1997. Delete Annexure Part K and all references to “Valuation Rules” in the Contract. Ensure that the Superintendent’s responsibilities with respect to clause 11.2 are Certifying Functions.
<b>Utilities</b>				
196.	Utilities – Delays, Diversions & Upgrades		Acts and omissions of Utilities can have a significant impact on the progress and cost of a construction project, especially where it is necessary for services to be diverted to permit the WUC to be undertaken.	Note relevant provisions in the DSG Specification (June 2024) dealing with Utilities.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>Other than the new definition of “Existing Utilities” (which includes reference to a defined term “Utilities” which has no definition), which is only used in clause 14.1 (discussed elsewhere), the Conditions of Contract does not specifically address the impact of Utilities on the Project.</p> <p>There are a number of provisions of the Contract which indirectly address the impact of Utilities, including:</p> <ul style="list-style-type: none"> <li>• Clause 11.2(a)(iii) – Changes to the provision of services by a municipal, public or other statutory authority in connection with WUC necessitated by Legislative Requirements</li> <li>• Clauses 24.3 and 24.3C to the extent that the Utilities are engaged by the Principal to carry out work on or in the vicinity of the Site. See separate comments on these provisions.</li> <li>• Clause 25 – Latent Conditions</li> </ul> <p>Whilst I have not been instructed to review and comment on the content of the DSG Specification (June 2024), I note that a number of provisions deal with utility services, including:</p> <ul style="list-style-type: none"> <li>• Section 160.12A (Existing Services) and 160.12B (Providing Services) – These need to be understood in context of clause 25 dealing with Latent Conditions</li> <li>• Section 160.72(a), which states: <ul style="list-style-type: none"> <li>“<i>In developing the Program, the Contractor shall consider all issues associated with the relocation of public utility services. The Contractor shall fully inform itself of the impact of the works under the Contract on existing services and make allowance in its Program for the lead times required by each service authority for design, liaison, supply of materials, notification to residents and construction periods, including making allowance for any periods of the year when services cannot be relocated.</i></li> <li><i>The Contractor shall consider the impacts of its Service Relocation Strategy in the development of its Program.</i>”</li> </ul> </li> </ul> <p>The effect of this provision is unclear, particularly where it is not part of the Contractor’s scope to procure the relocation of services. Care must be taken to ensure that this provision does not transfer the risk of delays to services relations to the Contractor where the Principal is responsible for such relocations.</p> <p>Finally, note that a number of the critical utilities are owned by the State, in particular TasNetworks (100%) and TasWater (minority share).</p>	

**INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT**

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Escalation</b>				
197.	Escalation	2.7	Other than section 199 of the Specification (where applicable) and the potential for clause 2.7 to call up “Pricing Adjustment Clauses” (as discussed above), there is no separate relief for rise and fall in the new Contract.  It appears that the previous drafting incorporated into DSG Contracts for “Supply Cost Relief Events” has not been incorporated.	Note



**CIVIL CONTRACTORS  
FEDERATION  
TASMANIA**

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

### PART 10 – NOTIFICATIONS, TIME BARS & DISPUTES

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Notification &amp; Time-Bars - General</b>				
198.	Time-Bars - General		<p>At the Industry Briefing on 24 July 2024, it was suggested that time bars were not included in the Contract to exclude legitimate claims of the Contractor where they may inadvertently miss a notification requirement, but rather that the State has a legitimate interest in being provided with early notification of claims at to enable it to mitigate its own losses.</p> <p>I acknowledge that the State does have a legitimate interest in early notification of claims as highlighted, however a time-bar is not the only way to satisfy such an interest.</p> <p>The alternative is an obligation to provide early notification which, if breached, will permit the party entitled to receive the notice to recover any losses it suffers due to late notification as common law damages for breach. This is the approach adopted in clauses 42.1 and 42.2 of the unamended AS4000-1997 for Prescribed Notices (discussed below).</p>	Note
<b>Notification &amp; Time-Bars - EOT</b>				
199.	Notice of Delay EOT Claim	34.2 & 34.3(c)	<p>As discussed above, the inclusion of the new clause 34.3(c) converts compliance with clause 34.2 into a condition of an entitlement to an EOT.</p> <p>This entirely new exclusion clause (time-bar) has no equivalent in the Old Government Standard Form and materially increases the Contractor’s contract administration (process) risk.</p> <p>For completeness, note the condition precedent (time bar) in the unamended clause 34.3(b) to provide a written claim for an EOT.</p>	Clause 34.3(c) should be deleted.
<b>Prescribed Notices / General Claims Notification</b>				
200.	Communication of claims - Prescribed Notice “Claim Information”	1.1 41.1	<p>The 1<sup>st</sup> and 2<sup>nd</sup> paragraphs of clause 41.1 state:  <i>“The Prescribed Notice is a written notice of the general basis and quantum of the claim.                      As soon as practicable after a party becomes aware of any claim in connection with the subject matter of the Contract, that party shall give to the other party and to the Superintendent the Prescribed Notice or a notice of Dispute under Subclause 42.1.”</i></p> <p>The requirement that a Prescribed Notice only must include the “<i>general basis and quantum of the claim</i>” reflects the fact that:</p> <ul style="list-style-type: none"> <li>The “prescribed notice” mechanism under AS4000-1997 is intended as an “early warning” mechanism with respect to all claims in connection with the</li> </ul>	Delete the 3 <sup>rd</sup> paragraph of clause 41.1 and the definition of “Claim Information”.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>subject matter of the Contract that is not required to be communicated by another provision of the Contract.</p> <ul style="list-style-type: none"> <li>• There is a very short time in the 2<sup>nd</sup> paragraph for providing the Prescribed Notice - <i>“as soon as practicable after a party becomes aware of any claim in connection with the subject matter of the Contract”</i></li> <li>• Clause 41.3 permits the party a further 28 days to provide <i>“particulars of the claim”</i> to the other party and the Superintendent.</li> </ul> <p>However, the entirely new 3<sup>rd</sup> paragraph now states:  <i>“A Prescribed Notice must include the Claim Information. Document purporting to be or which is relied upon as a prescribed notice which does not comply with these requirements shall not be regarded as a prescribed notice and may not be relied upon as a Prescribed Notice.”</i></p> <p>The entirely new definition of “Claim Information” in clause 1.1 specifies an <b>extensive</b> list of information which must be provided for a valid “Prescribed Notice” as follows:  <b>“Claim Information means:</b></p> <ol style="list-style-type: none"> <li>(a) <i>details of the events or circumstances giving rise to the Claim;</i></li> <li>(b) <i>to the extent that clauses and subclauses of the Contract are relied upon to bring the Claim, the clauses and subclauses relied upon and the way in which they are relied upon;</i></li> <li>(c) <i>to the extent that provisions of legislation are relied upon to bring the Claim, the legislation and sections of the legislation relied upon and the way in which they are relied upon;</i></li> <li>(d) <i>to the extent that principles of law are relied upon to bring the Claim, the principles relied upon and the way in which they are relied upon;</i></li> <li>(e) <i>the amount, or estimated maximum amount that the Contractor asserts it is entitled to by reason of the events giving rise to the Claim and the way in which that amount is determined;</i></li> <li>(f) <i>the period, or estimated maximum period of time that the Contractor asserts it is entitled to by way of EOT by reason of the events giving rise to the Claim and the way in which that period is determined; and</i></li> <li>(g) <i>if relief in addition to time or money is sought, the nature of the relief and the basis for the seeking of the relief the Contractor asserts it is entitled to by reason of the events giving rise to the Claim”</i></li> </ol> <p>The equivalent clause 46.1 of the Old Government Standard Form only required <i>“particulars of”</i> the breach, act, omission, direction, approval or circumstances on which the claim is or will be based, the provision of the Contract or other basis for the claim or proposed claim, and the quantum or likely quantum of the claim.</p>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>This list of required information goes far beyond “<i>notice of the general basis and quantum of the claim</i>” (1<sup>st</sup> paragraph of clause 41.1) and the Old Government Standard Form and, in my opinion, is unreasonably excessive, particularly given:</p> <ul style="list-style-type: none"> <li>• The context stated above, including the very short time for providing the Prescribed Notice.</li> <li>• The 2<sup>nd</sup> sentence of the 3<sup>rd</sup> paragraph has been inserted to ensure that there is no doubt that strict compliance with the requirement to provide the “Claim Information” by the Contractor is required to avoid the time-bar inserted into clause 41.2 (see below).</li> <li>• Most (if not all) contractors will require legal advice to be able to comply with many of these requirements (a cost which is unlikely to be recoverable).</li> </ul>	
201.	Liability for failure to communicate – Time Bar	41.2	<p>It is acknowledged that clause 46.1 of AS2124-1992 (unamended) contains a notification (time bar) requirement with respect to claims by the Contractor (subject to a limited list of exceptions) for:</p> <ul style="list-style-type: none"> <li>• breaches of the Contract by the Principal; and</li> <li>• any other claim for any extra cost or expense in respect of or arising out of any direction or approval by the Superintendent.</li> </ul> <p>The Old Government Standard Form amended this provision to significantly (and, in my opinion, unreasonably) extend its application to cover claims “<i>arising out of or related to the works under the Contract (including claims in tort, for a quantum meruit or pursuant to statute)</i>”.</p> <p>In contrast, clause 41.2 of AS4000-1997 removed this one-sided time bar and adopted a more reasonable and balanced provision as follows:</p> <p><i>“The failure of a party to comply with the provisions of Subclause 41.1 or to communicate a claim in accordance with the relevant provision of the Contract shall, inter alia, entitle the other party to damages for breach of Contract but shall neither bar nor invalidate the claim.”</i></p> <p>Accordingly, rather than only barring claims by the Contractor, it makes the giving of a Prescribed Notice a mutual obligation that gives the other party a right to damages for breach of contract if loss is suffered because of a failure to give timely notification.</p> <p>This approach still encourages timely notification of claims by both parties, whilst protecting the party entitled to receive the notice from any losses incurred where timely notice was not given.</p> <p>In any event, clause 41.2 has been amended to create an <b>exclusion clause (time-bar) that only applies to the Contractor</b> as follows:</p> <p><i>“The failure of the Contractor to comply with the provisions of Subclause 41.1 or to communicate a claim in accordance with the relevant provision of the Contract shall, bar and invalidate the claim.”</i></p>	<p>Delete clause 41.2 and revert to the drafting in the unamended AS4000-1997.</p> <p>Any specific time bar provisions elsewhere in the Contract (eg. clause 34.3(b)) are not affected by this approach.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>Importantly, <b>this extends even further than the Old Government Standard</b> in four critical respects:</p> <ul style="list-style-type: none"> <li>• A Prescribed Notice must be given under clause 41.1 with respect to “<i>any claim in connection with the subject matter of the Contract</i>”, subject to a smaller list of exceptions than in the Old Government Standard Form.</li> <li>• As noted above, the timing for the Prescribed Notice in clause 41.1 is “[a]s soon as practicable after [the Contractor] becomes aware of any claim”. This is likely to be much earlier than clause 46.1 of the Old Government Contract (ie. “<i>28 days after the first day upon which a competent and experienced contractor could reasonably have been aware of the circumstances which might give rise to any such claim</i>”)</li> <li>• As also noted, the extensive information required (ie. “Claim Information”) differs materially from that required under the Old Government Standard Form.</li> <li>• The 2<sup>nd</sup> half of clause 41.2 creates a new exclusion clause (time) for claims that must be communicated in accordance with other provisions of the Contract that are not covered by clause 41.1 and would not otherwise be barred.</li> </ul> <p>I am of the opinion that, whilst reasonable time-bars can serve a legitimate purpose for a Principal with respect to certain types of claims that are expressly provided for in a construction contract (EOTs being the primary one), they are not reasonable for general claims that do not have specific notification requirement attached to the express entitlement or claims for remedies at law.</p>	
<b>Other Notifications / Time Bars / Exclusion Clauses</b>				
202.	“Claim”	1.1 1.2(j)	<p>“Claim” is defined in clause 1.1 very broadly:</p> <p><i>“Claim means any allegation, debt, cause of action, liability, claim, proceeding, suit or demand of any nature however arising and whether present or future, fixed or unascertained, actual or contingent, and whether at law, in equity, under statute or otherwise”.</i></p> <p>This will almost certainly include non-financial claims, such as EOT, and all claims outside the Contract.</p> <p>It is used in clauses 1.2(j), 2A.2(c), 2B.3, 5.1A, 7.1, 8A.2, 8B.6, 8B.7(b), 11B.7, 20.2, 20.5, 20A.3, 20B.2, 20C.3, 24.2, 32.6, 34.6, 34.9, 37.1A, 37.4, 39.5, and 41A, and the definition of “Claim Information” in clause 1.1.</p> <p>With the exception of the definition of “Claim Information” in clause 1.1 and clauses 1.2(j), 5.1A, 7.1 and 41A, all of these provisions involve an exclusion of the Contractor’s right to claim.</p> <p>Clause 1.2(j) is an entirely new provision (no equivalent in the Old Government Standard Form in the general “Interpretation” provision that is to be applied</p>	Note

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>where the word “Claim” is used to exclude entitlements of the Contractor. It states:</p> <p><i>“where the Contractor is said to not have any Claim against the Principal, then, without limiting that expression, the Contractor shall not be entitled to any Relief in connection with or arising out of the circumstances which may have given rise to the claim and the Contractor releases the Principal from any Claim it has or might have in connection with or arising out of those circumstances”</i></p> <p>There are also many clauses where the word “claim” is used. It is presumed that these will have a different meaning to the defined term, although this creates some uncertainty.</p>	
203.	Early Warning Procedure – General	2B	<p>It was noted at the Industry Briefing on 24 July 2024 that the inspiration for this “Early Warning Procedure” were the NEC3/NEC4 suite of contracts and the NSW Government GC21 form.</p> <p>Standards Australia also incorporated an Early Warning Procedure in its discussion draft of AS 11000 – 2015, which the new clause 2B follows closely.</p> <p>Importantly, each if these forms of contract include with the “early warning procedure” other express provisions, such as:</p> <ul style="list-style-type: none"> <li>• NEC – A fundamental aspect of NEC3/NEC4 is clause 10 with provides that the Employer, the Contractor, the Project Manager and the supervisor must <i>“act as stated in this contract and in a spirit of mutual trust and co-operation”</i>.</li> </ul> <p>This underpins the collaborative nature of the NEC suite, including the early warning procedure.</p> <ul style="list-style-type: none"> <li>• NSW Government GC21 – Clauses 3 and 4 contain express obligations on both parties to reasonably co-operate and avoid hindering the performance of the other party, and clause 5.2 states that information provided by a party pursuant to the early warning procedure must not be used against that party as an admission of breach of the Contract</li> <li>• AS 11000 – Clause 2.1(a) expressly provides that each party must <i>“act reasonably in a spirit of mutual trust and cooperation, and generally in good faith towards the other”</i>, and clause 2.2 (Early Warning) is expressly linked to clause 2.1(a).</li> </ul> <p>Whilst the State has adopted the concept of the “early warning procedure”, these complementary provisions have not been incorporated.</p> <p>Further, when Standards Australia issued the discussion draft of AS 11000-2015 the feedback on the proposed “early warning procedure” was not all positive, with many responses suggesting that it would create an administrative burden on parties with a disproportionate practical benefit, particularly given all the other</p>	Delete clause 2B in its entirety.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>specific notification requirements under the Contract (including early warning type provisions such as clause 34.2).</p> <p>It is noteworthy that Australian Standards decided not to incorporate the early warning provisions in the recently released discussion draft updated to AS4000-2024.</p> <p>The spirit of co-operation, trust and good faith that is intended to underpin the early warning procedure and the procedure itself is also inconsistent with the adversarial nature of the other notification / time-bar requirements applicable to the Contractor in the Contract which continue to operate simultaneously (see clause 2B.1).</p> <p>An associated important issue is the role of the Superintendent in this process, given that under clause 20.1 the Superintendent is the agent of the Principal in all cases except where it is exercising Certifying Functions. There is a strong likelihood that the Superintendent will be involved in undertaking Certifying Functions at the same time that it is engaged in the collaborative “early warning procedure”. This will create a clear conflict of interest.</p> <p>For example, where an event causes delay to the WUC, the Contractor must give a notice under 34.2. At that stage the Contractor does not have a claim, but it may become an issue in dispute (if it causes delay to Practical Completion), so the Contractor must also give a notice under clause.</p> <p>The parties must confer with the Superintendent pursuant to clause 2B.2 “as soon as practicable” to “resolve” the issue, even though at that stage the Contractor has no claim, just the possibility of a claim.</p> <p>If during the period of consultation, the Contractor discovers that the event will delay the achievement of Practical Completion, the Contractor must also give an EOT claim under clause 34.3. This then triggers an obligation on the Superintendent to make a determination pursuant to clause 34.5 (as an independent certifier), which conflicts with its involvement in the collaborative process under clause 2B.1.</p> <p>In certain circumstances, depending on the timing of events, it may be that clause 2B.3 requires the Contractor to issue a Notice of Dispute before the Superintendent has assessed the entitlement to EOT.</p> <p>There is nothing preventing the parties from consulting whenever a notice is given under the other provisions of the Contract. It is unnecessary to specify an additional, ill-conceived and unworkable process.</p>	
204.	Early warning procedure – Failure to resolve issue & Time-bar	2B.3	<p>Given my conclusion above that the whole of clause 2B should be deleted, it is not strictly necessary to address clause 2B.3. However, it is important as it creates another new notification requirement that operates only as a time-bar against the Contractor.</p>	Delete the whole of clause 2B, including clause 2B.3.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>That is, clause 2B.3 bars any future claim of the Contractor with respect to an issue that is the subject of an early warning notice given pursuant to clause 2B.1 unless the Contractor notifies the Superintendent within 30 Business days of the early warning notice that it:</p> <ul style="list-style-type: none"> <li>intends to make a Claim by giving a Prescribed Notice under clause 41.1 in respect of the issue; or</li> <li>intends to give a notice of Dispute pursuant to Clause 42 which includes such issue.</li> </ul> <p>Strictly speaking, the Contractor may have to give such a notice even if it has already issued a Prescribed Notice under clause 41.1 or a Notice of Dispute under clause 42.</p> <p>Given the other notification requirements under the contract, in my view this additional time-bar is unreasonable .</p> <p>Further, it is unclear why such a notification requirement (time bar) does not apply to both parties. If such a general time-bar is necessary to protect the legitimate interests of one party, it must equally be necessary for the other party.</p>	
205.	Additional New Time-Bars:	8A.2(c) 8B.7(b) 20A.3 24.3C 34.6 37.1A	<p>There are also a number of additional express exclusion clauses (incorporating time-bars) incorporated into the Contract that apply only to the Contractor, including:</p> <ul style="list-style-type: none"> <li><b>Clause 8A.2 (Discrepancies in the Contract Documents)</b> – The Contractor is not entitled to Claim against the Principal by reason of or in connection with an error, inconsistency, ambiguity, discrepancy or omission in the Contract Documents unless all of the requirements of clauses 8A.2(a) to (d) are satisfied, including notification to the Superintendent “<i>as soon as practicable</i>” after discovering any such error etc. See further discussion in relation to clause 8A.2 above.</li> <li><b>Clause 8B.7 (Relied Upon Information)</b> - The Contractor is not entitled to Claim against the Principal by reason of or in connection with an error, inconsistency, ambiguity, discrepancy or omission in the Relied Upon Information unless it has notified the Superintendent immediately upon discovering the error etc. See further discussion in relation to clause 8B.7 above.</li> <li><b>Clause 20A.3 (Directions – Time and cost consequences)</b> – The Contractor is not entitled to Claim against the Principal with respect to any direction given by the Superintendent under or in accordance with the Contract unless it complies with the notification requirement in clause 20A.3. See detailed discussion with respect to this provision below.</li> <li><b>Clause 24.3C (Work by other contractors)</b> – The effect of the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> paragraphs of this clause is that if the Contractor becomes aware of any condition in, inadequacy of or omission from the work of the other</li> </ul>	Delete the exclusion clauses and time-bars in each of these provisions.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>contractors that may prejudicially affect The Works or the Contractor’s ability to carry out WUC and does not notify the Superintendent before proceeding with the relevant WUC, it has no entitlement to claim against the Principal. See further discussion in relation to clause 24.3C.</p> <ul style="list-style-type: none"> <li> <b>Clause 34.6 (Practical Completion &amp; Deed of Release (Practical Completion))</b> – The entirely new 4<sup>th</sup> and 5<sup>th</sup> paragraphs of clause 34.6 requiring releases from the Contractor as a condition of a request for Practical Completion are a form of exclusion clause / time-bar.                      See further discussion in relation to clause 34.6 and the definition of “Claim” above.                 </li> <li> <b>Clause 37.1A (Payment Claim warranties)</b> – The warranty in clauses 37.1A(a)(iii) and the releases in clause 37.1A(b) which are deemed to be given with each progress claim are a form of exclusion clause / time-bar.                      They prevent the Contractor from making any Claims which are then known to the Contractor (or could have been known by reasonably competent contractor) and which are not disclosed in the progress claim (or have not been disclosed in any previous progress claim).                      See further discussion in relation to clause 37.1A and the definition of “Claim” above. Importantly, the “Claim” will almost certainly include non-financial claims, such as EOT, which makes it difficult to reconcile with the drafting of clause 37.1A.                 </li> </ul> <p>All of these new and additional exclusion clauses are unreasonable. It is very difficult to see how these provisions could be reasonably necessary in order to protect any legitimate interests of the State that are not already reasonably protected by other provisions of the Contract.</p>	
<b>Service of Notices</b>				
206.	Time of Receipt of Notices	7.2	<p>Clause 7.2 replaces clause 7(b) of AS4000-1997 with respect to the time when notices are deemed to have been given and received. This provision is the same as clause 7.2 of the Old Government Standard Form.</p> <p>Given the extensive notification provisions that are time-bars under the Contract, these changes create significant new “process risk” for the Contractor.</p> <p>There are two changes that cause particular concern.</p> <p>Firstly, a notice under the Contract is <b>deemed</b> to be given and received at a particular time depending on the nature of service regardless whether it was actually received earlier. This is known as a “contractual fiction”.</p> <p>Secondly, clause 7.2(c) deals with notices sent by electronic mail transmission. There are two particular concerns with the drafting:</p>	<p>Replace clause 7.2 with the following:</p> <p><i>“A Notice given to a person stated in the Contract is treated as having been given and received on the earliest date of actual receipt or:</i></p> <p>(a) <i>if hand delivered, on the day of delivery if delivered before 4.00 pm on a Business Day, otherwise at 9.00 am on the next Business Day;</i></p> <p>(b) <i>if sent by pre-paid mail, on the third Business Day after the day of posting where the person's address and the place of posting are both within</i></p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>The requirement that it “<i>enters the recipients mail server in full and without error</i>” – this means that a notice is treated as if never received if one word is missing.</li> <li>The 2<sup>nd</sup> sentence states “<i>If the transmission is caught by the receiver’s spam filter, the notice is not to be considered as received until the transmission is opened by the recipient</i>”.</li> </ul> <p>The sender of an email has no control over a recipient’s spam filter, nor any way of knowing whether the notice is caught by the spam filter or not. Further, even if the recipient checks its spam folder and sees the email, it is not deemed to be received until it is opened by the recipient. This is clearly unreasonable and inappropriate.</p> <p>Sections 11 and 11A of the <i>Electronic Transactions Act 2000</i> (Tas) specify default meanings of “the time of dispatch of the electronic communication” and “time of receipt of the electronic communication”. In my view, these are both reasonable and appropriate to be incorporated by reference into clause 7.2(c).</p> <p>Finally, the chapeau refers to “Notice”, which is not defined. It is presumed that it is intended to have the same meaning as the communications referred to in clause 7.1 (ie. “<i>all notices, requests, Claims, demands and other communications under the Contract or in relation to WUC</i>”).</p>	<p><i>Australia, otherwise when it would be delivered in the due course of post;</i></p> <p>(c) <i>if sent by electronic mail transmission, as determined in accordance with sections 11 and 11A respectively of the Electronic Transactions Act 2000 (Tas);</i> <i>or</i></p> <p>(d) <i>if delivered via a document management system, on the day of delivery if delivered before 4.00 pm on a Business Day, otherwise at 9.00 am on the next Business Day.”</i></p> <p>Define “Notice”.</p>
<b>Dispute Resolution</b>				
207.	Prescribed Notice - Superintendent’s decision	41.3	The Superintendent’s obligation to assess the claims in Prescribed Notices in clause 41.3 is not currently a “Certifying Function” (as defined).	Ensure that the Superintendent’s responsibilities with respect to clause 2.5 are Certifying Functions.
208.	Arbitration	42.3 Item 155	Item 155 includes as an option the UNCITRAL Arbitration Rules as adopted by a Resolution of the General Assembly of the United Nations on 9 December 2021. It is presumed that this is only intended where one of the parties is not an Australian corporation. However, this not clear and recent DSG Tenders have chosen this option for fully domestic parties.	Either delete the option in Item 155 or make it clear that it is only to be used for international arbitrations where the Contractor is not an Australian corporation or where the Contractor is a joint venture, all joint venturers are not Australian corporations.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

### PART 11 – CONTRACTOR’S OBLIGATIONS, WARRANTIES & DEFECTS

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Performance of Works</b>				
<b>General</b>				
209.	“WUC” and “The Works”	1.1	<p>These are critical definitions for the Contractor as they underpin the Contractor’s primary obligations.</p> <p>The definition of “WUC” (“Work under the Contract”) in clause 1.1 is unamended from AS4000-1997 as follows:</p> <p style="padding-left: 20px;"><b>“WUC (from “Work Under the Contract”) means the Work which the Contractor is or may be required to carry out and complete under the Contract and includes Variations, remedial Work, Construction Plant and Temporary Works”</b></p> <p>Whereas the definition of “The Works” has been amended significantly (and is not consistent with the definition in the Old Government Standard Form) as follows (underling is new wording):</p> <p style="padding-left: 20px;"><b><u>“The Works means the whole of the Work to be carried out and completed in accordance with the Contract, including the works described in or depicted in the Specification, the Drawings and the other Contract Documents together with any Variations provided for by the Contract and any minor or incidental work which, in the opinion of the Superintendent, is reasonably and obviously necessary for the completion of WUC or which is reasonably capable of inference from the Contract Documents and which is to be handed over to the Principal”</u></b></p> <p>As such, there are two significant additions to this definition:</p> <ul style="list-style-type: none"> <li>• The Works includes “<i>the works described in or depicted in the Specification, the Drawings and the other Contract Documents</i>”.</li> </ul> <p>Whilst on its face this appears reasonable, there is a risk that this will inadvertently include works that are specified in the Specification, Drawings and other Contract Document to be performed by or on behalf of the Principal (eg. service relocation works to be undertaken by utilities).</p> <p>In light of this, and the fact that the additional wording is unnecessary as the Specification, Drawings and other Contract Documents form part of the Contract, this should be deleted to avoid the potential for unintended consequences.</p> <ul style="list-style-type: none"> <li>• The Works includes “<i>any minor or incidental work which, in the opinion of the Superintendent, is reasonably and obviously necessary for the completion of WUC or which is reasonably capable of inference from the Contract Documents</i>”.</li> </ul>	<p>Delete the amendments to the definition “The Works” and revert to the definition in AS4000-1997 and the Old Government Standard Form.</p> <p>See the discussion on clauses 2.1(i) to 2.1(k) below.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>Similar wording was in a contract considered in the English appeals case of <i>Sharpe v San Paulo Railway Company</i> (1872 – 73) LR 8 Ch. App. 597 involving the construction of a railway in Brazil.</p> <p>The new clauses 2.1(i) and 2.1(k) cover this, but in an <b>inconsistent</b> manner (see discussion below). Significantly, these provisions involve a purely objective assessment of such matters, rather than importing the subjective opinion of the Superintendent (which is unreasonable).</p> <p>Further, the Contractor’s obligations under the contract are determined by the common law principles application to the interpretation of contracts. To the extent that inferences can be drawn from the terms of the Contract Documents should be left to those common law principles, to avoid unintended consequences.</p>	
210.	“Contractor’s Activities”	1.1	<p>Clause 1.1 introduces a new defined term “Contractor’s Activities” as follows:</p> <p><b>“Contractor’s Activities means all of the activities which the Contract requires the Contractor to undertake and all of the obligations which the Contract requires the Contractor to comply with (except for the carrying out of WUC and the completion of The Works)”.</b></p> <p>That is, it is <b>all</b> of the contractor’s obligations under the Contract <b>except</b> “for the carrying out of WUC and the completion of The Works”.</p> <p>Thus, its purpose seems to be to distinguish between the Contractor’s obligations under the Contract “for the carrying out of WUC and the completion of The Works” and all other obligations under the Contract.</p> <p>This defined term is used in the following provisions:</p> <ul style="list-style-type: none"> <li>• Definition of “Non-Compliance” – This is limited to “Contractor’s Activities which do not comply with the Contract.”</li> </ul> <p>This is used the definitions of “Defects” and “rectify” and in clauses 11B.7, 11C.4, and 20B.1. See discussion below.</p> <ul style="list-style-type: none"> <li>• Paragraph (d) of the definition of “Practical Completion” – “all of the Contractor’s Activities have been undertaken in accordance with the Contract (where the time for that activity to have been undertaken has passed) and all of the Contractor’s Activities which have been undertaken, or the results of those activities comply with the Contract”.</li> </ul> <p>As discussed elsewhere, this is unreasonable and should be deleted.</p> <ul style="list-style-type: none"> <li>• Clause 2.1(b) - Performance and payment – “The Contractor shall undertake and complete the Contractor’s Activities”.</li> </ul> <p>Whilst this is strictly unnecessary, it is also not unreasonable.</p> <ul style="list-style-type: none"> <li>• Clause 20C.3 - Requests for Information (RFIs) – “The Contractor is not entitled to delay WUC or the performance of the Contractor’s Activities by</li> </ul>	Note.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><i>reason of the submission of a RFI or the time taken for a RFI Response to be provided (if one is provided)."</i></p> <p>As discussed elsewhere, this is unreasonable and should be deleted.</p> <ul style="list-style-type: none"> <li>• Clause 37A.4 - Suspension of Works under the Security of Payment Act – <i>“If the Contractor suspends all or part of WUC and the Contractor’s Activities pursuant to the Security of Payment Act, the suspension in itself shall not affect the Date for Practical Completion but may be a ground for an extension of time under Subclause 34.5.”</i></li> </ul> <p>This part of clause 37A.4 is not unreasonable, but as noted elsewhere, this should be expressly stated to be a Qualifying Cause of Delay.</p>	
211.	“Non-Compliance”	1.1	<p>Clause 1.1 contains a new defined term “Non-Compliance” as follows:</p> <p><b>“Non-Compliance</b> <i>means any of the Contractor’s Activities which have not been undertaken in accordance with the Contract (where the time for that activity to have been undertaken has passed) and any of the Contractor’s Activities which, or the results of which, do not comply with the Contract and any other circumstance nominated as such in the Specification”.</i></p> <p>Significantly, “Non-Compliance” is limited to the “Contractor’s Activities” (see previous Issue above).</p> <p>This defined term is only used in:</p> <ul style="list-style-type: none"> <li>• Definitions of “Defects” and “rectify”</li> </ul> <p>As discussed below, given how these defined terms are used in the Contract and the exclusion of “Contractor’s Activities” from the definition, “Non-Conformance” is not appropriate to describe these matters.</p> <ul style="list-style-type: none"> <li>• Clause 11B.7 (WHS) and clause 11C.4 (Environmental)</li> </ul> <p>As discussed below, given that these clauses are limited to breaches of clause 11B and 11C respectively, the broader defined term “Non-Compliance” is not appropriate.</p> <ul style="list-style-type: none"> <li>• Clause 20B.1 – definitions of “Preventative Direction”, “Regulatory Direction”, “Remedial Direction”, and “Safety Direction”</li> </ul> <p>As discussed below, clause 20B.1 and these definitions should be deleted.</p> <p>In these circumstances, there is no need for this definition.</p> <p>Further, the drafting makes it difficult to understand its full scope and purpose, including:</p> <ul style="list-style-type: none"> <li>• The literal meaning of the phrase <i>“which have not been undertaken in accordance with the Contract (where the time for that activity to have been undertaken has passed)”</i> would cover breaches that have been remedied.</li> </ul>	Delete the definition of “Non-Conformance” in clause 1.1 and all other reference to “Non-Conformance” in the Contract.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>It is unclear to me the full meaning and operation of the phrase “<i>any of the Contractor’s Activities which, or the results of which, do not comply with the Contract</i>”, particularly in the context of the balance of the definition.</li> <li>It is difficult to conceive of a legitimate basis for the Specification to “nominate” a circumstance as a “Non-Compliance” which is not otherwise a breach of Contract.</li> </ul>	
212.	“rectify”	1.1	<p>The Contract includes an entirely new definition as follows:</p> <p><b>“rectify includes the completion of incomplete or omitted work and the making good of any Non-Compliance”.</b></p> <p>This is not an exclusive definition and thus, its purpose is to include within the usual meaning of “rectify” in the specific provisions in the Contract where it is used matters which would not ordinarily be included.</p> <p>Given the changes to the definition of “Defect” above and the fact that it is abundantly clear in each provision what is intended by the word “rectify” and its derivative, this definition is unnecessary and is likely to create unintended consequences (eg. see clause 42.1(b)(iv)).</p>	Delete the definition “rectify”.
213.	Performance and payment	2.1	<p>The very simple statement of the Contractor’s primary obligation in clause 2.1 of AS4000-1997 (ie. “<i>The Contractor shall carry out and complete WUC in accordance with the Contract and Directions authorised by the Contract</i>” has been replaced with new clauses 2.1(a) to 2.1(k), most of which either are covered by the deleted wording in AS4000-1997, repeat provisions elsewhere in the Contract, cover matters addressed inconsistently elsewhere in the Contract, are unreasonably wide or is poorly drafted.</p> <p>In particular note:</p> <ul style="list-style-type: none"> <li>Clause 2.1(a)(ii) and 2.1(k) – “Plans” is not defined.</li> <li>Clause 2.1(a)(iii) – “Australian Standards” is defined as “Standards” in clause 1.1, and (to the extent that they have the force of law, which would include the National Construction Code) are Legislative Requirements (see clause 2.1(c)). Further, it is not reasonable to impose a blanket obligation to comply with all “<i>relevant Australian Standards</i>”. To the extent that it is necessary for any other Australian Standards that do not have the force of law to apply, it would be reasonable to expect that they would be transparently referred to in the Specification.</li> <li>Clauses 2.1(a)(iv) and 2(h) – These overlap with clause 29.1 (“<i>the Contractor shall use suitable new materials and proper and tradesmanlike workmanship</i>”), although using different wording.</li> </ul>	<p>Subject to the comments on the treatment of “Government Requirements”, the amendments to clause 2.1 should be reversed such that it reverts to the unamended AS4000-1997, which satisfactorily addresses the Contractor’s primary obligation and avoids the conflicts with other provisions of the Contract.</p> <p>Ensure that the definition of “The Works” reverting to the definition in AS4000-1997, t</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>The requirement that the materials be “free of Defects” is unnecessary here and potentially conflicts with other aspects of the contract regarding the timing of when something is considered defective and for what purpose.</p> <ul style="list-style-type: none"> <li>Clause 2.1(d) – This overlaps and conflicts with clause 12 (unamended from AS4000-1997). Clause 12 contains reasonable limitations on the Contractor’s obligation which are not in clause 2.1(d).</li> <li>Clauses 2.1(e) and 2.1(j) – These overlap with clause 11, assuming that “consents and approvals” are Legislative Requirements (see discussion on clause 11.3).</li> <li>Clause 2.1(g) – Clause 1.1 defines “Government Requirements” as “<i>the policies and procedures described at Annexure Part JJ</i>”. It appears that in the BAU version the correct Annexure is Annexure BB. It is unclear why these requirements are not separate provisions in the Conditions of Contract.</li> <li>Clause 2.1(k) – Subject to the definition of “The Works” reverting to the definition in AS4000-1997, this provision appears reasonable.</li> </ul>	
<b>Compliance with Directions</b>				
214.	“Direction”	1.1	<p>The broad definition of “Direction” in the unamended AS4000-1997 and the Old Government Standard Form (ie. “<i>includes agreement, approval, assessment, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement</i>”) has been replaced with a more limited definition as follows:</p> <p><b>“Direction means a communication from or on behalf of the Superintendent or the Principal:</b></p> <p>(a) <i>described as a direction; or</i></p> <p>(b) <i>which, having regard to the nature of the communication, is properly characterised as a communication that the Contractor shall comply with</i>”</p> <p>It is not entirely clear why it is necessary to change this definition. However, it is important to note that paragraph (b) introduces significant uncertainty.</p> <p>For example, is a statement by the Superintendent or Principal of agreement, acquiescence, approval, authorization or permission of a proposed course of action by the Contractor a communication that the Contractor “must comply with”? My view is that it is probably not.</p> <p>What about a certificate, decision, demand, determination, explanation or rejection? Again, in most cases, probably not.</p> <p>Given that a word search of the new BAU AS4000-1997 contract contains around 150 instances of the word “direction” and its derivatives, this change is potentially</p>	Delete the definition of “direction” and revert to the unamended definition in AS4000-1997.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>significant, especially as many of these instances are the trigger for some form of relief for the Contractor.</p> <p>I have not gone through each of these instances, but have great concerns that this amendment has unintended consequences that are particularly likely to disadvantage the Contractor.</p>	
215.	Entitlement to give Directions	20A.1	<p>Importantly, clauses 2.1(a)(v) and 2.2(f) require the Contractor to comply with all “<i>Directions authorised by the Contract</i>”. This is a reasonable provision, meaning that the source of the authority must be found in another provision of the Contract.</p> <p>There are many provisions which expressly authorise the Superintendent to give Directions (eg. clause 33.1 with respect to suspending the WUC).</p> <p>The entirely new clause 20A.1 (that is not in the Old Government Standard Form) is a very wide authorization provision as follows:</p> <p style="padding-left: 20px;"><i>“The Superintendent may give a Direction as provided for or in relation to the Contract or requiring the Contractor to comply with an obligation imposed on the Contractor by the Contract or in connection with any matter under the Contract. The Contractor must comply with any Direction given in accordance with the Contract.”</i></p> <p>Clause 20A.1 has 3 components:</p> <ul style="list-style-type: none"> <li>• “<i>The Superintendent may give a Direction</i>” – As such, clauses 1.2(m), 1.2(n) and 45.5 will apply. See separate discussion.</li> </ul> <p>Also as discussed above, clause 45.5 confirms that the Superintendent may give such a Direction subject to any conditions in its “absolute discretion”. Further, this is not a “Certifying Function” for the purposes of clause 20.1.</p> <ul style="list-style-type: none"> <li>• The only limitation on the Superintendent as to the nature of such Directions is that they must be: <ul style="list-style-type: none"> <li>○ “<i>as provided for</i>” in the Contract – it is unclear why this is necessary in light of clauses 2.1(a)(v) and 2.2(f), which appear to cover the same point.</li> <li>○ “<i>requiring the Contractor to comply with an obligation imposed on the Contractor by the Contract</i>” – It is not necessary to include such an express right as a simply directing a party to comply with its contractual obligations has no legal significance as the obligation already exists in the contract. Equally, there is no harm in this remaining as long as the direction does not go beyond the contractual obligation (although see the discussion with respect to clause 20B below)</li> <li>○ “<i>in relation to the Contract</i>” or “<i>in connection with any matter under the Contract</i>” – These are particularly concerning as it only requires a</li> </ul> </li> </ul>	Delete clause 20A.1 in its entirety.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>relatively tenuous connection between the Direction and the Contract to be ‘authorised’.</p> <p>Consequently, this essentially renders the reasonable limitation in clauses 2.1(a)(v) and 2.1(f) that the Contractor must only comply with “authorised” Directions largely meaningless.</p> <ul style="list-style-type: none"> <li>• <i>“The Contractor must comply with any Direction given in accordance with the Contract”</i> – This provision overlaps with clauses 2.1(a)(v) and 2.1(f) and again, given the previous point, essentially means that the Contractor must comply with any Direction given by the Superintendent.</li> </ul> <p>For these reasons, part of clause 20A.1 is unnecessary, and the balance is unreasonable.</p>	
216.	Time and cost consequences	20A.3	<p>As noted above, this entirely new provision (no equivalent in the Old Government Standard Form) is <b>another new exclusion clause (time-bar)</b>, which is in addition to and <b>overlaps with other notification / time-bar provisions</b> (but with far stricter requirements) in relation to Directions given by the Superintendent (generally when acting as agent of the Principal) to the Contractor.</p> <p>The elements of this provision are:</p> <ul style="list-style-type: none"> <li>• 1<sup>st</sup> paragraph - An obligation on the Contractor to consider whether compliance with <b>every</b> direction from the Superintendent will involve a claim by the Contractor <b>for additional payment or a claim by the Contractor for an extension of time or some other relief.</b></li> <li>• 2<sup>nd</sup>, 3<sup>rd</sup> &amp; 5<sup>th</sup> paragraphs - The Contractor’s <b>entitlement to claim will be excluded unless</b> the Contractor provides written notice to the Superintendent, prior to complying with the direction and within the time stated by the Superintendent (or if no time is stated within <b>3 days</b> of the giving of the direction), of its view that it has an entitlement to a Claim and the reasons for the view.</li> </ul> <p>The default period is calendar days, not “Business Days”,</p> <p>The notice must state the basis upon which any such claim will be made and the anticipated amount of any Claim for additional money and the anticipated time by which an extension will be sought.</p> <p>If the Superintendent is of the view that the information provided by the Contractor is not adequate to enable the Superintendent to properly understand the basis or extent of the Contractor’s foreshadowed claim the Superintendent may direct the Contractor to provide further information.</p> <ul style="list-style-type: none"> <li>• 4<sup>th</sup> paragraph - The Contractor will <b>not be entitled to a payment in excess of the anticipated amount nominated in the notice or an extension of time in excess of the period set out in the notice or any</b></li> </ul>	Delete clause 20A.3

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><b>relief in addition to or greater than the relief described in the notice.</b></p> <ul style="list-style-type: none"> <li>• 6<sup>th</sup> and 7<sup>th</sup> paragraphs - Upon receipt of the advice from the Contractor:                             <ul style="list-style-type: none"> <li>○ The Superintendent may (but is not obliged to) the rescind or confirm the direction - confirmation of the direction is not an acceptance of the Contractor’s claim.</li> <li>○ If the Superintendent does not confirm the direction within <b>10 days</b> of the Contractor’s notice the direction is taken to be <b>rescinded</b> - the Contractor shall not have any Claim by reason of the issuing of the direction or the rescission or deemed rescission of the direction.</li> </ul> </li> </ul> <p>In addition, the 7<sup>th</sup> paragraph may be unworkable where the Direction is one which the Superintendent is required to give under the Contract (either because of an express or implied duty).</p> <p>Further, every time the Contractor goes through this process it must wait at least 10 days before it can comply with any Direction and must bear the risk and cost of this delay without any entitlement to an EOT or delay cost compensation.</p>	
217.	Time for compliance with Directions	20A.4	<p>Again, this is an entirely new provision (with no equivalent in the Old Government Standard Form) which states:</p> <p><i>“Where the Superintendent may give a Direction under the Contract, the Superintendent may, as part of the Direction or subsequent to the Direction, prescribe a time within which the Direction must be complied with. The Contractor must comply with the Direction within the prescribed time. If no time is prescribed, the Contractor must comply with the Direction within a reasonable time.”</i></p> <p>As this involves a discretion, clauses 1.2(m), 1.2(n) and 45.5 will apply, permitting the Superintendent to set the time limit in its <i>“absolute discretion”</i>. See separate discussion.</p> <p>Further, this conflicts with those provisions in the Contract which already expressly provide a time limit for compliance with Directions. Further, as discussed above, in the absence of an express time limit, the common law will imply that it must be complied with within <i>“a reasonable time”</i>.</p>	Delete clause 20A.4.
218.	Action by The Principal	20A.5	<p>Again, this is an entirely new provision which is not found in AS4000-1997 or the old Government Standard Form. It states:</p> <p><i>“If the Contractor fails to comply with a Direction of the Superintendent, in addition to any other remedies of the Principal, the Principal may have work carried out, or the necessary action taken by other persons such that the Direction is complied with, and the cost incurred by the Principal shall be a debt due from the Contractor to the Principal.”</i></p>	Delete clause 20A.5 in its entirety.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>At first blush, this provision (often known as a “self-help” provision) may seem reasonable.</p> <p>However, as is often the case with this Contract, incorporating a general provision that is applicable in all circumstances results in the potential for unintended and unreasonable consequences for the Contractor.</p> <p>The most obvious example is that it applies to a Direction to vary the WUC under clause 36.1. Whilst it may be reasonable for the Principal to have another contractor perform the work if the Contractor fails to do so, it cannot be that the cost is a debt due from the Contractor since the Contractor was never paid for such works.</p> <p>The Contract already addresses the limited type of circumstances where it is reasonable and appropriate for the Principal to have this self-help right (eg. clauses 12, 14.1, 27, 29.3, and 35), but often in a manner that is inconsistent with clause 20A.5.</p>	
219.	Particular Directions “Preventative Direction”, “Regulatory Direction”, “Remedial Direction”, and “Safety Direction”	20B	<p>Clause 20B.1 contains the definitions applicable to the entirely new <b>exclusion</b> of Contractor claims in clause 20B.2:</p> <ul style="list-style-type: none"> <li>• <b>“Preventative Direction”</b> - <i>“a Direction which is directed towards preventing a breach or Non-compliance with the Contract or reducing the prospect of there being such a breach or Non-compliance (in circumstances where the Principal or the Superintendent reasonably forms the view that there is a prospect, other than a fanciful prospect, of there being a breach or Non-compliance) and includes a Regulatory Direction and a Safety Direction”.</i></li> <li>• <b>“Regulatory Direction”</b> – <i>“a Direction which is directed towards procuring compliance with any Legislative Requirement or preventing any Non-compliance with a Legislative Requirement (in circumstances where the Principal or the Superintendent reasonably forms the view that there is a prospect, other than a fanciful prospect, of there being such a Non-compliance)”.</i></li> <li>• <b>“Remedial Direction”</b> – <i>“a Direction which is directed towards remedying a breach or Non-compliance with the Contract or addressing the consequences of such a breach or Non-compliance and may include a Regulatory Direction and a Safety Direction”.</i></li> <li>• <b>“Safety Direction”</b> – <i>“a Direction given by or on behalf of the Superintendent, the Principal or any authority competent under a WHS Law which Direction is directed towards preventing any Non-compliance with a WHS Law or any injury to any person in the vicinity of WUC or breach of or liability under a WHS Law or reducing the prospect of there being such a Non-compliance, injury or breach (in circumstances where the Principal or</i></li> </ul>	<p>Two options – delete clause 20B in its entirety or delete the definitions in clause 20B.1 and significantly amend clause 20B.2 as follows:</p> <p><i>“The Contractor shall not have any Claim against the Principal or the Superintendent with respect to compliance with any direction authorised by this Contract to the extent that it requires the Contractor to take action or refrain from taking action that the Contractor was required to take or refrain from taking at its cost and risk under the Contract.”</i></p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><i>the Superintendent reasonably forms the view that there is a prospect, other than a fanciful prospect, of there being such a breach”.</i></p> <p>Based on these definitions, these types of Directions are focused on:</p> <ul style="list-style-type: none"> <li>• Preventing or reducing the chance that the Contractor might breach the Contract or an applicable Legislative Requirement (including a WHS Law).</li> <li>• Preventing or reducing the chance of any injury to any person in the vicinity of WUC.</li> <li>• Remedying or addressing the consequences of a breach of the Contract.</li> </ul> <p>The 1<sup>st</sup> paragraph of clause 20B.2 states:  <i>“The Contractor shall not have any Claim against the Principal or the Superintendent by reason of the issuing of a Remedial Direction, Safety Direction, Regulatory Direction or Preventative Direction or in respect of any steps taken by the Contractor in compliance with any such Direction.”</i></p> <p>There is some important context that must be understood when considering the risks to Contractors from this provision and whether such a provision is reasonable. This includes:</p> <ul style="list-style-type: none"> <li>• Contracts are underpinned by the fundamental principle that each party is responsible for complying with its contractual obligations and the innocent party has rights if the other party breaches those obligations (both contractual and at law).</li> <li>• As noted above, simply directing a party to comply with its contractual obligations has no legal significance as the obligation already exists in the contract.</li> <li>• Any direction that requires the Contractor to do something which it is not otherwise required to do under the Contract has the potential to increase the Contractor’s costs and delay the project (leading to further costs and potential liability for liquidated damages).</li> <li>• Where there are multiple ways to comply with a contractual obligation, the general rule of contracts is that the party whose obligation it is has the choice of how to comply. The other party should not be permitted to dictate the method of compliance.</li> </ul> <p>With this in mind, it is clear that the exclusion of any Claims by the Contractor in clause 20B goes far beyond what is reasonable and will exclude Claims for relief by the Contractor that it would otherwise have under the Contract and at law.</p> <p>In particular:</p> <ul style="list-style-type: none"> <li>• There appears to be much unnecessary duplication in these definitions because a breach of an applicable Legislative Requirement is a breach of the Contract and as discussed elsewhere, “Non-Compliance” should only be a reference to a breach of the Contract. The risk of permitting such duplication</li> </ul>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>is that the apparent intention may be to include matters that go beyond the terms of the Contract.</p> <ul style="list-style-type: none"> <li>• The wording “<i>is directed towards</i>” in each of the defined terms is incredibly wide and focuses on the Superintendent’s <b>intended purpose</b> of the direction, not its outcome or consequence.</li> </ul> <p>There is also no limitation on it being the “sole” intended purpose.</p> <ul style="list-style-type: none"> <li>• The exclusion will also cover all of the consequences of directions that go beyond what is necessary to satisfy the intended purpose. For example, a direction to take certain actions that are directed towards compliance with the Contract will be excluded, even if those actions would otherwise fall within the meaning of a Variation.</li> <li>• Until a breach of the Contract etc occurs, it is impossible to know whether it will actually occur. Thus, any direction that has the purpose of “preventing a breach” involves, by its nature, a degree of speculation.</li> </ul> <p>However, the exclusion in clause 20B.2 is not even limited to directions for the prevention of a breach of the Contract etc or injury to persons, but includes directions for “<i>reducing the prospect of</i>” a breach etc.</p> <p>The word “<i>prospect</i>” simply means “possibility”. The apparent qualification (ie. “<i>where the Principal or the Superintendent reasonably forms the view that there is a prospect, other than a fanciful prospect</i>”), contains two parts:</p> <ul style="list-style-type: none"> <li>○ It is sufficient that the Principal or the Superintendent “<i>reasonably forms the view</i>”, even if that view is incorrect.</li> <li>○ The phrase “<i>other than a fanciful prospect</i>” is generally understood as referring to nothing more than a mere “realistic possibility” as opposed to something that is considered a very remote possibility (ie. mere speculation as to whether it might occur).</li> </ul> <p>Accordingly, this is a long way from there being any degree of certainty that the breach etc that the Direction is directed at will actually occur.</p> <ul style="list-style-type: none"> <li>• There is no requirement that the Direction have any degree of urgency or necessity (compare clause 13).</li> <li>• Finally, there are specific provisions in the Contract that already addresses some of these matters, including clauses 11B.7, 11C.4, 12 and 13 (discussed elsewhere).</li> </ul> <p>Consequently, clause 20B in its current form is unreasonable.</p> <p>Clause 13 of the Contract (which is unamended from AS4000-1997) reflects a fair and reasonable model. It provides:</p> <p><i>“If urgent action is necessary to protect WUC, other property or people and the Contractor fails to take the action, in addition to any other remedies of the Principal, the Superintendent may take the necessary action. <b>If the action was action which the Contractor should have taken at the</b></i></p>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><b>Contractor’s cost, the Superintendent shall certify the cost incurred as moneys due from the Contractor to the Principal.”</b></p> <p>That is, I acknowledge that it is reasonable that the Contractor have no entitlement to claim against the Principal or the Superintendent with respect to compliance with any direction to the extent that it requires the Contractor to take action or refrain from taking action that the Contractor was required to take or refrain from taking at its cost and risk under the Contract.</p>	
<b>Separate Warranties</b>				
220.	Separate Warranties – General	29B	<p>Stand-alone warranties (often called “collateral warranties) are typically required by a Principal for two purposes:</p> <ul style="list-style-type: none"> <li>• To provide the Principal with contractual rights against the Contractor additional to those under the construction contract.</li> </ul> <p>As a general rule, there are very few reasonable justifications for requiring the Contractor to enter into a separate “collateral” contract with the Principal - all applicable rights, obligations and liabilities of the parties should be included in the construction contract.</p> <ul style="list-style-type: none"> <li>• To provide the Principal with direct contractual rights against specific subcontractors or suppliers of the Contractor, giving the Principal direct contractual rights against them.</li> </ul> <p>However, the concern for these subcontractors is that it may create additional (different) obligations and liabilities to the Principal than it otherwise has to the Contractor.</p> <p>Whilst these warranties might be important for the Principal if the Contractor becomes insolvent, the right to novate the subcontract upon the insolvency of the Contractor is an alternative (and more reasonable) way to address this risk.</p> <p>The primary concerns for Contractors include:</p> <ul style="list-style-type: none"> <li>• To ensure that they are not exposed to greater obligations and liability than they are otherwise exposed under the contract, or that unreasonable warranties to be given to the Principal cannot be stepped down to the subcontractors performing the works.</li> <li>• To ensure that they can discharge their obligation to obtain the warranties from the suppliers and subcontractors – this will be very difficult if principal requires an unreasonable from of warranty (especially if such warranties are prohibited by the unfair small business contracts regime in the ACL).</li> </ul> <p>In construct-only contracts (such as Government’s AS4000-1997 BAU form), the primary obligation of the Contractor is to deliver the Works to the Principal at Practical Completion in the form specified by the Contract, satisfying the</p>	Note

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>applicable performance warranties should be limited to materials and workmanship (eg. see clauses 2.1(a)(iv), 2.1(h) and 29.1).</p> <p>As a general rule, the warranties that the Contractor is required to obtain from subcontractors and suppliers should go no further than the performance warranties given by the Contractor in its contract with the Principal, as the Contractor will already be expected to pass these down to its subcontractors and suppliers.</p> <p>Two types of warranties are never reasonable in a construct-only contract (where the Principal is responsible for the design) are:</p> <ul style="list-style-type: none"> <li>• Fitness for Purpose – ie. that the completed works handed over by the Contractor or subcontractor (as the case may be) are fit for the intended purpose at Practical Completion. This is unreasonable because such a guarantee can only be satisfied if the design which the Contractor is obliged to follow permits the purpose to be achieved.</li> <li>• A service life” (expected design life) warranty, - ie. that the relevant works or materials <b>will remain in the condition they were required to be in as at Practical Completion</b> for the period specified. Even where fair wear and tear is excluded and the warranty is subject to the Principal operating and maintaining the Works as required, this is an unreasonable requirement for two primary reasons: <ul style="list-style-type: none"> <li>○ The “service life” of any completed works is primarily determined by the design of the Works including the materials specified, both of which are the responsibility of the Principal in a construct-only contract.</li> <li>○ This warranty seeks to reverse the usual onus of proof with respect to defects. That is, usually for the Principal to successfully claim against the Contractor for defects after Practical Completion it must prove that the Works were incomplete or defective as at the Date of Practical Completion even if that only becomes apparent later. However, with respect to a “service life” warranty, if the relevant works or materials are not in the condition they were required to be in as at Practical Completion at any time during the warranty period (default 10 years), the Contractor is liable unless it can prove that one of the exceptions applies.</li> </ul> </li> </ul>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
221.	“Schedule of Warranties”	1.1 & 29B.1 Item 108 Ann Part R	<p>Clause 29.1A (should be Clause 29B.1) requires the Contractor to provide itself and/or procure the warranties described in the Schedule of Warranties <b>and</b> the warranties described in the Specification.</p> <p>It is far from easy for the Contractor to determine what warranties it must provide and/or procure as it must:</p> <ul style="list-style-type: none"> <li>Consider the definition of “Schedule of Warranties” in clause 1.1. This refers to Item 108 in Annexure Part A.</li> <li>Item 108 contains the note “<i>The Schedule of Warranties may be identified here or be found at Annexure Part U</i>”.</li> <li>Annexure Part U of DSG RFT 3449 version is the deed of Release (Practical Completion). The correct Annexure reference appears to be Annexure Part R. Annexure Part R includes the statement “<i>This Annexure Part R is called up by Item 108 and Clause 29C</i>”. Again, unfortunately, the correct clause reference in BAU is clause 29B.</li> <li>Finally, the Contractor must also scour the Specification to determine if it contains any warranties that must be provided or procured.</li> </ul> <p>Further, it is unclear from what is currently available whether the intention is to specify warranties from particular subcontractors or suppliers or on particular items or work or more generally. There is <b>no</b> indication in clause 29B as to the timing for when these separate warranties must be provided.</p> <p>It must be possible to simplify this to clearly identify from whom, in what form and the timing of when any warranties must be provided.</p>	Delete the whole of clause 29B.
222.	Warranty requirements	29B.2	<p>Clause 29.1B (which should be clause 29B.2) requires that each of the warranties provided or required to be procured under Clause 29B:</p> <ul style="list-style-type: none"> <li>Clause 29B.2(b) - “<i>is or must be to the effect that the relevant works or materials <b>will remain in the condition they were required to be in as at Practical Completion</b> for the period referred to in paragraph (a) of Clause 29C (subject to fair wear and tear or a failure by the Principal to maintain and service the relevant works as specified by the supplier or manufacturer)</i>”</li> </ul> <p>This is a form of “service life” warranty (as discussed above), which is unreasonable</p> <ul style="list-style-type: none"> <li>Clause 29B.2(a) – “<i>is for the period of time nominated in respect of the relevant matter (or in the absence of any such nomination the period nominated at Item 109 or Annexure Part U)</i>”</li> </ul> <p>Note that the Annexure reference is incorrect, this is unnecessarily complex, and the default period specified in Item 109 is 10 years from the last date of Practical Completion.</p>	Delete the whole of clause 29B.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>Nonetheless, as this forms part of the service life” warranty (as discussed above), it should be deleted.</p> <ul style="list-style-type: none"> <li>Clause 29B.2(b) - “<i>must be in a form required by the Specification or otherwise approved by the Principal</i>”.</li> </ul> <p>No default form is provided for review.</p>	
223.	Third party warranties	29B.3	<p>Clause 29.1C (which should be clause 29B.3) specifically addresses the situation where the warranty (required by clauses 29B.1 and 29B.2) is to be provided by a third party.</p> <p>Given that the form and content of the required warranties set out in clause 29B.2 are, as discussed below, unreasonable, the whole of clause 29B in its current form should be deleted.</p> <p>Further, the drafting of clause 29.1C(c) is of particular concern. This addresses the situation where the Principal cannot be the beneficiary of the warranty, which will only arise if that is prohibited by law or the subcontractor or supplier refuses to provide a warranty for the benefit of the Principal.</p> <p>In particular, if the Contractor assigns its rights to the Principal or holds those rights on trust for the Principal (as required by clauses 29.1C(c)(i) and (ii)), any direct rights that the Contractor has against the subcontractor may be lost.</p> <p>This is would mean that the Contractor will be liable to the Principal (through the “back-to back” warranty and indemnity to the Principal provided by clauses 29.1C(c)(iii) and 29.1C(c)(iv)), but may be unable to recover from its supplier or subcontractor that caused the liability.</p> <p>The Principal has engaged the Contractor to construct the Works in accordance with the Contract and requires the Contractor to be 100% responsible for any breach of the Contract caused by a subcontractor or supplier (including by excluding the proportionate liability legislation). The Principal also has the ability to novate certain subcontracts if the Contractor is insolvent.</p> <p>In the circumstances, it is unreasonable to require the Contractor to obtain additional direct contractual rights for the Principal against suppliers or subcontractors.</p>	Delete the whole of clause 29B.
<b>Compliance with Laws, Standards and Policies</b>				
224.	“Standards”	1.1 2.1(a)(iii)	<p>Clause 1.1 includes:</p> <p><i>“Standards means all relevant Australian Standards published from time to time by, or on behalf of, Standards Australia (being the organisation designated by ABN 85 087 326 690)”.</i></p> <p>It is used in the following provisions:</p>	Delete clause 2.1(a)(iii)

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>• Definition of “Legislative Requirement” (paragraph (e)) – <i>“Standards, codes and guidelines which have the force of law in the jurisdiction where WUC or the particular part of WUC is being carried out”</i>.</li> <li>• Definition of “WHS Law” – <i>“and all other Legislative Requirements, Standards and Code of Practice in relation to work health and safety (as amended from time to time and any replacement instrument which deals with the same issues)”</i>.</li> <li>• Clause 2.1(a)(iii) – <i>“The Contractor shall carry out and complete WUC in accordance with all relevant Australian Standards”</i>.</li> <li>• Clause 11B.3 – <i>“The Contractor shall ensure that all machinery, equipment, materials and work practices used shall comply with all relevant Standards, current health and safety requirements, and all other relevant Codes of Practice approved under Part 14 of the Work Health and Safety Act 2012 (Tas) and regulations as may be applicable.”</i></li> <li>• Clause 11C.1 – <i>“Environmental Law means the EMPCA and all other Legislative Requirements, Standards and Codes of Practice in relation to protecting the environment and avoiding, mitigating, and controlling pollution (as amended from time to time and any replacement instrument which deals with the same issues).”</i></li> </ul> <p>Each of these are addressed elsewhere.</p> <p>Australian Standards can either have the force of law (eg. through adoption in the National Construction Code and the <i>Building Act 2016</i> (Tas)) or can be incorporated by reference into a construction contract to specify an acceptable standard of performance.</p> <p>Standards Australia issue updated Standards from time-to-time, but importantly, it is not always the latest version that has the force of law. Thus, care must be taken in mandating compliance with the latest version of all Australian Standards.</p> <p>More importantly, it is not reasonable to impose a blanket obligation to comply with all <i>“relevant Australian Standards”</i> (as per clause 2.1(a)(iii)). To the extent that it is necessary for any other Australian Standards that do not have the force of law to apply, it would be reasonable to expect that they would be transparently referred to in the Specification.</p>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
225.	Legislative Requirements – Compliance	11.1	<p>The primary obligation is that the Contractor shall “satisfy” all Legislative Requirements except those in Item 64 or directed by the Superintendent to be satisfied by or on behalf of the Principal.</p> <p>The definition of “Legislative Requirements” in clause 1.1 is essentially the same as the definition in the old Government Standard Form except for the new paragraph (d). They essentially fall into three categories:</p> <ul style="list-style-type: none"> <li>• Legislation and associated documents (including Australian Standards) having the force of law (paragraphs (a), (d) and (e));</li> <li>• certificates, licences, consents, permits, approvals and requirements of organisations having jurisdiction in connection with the carrying out of WUC (paragraph (b); and</li> <li>• fees and charges payable in connection with the foregoing.</li> </ul> <p>The default position in Item 64 is that the Contractor shall satisfy all Legislative Requirements (ie. no exceptions). Some Legislative Requirements, as a matter of law, can only be satisfied by the Principal. The default position should expressly exclude such requirements.</p> <p>The greater concern is the entirely new 3<sup>rd</sup> paragraph (which is not in the Old Government Standard Form), which states:</p> <p><i>“Where a Legislative Requirement and other requirements of the Contract can be satisfied, the Contractor shall, subject to a Direction of the Superintendent, satisfy both requirements. The Superintendent shall direct the Contractor as to whether the other requirements of the Contract are to be satisfied.”</i></p> <p>It is difficult to understand the purpose of this provision, and consequently, how it is intended to operate:</p> <ul style="list-style-type: none"> <li>• If there is no conflict, the Contractor must comply with all requirements of the Contract subject to a Variation Direction, amendment to the Contract or waiver by the Principal. If there is a conflict, clause 8A.2 applies.</li> <li>• The Superintendent cannot direct the Contractor not to comply with a Legislative Requirement that has the force of law.</li> <li>• What is the purpose and meaning of the 2<sup>nd</sup> sentence?</li> </ul>	Delete the new 3 <sup>rd</sup> paragraph of clause 11.1
226.	Legislative Requirements – Changes	11.2	See separate discussion above regarding application of Valuation Rules.	Delete the new last paragraph of clause 1.2

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
227.	Permits, approvals, consents and conditions “Regulatory Approvals”	1.1 & 11.3	<p>This is an entirely new provision that is not in the unamended AS4000-1997 nor the old Government Standard Form.</p> <p>Key concerns include:</p> <ul style="list-style-type: none"> <li>• Clause 1.1 contains a new definition of “Regulatory Approvals”. This is not an easy definition to understand, but it appears to fully overlap with the definition of “Legislative Requirements” (especially paragraphs (b) and (d) of that definition).</li> <li>• As a consequence, it appears to overlap in an <b>inconsistent</b> manner with clause 11.1 and 11.2, particularly with respect to changes to Legislative Requirements comes into effect after the 14th day before the closing of tenders but could not reasonably then have been anticipated by a competent Contractor that impact approvals.</li> </ul>	Delete clause 11.3 as it is covered by clauses 11.1 and 11.2. If this State feels that these clauses need clarification with respect to approvals, this should be included in these clauses.
<b>Management Plans</b>				
228.	Contractor’s Management Plans – General	1.1 & 11D	<p>Clause 1.1 defines “Contractor’s Management Plans” as “<i>the plans described as such at item 28, being the plans the subject of Clause 11D</i>”.</p> <p>The template Item 28 includes “<i>the Work Health and Safety Management Plan required under Subclause 11B.2 together with any other plans referred to in the Contract Documents which are related to the way in which the Contractor carries out WUC</i>”.</p> <p>Traditionally, contractor’s management plans are prepared to comply with statutory requirements (most prominently WHS and Environmental requirements) and to comply with quality management system requirements (such as ISO 9001). The other purpose is as a pure management tool to assist the Contractor to comply with its contractual obligations. Note that neither AS2124-1992 and AS4000-1997 contain any express provisions dealing with management plans.</p> <p>With this in mind, there are a number of general principles that ought to be applicable to a contractor’s management plans in construction contracts:</p> <ul style="list-style-type: none"> <li>• Subject to compliance with any legislative requirements, Contractors should not be required to strictly comply with its management plans and should be able to amend them as long as the Contractor still complies with its contractual obligations.</li> </ul> <p>Otherwise, a Contractor will not be able to depart from or amend management plans where they are inconsistent with the Contractor’s other contractual and legislative obligations. It also would deny the Contractor the opportunity to improve the efficiency and effectiveness of its performance.</p> <ul style="list-style-type: none"> <li>• Whilst it may be appropriate for the Superintendent to have a right to review and comment on the management plans, it should not have a right of approval or a right to direct changes. If Principal believes that the</li> </ul>	Note

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>management plan does not comply with the contractual requirements or will not permit the Contractor to comply with its obligations, the Principal has other right under the Contract.</p> <p>Further, with respect to the Contract, note:</p> <ul style="list-style-type: none"> <li>• Clause 11B.2 (discussed below) separately deals with the Work Health and Safety Management Plan. It is important to ensure that clause 11D does not conflict with clause 11B.2.</li> <li>• Sections 160.02A, 160.02B and 160.54(b) of the DSG Standard Specification (June 2024) also contain references to various management plans.</li> </ul>	
229.	Plan requirements	11D.1	<p>Specific concerns with this entirely new provision (which is not in the Old Government Standard Form) include:</p> <ul style="list-style-type: none"> <li>• Clause 11D.1(b) requires the Contractor to submit the Contractor’s Management Plans to the Superintendent “<i>at least 10 days prior to the commencement of work on the Site</i>”.</li> </ul> <p>This is not strictly inconsistent with clauses 11B.2 or 11D.3 (below), or the requirements of the “Commencement Preconditions”, “Mobilisation Preconditions”, “Access Preconditions” and sections 160.02A and 160.02B of the DSG Specification, but each of these adopts a different description of the timing of this requirement (eg. prior to mobilization to Site or commencing the WUC),</p> <p>To avoid uncertainty and confusion, each of these should be aligned.</p> <ul style="list-style-type: none"> <li>• 3<sup>rd</sup> paragraph – This paragraph is a duplicate of the 1<sup>st</sup> paragraph of clause 11D.2 discussed below. Delete from clause 11D.1.</li> </ul>	<p>Align the timing in clause 11D.1(b) with clause 11B.2, the requirements of the “Commencement Preconditions”, “Mobilisation Preconditions”, “Access Preconditions” and sections 160.02A and 160.02B of the DSG Specification.</p> <p>Delete the 3<sup>rd</sup> paragraph of clause 11D.1.</p>
230.	Compliance with the Contractor Management Plans	11D.2	<p>Specific concerns with this entirely new provision (which is not in the Old Government Standard Form) include:</p> <ul style="list-style-type: none"> <li>• 1<sup>st</sup> paragraph – As noted above, it is not reasonable to require the Contractor to strictly comply with the Contractor’s Management Plans as separate contractual obligations.</li> </ul> <p>Further, the 4<sup>th</sup> paragraph of clause 11D.1 and its duplicate, the 2<sup>nd</sup> paragraph of clause 11D.2, accepts that the Contractor is free to amend the Contractor Management Plans.</p> <ul style="list-style-type: none"> <li>• 2<sup>nd</sup> paragraph - This paragraph is a duplicate of the 4<sup>th</sup> paragraph of clause 11D.1. Delete from clause 11D.2.</li> <li>• 3<sup>rd</sup> paragraph – “<i>If the Principal or the Superintendent forms the view that any of the Contractor’s Management Plans do not comply with this Clause and advises the Contractor of that view, and the reasons for the view, then</i> </li></ul>	Delete the whole of clause 11D.2.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><i>the Contractor shall amend the relevant plans so that the plans comply with this Clause.</i></p> <p>It is not reasonable that a subjective view (no matter how reasonable) of the Principal or the Contractor is the trigger for the operation of this provision. The Principal’s or Superintendent’s view as to the Contractor’s compliance with its contractual obligations must never be determinative of whether it has complied.</p> <p>Further, the Principal is free to advise the Contractor at any time if it considers that the Contractor is in breach of its contractual obligations. If the Contractor agrees, it goes without saying that it will remedy that breach or face the prospect of liability to the Principal arising from the breach.</p> <p>Finally, given the above and the fact that the Contractor must comply with Directions authorised by the Contract, this provision also could create uncertainty as to whether the Contractor must comply if it disagrees with the “view” formed by the Principal or the Superintendent.</p>	
231.	Commencement precondition	11D.3	<p>Clause 11D.3, as amended by clause 8(4) of the FIA, provides that:  <i>“The provision of the Contractor’s Management Plans in accordance with this Clause is a <b>Mobilisation Precondition</b>”.</i></p> <p>The 2<sup>nd</sup> paragraph of clause 8(4) of the FIA also states:  <i>“Notwithstanding clauses 11B.2 and 11D.3, the Mobilisation Preconditions included in Item 91 of Annexure Part A must be satisfied at least 10 days prior to the Contractor mobilising to Site.”</i></p> <p>There is now an inconsistency between the drafting of clause 11D.1 and section 160.02B of the DSG Specification on the one hand (ie. prior to the Contractor commencing carrying out of WUC on the Site) and clauses 11B.2 and 11D.3 and section 160.02A on the other (prior to the Contractor mobilising to Site). See also separate discussion on “Commencement Precondition” and “Mobilisation Precondition” elsewhere.</p> <p>Which is appropriate and whether either is appropriate will depend on the specific types of plans required on a case-by-case basis. However, to avoid uncertainty, it is my opinion that these be aligned.</p>	Align the provisions to ensure consistency.
<b>Quality Management</b>				
232.	Quality assurance	29.2	<p>There was no equivalent provision in the Old Government Standard Form as clause 30 of AS2124-1992 was deleted.</p> <p>Clause 29.2 now requires the Contractor to provide the “further quality assurance” set out in that clause “<i>if indicated at Item 105 or if required elsewhere in the Specification</i>”, and the default position in Item 105 is that it is required.</p>	Delete the reference to “Item 105”, clauses 29.2(d) and 29.2(e) and the 4 <sup>th</sup> paragraph of clause 29.2.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>Realistically, any requirements for a quality assurance system can only be included in the Specification. Thus, to avoid unnecessary complexity and the possibility that the default position in Item 105 applies but the Specification is silent (see clause 29.2(c)), the reference to Item 105 should be deleted.</p> <p>Note also that sections 160.51 to 160.54 of the DSG Specification also address “Quality” and the specific requirements for quality assurance.</p> <p>The new 3<sup>rd</sup> paragraph (clauses 29.2(c) to (e)) specifies the requirements of a “conforming quality system”. Clauses 29.2(d) and (e) are both unnecessary (as the requirements must be specified in the Specification) and unreasonable as they are subject to the Superintendent’s subjective “satisfaction” and “opinion” (see separate discussions on clauses 1.2(m), 1.2(n), 20.1 and 45.5).</p> <p>Finally, the 4<sup>th</sup> paragraph states that “<i>The Contractor shall comply with the quality system</i>”. This appears to conflict with the 2<sup>nd</sup> paragraph of clause 29.2.</p>	
<b>WHS Obligations</b>				
233.	“WHS Law”	1.1	<p>The second half of the definition of “WHS Law” is:  <i>“and all other Legislative Requirements, <b>Standards</b> and Code of Practice in relation to work health and safety (as amended from time to time and any replacement instrument which deals with the same issues)”</i></p> <p>The effect of the adoption of “Standards” (as defined) is that all Australian Standards in relation to work health and safety are incorporated by reference, regardless of whether they have the force of law (which are already covered by the definition of “Legislative Requirements”).</p> <p>As discussed elsewhere in relation to “Standards” more broadly, this is unreasonable and likely to create uncertainty for all parties. To the extent that it is necessary for any other Australian Standards that do not have the force of law to apply, it would be reasonable to expect that they would be transparently referred to in the Specification.</p>	Delete the word “Standards” from the definition.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
234.	WHS - Legislative compliance	11B.1	<p>Whilst I acknowledge that this reflects the drafting of clause 49.2 of the Old Government Standard Form, I have a number of concerns including:</p> <ul style="list-style-type: none"> <li>• Clause 11B.1 is ostensibly about compliance with the WHS Laws, but clauses 11B.1(b) and 11B.1(c) go beyond these requirements (creating absolute obligations, compared with the duties under the WHS Laws to “ensure, so far as is reasonably practicable” that the relevant objective is obtained).</li> <li>• Clause 11B.1(b) – It is unclear what is meant by “identify, comply with and exercise all necessary, duties and precautions” in this context, and in particular, does it add anything to the obligation to comply with the WHS Law in clause 11B.1(a)?</li> <li>• Clause 11B.1(c)(iii) – Such a requirement is only reasonable if these requirements are either included in the Contract Documents or at the least, were notified before the parties entered into the Contract.</li> <li>• Finally, the unamended clause 12 already requires the Contractor to “take measures necessary to protect people and property”, subject to the reasonable limitation “insofar as compliance with the Contract permits”. Clause 11B does not have such a reasonable limitation.</li> </ul>	Delete clauses 11B.1(b) and 11B.1(c)(iii).
235.	WHS - Machinery and Equipment	11B.3	<p>Whilst I acknowledge that this reflects the drafting of clause 49.1(d) of the Old Government Standard Form, I have a number of concerns including:</p> <ul style="list-style-type: none"> <li>• 1<sup>st</sup> sentence – “The Contractor shall ensure that all machinery, equipment, materials and work practices used shall comply with all relevant Standards, current health and safety requirements, and all other relevant Codes of Practice approved under Part 14 of the Work Health and Safety Act 2012 (Tas) and regulations as may be applicable.”</li> </ul> <p>It is unclear whether this is intended to require compliance with more than “WHS Laws” (as defined). If so, it is unclear what these additional requirements involve.</p> <ul style="list-style-type: none"> <li>• 2<sup>nd</sup> sentence is much broader and simply states “The Contractor shall comply with all Directions given by the Superintendent relating to Workplace Health and Safety”.</li> </ul> <p>The term “Workplace Health and Safety” is not defined, but in any event, this is unreasonably broad (particularly in light of the other changes to the Contract (including clauses 1.2(n), 20, 20A, 20B and 45.5, each of which is addressed elsewhere). See also comments on clause 20B elsewhere.</p> <p>Further, it is essential that no direction of the Superintendent be permitted to cut across the Contractor’s responsibilities under the WHS and as “principal contractor”.</p> <p>Finally, note the Superintendent’s rights under clause 13.</p>	<p>Re-draft the 1<sup>st</sup> sentence of clause 11B.3 as follows:  <i>“The Contractor shall ensure that all machinery, equipment, materials and work practices used shall comply with the WHS Law.”</i></p> <p>Delete the 2<sup>nd</sup> sentence of clause 11B.3.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
236.	WHS - Evidence of compliance	11B.4	Whilst this provision is materially the same as clause 49.4(a) of the Old Government Standard Form, it is not appropriate for the question of whether the evidence is “satisfactory” be left to the Principal’s agent (the Superintendent) in its absolute discretion (see clauses 1.2(m), 1.2(n), 20.1 and 45.5).	Insert the word “reasonably” before “satisfactory to the Superintendent”.
237.	“Incident”	1.1	<p>“Incident” is a new definition (not in Old Government Standard Form) with two parts:</p> <ul style="list-style-type: none"> <li>• a ‘notifiable incident’ within the meaning of the WHS Law; and</li> <li>• <b>any</b> accident, death, injury, workplace related illness, property or environmental damage that occurs during the carrying out of WUC.</li> </ul> <p>This defined term is only used in clause 11B.6 and the definition of “Near Miss” (which is also only used in clause 11B.6).</p> <p>The second part of the definition is too wide and should be deleted:</p> <ul style="list-style-type: none"> <li>• Given its limited uses, “Incident” is intended to be limited to WHS incidents, but the 2<sup>nd</sup> part is very wide, going far beyond WHS incidents, and includes property and environmental damage.</li> </ul> <p>Clause 11C deals with Environmental (including “Environmental Incidents”)</p> <ul style="list-style-type: none"> <li>• Section 35 of the WHS Act defines “notifiable incident” as the death of a person, a serious injury or illness of a person, or a dangerous incident (sections 36 and 37 define “serious injury or illness” and “dangerous incident”).</li> </ul> <p>This largely overlaps with the 2<sup>nd</sup> part of the definition of Incident, although with an appropriate materiality limitation.</p>	<p>For clarity, the definition of “Incident” be amended as follows:</p> <p><b>“Incident</b> means a ‘notifiable incident’ within the meaning of the WHS Law”.</p>

CIVIL CONTRACTORS  
FEDERATION  
TASMANIA

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
238.	“Near Miss”	1.1	<p>“Near Miss” is also an entirely new definition (not in Old Government Standard Form), which is defined in clause 1.1 as follows:</p> <p><b><i>“Near Miss means a circumstance which, in the opinion of the Principal or the Superintendent gives rise to a reasonably likely prospect of an Incident occurring (and which is the subject of Subclause 11B.6).”</i></b></p> <p>This defined term is only used in Clause 11B.6, which creates obligations on the Contractor to take action in relation to WHS incidents, including to promptly notify the Superintendent of its occurrence.</p> <p>This is unworkable as it requires the Contractor to notify the Superintendent of the occurrence of a circumstance that only the Superintendent or the Principal can know satisfies the definition of “Near Miss”.</p> <p>Further, it is not reasonable to impose the other extensive administrative obligations in clause 11B.6 on the Contractor based on a purely subjective opinion of the Principal or Superintendent.</p> <p>Finally, the WHS Act includes as part of the definition of “notifiable incident” (which is already covered by the definition of “Incident” above) the defined term “dangerous incident” (section 37) meaning “<i>an incident in relation to a workplace that exposes a worker or any other person to a serious risk to a person’s health or safety emanating from an immediate or imminent exposure to</i>” a list of circumstances.</p> <p>Given the extensive definition of “notifiable incident” in the WHS Law incorporated by reference into the definition of “Incident”, a separate concept of “Near Miss” is unnecessary and unreasonable.</p>	Delete the defined term “Near Miss” and all references in clause 11B.6.
239.	WHS – Incidents	11B.6	<p>This provision generally follows clauses 49.4(c) to (e) of the Old Government Standard Form.</p> <p>In addition to the comments on the definitions of “Incident” and “Near Miss” (above), I have the following concerns:</p> <ul style="list-style-type: none"> <li>• Clauses 11B.6(a) and (b) both require notification of “Incidents” and thus, entirely overlap (although one uses “promptly” and the other “immediately”). To avoid inconsistency and uncertainty, it is my opinion that clause 11B(b) be deleted.</li> <li>• Clause 11B.6(d) – Any processes of the Principal and any Directions of the Superintendent should be limited to those which are objectively reasonable in the circumstance (cf. clauses 1.2(m), 1.2(n), 20, 20A, 20B and 45.5), including not conflicting with any requirements under the WHS Law.</li> </ul>	Delete clause 11B.6(b) and amend clause 11B.6(d) to read:  <i>“manage the Incident in accordance with any reasonable processes of the Principal or reasonable Direction of the Superintendent”</i>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
240.	WHS - Non-compliance with requirements	11B.7	<p>Despite this provision being based on clause 49.5 of the Old Government Standard Form, I have significant concerns with this drafting, including:</p> <ul style="list-style-type: none"> <li>The Superintendent (as agent of the Principal) is authorised to give the Directions in clauses 11B.7(a) and (b) if it merely “forms the view” (subjectively and in its absolute discretion) that the Contractor is not complying with Clause 11B (see clauses 1.2(m), 1.2(n), 20, 20A, 20B and 45.5).</li> </ul> <p>Accordingly, the Superintendent can direct rectification of a “Non-Compliance” and suspension of the WUC until the “Non-Compliance” is rectified (with the Contractor’s entitlement to Claim excluded) even if there is no breach of the Contract.</p> <ul style="list-style-type: none"> <li>There is no limitation on the Superintendent’s discretion to direct suspension (see clauses 1.2(m), 1.2(n), 20, 20A, 20B and 45.5). For example, there is no requirement that such suspension be reasonably necessary to ensure the protection of people or prevent an ongoing breach.</li> </ul> <p>This provision is unreasonable.</p> <p>Significantly, the unamended clause 13 of the Contract already provides an appropriate process for addressing failures by the Contractor to take measures necessary to protect people and property.</p> <p>Finally, see the separate discussion in relation to clause 20B elsewhere in this table.</p>	Delete clause 11B.7.
<b>Environmental Compliance</b>				
241.	Environmental - General	11C	<p>This is an entirely new provision that was not in the Old Government Standard Form, that generally follows the form of clause 11B (WHS) discussed above and thus, has similar issues (including overlap with clauses 11, 11B, 12 and 13).</p>	See below.
242.	Definition - “Environmental Law”	11C.1	<p>Clause 11C.1 defines “Environmental Law” as follows:</p> <p><i>“<b>Environmental Law</b> means the EMPCA and all other Legislative Requirements, Standards and Codes of Practice in relation to protecting the environment and avoiding, mitigating, and controlling pollution (as amended from time to time and any replacement instrument which deals with the same issues).”</i></p> <p>There are two concerns with this definition:</p> <ul style="list-style-type: none"> <li>“Standards” – See separate discussion on this definition elsewhere. Other than Standards that have the force of law (which already form part of the definition of “Legislative Requirements”), any other applicable Australian Standards that the Contractor must comply with should be expressly identified in the Specification.</li> </ul>	Delete the words “Standards and Codes of Practice” from the definition of “Environmental Law”.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>“Codes of Practice” - This is defined in clause 1.1 to mean a code of practice approved under Part 14 of the <i>Work, Health and Safety Act 2022</i> (Tas). This has nothing to do with the environment and would appear to have been included in error.</li> </ul>	
243.	Definitions - “Environmental Harm”	11C.1	<p>Clause 11C.1 defines “Environmental Harm: by reference to the <i>Environmental Management and Pollution Control Act 1994</i> (Tas) (<b>EMCPA</b>),</p> <p>This defined term is only used in the definition of “Environmental Incident”, the occurrence of which triggers the Contractor’s obligations in clause 11C.3 (including notification) (see below).</p> <p>Section 5(1) of the EMPCA defines “environmental harm” as “<b>any adverse effect on the environment (of whatever degree or duration) and includes an environmental nuisance</b>”.</p> <p>This a very low bar that covers the most minor adverse impact. In contrast, section 5(2) distinguishes between “environmental harm” and “material environmental harm” and “serious environmental harm”.</p> <p>Under section 32 of the EMCPA “notifiable incidents” are limited to “material environmental harm”, “serious environmental harm” and “environmental nuisance”, rather than any form of “environmental harm”.</p> <p>It is unreasonable that the obligations in clause 11C.3 apply to any environmental harm, no matter what degree or duration. Instead, it is suggested that it should be consistent with the framework in the EMPCA.</p>	<p>Amend the definition of “Environmental Harm” as follows:</p> <p><b>“Environmental Harm means “material environmental harm” or “serious environmental harm” as defined in the EMPCA.”</b></p>
244.	Compliance with “Environmental Requirements”	11C.1 & 11C.2	<p>The definition of “<b>Environmental Requirement</b>” includes “<i>any requirement in a Contractor’s Management Plan relating to the environment</i>”.</p> <p>Clause 11C.2 requires strict compliance with “all Environmental Requirements”, whereas as discussed elsewhere, the Contractor should not be required to strictly comply with any Contractor’s management Plan (see comments on clause 11D).</p>	<p>Delete the phrase “<i>any requirement in a Contractor’s Management Plan relating to the environment</i>” from the definition of “Environmental Requirements”.</p>
245.	Environmental Incidents	11C.3	<p>In addition to the amendments to the definitions in clause 11C.1 discussed above:</p> <ul style="list-style-type: none"> <li>Clause 11C.3(a) – Given that “Incident” is a defined term that differs from “Environmental Incident”, it is presumed that the reference to “Incident” in this clause is a typographical error.</li> <li>Clause 11C.3(c) – Any processes of the Principal and any Directions of the Superintendent should be limited to those which are objectively reasonable in the circumstance (cf. clauses 1.2(m), 1.2(n), 20, 20A, 20B and 45.5), including not conflicting with any requirements under the EMPCA.</li> </ul>	<p>Amend clause 11C.3(a) by replacing “Incident” with “Environmental Incident” and amend clause 11C.3(c) to read:</p> <p><b>“manage the Environmental Incident in accordance with any reasonable processes of the Principal or reasonable Direction of the Superintendent”</b></p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
246.	Environmental - Non-compliance with requirements	11C.4	<p>This provision is essentially the same as clause 11B.7 discussed above, and as such, I have the same concerns:</p> <ul style="list-style-type: none"> <li>The Superintendent (as agent of the Principal) is authorised to give the Directions in clauses 11C.4(a) and (b) if it merely “forms the view” (subjectively and in its absolute discretion) that the Contractor is not complying with Clause 11C (see clauses 1.2(m), 1.2(n), 20, 20A, 20B and 45.5).</li> </ul> <p>Accordingly, the Superintendent can direct rectification of a “Non-Compliance” and suspension of the WUC until the “Non-Compliance” is rectified (with the Contractor’s entitlement to Claim excluded) even if there is no breach of the Contract.</p> <ul style="list-style-type: none"> <li>There is no limitation on the Superintendent’s discretion to direct suspension (see clauses 1.2(m), 1.2(n), 20, 20A, 20B and 45.5). For example, there is no requirement that such suspension be reasonably necessary to ensure the protection of people or prevent an ongoing breach.</li> </ul> <p>This provision is unreasonable. Finally, see the separate discussion in relation to clause 20B elsewhere in this table.</p>	Delete Clause 11C.4.
247.	Particular products, materials and substances	1.1 & 28A	<p>Clause 28A is entirely new (no equivalent in the Old Government Standard Form). It deals with three specific types of “products, materials and substances”:</p> <ul style="list-style-type: none"> <li>“Prohibited Products” (clause 28A.1);</li> <li>“Hazardous Substances” (clause 28A.2); and</li> <li>“Asbestos” (clause 28A.3).</li> </ul> <p>As discussed below, the definitions all overlap and consequently, all of clauses 28A.1, 28A.2 and 28A.3 also overlap to some extent creating unnecessary complexity and uncertainty.</p>	Note. See below.
248.	“Prohibited Products” “Prohibited Cladding Product”	1.1 28A.1	<p>“Prohibited Products” is defined in clause 1.1 as:</p> <ul style="list-style-type: none"> <li>Paragraph (a) - “<i>any product containing asbestos</i>”.</li> </ul> <p>Asbestos and asbestos containing material are also part of the definition of “Hazardous Substance” (the subject of clause 28A.2) and is also the subject of its own provision (clause 28A.3).</p> <ul style="list-style-type: none"> <li>Paragraph (b) - “<i>any Prohibited Cladding Product</i>”</li> </ul> <p>The only place that the defined term “Prohibited Cladding Product” is used is in the definition of “Prohibited Products”. It is suggested that these definitions be combined to reduce complexity.</p>	<p>Amend the definition of “Prohibited Products” as follows:</p> <ul style="list-style-type: none"> <li>Delete paragraph (a)</li> <li>Insert the current definition of “Prohibited Cladding Product” into paragraph (b) and align that definition with the <i>Building Act 2016</i> (Tas).</li> <li>Insert a general exception to the effect that a product specified by or on behalf of the Principal in the Contract Document or any</li> </ul>

## INDEPENDENT REPORT: AMENDED AS4000-1997 "BAU" CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>It is also noted that the definition of "Prohibited Cladding Product" follows the prohibition in Victoria declared by the Minister for Planning under section 192B(1) of the <i>Building Act 1993</i> (Vic) with effect from 1 February 2021. It does not necessarily reflect the position under the <i>Building Act 2016</i> (Tas) and associated Regulations.</p> <ul style="list-style-type: none"> <li>Paragraph (c) - "<i>any Hazardous Substance or any product containing a Hazardous Substance</i>".</li> </ul> <p>See below for discussion of definition of "Hazardous Substances".</p> <ul style="list-style-type: none"> <li>Paragraph (d) - "<i>any product described in the Specification as being prohibited</i>".</li> </ul> <p>As this is a construct-only contract, the Principal must ensure that its designers do not specify the use of any "Prohibited Products". Thus, there should be a general exception included in the definition to the effect that a product specified by or on behalf of the Principal in the Contract Document or any Variation Direction is deemed not to be a "Prohibited Product".</p>	Variation Direction is deemed not to be a "Prohibited Product".
249.	"Hazardous Substances"	1.1	<p>Clause 1.1 defines "Hazardous Substances" as follows:</p> <p><b>"Hazardous Substance means:</b></p> <p>(a) <i>a substance which is defined or listed in the Australian National Occupation Health and Safety Commission's Guidance Notes (NOHSC 1008-2004: "Approved Criteria for Classifying Hazardous Substances" and NOHSC 1005-1999: "List of Designated Hazardous Substances";</i></p> <p>(b) <i>a substance which is defined as or regarded as hazardous in any Legislative Requirement;</i></p> <p>(c) <i>asbestos and asbestos containing material;</i></p> <p>(d) <i>a substance nominated as hazardous in the Specification ..."</i></p> <p>I have a number of concerns with this definition in light of the obligations in clauses 28A.1 and 28A.2 (noting that "Hazardous Substances" is part of the definition of "Prohibited Products"):</p> <ul style="list-style-type: none"> <li>This definition will be very difficult for lay construction people to understand what is included in "Hazardous Substances".</li> <li>Paragraph (a) incorporates Guidance Notes prepared by an organisation that was abolished in 2005 (the Australian National Occupation Health and Safety Commission) and which is clearly out of date.</li> </ul> <p>Safe Work Australia (NOHSC's current successor) makes available on its website a "Hazardous Substance Information System Consolidated List" (<b>HSIS</b>) as at 31 December 2016 (which is 355 pages). It contains the important health warnings to users:</p> <p><i>"The Hazardous Substance Information System was an online database intended for use with the 1994 Hazardous Substances Regulatory</i></p>	<p>Paragraphs (a) and (b) of the definition of "Hazardous Substances" is far too wide for use in clauses 28A.1 and 28A.2 as it picks up substances that are commonly used and in many cases are necessary for construction (such as diesel fuel and petroleum, a necessary constituent in bitumen). The definition must be narrowed appropriately to ensure that it only picks up substances that should be covered by the restrictive requirements of clauses 28A.1 and 28A.2.</p> <p>Delete paragraph (c) as asbestos is specifically addressed in clause 28A.3.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p><i>Framework. In 2012 the Hazardous Substances Regulatory Framework was replaced by the model work health and safety legislation.</i></p> <p><i>Please be aware that the model work health and safety legislation do not recognise the Approved Criteria for Classifying Hazardous Substances. This information is not kept up to date and should not be used for preparing labels or safety data sheets.</i></p> <p><i>This information is made available for reference and historical purposes only.”</i></p> <p>In August 2018, Safe Work Australia published the National Guide to Classifying Hazardous Chemicals, which reflects changes since NOHSC 1008-2004, including the national WHS legislative scheme and the adoption in Australia of the Globally Harmonized System of Classification and Labelling of Chemicals (GHS).</p> <p>Safe Work Australia maintains a replacement database called the Hazardous Chemical Information System (HCIS). HCIS is a database of chemicals that have been classified in accordance with the Globally Harmonized System of Classification and Labelling of Chemicals (GHS) or which have an Australian Workplace Exposure Standard. There are 7070 individual chemicals listed in the HCIS.</p> <p>More significantly, these databases contain a vast number of substances that are commonly used in construction. <b>For example, diesel fuel and petroleum (a critical component of bitumen) are listed in both the HSIS and HCIS.</b></p> <ul style="list-style-type: none"> <li>• Paragraph (b) – Merely because a substance is identified as being “hazardous” in any Legislative Requirement should not automatically mean that it is prohibited (as per clause 28A.1) or subject to the proscriptive requirements in clause 28A.2.</li> </ul> <p>For example, the WHS Law does not prohibit the use of “<i>hazardous chemicals</i>” (as defined in the <i>Work Health and Safety Regulations 2022</i> (Tas)), but simply specifies that certain duties must be met when using them.</p> <ul style="list-style-type: none"> <li>• Paragraph (c) - It is not unusual for demolition of old government buildings to require removal of asbestos. The current definition, in conjunction with clause 28A.2 does not adequately address such a scenario (whereas the 4<sup>th</sup> paragraph of clause 28A.3 does). Given that asbestos is addressed separately in clause 28A.3, it is suggested that it be removed from the definition of “Hazardous Substance”.</li> </ul> <p>Accordingly, it is clear that the definition of “Hazardous Substances” is far too wide for use in clauses 28A.1 and 28A.2.</p>	

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
250.	Hazardous Substances	28A.2	<p>The following proceeds on the assumption that the definition of “Hazardous Substances” is amended to only capture substances that the requirements of clause 28A.2 are appropriate to deal with.</p> <p>Clause 28A.2 commences as follows:</p> <p><i>“If the Contractor suspects the existence of a Hazardous Substance on the Site or encounters any Hazardous Substance on the Site or in carrying out of WUC, the Contractor shall immediately ...”</i></p> <p>With this in mind, I only have the following comments:</p> <ul style="list-style-type: none"> <li>It is not reasonable to require a Contractor to be bound by the obligations in clause 28A.2 based on a mere “suspicion” of the existence of Hazardous Materials. The trigger should be ‘awareness’ (and in fact, most of the obligations can only be undertaken if the Contractor has actual awareness).</li> <li>Clause 28A.2(f) requires the Contractor to “<i>await instructions from the Superintendent</i>”. There is nothing that requires the Superintendent to provide any instructions and it is unclear what happens if the Superintendent fails to do so.</li> <li>More importantly, the Contract currently does not separately provide for an EOT or recovery of delay damages and other costs (see separate discussion in relation to Latent Conditions).</li> </ul> <p>It is my opinion that, to avoid any argument, the discovery of Hazardous Substances be a Qualifying Cause of Delay and a Compensable Cause, and also similar wording to the 2<sup>nd</sup> paragraph of clause 24.4 be added.</p>	<p>Amend the chapeau to read:</p> <p><i>“If the Contractor becomes aware of the existence of a Hazardous Substance on the Site, the Contractor shall immediately ...”</i></p> <p>Delete clause 28A.2(f) and replace with a new paragraph to the following effect:</p> <p><i>“As soon as reasonably possible, the Superintendent must Direct the Contractor as to how the existence of the Hazardous Substance is to be addressed.</i></p> <p><i>All costs incurred in complying with this clause 28A.2 by the Contractor shall be assessed by the Superintendent and added to the Contract Sum</i></p> <p>Amend the definitions of “Qualifying Cause of Delay” and “Compensable Cause” to include the following:</p> <p><i>“the discovery of a Hazardous Substance on Site”</i></p>
251.	Asbestos	28A.3	<p>As discussed above, to avoid duplication and inconsistencies, and also allow appropriate flexibility to address works that include removal of asbestos, it is my opinion that clause 28A.3 be the sole provision dealing with asbestos (thus, delete the 1<sup>st</sup> paragraph).</p> <p>The 2<sup>nd</sup> paragraph also currently overlaps with clause 28A.1(a). As discussed above, it is my opinion that the reference to asbestos should be deleted from the definition of “Prohibited Products”.</p>	Delete the 1 <sup>st</sup> paragraph.
<b>Protection of Third Party People and Property</b>				
252.	Protection of people and property Urgent protection	12 & 13	<p>Clauses 12 and 13 are unamended from AS4000-1997.</p> <p>However, see the discussion elsewhere regarding the potential overlap with clauses 11B (Workplace Health and Safety) and 11C (Environmental), and the impact of clauses 20.1 and the Valuation Rules.</p>	No change to clauses 12 and 13 required.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Defects Liability</b>				
253.	Defects Liability Period	35 & Item 145	The default Defects Liability Period for the purposes of clause 35 is 12 months, unless a different period is included in Item 145. This is reasonable.	Note
254.	“Defects”	1.1	<p>The Old Government Standard Form has no separate definition of “Defects”. Instead, clause 30.3 refers to “<i>material or work provided by the Contractor which is not in accordance with the Contract</i>” and clause 37 simply refers to “<i>defects or omissions in the work under the Contract</i>”.</p> <p>“Defects” is defined in the unamended AS4000-1997 as having “<i>the meaning in Clause 35 and includes omissions</i>”, although there is no obvious definition in clause 35.</p> <p>I agree that for clarity it is sensible to include a meaningful definition of “Defects”, given its use in the definition of “Practical Completion” and clauses 2.1(h), 14.3, 34.6(a)(ii), 34A.3, 35, and 37.4(a)(ii).</p> <p>In this respect, note that the discussion draft of AS 11000-2015 defined “Defects” as “<i>work that does not comply with the Contract and includes omissions</i>”.</p> <p>In contrast, the Contract defines “Defects” expansively to also include items that go far beyond a reasonable definition of “Defect”, including:</p> <ul style="list-style-type: none"> <li>• Paragraph (b) - “<i>incomplete work</i>” Simply because work is incomplete does not make it defective, particularly if the time for completion has not yet passed. Further, it is unclear why this is necessary given the inclusion of “omissions” in paragraph (a).</li> <li>• Paragraph (c) - “Non-Compliance” As discussed above, this defined term is limited to “Contractor’s Activities”, being it is all of the Contractor’s obligations under the Contract <b>except</b> “<i>for the carrying out of WUC and the completion of The Works</i>”. As the definition of “Defects” should be limited aspects of the WUC / The Works that does not comply with the Contract, paragraph (c) is not appropriate.</li> <li>• Paragraph (e) - “<i>any matter described as a defect or a non-compliance in the Specification</i>”.</li> </ul> <p>It is difficult to conceive of a legitimate basis for the Specification to describe a circumstance as a “defect or non-compliance” which is not otherwise an “<i>aspect of WUC or The Works which does not comply with the Contract</i>”.</p>	Amend the definition of “Defects” to read:  “ <i>any aspect of WUC or The Works which does not comply with the Contract and includes omissions</i> ”

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
255.	Defective Work	29.3	Clause 29.3 is unamended from AS4000-1997. However, see the discussion elsewhere regarding the effect of clauses 1.2(m), 1.2(n), 20.1 and 45.5 on the Superintendent's and Principal's discretions.	Note
256.	Acceptance of Defective Work	29.4 & Sect 8.3, Ann Part K	<p>Clause 29.4 is unamended from AS4000-1997.</p> <p>It permits the Principal to elect to accept Work done (including material provided) by the Contractor which does not comply with the Contract, as an alternative to directing the Contractor to rectify such Work, whereupon there shall be a deemed Variation. This right may be exercised at any time before the expiry of the last Defects Liability Period (clause 29.5).</p> <p>As a deemed Variation it is to be priced in accordance with clause 36.4. See the separate discussion on the amendments to clause 36.4 and section 8 of the Valuation Rules, and proposed amendments.</p> <p>See also the discussion elsewhere regarding the effect of clauses 1.2(m), 1.2(n), 20.1 and 45.5 on the Superintendent's and Principal's discretions.</p>	Note
257.	Defects Liability – Superintendent's Duties	35	<p>The first 5 paragraphs of clause 35 are unamended from AS4000-1997.</p> <p>With respect to the 4<sup>th</sup> paragraph, see the discussion elsewhere regarding the effect of clauses 1.2(m), 1.2(n), 20.1 and 45.5 on the Superintendent's and Principal's discretions.</p> <p>This is particularly relevant with respect to clause 35(b), which permits the Superintendent to create separate Defects Liability Periods with respect to defects rectified during the Defects Liability Period (see also the definition of “defects Liability Period” in clause 1.1).</p> <p>In theory, this could mean that the Defects Liability Period never ends, but more importantly affects the rights and obligations of the parties under various provisions, including clause 29.5 (Directions under clause 29), clause 30.1 (Tests), 37.4 (Final Payment Claim and certificate) and clause 5.4B (Return of balance of security).</p> <p>The return of the balance of the security is of greatest concern. For example, if the Superintendent identifies a minor defect just before the end of the Defects Liability Period (which is often 2 years in DSG contracts) which is rectified, this provision permits the Superintendent to create a new Defects Liability Period (say 2 years) with respect to that item of work and enable the Principal to continue to hold the 50% of the performance security for that further period, even where the value of the security vastly exceeds the cost of rectifying the relevant defect.</p> <p>This concern was appropriately ameliorated in the Old Government Standard Form by the 2<sup>nd</sup> paragraph of clause 5.7 which provided:</p> <p style="padding-left: 40px;"><i>“Subject to the first paragraph of Clause 5.7, if in the opinion of the Superintendent it is reasonable to further reduce the Principal's entitlement</i></p>	<p>Add into clause 5.4B wording to the similar effect as the 2<sup>nd</sup> paragraph of clause 5.7 of AS2124-1992 (as contained in the Old Government Standard Form Contract).</p> <p>Make the necessary changes to reflect the deletion of clauses 1.2(m), 1.2(n) and 45.5 and the discussion with respect to clause 20.1(b) and the Certifying Functions above.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<i>to security and retention moneys, that entitlement shall be reduced to the amount which the Superintendent determines to be reasonable.”</i>	
258.	Defects Liability –Entirely new 6th paragraph	35	<p>The entirely new 6th paragraph (not in the Old Government Standard Form) creates 4 new obligations of the Contractor with respect to Defect rectification. My concerns are as follows:</p> <ul style="list-style-type: none"> <li>• Clause 35(c) – <i>“subject to paragraph (f) of this Subclause and subject to any Direction from the Superintendent, rectify all Defects (i) by the date or dates nominated (or within the time nominated) by the Superintendent; or (ii) if no such date or time is nominated, as soon as practicable”</i></li> </ul> <p>This is inconsistent with clause 35.5(a), which requires the Superintendent to identify the date for completion of the rectification of the Defect in the direction. As discussed elsewhere, such time must be reasonable taking into account all relevant circumstances.</p> <ul style="list-style-type: none"> <li>• Clause 35(d) duplicates the 2<sup>nd</sup> paragraph of clause 35.5.</li> <li>• Clause 35(e) – <i>“comply with reasonable conditions nominated by the Principal in relation to the rectification”</i>.</li> </ul> <p>As discussed elsewhere, it is important that the express requirement that conditions be “reasonable” is not nullified by clauses 1.2(m), 1.2(n), 20.1 and 45.5.</p> <ul style="list-style-type: none"> <li>• Clause 35(f) – <i>“not carry out rectification at times or on days nominated by the Principal”</i>.</li> </ul> <p>This provision should be deleted as, to the extent that such a condition is “reasonable”, it will be covered by clause 35(e).</p>	<p>Delete the new clauses 35(c) and 35(f). Make the necessary changes to reflect the deletion of clauses 1.2(m), 1.2(n) and 45.5 and the discussion with respect to clause 20.1(b) and the Certifying Functions above.</p>
<b>Miscellaneous Obligations</b>				
259.	Setting Out	26.1	<p>The 2<sup>nd</sup> paragraph is entirely new (not in the Old Government Standard Form) and states: <i>“The Contractor shall, when Directed by the Superintendent, certify that The Works have been set out in accordance with the Contract. The certification shall be in the form described at Annexure Part V (or in such other form as may be approved by the Superintendent).”</i></p> <p>This is unreasonable:</p> <ul style="list-style-type: none"> <li>• The setting out of The Works is conditional upon the Superintendent providing the Contractor with the necessary information.</li> <li>• Clause 26.2 provides compensation to the Contractor for errors in setting out the Works caused by incorrect data, Survey Marks or information given by the Superintendent.</li> </ul>	<p>Delete the unreasonable additional paragraph and revert to the unamended clause 26.1 of AS4000-1997. Delete Annexure Part S</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>The Principal already has rights under the Contract and at law if the Contractor breaches its setting out obligation.</li> </ul> <p>It is unclear why it is necessary for the Contractor to specifically certify that it has complied with its obligation to set out The Works in accordance with the Contract, other than to try to transfer the risk and responsibility to the Contractor for the information to be provided by the Superintendent on behalf of the Principal.</p>	
260.	Errors in setting out	26.2	A new last paragraph is inserted proving that the assessment shall be in accordance with the Valuation Rules. The specific concerns with the Valuation Rules, including section 5, are addressed in detail above.	Delete the new last paragraph. Make the necessary changes to reflect the deletion of clauses 1.2(m), 1.2(n) and 45.5 and the discussion with respect to clause 20.1(b) and the Certifying Functions above.
261.	Tasmanian Industry Participation Policy (TIPP)	Item 17	<p>Section 2.14 to 2.17 of the Treasurer’s Instruction PF-2 specifies the Government’s policy requirements applicable to all Agencies listed in Column 1 of Schedule 1, Part 1 in the <i>Financial Management Act 2016</i> (Tas) with respect to Tasmanian Industry Participation Plans (TIPPs).</p> <p>Where required, these must be prepared and provided to the applicable Accountable authority prior to entry into the Contract. As such, these requirements will be specified in the RFT.</p> <p>The current drafting of the Contact is unnecessarily complex and uncertain with respect to TIPPs, with multiple cross-referencing errors.</p> <p>This can be simplified as follows:</p> <ul style="list-style-type: none"> <li>Insert a new provision in the Conditions of Contract (see over).</li> <li>Amend Item 17 – The relevant question is not whether a TIPP is required (as that is determined by the RFT) but whether a TIPP is included in the relevant Annexure.</li> <li>Remove clause 4 from the “Government Requirements” Annexure.</li> </ul>	<p>Add a new provision in the Conditions of Contract as follows:</p> <p><i>“Where indicated at Item 17, the Contractor must, in connection with carrying out WUC, implement, and otherwise comply with, the Tasmanian Industry Participation Plan described at Annexure Part [XX]. The Principal may publish the whole or any part of the Tasmanian Industry Participation Plan.”</i></p> <p>Make all necessary other amendments to the terms.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

### PART 12 – ASSIGNMENT, NOVATION & SUBCONTRACTING

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Assignment &amp; Novation</b>				
262.	Assignment by Principal	9.1	<p>Clause 9.1 of the Contract materially changes the Contractor’s potential risk profile compared with from clause 9.1 of the Old Government Standard Form, as it gives the Principal has an <b>absolute right</b> to assign its rights under the Contract without the consent of the Contractor.</p> <p>In contrast, clause 9.1 of the Old Government Standard Form (which applied to both parties) was appropriately limited as follows:</p> <p><i>“Neither party shall, without the prior written approval of the other and except on such reasonable terms and conditions as are determined in writing by the other, assign the Contract or any payment or any other right or benefit or interest thereunder.”</i></p> <p>This provision reflects the need to balance the legitimate interests of both of the parties, including the fact that a Contractor enters into the Contract on the expectation that its counterparty will remain the State of Tasmania.</p> <p>Note that clause 9.1 of the Contract is also affected by clauses 1.2(m) and 45.5 discussed above.</p>	<ul style="list-style-type: none"> <li>• Revert to the position in clause 9.1 of the Old Government Standard Form but replace “<i>assign the Contract or any payment or any other right or benefit or interest thereunder</i>” with “<i>Deal with its interest in the Contract</i>”.</li> <li>• Amend the definition of “Deal” to delete paragraphs (b) and (e).</li> <li>• Make the necessary changes to reflect the deletion of clauses 1.2(m), 1.2(n) and 45.5 and the discussion with respect to clause 20.1(b) and the Certifying Functions above.</li> </ul>
263.	“Deal” and “Dealing” / Dealings etc. by Contractor	1.1 & 9.1A	<p>Clause 9.1A also materially changes the position for the contractor from under the Old Government Standard Form. It states:</p> <p><i>“The Contractor must not assign or otherwise <b>Deal</b> with its interest in the Contract without the Principal’s prior written consent, <b>which consent may be given (conditionally or unconditionally) or withheld entirely at the Principal’s absolute discretion.</b>”</i> (emphasis added)</p> <p>The full extent of clause 9.1A provision can only be understood when the defined term “Deal” is consulted. Clause 1.1 states:</p> <p><b>“Deal means to:</b></p> <p>(a) <i>assign, transfer or novate the Contract;</i></p> <p>(b) <i>appoint a person (other than as an employee) to provide any WUC including a subcontractor;</i></p> <p>(c) <i>dispose of the Contract or any Rights under the Contract;</i></p> <p>(d) <i>become the trustee of a trust in respect of the Contract; or</i></p> <p>(e) <i>give a Security Interest in relation to the Contract, or any combination of the above”</i></p> <p>In contrast, clause 9.1 of the Old Government Standard Form:</p> <ul style="list-style-type: none"> <li>• Is limited to each party’s right to “<i>assign the Contract or any payment or any other right or benefit or interest thereunder</i>”.</li> </ul>	<ul style="list-style-type: none"> <li>• Revert to the position in clause 9.1 of the Old Government Standard Form but replace “<i>assign the Contract or any payment or any other right or benefit or interest thereunder</i>” with “<i>Deal with its interest in the Contract</i>”.</li> <li>• Amend the definition of “Deal” to delete paragraphs (b) and (e).</li> <li>• Make the necessary changes to reflect the deletion of clauses 1.2(m), 1.2(n) and 45.5 and the discussion with respect to clause 20.1(b) and the Certifying Functions above.</li> </ul>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<ul style="list-style-type: none"> <li>Prohibits such dealing without the prior written approval of the other party, which may only be subject to “<i>reasonable terms and conditions as are determined</i>” by the other party.</li> </ul> <p>Consequently, the primary unreasonable changes from the position in the Old Government Standard Form are:</p> <ul style="list-style-type: none"> <li>The definition of “Deal” extends the application of this limitation far beyond the limitation in clause 9.1 of the Old Government Standard Form, in particular paragraphs (b) and (e). As discussed below, paragraph (b) includes appointing subcontractors, which are also dealt with (inconsistently) in clause 9.2, and paragraph (e) relates to matters addressed in clause 11E (again, inconsistently).</li> <li>Instead of the Principal being required to exercise its discretion reasonably and ensure that any applicable terms and conditions are “reasonable”, the Principal’s consent may now be given “(conditionally or unconditionally) or withheld entirely at the Principal’s absolute discretion.”</li> </ul> <p>The same reasons as discussed above with respect to the similar provisions of clauses 1.2(m) and 45.5, these changes are unreasonable and should be reversed.</p>	
264.	Change of Control in relation to Contractor	9.1B	<p>This an entirely new provision (with no equivalent in the Old Government Standard Form) includes:</p> <p><i>“If the Contractor is a corporation, the Contractor must not permit, during the <b>Relevant Period</b>, any change in the <b>Control</b> of the Contractor (whether by a single transaction or event, or a series of transactions or events), <b>without the consent</b>, in writing, of the Principal.”</i> (emphasis added)</p> <p>Clause 9.1B does not apply where the <i>the</i> change in Control occurs by reason of dealings in securities listed or quoted on the stock exchange market operated by ASX Limited (3<sup>rd</sup> paragraph).</p> <p>Limitations on “change of control” of contractors are unheard of in construction contracts, usually for complex for major projects.</p> <p>Nonetheless, if it is necessary to protect a legitimate interest of the State with respect to BAU projects, there are aspects of this drafting that is unclear and unreasonable that should be amended:</p> <ul style="list-style-type: none"> <li>The definition of “Control” in clause 9.1B – “<i>means the direct or indirect holding of more than 50% of the issued shares of the Contractor.</i>”</li> </ul> <p>The meaning of “indirect holding” is potentially very broad and could result in unintended breaches of this provision. It should be limited to “direct holding”.</p>	<ul style="list-style-type: none"> <li>Delete “<i>or indirect</i>” in the definition of “Control”.</li> <li>Amend the definition of “Relevant Period” to replace “<i>the date on which the Contractor has fully performed all of its obligations under the Contract</i>” with “<i>when the Final Certificate is issued.</i>”</li> <li>Make the necessary changes to reflect the deletion of clauses 1.2(m), 1.2(n) and 45.5 and the discussion with respect to clause 20.1(b) and the Certifying Functions above.</li> </ul>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>An alternative would be to adopt the definition of “control” in section 50AA of the <i>Corporations Act 2001</i> (Cth)</p> <ul style="list-style-type: none"> <li>The definition of “Relevant Period” in clause 9.1B – “<i>means the period commencing on the Date of Contract and ending on the date on which the Contractor has fully performed all of its obligations under the Contract.</i>”</li> </ul> <p>This is far too uncertain -it should end on the issue of the Final Certificate.</p> <p>Note that clause 9.1B of the Contract is also affected by clauses 1.2(m) and 45.5 discussed above.</p>	
265.	Novation by the Principal	9.1C	<p>This is an entirely new provision (with no equivalent in the Old Government Standard Form) which permits the Principal to novate the Contract to any ‘entity’ (within the meaning of the <i>Financial Management Act 2016</i> (Tas).</p> <p>Based on a review of the Coloured Complex AS4000-1997 version provided by DSG, it appears that this provision may not be intended to be included in the BAU version.</p> <p>In any event:</p> <ul style="list-style-type: none"> <li>As this clause commences with “<i>The Principal may novate ...</i>” and later includes reference to the Principal’s approval”, it is affected by clauses 1.2(m) and 45.5 discussed above.</li> </ul> <p>Given how broadly “entity” is defined in the Act, it would not be unreasonable for the Principal’s discretion to be subject to the usual limitations.</p> <ul style="list-style-type: none"> <li>Form of Deed – The second paragraph states that the “<i>Deed of Novation shall be in the form set out in Annexure Part Y</i>”.</li> </ul> <p>Annexure Part Y in BAU version appears to be the Deed of Guarantee and Indemnity. I have been unable to find a draft of the form of Deed to review.</p> <ul style="list-style-type: none"> <li>The last paragraph of clause 9.1C irrevocably grant a power of attorney to each of the Superintendent, the Principal and the Principal’s Representatives for the purposes of such novation “<i>with authority to execute such documents as are necessary to give effect to the novation and to bind the Contractor accordingly</i>”.</li> </ul> <p>The granting powers of attorney can have significant consequences, even where they are limited in authority. However, in this case the authority goes beyond executing the pre-agreed form of Deed of Novation.</p> <p>The Principal has other legal rights to enforce the Contractor’s obligations, including seeking orders of specific performance from the Courts, which are subject to appropriate limitations.</p>	<p>Delete clause 9.1C if it is not intended to form part of the BAU version.</p> <p>If it is intended to remain:</p> <ul style="list-style-type: none"> <li>Correct the cross-referencing errors and insert the applicable Annexure Part.</li> <li>Delete the 3<sup>rd</sup> paragraph.</li> <li>Make the necessary changes to reflect the deletion of clauses 1.2(m), 1.2(n) and 45.5 and the discussion with respect to clause 20.1(b) and the Certifying Functions above.</li> </ul>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
Subcontracting				
266.	Subcontracting generally	9.2 9.A	<p>The only amendment to clause 9.2 of AS4000-1997 dealing with subcontracting by the Contractor is the new last paragraph, which states:</p> <p style="padding-left: 20px;"><i>“Approval may also be conditional upon the Contractor ensuring that the requirements set out at item 59 are complied with”.</i></p> <p>There are 4 parts to clause 9.2:</p> <ul style="list-style-type: none"> <li>• 1<sup>st</sup> paragraph - <i>“The Contractor shall not without the Superintendent’s prior written approval (<b>which shall not be unreasonably withheld</b>) (a) subcontract or allow a subcontractor to subcontract any Work described in Item 58; or (b) allow a subcontractor to assign a subcontract or any payment or any other right, benefit or interest thereunder.”</i> (emphasis added)</li> </ul> <p>The default position in Item 58 is <i>“all work”</i>.</p> <ul style="list-style-type: none"> <li>• 2<sup>nd</sup> paragraph addresses the information that the Contractor must provide with a request, which includes <i>“information which the Superintendent <b>reasonably requests</b>”</i>.</li> <li>• 3<sup>rd</sup> paragraph – <i>“Within 14 days of the Contractor’s request for approval, the Superintendent shall give the Contractor written notice of approval or of the reasons why approval is not given”</i>.</li> <li>• 4<sup>th</sup> and 5<sup>th</sup> paragraphs – Limits the conditions that the Superintendent may place on its approval, including those identified in Item 59.</li> </ul> <p>The underlying commercial purpose of clause 9.2 of AS4000-1997 is to permit the superintendent to have reasonable rights of approval with respect to specific Work of particular concern to the Principal due to its value, complexity or significance.</p> <p>However, there are two other parts of the Contract that are directly inconsistent with clause 9.2 which unreasonably affects the Contractor:</p> <ul style="list-style-type: none"> <li>• Clause 9.1A - As discussed above, because paragraph (b) of the definition of “Deal” includes to <i>“appoint a person (other than as an employee) to provide any WUC <b>including a subcontractor</b>”</i>, clause 9.1A limits the ability of the Subcontractor to subcontract <b>any</b> WUC in accordance with its terms (discussed above).</li> </ul> <p>This directly conflicts with clause 9.2.</p> <ul style="list-style-type: none"> <li>• Clauses 1.2(m), 1.2(n), 20.1 and 45.5 – As discussed, clauses 1.2(m) and 1.2(n) also directly conflicts with clause 9.2.</li> </ul> <p>These are clear examples of the how heavily amending industry standard form contracts can have unintended consequences.</p> <p>More importantly, it is the nature of the modern construction industry and the complexity of modern State infrastructure projects that the Contractor will have</p>	<ul style="list-style-type: none"> <li>• Amend the default position in Item 58 to make it clear that it should be limited to specific Work of particular concern to the Principal due to its value, complexity or significance.</li> <li>• Amend the definition of “Deal” to delete paragraphs (b) so that clause 9.1A does not apply to subcontracting.</li> <li>• Make the necessary changes to reflect the deletion of clauses 1.2(m), 1.2(n) and 45.5 and the discussion with respect to clause 20.1(b) and the Certifying Functions above.</li> </ul>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>to subcontract at least some of the WUC as they do not have the resources or expertise to self-perform.</p> <p>If:</p> <ul style="list-style-type: none"> <li>the Contractor requires the Superintendent’s consent to subcontract all WUC (regardless of the value, significance or complexity of the activities subcontracted) as per Item 58 and clause 9.1A; and</li> <li>the Principal or Superintendent has the right to withhold consent in its absolute discretion or to place unreasonable conditions on that consent, there will be excessive and unnecessary delay and administration costs, and in some cases the projects may become impossible to complete.</li> </ul>	
267.	Selected Subcontract Work	9.3	<p>The amendments to clause 9.3 (new 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> paragraphs) are largely taken from clause 10.6 of the Old Government Standard Form.</p> <p>These amendments appear to be generally reasonable, however, note the effect of clauses 1.2(m), 1.2(n), 20.1 and 45.5 discussed elsewhere.</p>	Make the necessary changes to reflect the deletion of clauses 1.2(m), 1.2(n) and 45.5 and the discussion with respect to clause 20.1(b) and the Certifying Functions above.
268.	Novation on Termination Novation of Subcontractors	9.2A 9.4	<p>Clause 9.2A is an entirely new provision (no equivalent in the Old Government Standard Form), which appears to cover the same ground as clause 9.4 discussed below, including a reference to the same form of Deed of Novation.</p> <p>In these circumstances, to avoid duplication, uncertainty and potential inconsistency, clause 9.2A should be deleted.</p> <p>The risk for Contractors with a provision such as clause 9.4 is that specific subcontractors may refuse to execute the Deed of Novation, particularly Selected Subcontractors (that are mandated by the Principal). Ideally the obligation on the Contractor to procure these Deeds is limited to “reasonable endeavours”.</p> <p>There are three other general comments on clause 9.4:</p> <ul style="list-style-type: none"> <li>Both the Principal and the Superintendent have discretions in this provision (eg. time for return pursuant to clause 9.4(e) and approval of amendments to the form of Deed). It must be made clear that both must act reasonably and that clauses 1.29m), 1.2(n) and 45.5 do not apply.</li> <li>For the reasons discussed elsewhere, the provision of a power of attorney is not reasonable.</li> <li>From a drafting perspective, It is suggested that items 60 and 61 are combined and the reference to Annexure Part Z in the 3<sup>rd</sup> paragraph be corrected to read “Annexure Part T”.</li> </ul> <p>Specific comments on the form of Deed are set out below.</p>	<p>Delete clause 9.2A.</p> <p>Delete the 4<sup>th</sup> paragraph of clause 9.4 dealing with the granting of powers of attorney.</p> <p>Combine Items 60 and 61 and correct the cross-referencing error in the 3<sup>rd</sup> paragraph.</p>

**INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT**

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
269.	Novation of Subcontractors – Form of Deed of Novation	Annexure Part T	No form of Deed was included with the DSG RFT 3449 version. Consequently, I have not reviewed any Form of Deed at this stage.	Note.



**CIVIL CONTRACTORS  
FEDERATION  
TASMANIA**

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

### PART 13 – SUSPENSION AND TERMINATION

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED SOLUTION
<b>Principal / Superintendent Suspension</b>				
270.	Superintendent’s suspension	33.1	<p>The drafting from AS4000-1997 and the equivalent provision in the Old Government Standard Form (ie. clause 34.1 of AS2124-1992) has been entirely replaced by clause 33.1.</p> <p>The previous provision limited the Superintendent’s right to suspend the whole or part of the WUC to 4 specific circumstances, recognizing that there may be limited circumstances, which are not anticipated at the time of entering into the contract that may need the WUC to be paused for a period of time to allow those matters to be resolved.</p> <p>The new clause 33.1 (coupled with clauses 1.2(m), 1.2(n), 20 and 45.5) gives the Superintendent the <b>absolute discretion</b> to direct the Contractor to suspend carrying out all or part of the Works <b>on any condition for an unlimited period of time</b>.</p> <p>A right to unilaterally suspend the WUC for an unlimited period of time undermines the whole premise of the Contract, makes it impossible for contractors to manage their resources and workflow, and due to the inevitable difficulties (both contractual and factual) in recovering all of its losses arising from delay (including escalation of costs that were expected to be incurred earlier and lost profit on future projects).</p> <p>This also renders clause 33.3 effectively meaningless as the Superintendent no longer requires a reason to suspend.</p> <p>As such, this is unreasonable .</p>	<p>Clause 33.1 to revert to the drafting in AS4000-1997.</p> <p>Make the necessary changes to reflect the deletion of clauses 1.2(m), 1.2(n) and 45.5 and the discussion with respect to clause 20.1(b) and the Certifying Functions above.</p>
271.	Contractor’s suspension	33.2	<p>Whilst clause 33.2 is unamended from AS4000-1997, I have two specific comments:</p> <ul style="list-style-type: none"> <li>• To avoid the possibility of clause 33.2 being void under section 11 of the Security of Payment Act and to provide clarity for the parties and the Superintendent, it is suggested that the words “<i>or the security of Payment Act</i>” be added after the reference to “<i>Subclause 39.9</i>”.</li> <li>• Notwithstanding clauses 1.2(m), 1.2(n), 20.1 and 45.5 (discussed elsewhere), there will be circumstances where it is both appropriate and reasonable for the Superintendent to approve such a request.</li> </ul>	<p>Add the words:</p> <ul style="list-style-type: none"> <li>• “<i>or the security of Payment Act</i>” after the reference to “<i>Subclause 39.9</i>”; and</li> <li>• “<i>(not to be unreasonably delayed, conditioned or withheld)</i>” after “<i>written approval</i>”.</li> </ul>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED SOLUTION
272.	Cost	33.4	<p>The the drafting from AS4000-1997 and the equivalent provision in the Old Government Standard Form (ie. clause 34.4 of AS2124-1992) has been entirely replaced by clause 33.4. There are two primary differences:</p> <ul style="list-style-type: none"> <li>1<sup>st</sup> paragraph – <i>“If the suspension is due to an act or omission of the Superintendent, the Principal or others for whom it is responsible and the suspension causes the Contractor to incur more or less cost than would otherwise have been incurred but for the suspension, the difference shall be assessed by the Superintendent and added to or deducted from the Contract Sum.”</i></li> </ul> <p>This reverses the position from AS4000-1997 and the Old Government Standard Form, where the Contractor is entitled to compensation <b>in all cases other than</b> the three identified exceptions.</p> <p>This unreasonably reverses the onus of proof, and when coupled with the changes to clause 33.1 (discussed above) whereby the Superintendent can suspend for no reason (in its absolute discretion), makes it very difficult to prove an entitlement.</p> <ul style="list-style-type: none"> <li>2<sup>nd</sup> paragraph – <i>“The difference shall be assessed in accordance with the Valuation Rules”</i>. See separate discussion above regarding Valuation Rules.</li> </ul> <p>The amendments to clause 33.4 are unreasonable.</p>	Clause 33.4 to revert to the drafting in AS4000-1997.
<b>Principal Rights – Contractor Default</b>				
273.	Contractor’s default	39.2	<p>An entirely new paragraph has been inserted at the end of clause 39.2 (not in the Old Government Standard Form) as follows:</p> <p><i>“Each substantial breach of the Contract by the Contractor shall be taken to have been committed afresh on each day following the substantial breach (until the substantial breach has ceased and the consequences of the substantial breach for the Principal have been neutralised) and the rights of the Principal in respect of that substantial breach accrue again on each such day”</i>.</p> <p>I have three primary issues with this provision:</p> <ul style="list-style-type: none"> <li>It only applies to the Contractor. It is very telling that a similar paragraph has not been included in clause 39.7 with respect to substantial breaches of the Principal.</li> <li>I cannot understand what is required to satisfy the condition that <i>“the substantial breach has ceased and the consequences of the substantial breach for the Principal have been neutralized”</i>. Is this satisfied if the Principal exercises its rights under clause 39, or waives a substantial breach, or receives damages for the breach, but due to the rules applicable to common law damages, its full loss is not recoverable?</li> </ul>	Delete the entirely new paragraph at the end of clause 39.2

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED SOLUTION
			<ul style="list-style-type: none"> <li>This new paragraph is not limited to the contractual rights and obligations under clause 39, but will impact the Contractor’s common law position with respect to liability for breach of contract.</li> </ul> <p>There are very developed principles with respect to “continuing breaches” at common law. As the caselaw provides, the continued failure to do that act “by” a fixed date “<i>is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant</i>”; it does not involve “<i>a further breach arises in every successive moment of time during which the state or condition is not as promised</i>”.</p> <p>On its face, this paragraph appears to be trying to reverse this position. However, the drafting seems to go even further than that, suggesting that there is a continuing substantial breach not just until the breach “<i>has ceased</i>”, but also until “<i>the consequences of the substantial breach for the Principal have been neutralized</i>”.</p> <p>This appears to mix up the concepts of breach of contract and the remedies that may flow to the innocent party as a consequence of the breach.</p> <p>In my opinion, this is unreasonable.</p>	
274.	Principal’s rights	39.4	<p>This is the unamended clause 39.4 from AS4000-1997.</p> <p>However, note the discussion elsewhere with respect to clauses 1.2(m) and 45.5 with respect to the exercise of the Principal’s discretion in this clause. These provisions must not cut across the implied protections for the Contractor outlined by Dixon J in <i>Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3)</i> [2012] VSC 99 at [564]-[566] in relation to the equivalent provision in AS2124-1992.</p> <p>Further, there is no legitimate reason why the equivalent of the new 2<sup>nd</sup> paragraph of clause 39.9 should not also be included here.</p>	<p>Insert the equivalent of the new 2<sup>nd</sup> paragraph of clause 39.9 in clause 39.4.</p> <p>Make the necessary changes to reflect the deletion of clauses 1.2(m), 1.2(n) and 45.5 and the discussion with respect to clause 20.1(b) and the Certifying Functions above.</p>
275.	Take out	39.5	<p>An entirely new paragraph has been inserted at the end of clause 39.5 (not in the Old Government Standard Form). This provides:</p> <ul style="list-style-type: none"> <li>1<sup>st</sup> sentence – “<i>The Contractor must continue to perform and comply with the Contract in respect of the work not taken out of the Contractor’s hands.</i>” This goes without saying.</li> <li>2<sup>nd</sup> sentence – “<i>The Contractor must cooperate with and not interfere with or delay the Principal in the carrying out of the work taken out of the Contractor’s hands or any contractor or subcontractor engaged in the carrying out of such work.</i>”</li> </ul> <p>This is unnecessary as it is already covered by clause 24.3 (Access for Principal and others) and clause 24.3C (Work by other contractors). Further, it is inconsistent with those provisions (see discussion elsewhere). If it is</p>	<p>Delete the 2<sup>nd</sup> sentence of the last paragraph. If it is necessary to avoid doubt, it would be reasonable to simply refer to clauses 24.3 and 24.3C.</p> <p>Delete the 3<sup>rd</sup> sentence of the last paragraph.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED SOLUTION
			<p>necessary to avoid any doubt, it would be reasonable to simply refer to clauses 24.3 and 24.3C.</p> <ul style="list-style-type: none"> <li>3<sup>rd</sup> sentence – <i>“The Contractor shall not have any Claim against the Principal or any contractor or subcontractor engaged in the carrying out of the work taken out of the Contractor’s hands including any delay or disruption to the progress of the work not taken out of the Contractor’s hands.”</i></li> </ul> <p>This exclusion clause is unreasonable. The effect of this is that the Principal may delay or prevent the completion of the balance of the WUC indefinitely (either directly or indirectly through any contractor or subcontractor engaged in the carrying out of the work taken out of the Contractor’s hands) and the Contractor has no entitlement to relief.</p> <p>In fact, the literal meaning of this drafting is that the Principal has no further liability to the Contractor for any claim, regardless of whether it is associated with the WUC taken out of the Contractor’s hands. I accept that this is an unlikely interpretation, but it does create uncertainty for a Contractor.</p> <p>The parties’ rights and obligations with respect to the WUC taken out of the Contractor’s hands and any remaining WUC are adequately addressed by the balance of the Contract (including clauses 24.3, 24.3C, 39.5 and 39.6) and ought not be amended.</p>	
276.	Adjustment on completion of Work taken out	39.6 & Ann Part K	<p>This is the unamended clause 39.6 from AS4000-1997.</p> <p>There is no mention in this clause of the Valuation Rules. However, as discussed above, it is not clear whether sections 2.4 and 3.1 of Annexure Part K require the Valuation Rules to apply to the Superintendent’s assessment under clause 39.6.</p> <p>As discussed elsewhere, it is my opinion that all references to the Valuation Rules and Annexure Part K be deleted in their entirety and rely on the terms of AS4000-1997.</p> <p>In any event, clause 39.6 contains an added complexity. The Superintendent is required to assess <i>“the cost thereby incurred”</i>, which is clearly referring to costs incurred by the Principal. However, the Valuation Rules contain no mechanism for assessing the costs of the Principal (as opposed to the Contractor).</p>	<p>No change required to clause 39.6.</p> <p>As discussed elsewhere, delete Annexure Part K and all references to Valuation Rules, and ensure that the Superintendent’s assessment under clause 39.6 is a “Certifying Function”</p>
<b>Contractor Rights – Principal Default</b>				
277.	Principal Default	39.7	<p>Clause 39.7 of the Contract replaces the drafting from AS4000-1997 with drafting that is similar (but not the same) as the amended clause 44.7 of the Old Government Standard Form.</p> <p>The 1<sup>st</sup> paragraph and chapeau of the 2<sup>nd</sup> paragraph are to be contrasted with the 1<sup>st</sup> and 2<sup>nd</sup> paragraphs of clause 39.2 (dealing with Contractor’s default) in two respects:</p>	<p>Either amend the 1<sup>st</sup> paragraph of clause 39.2 to reflect the first paragraph of clause 39.7 or vice versa.</p> <p>Further, amend the drafting of:</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED SOLUTION
			<ul style="list-style-type: none"> <li>The Contractor can only give a “show cause notice” if “<i>damages are not an adequate remedy</i>” (as an absolute). No such limitation is in clause 39.2. It should be noted that it also differs materially from the 1<sup>st</sup> paragraph of the amended clause 44.7 of the Old Government Standard Form, which was qualified as “<i>the Contractor considers that damages may not be an adequate remedy</i>”.</li> <li>A “substantial breach” of the Principal is defined exclusively by reference to clauses 39.7(a) and (b), whereas under clause 39.2 a “substantial breach” of the Contractor is defined non-exclusively (“<i>include, but ae not limited to</i>”).</li> </ul> <p>I am not aware of any legitimate reason why the parties should be treated any differently under clauses 39.2 and 39.7.</p> <p>Clause 39.7 specifies two “substantial breaches” by the Principal:</p> <ul style="list-style-type: none"> <li>Clause 39.7(a) - “<i>failing to make a payment due and payable pursuant to the Contract and which remains unpaid 20 Business Days after the Contractor gives the Principal notice that the amount has become due and payable and has not been paid</i>”.</li> </ul> <p>The effect is that the Contractor must wait <b>20 Business Days (at least 28 calendar days)</b> from the date when the Contractor notifies the Principal that it is in breach of its payment obligations under the Contract before it is permitted to issue a “show cause” notice.</p> <p>Importantly, the Contractor is only permitted to suspend the works if the Principal fails to “show cause” within a further 7 days of receiving the notice (at least 35 days after the Principal was in breach of its payment obligation).</p> <p>The unamended AS4000-1997 permits the Contractor to issue a “show cause” notice immediately upon a failure to make a payment when it is due and payable pursuant to the Contract.</p> <p>Clause 44.7 of the Old Government Standard Form required that the amount remained unpaid for <b>10 Business Days</b> from the date when the Contractor notifies the Principal that it is in breach of its payment obligations. This is <b>half</b> the period in the new clause 37.9(a).</p> <p>It is difficult to conceive of any legitimate reason why a Contractor’s right to ask the Principal to show cause why it has breached the Contract should be delayed by even one day.</p> <ul style="list-style-type: none"> <li>Clause 39.7(b) - “<i>the Superintendent not giving a Certificate of Practical Completion or reasons as referred to in Subclause 34.6 within 28 days of receipt of a request by the Contractor to issue that certificate</i>”.</li> </ul> <p>Clause 36.4 requires the Superintendent to issue a Certificate of Practical Completion or reasons within 14 days of a request from the Contractor. Accordingly, the earliest that the Contractor is permitted to issue a “show cause” notice in this case is <b>14 days after</b> the Superintendent was required to issue the Certificate.</p>	<ul style="list-style-type: none"> <li>clause 39.7(a) to revert to the position in the unamended clause 37.9(a)(iv) of AS4000-1997; and</li> <li>clause 39.7(b) to revert to the position in the unamended clause 39.7(c) of AS4000-1997; and</li> </ul> <p>insert the unamended amended clause 39.7(a)(ii) of AS4000-1997.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED SOLUTION
			<p>The unamended clause 39.7(c) of AS4000-1997 permits the Contractor to issue a “show cause” notice immediately upon the Superintendent not giving a Certificate of Practical Completion or reasons as referred to in Subclause 34.6. This is the same position as in the amended clause 44.7(b) of the Old Government Standard Form</p> <p>Thus, the new clause 37.9(b) increases the period before the Contractor is permitted to issue a “show cause” notice in these circumstances by 14 days against both of these contracts.</p> <p>As with clause 37.9(a) above, It is difficult to conceive of any legitimate reason why a Contractor’s right to ask the Principal to show cause in these circumstances by one day, let alone 14 days (being 14 days plus 14 days).</p> <p>Finally, given that the Principal’s default position is to provide Works Insurance and Public Liability Insurance, it is also reasonable that a failure to provide evidence of insurance (as per the unamended amended clause 39.7(a)(ii)) permits the Contractor to issue a “show cause” notice.</p>	
278.	Contractor’s rights (Suspension and Termination)	39.9 & Ann Part K	<p>A new 2<sup>nd</sup> paragraph has been inserted in this clause as follows:  <i>“The Principal shall be taken to have shown reasonable cause if the Principal has remedied the consequences of the breach or compensated the Contractor in respect of the consequences of the breach.”</i></p> <p>I am generally comfortable with providing some (non-exclusive) guidance as to what may amount to “showing reasonable cause” for the purposes of clauses 39.4 and 39.9. However, to avoid uncertainty and inconsistency, this paragraph should reflect the drafting in clauses 39.9(a) and 39.9(b).</p> <p>Further, whilst the last paragraph (dealing with damages suffered by the Contractor by reason of suspension pursuant to clause 39.9) does not expressly refer to the Valuation Rules, as discussed above, it is not clear whether sections 2.4 and 3.1 of Annexure Part K require the Valuation Rules to apply to the Superintendent’s assessment under clause 39.9.</p> <p>It is my opinion that all references to the Valuation Rules and Annexure Part K be deleted in their entirety and rely on the terms of AS4000-1997. Further, it is necessary to ensure that the Superintendent’s assessment under clause 39.9 is a “Certifying Function”.</p>	<p>Amend the 2<sup>nd</sup> paragraph to read:  <i>“The Principal shall be taken to have shown reasonable cause if the Principal has remedied the breach or made other arrangements to the reasonable satisfaction of the Contractor.”</i></p> <p>As discussed elsewhere, delete Annexure Part K and all references to Valuation Rules, and ensure that the Superintendent’s assessment under clause 39.9 is a “Certifying Function”</p>
279.	Termination - Remedies	39.10	<p>Clause 39.10 specifies entirely different consequences for the parties where the Contract is terminated for default compared with the unamended clause 39.10 of AS4000-1997 and clause 44.10 of the Old Government Standard Form (which was the unamended provision from AS214-1992). These provisions:</p> <ul style="list-style-type: none"> <li>• Did not apply to termination at common law (ie. limited to termination for “substantial breach” pursuant to the express rights in the contract).</li> </ul>	<p>Delete the amendments to clause 39.10 and revert to the drafting in AS4000-1997 which is entirely consistent with the Old Government Standard Form.</p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

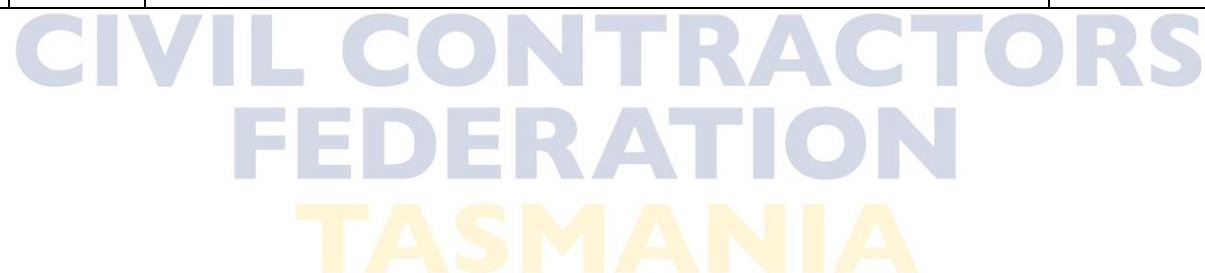
#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED SOLUTION
			<ul style="list-style-type: none"> <li>Specified the <b>same</b> consequences for both the Principal and the Contractor where they terminated the contract for the other’s substantial breach (ie. the same at common law if the contact were terminated due to the repudiatory conduct of one party).</li> </ul> <p>Contrary to this fair and balanced regime, the new clause 39.10 now adopts <b>entirely different consequences for each of the parties.</b></p> <p>With respect to the Contractor’s remedies for termination for Principal default either pursuant to clause 39.9 or at common law for the Principal’s repudiation:</p> <ul style="list-style-type: none"> <li>The Contractor is limited to “<i>damages as assessed by the Superintendent in accordance with the Valuation Rules</i>” (compared with common law damages).</li> </ul> <p>It is unclear which aspects of the Valuation Rules apply as there is no provision expressly dealing with clause 39.10. Nevertheless, as discussed elsewhere, all valuations pursuant to the Valuation Rules result in a significant under-recovery by the Contractor.</p> <ul style="list-style-type: none"> <li>By including termination by the Contractor at common law for repudiation by the Principal, this now excludes the “savings” in clause 39.1 in relation to common law remedies, but only with respect to the Contractor.</li> </ul> <p>In stark contrast, the Principal’s remedies for Contractor default:</p> <ul style="list-style-type: none"> <li>Clause 39.10 does not apply to termination by the Principal at law.</li> <li>The Principal’s remedies are unamended from AS4000-1997.</li> </ul>	
280.	Termination	39.10(d)	<p>The entirely new clause 39.10(d) provides that:</p> <p><i>“the Contractor must <b>as soon as possible</b> provide the Principal with all Contract Material and comply with its obligations under Clause 8B, Clause 8C and Clause 10”.</i></p> <p>It is unclear which obligations under clauses 8B, 8C and 10 are intended to be captured, as not all will survive termination (see separate discussion on clause 45.4).</p> <p>It is presumed that the intention is to deal with the return of the Principal’s Material pursuant to clause 8B.5 and the provision of the Contract Material to the Principal pursuant to clause 8C.6 (which must be performed “immediately” upon termination), whereas there are no obligations under clause 10 which appear to be applicable here.</p> <p>See the separate comments in relation to clauses 8B, 8C and 10 that proposes material changes to these provisions.</p>	Delete clause 39.10(d) as these obligations are dealt with elsewhere in the Contract.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED SOLUTION
<b>Principal Rights – Termination for Convenience</b>				
281.	Termination for convenience	40A	<p>Clause 40A is an entirely new provision (no equivalent in the Old Government Standard Form).</p> <p>A right of termination for convenience can serve a legitimate purpose when the viability of a project is dependent on matters outside of the Principal’s control. However, this must be balanced against the fact that, unless carefully drafted, it can be used to significantly shift the contractual risk allocation in favour of principal and deprive the contractor of the benefit of the contract (ie. its right to earn its expected profit).</p> <p>Contractors require a level of certainty as to future cashflows, revenues and utilization of limited resources based on their work-in-hand. Should that work disappear, that can cause significant hardship.</p> <p>Clause 40A, in its current form, goes beyond this legitimate purpose and is unreasonable. Specific concerns include:</p> <ul style="list-style-type: none"> <li>• Clause 40A(a) and (f) – As noted, a termination for convenience right should not be available simply because the Principal has decided that it would rather have another contractor perform the work. This undermines the fundamental nature of a contract and deprives the Contractor of its benefit.</li> </ul> <p>However, it is also accepted that a Principal’s inability to proceed with the project may not be permanent. As such, it is not uncommon for such a provision to expressly prohibit the Principal from completing the Works with other contractors for a period of time (such as 2 years).</p> <p>An alternative approach is that, if the Principal wishes to use other contractors to complete the Works within an agreed period (again, say 2 years), the Principal must pay the Contractor its expected profit on the Works it did not complete.</p> <ul style="list-style-type: none"> <li>• Clauses 40A(b), (c), (d) and (e) – Clause 40A(b) sets out the Contractor’s sole and exclusive entitlement to compensation, which is subject to the exclusions and limitations in clauses 40(c) and (d).</li> </ul> <p>It is important to remember that the Principal has terminated the Contract for its convenience, not because of the Contractor’s default. In these circumstances, the Contractor ought to be entitled, as a minimum, to the same entitlements as set out in clauses 40(a) and 40(b) with respect to termination by frustration.</p> <ul style="list-style-type: none"> <li>• Clause 40A(b)(i) – It is unclear why clause 39.4(b) is referred to as that is termination by the Principal for Contractor default. In such a case, it is unlikely that the Contractor will receive anything.</li> <li>• Clause 40A(c) – The compensation payable to the Contractor is limited to the unpaid amount of the “Contract Sum” at the date of termination.</li> </ul>	<p>Delete clause 40A(c).</p> <p>Replace clause 40A(b) as follows:</p> <p><i>“If the Principal terminates the Contract pursuant to paragraph (a) of this Clause:</i></p> <p>(i) <i>the Superintendent shall issue a Progress Certificate for WUC carried out to the date of termination, evidencing the amount which would have been payable had the Contract not been terminated and had the Contractor been entitled to and made a progress claim on the date of termination;</i></p> <p>(ii) <i>the Principal must pay to the Contractor:</i></p> <p>(A) <i>the amount due to the Contractor evidenced by all unpaid certificates;</i></p> <p>(B) <i>the cost of materials and equipment reasonably ordered by the Contractor for WUC and which the Contractor is liable to accept, but only if they will become the Principal’s property upon payment; and</i></p> <p>(C) <i>subject to paragraph (d) of this Clause, any costs and loss incurred by the Contractor as a result of the early termination of the Contract, being a loss that the Contractor cannot reasonably avoid or mitigate;</i></p> <p>(iii) <i>each party shall promptly release and return all Security provided by the other.”</i></p> <p>Replace clause 40A(d) as follows:</p> <p><i>“For the purposes of paragraph (ii)(C) of Subclause 40A(b), but subject to paragraph (f), loss is not to include loss of prospective profits”.</i></p> <p>Replace clause 40A(f) with the following:</p> <p><i>“If the Principal terminates the Contract pursuant to this Clause, and the Principal engages other Contractors to complete The Works within 2 years of the termination, the Principal must pay to the Contractor its loss</i></p>

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED SOLUTION
			<p>It is difficult to see why it is reasonable, where the Principal has decided to end the Contract early for its own convenience, for there to be any limitation on recovery of additional losses suffered by the Contractor (subject to the duty to mitigate).</p> <p>Further, such a limit could potentially lead to a significant loss for the Contractor as claims that have accrued, but not been certified, as at the date of termination, are unlikely to be taken into account.</p> <ul style="list-style-type: none"> <li>• Clause 40A(d) – Whilst a reasonable position would be for the Contractor to also be compensated for “loss of prospective profits”, it is generally accepted in the industry that, provided the right to terminate for convenience is exercised by the Principal due unforeseen circumstances. See also above regarding clause 40A(f).</li> <li>• Clause 40A(e) – This is an exclusive remedies clause. Provided that the express rights to compensation in clause 40A are fair and reasonable, this provision is should not be a concern.</li> </ul> <p>Further, it is important to address the release and return of the security - clause 40(c) should be replicated in clause 40A. Finally, note the numerous typographical and cross-referencing errors.</p>	<i>of prospective profits that it expected to earn had the Contract not been terminated.”</i>
<b>Other Termination</b>				
282.	Termination by Frustration	40	While clause 40 is the unamended AS4000-1997, note comments elsewhere regarding the duties of the Superintendent and the application of the Valuation Rules (which may otherwise apply to this provision).	Ensure that the Superintendent’s responsibility is a Certifying Function.



## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

### PART 14 – OTHER

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
<b>Other</b>				
283.	Executive Nature of the Principal	1A	<p>This entirely new provision states:</p> <p><i>“Nothing in the Contract is intended to prevent, is to be taken to prevent, or prevents, the free exercise by the Governor, by any member of the Executive Council, or by any Minister of the Principal, of any duties or authorities of his or her office. Any provision of the Contract that is inconsistent with this Clause is of no legal effect to the extent of the inconsistency.”</i></p> <p>As a matter of law, a public authority (eg. State Government) cannot preclude itself from exercising important discretionary powers or performing public duties by incompatible contractual or other undertakings.</p> <p>To ensure that the contract is not invalidated, it is reasonably common to have a provision such as clause 1A. However, it is important to ensure that it goes no farther than is necessary. Such a provision usually provides something like:</p> <p><i>“Nothing expressly stated or implied in the Contract has the effect of constraining the Principal, the Governor, by any member of the Executive Council, or by any Minister of the Principal or placing any fetter on the Principal’s discretion to exercise or not to exercise any of its executive or statutory rights, duties or functions.”</i></p>	Amend clause 1A to align to the suggested drafting to ensure that it goes no farther than is strictly necessary.
284.	Public auditing	8F	<p>This is an entirely new provision (ie. not in the Old Government Standard Form). It is unclear why it is considered necessary to now include a provision creating obligations on Contractors with respect to <i>Audit Act 2008</i> (Tas), when the legislation already clearly addresses such obligations and the consequences for failing to comply.</p> <p>It is not reasonable for the Contractor to have any greater obligations under the Contract than its obligations under the <i>Audit Act 2008</i> (Tas).</p> <p>I am unable to determine from the drafting of clause 8F.2 whether it creates more onerous obligations than are otherwise imposed upon it pursuant to the <i>Audit Act 2008</i> (Tas).</p>	<p>Replace clause 8F with a simple statement to the effect that:</p> <p><i>“The Contractor shall comply with any obligations or requirements imposed upon it pursuant to the Audit Act 2008 (Tas).”</i></p>
285.	<i>Personal Property Securities Act 2009</i> (Cwth)	11E	<p>This is an entirely new provision that was not in the Old Government Standard Form contract.</p> <p>It provides that:</p> <ul style="list-style-type: none"> <li>• Clause 11E(a) - The Contractor “shall not seek to perfect a Security Interest in any PPS Property relevant to the carrying out of WUC or relevant to The Works”.</li> </ul>	Replace with the proposed PPSA provision in the discussion draft of AS4000-2024.

## INDEPENDENT REPORT: AMENDED AS4000-1997 “BAU” CONTRACT

#	ISSUE	CL. REF	COMMENT / CONCERN	PROPOSED CHANGES
			<p>This is unreasonable as it prevents the Contractor exercising rights otherwise created by the Contract and legislation.</p> <ul style="list-style-type: none"> <li>• Clause 11E(b) - The Contractor “<i>agrees that the Principal may, but is not obliged to, perfect a Security Interest under the PPS Law in any PPS Property relevant to the carrying out of WUC or relevant to The Works</i>”.</li> </ul> <p>It is unclear why this provision is necessary as nothing in the Contract would otherwise affect any such rights of the Principal.</p> <ul style="list-style-type: none"> <li>• Clause 11E(c) - The Contractor “<i>must do everything and must ensure that its employees and agents do everything that the Principal may reasonably require to perfect any such Security Interest under the PPS Law</i>”.</li> </ul> <p>Other than the effect of clauses 1.2(m) and 45.5 discussed elsewhere, this is not unreasonable.</p> <ul style="list-style-type: none"> <li>• Last paragraph – “The Contractor warrants that all Contract Material created by the Contractor will be free from any Security Interest (except for a Security Interest created by the Principal)”.</li> </ul> <p>This overlaps with the last paragraph of the new clause 8C.2 (although see comments on that provision elsewhere).</p> <p>The proposed amendments to AS4000-2024 contain a far more balanced approach which requires both parties to do all things reasonably required by the other party to ensure that Security Interests created under the contract are enforceable, perfect or otherwise effective, are the highest ranking possible and to enable the other party to exercise rights in connection with its security Interests arising in its favour.</p>	

# CIVIL CONTRACTORS FEDERATION TASMANIA