

[Client Name] Pty Limited
 [Principal's Name] Limited
 [Project Name]

Preliminary contract comments on amended AS 4902 prepared by [Law Firm]

These comments are based on the version of the documents received from [Client Name] on [date].

Issue	Comment	[Client Notes]
1. Overview	This is a design and construct engagement, based on a heavily amended AS 4902.	
2. Contracting entity <small>cl 51.1, 51.2</small>	<p>The Principal is entering into the contract as agent for #, which is the manager of the # Unit Trust (the Trust). The contract contains a clause limiting both the Principal's and #'s liability.</p> <p>There are two issues for # to be aware of:</p> <ul style="list-style-type: none"> (a) # will need to make sure its credit checks are conducted on the correct entity; and (b) if there is a payment dispute, extracting payment from a trust is often more difficult than from a company (from a legal perspective). 	
3. Design risk <small>'Legislative requirements', 2.2(d), 6.1, 6.2</small>	<p>The Contractor will bear full design responsibility. The Contractor is required to warrant that:</p> <ul style="list-style-type: none"> (a) it has examined any preliminary design in the Principal's Project Requirements, and that any such preliminary design is suitable, appropriate and adequate for the intended purpose of the Works; and (b) the Works when complete will be fit for their intended purpose and comply with all Legislative Requirements (including the Building Code). <p>These obligations apply regardless of whether the Principal has provided design documents. This essentially means that the Contractor must accept full responsibility for the existing designs prepared by the Principal or its consultants, regardless of the Contractor's involvement (if any).</p>	

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	The Contractor cannot rely on any information or documents provided by the Principal which do not form part of the contract.	
4. Design and document review <small>cl 2.6, 8.3, Item 18</small>	The Contractor must allow the Principal 10 business days to review and comment on Design Documents or other documents which require the Principal's approval.	
5. Design discrepancies <small>cl 8.1</small>	<p>The Contractor will carry the risk of all design discrepancies.</p> <p>The Contractor cannot claim any time or cost relief for complying with a direction in relation to discrepancies in the design documents or between the design documents and the Principal's Project Requirements.</p> <p>Although the contract contemplates the Contractor being entitled to an adjustment to the contract sum for compliance with 'other directions' under clause 8.1, this relief is limited by the warranty the Contractor is required to give that it has reviewed all the contract documents and to the best of its knowledge there are no discrepancies between those documents.</p>	
6. Deed of Guarantee <small>cl 5.6, 5.9</small>	<p>Prior to commencing WUC, the Contractor must provide:</p> <p>(a) a Deed of Guarantee from the Guarantor identified at item 45 (this item has not been completed in the version we have reviewed); and</p> <p>(b) a Deed of Guarantee from each director.</p> <p>These deeds must be in the prescribed form at Annexure Part G.</p>	
7. Variations <small>cl 36</small>	<p>If the Contractor is directed to perform a variation, or performs a deemed variation (eg a latent condition), the Contractor will be paid:</p> <p>(a) the trade costs, as agreed or assessed by the Superintendent; and</p> <p>(b) an amount equal to 10% of the trade costs.</p> <p>The Contractor may be entitled to an EOT if agreed or assessed by the Superintendent, however it will not be entitled to any delay costs.</p>	

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<p>8. Latent condition cl 6.2, 25</p>	<p>Although under clause 25.3 the effect of a latent condition will be a deemed variation, it is difficult to predict when this relief might be available (if ever) given the warranties the Contractor is required to provide elsewhere in the contract. The Contractor is required to warrant that:</p> <ul style="list-style-type: none"> (a) it has made its own investigations and determinations; and (b) it is not relying on any information made available by the Principal which does not form part of the contract. 	
<p>9. As-built drawings cl 8.3</p>	<p>Draft as-built drawings must be provided as a precondition to practical completion, and final copies must be provided within 4 weeks of the date of practical completion.</p>	
<p>10. Approvals and Legislative Requirements cl 11.1, 11.3, 39.2(vi), Item 22A</p>	<p>The Contractor is responsible for obtaining all approvals, except for the Development Consent and those approvals specified as the Principal's responsibility in the DA Matrix (which is not included in the version of the contract we have reviewed).</p> <p>The PPR at page 9 notes that the Contractor will be responsible for coordinating the close out of the development approval consent conditions and for satisfying the requirements to achieve a construction certificate and occupation certificate, with the nominated Private Certifying Authority (#).</p> <p>Any failure to comply with a Legislative Requirement will be considered a substantial breach of the contract, which may allow the Principal to take work out of the Contractor's hands or terminate the contract.</p>	
<p>11. Legislative inspections cl 11.5</p>	<p>The Contractor is required to warrant that it understands the inspections which are required to be carried out in relation to WUC under the relevant legislative requirement ("Legislative Inspections") and the Contractor is taken to have allowed for these in its program.</p> <p>The Contractor must give the Superintendent 5 business days' notice if a Legislative Inspection is required.</p>	
<p>12. Subcontractor warranties and side deeds cl 9.2(e), 9.2(f), 9.6</p>	<p>Prior to each subcontractor commencing WUC, the Contractor must obtain from the subcontractor:</p> <ul style="list-style-type: none"> (a) a Subcontractor Warranty, either in the approved form at Annexure Part N, or in another form acceptable to the Principal; and (b) a Subcontractor's Side Deed, in the prescribed form (Annexure Part M). <p>The approved form of Subcontractor Warranty requires the subcontractor to:</p>	

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	<ul style="list-style-type: none"> (c) warrant that all work to be performed or materials to be provided under the subcontract will comply with the requirements of the subcontract; (d) grant the Principal a charge of the subcontractor's collateral (all materials, equipment, construction plant, temporary works and all design documents and drawings, whether on site or off site) and agree to the Principal registering that security interest under the Personal Property Security Act; and (e) indemnify the Principal in respect of any loss suffered by the Principal as a result of a breach of (c) or (d) above. 	
13. Indemnities <small>cl 10.1, 10.2, 15.1, 43.8</small>	<p>In addition to the usual indemnities that the Contractor is required to give under the unamended AS 4902, the Contractor agrees to indemnify the Principal in relation to:</p> <ul style="list-style-type: none"> (a) a breach of the contract by the Contractor (except for clause 34.1 in relation to progress); (b) any wilful or negligent act or omission of the Contractor, a subcontractor of their employees or agents; and (c) loss of or damage to the Environment as a consequence of WUC. <p>These indemnities are reduced proportionately to the extent of any negligent act or omission of the Superintendent the Principal or its other contractors, employees or agents. The Contractor also agrees to grant the following indemnities (these are not reduced proportionately for any contribution by the Principal):</p> <ul style="list-style-type: none"> (d) a breach of the Contractor's obligations to obtain moral rights consent and waiver forms from the author of any Project Documents (cl 10.3); (e) a breach of the Contractor's obligations in relation to Legislative Inspections (cl 11.6(c)); (f) loss arising from WUC executed outside of the boundaries of the site (cl 24.4); (g) loss suffered as a result of the Principal exercising its right to take work out of the Contractors hands or terminate the contract if the Contractor fails to show reasonable cause (cl 39.6(b)); and (h) a breach of the Contractor's obligations in relation to ongoing operations (cl 47(b)). 	
14. Security <small>cl 5</small>	<p>The Contractor must provide security for the value of 5.5% of the contract sum in the form of 2 unconditional undertakings, each for 2.75% of the contract sum.</p>	

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	<p>The undertakings must not contain an expiry date and must be in a form and from a bank approved by the Principal in its absolute and sole discretion (the form at Annexure Part B is approved).</p> <p>The Principal is not required to give notice before having recourse to the Contractor's security. The Principal's right to have recourse to security is relatively broad – only a 'bona fide claim' is required.</p>	
<p>15. Financial information cl 5.8</p>	<p>The Principal may at any time require the Contractor to:</p> <ul style="list-style-type: none"> (a) provide financial information including a current balance sheet and details of the Contractor's secured and unsecured creditors; and (b) permit the Principal and its financial advisers to carry out a financial review of the Contractor to determine its financial status. If requested, the Contractor must provide the Principal with such information which the Principal or its financial advisers deem reasonably necessary to carry out the financial review. 	
<p>16. Intended purpose of the Works <small>'Practical Completion', cl 2.2(b)</small></p>	<p>The Contractor must:</p> <ul style="list-style-type: none"> (a) warrant that: <ul style="list-style-type: none"> (i) the preliminary design is suitable and appropriate and adequate for the <i>intended</i> purpose of the Works; and (ii) the Works when complete will be adequate for their <i>intended</i> purpose; (b) to achieve practical completion, complete the Works, except for minor Works which do not reasonably prevent them from being used for their '<i>intended</i> purpose'. <p>Usually each of these clauses would refer to '<i>for the purpose stated in the Principal's Project Requirements</i>'.</p>	
<p>17. Superintendent cl 20, Item 46</p>	<p>The Superintendent will also be engaged as the project manager, in addition to its role as Superintendent.</p> <p>Normally if the Contractor requests that the Superintendent confirm an oral direction in writing, the Contractor is not bound to follow the direction until the Superintendent does so. This protection has been removed.</p>	
<p>18. Liquidated damages cl 34.7, Item 29</p>	<p>If more than one separable portion is in delay, liquidated damages may be applied cumulatively across different separable portions at the same time. The liquidated damages rate for each separable portion is:</p>	

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	<ul style="list-style-type: none"> (a) separable portion 1 - \$1,000 per day; (b) separable portion 2 - \$2,500 per day; (c) separable portion 3 - \$2,500 per day; (d) separable portion 4 - \$4,500 per day; and (e) separable portion 5 - \$1,500 per day. 	

19. Notice timeframes

The Contractor must submit notices within the following timeframes:

Notice	Time	Ref
(a) Notice of delay	Promptly	34.2
(b) Delay claim	Within 5 business days of becoming aware of the cause of delay	34.3(a)(ii)
(c) Updated delay claim (notifying of further delay)	Within 2 business days of becoming aware of the further delay	34.3(b)
(d) Notice of a possible variation	As soon as practicable, but if given orally it must be confirmed in writing on the next business day	36.5
(e) Variation estimate	Within 10 business days from the direction, or the deemed variation arising (excluding latent conditions) Or within 5 business days of giving notice of a possible variation	36.2(b), 36.5
(f) Further information on proposed variation (if requested by the Superintendent)	Within 5 business days of the Superintendent's request	36.2(c)
(g) Notice of latent condition	Within 10 business days	25.3
(h) Latent condition estimate	Within 10 business days from the notice of latent condition	36.2(b)(iv)
(i) Notice of anticipated practical completion	3 months prior, and 15 business days prior	34.6

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(j)	Notice of any incident or injury which occurs during WUC	Orally and immediately
		48.6(a)(i)
(k)	Any other claim	Within 10 business days
		41.4

20. Relief for delays Time and cost relief is available as follows:

Delay Event	Time	Cost	Ref
(a) Delayed access to the Site	✓	✓	'compensable cause', 'qualifying cause', 24.1
(b) An act, default or omission of the Superintendent, the Principal or the Principal's consultants or agents <u>which is not permitted under the contract</u>	✓	✓	'compensable cause', 'qualifying cause'
(c) An act or omission of the Superintendent, the Principal or the Principal's consultants or agents <u>which is permitted under the contract *</u>	✓	✗	'compensable cause', 'qualifying cause'
(d) Other contractors engaged by the Principal	✓	✗	'compensable cause', 'qualifying cause', 24.2
(e) Other contractors not engaged by the Principal, or other persons authorised by the Principal to access the site	✗	✗	24.2
(f) A delay by a Certifying Authority	Probably	✗	'compensable cause'
(g) A suspension by the Principal (not caused or contributed to by the Contractor)	✓	✓	33
(h) A change in Legislative Requirements which comes into effect after the 10 th Business Day before the date of contract (or the commencement of WUC if that is earlier), which could not reasonably have been anticipated	Probably	✓	11.2
(i) A Variation (see Item 7 above)	Probably	✗	36
(j) A Detail Change	✗	✗	

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	(k) A Latent Condition	Qualified, see item 8 above	Qualified, see item 8 above	
	(l) Minerals, fossils and relics	Probably	✓	24.3
	(m) Climatic and weather conditions	✗	✗	
	(n) Industrial relations issues	✗	✗	
	(o) Anything else	✗	✗	
<p>* For example, where the delay is caused by the Principal, or other persons authorised by the Principal, accessing the site for any reason (after giving reasonable notice as required).</p>				
21. Delay costs <small>cl 34.9</small>	<p>The contract contemplates a daily cap on delay costs, however the value has not been included in the version we have reviewed (item 31(b)). This is the maximum amount that the Contractor can claim for any one day of delay, regardless of whether the delay impacts more than one separable portion.</p> <p>The Contractor can only claim delay costs for delays on Working Days.</p>			
22. Defect liability period <small>cl 35, Item 32</small>	<p>The defects liability period for each separable portion will be 12 months from the date of practical completion of the last separable portion to reach practical completion.</p>			
23. Long service levy <small>cl 11.8</small>	<p>The Contractor must pay any applicable long service levy prior to commencing WUC. The Principal is not required to reimburse the Contractor for this levy.</p>			
24. Setting out the Works <small>cl 26.1, 26.4</small>	<p>The Contractor must obtain the data, survey marks and information necessary to set out the Works, and the Contractor will bear the risk of any errors in that information.</p> <p>As a condition precedent to commencing construction, the Contractor must provide a survey from a registered surveyor stating that the Works have been set out in accordance with the contract.</p>			
25. Services <small>cl 24.6, 24.7</small>	<p>The Contractor bears the risk of all site services, including in relation to availability and capacity.</p> <p>The Contractor must make all arrangements and pay all costs associated with the supply of services necessary for carrying out WUC. This includes electricity, gas, telephone, water, drainage, sewerage,</p>			

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	<p>utilities, electronic communications services and all equipment, machinery, cabling, wiring, conduits, pipes and pits associated with or used in the provision of such services.</p> <p>The Contractor must obtain the Superintendent’s approval before performing any WUC which will affect the site services (including turning off or reducing capacity).</p>	
<p>26. Unfixed plant and material</p> <p>cl 37.3</p>	<p>The Contractor cannot claim for unfixed plant and material as there are no plant and material listed at item 34 in the version of the contract that we have reviewed.</p>	
<p>27. Ongoing operations</p> <p>cl 47</p>	<p>The Contractor must not interfere with the ‘Ongoing Operations’ (which includes the activities in buildings and areas forming the site and adjoining areas must ensure that there is quiet enjoyment of the premises. The Contractor must comply with any direction of the Superintendent in relation to the Ongoing Operations.</p>	
<p>28. Proportionate liability</p> <p>cl 54</p>	<p>The contract purports to exclude the operation of the proportionate liability legislation.</p>	
<p>29. Notices</p> <p>cl 7</p>	<p>Any notices in relation to suspension of work, disputes or any other claim (except for an EOT or a variation claim) must be either hand delivered or sent by registered post.</p>	
<p>30. Termination for convenience or frustration</p> <p>cl 40, 40A</p>	<p>The Principal may terminate the contract at any time for any reason, regardless of whether the Contractor has complied with its obligations. If this occurs, the Contractor will be paid for:</p> <ul style="list-style-type: none"> (a) the amounts due to the Contractor evidenced by all unpaid certificates; (b) the cost of materials and equipment reasonably ordered which cannot be returned or cancelled and which will become the property of the Principal upon payment; and (c) the cost of removing temporary works and construction plant. <p>The Contractor will not be paid for the cost of labour which cannot be redeployed, the cost of any redundant services (eg hire costs, permits or subcontractor cancellation fees) or loss of profit.</p>	
<p>31. WHS</p> <p>cl 48.3, 48.7</p>	<p>The Contractor will be appointed as the principal contractor for WHS purposes.</p>	

Issue

Comment

[Client Notes]

For any structure that the Contractor has engaged someone else to design, the Contractor must provide the Design Report required under clause 295 of the WHS Regulation to the Principal within 5 business days of receiving the report from the designer.

SAMPLE ONLY