

NSW HEALTH



# Long Bay Forensic and Prison Hospitals privately financed project

## Summary of contracts

as at 10 November 2006







# Long Bay Forensic and Prison Hospitals privately financed project

## Summary of contracts

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# I Introduction

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This report summarises the main contracts, from a public sector perspective, for the Long Bay Forensic and Prison Hospitals project.

It has been prepared by the New South Wales Department of Health, Justice Health (a NSW statutory health corporation) and the NSW Department of Corrective Services in accordance with the public disclosure provisions of the NSW Government's November 2001 guidelines *Working with Government: Guidelines for Privately Financed Projects*, and has been submitted to the Auditor-General for auditing prior to its tabling in Parliament.

In compliance with the requirements of and restrictions imposed by these *Guidelines*, this report:

- Focuses on the project contracts to which the Minister for Justice (representing the State of NSW), the Minister for Lands (also representing the State of NSW), the Health Administration Corporation (the Director-General of the NSW Department of Health) and/or Justice Health are parties or which otherwise have a potentially substantive impact on public sector benefits or risks. Other contracts solely between private sector organisations are referred to only to the extent necessary to explain the public sector's exposure.
- Does not disclose the private sector parties' structures, profit margins, intellectual property or any other matters which might place them at a disadvantage with their competitors.

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

It is based on the project's contracts as at 10 November 2006. Subsequent amendments of or additions to these contracts, if any, are not reflected in this report.

## 1.1 The project

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The Long Bay Forensic and Prison Hospitals project involves:

- Private sector financing, design, construction and commissioning of two new hospitals and associated facilities within the Long Bay Correctional Complex in Malabar, to standards that must meet or exceed detailed Department of Health, Justice Health and Department of Corrective Services specifications, and

- Private sector facilities management and delivery of ancillary non-clinical services for these hospitals until 19 July 2034 or any earlier termination of the project's contracts, when the hospital facilities will be handed over to the public sector,

in return for payments to the main private sector parties upon the completion of both of the hospitals (through the diversion of identical payments *from* other private sector participants) and performance-based monthly payments to the main private sector parties by the State of NSW and the Health Administration Corporation during the operational phases of each of the hospitals.

The private sector participants in the project include Multiplex Infrastructure, Babcock & Brown, Multiplex Constructions, Honeywell, Medirest/Compass Group, the Commonwealth Bank and the Royal Bank of Scotland.

The two new hospitals will be:

- A 135-bed Forensic Hospital for "forensic" patients (people who have been found not guilty of a crime on the grounds of mental illness or are unfit to plead because of mental illness), sentenced prison inmates who have become mentally ill while in prison and need inpatient treatment at this type of hospital, and mentally ill "civilian" patients whose behaviour cannot be managed in other psychiatric facilities, and
- A new 85-bed Prison Hospital for prison inmates, replacing the current Long Bay prison hospital and providing 30 beds for medical and surgical patients, 15 beds for medium to long-stay aged and rehabilitation patients and 40 beds for mental health patients.

The Forensic Hospital, a NSW Department of Health facility, will be managed by Justice Health, a statutory health corporation that is responsible for the health care provided to all inmates and detainees in the NSW criminal justice system.

In addition to the hospital facilities themselves, it will include a new Operations Building for Justice Health, a new Pharmacy Building and a new gatehouse. The Operations Building and Pharmacy Building are to be completed by 29 August 2008, the hospital and the gatehouse by 11 November 2008 and associated landscaping by 18 February 2009.





*Two artists' impressions of the proposed Justice Health Operations Building and Pharmacy Building from the northwest, from Anzac Parade, with the other Forensic Hospital facilities in a new secure area to the rear.*



*The proposed Forensic Hospital's secure hospital facilities from the west, looking across Anzac Parade.*

The Prison Hospital, a NSW Department of Corrective Services facility, will include a new gatehouse, to be completed by 4 August 2008, and is to be fully completed by 13 September 2008. Its custodial services will be provided by the Department of Corrective Services and its clinical services by Justice Health.

The works will also include the demolition of the existing Long Bay Hospital and other infrastructure on the sites by 13 January 2009, and all the new facilities are due to be completed and opened by 18 February 2009.

The capital cost of the project's work will be approximately \$130 million.

All clinical, clinical support and related administration functions for the care, treatment and rehabilitation of patients at both of the hospitals will be provided by Justice Health staff, managed by Justice Health.

The non-clinical services to be provided by the private sector parties will comprise:

- Building maintenance and refurbishment services, grounds maintenance services, utility services and pest control services for both of the hospitals and their sites
- Security services, cleaning services, catering services, non-clinical waste management services and linen and laundry services for the Forensic Hospital and its site, and
- Associated management, performance monitoring, reporting, inspection, auditing, equipment transfer, handover, helpdesk and employee and training services.

The private sector parties' cleaning, catering and linen and laundry services at the Forensic Hospital will be delivered primarily by Justice Health employees, who will continue to



be employed by Justice Health but will be managed by the private sector parties.

The NSW Treasury has estimated that the net present cost of the hospitals to the NSW public sector will be approximately 0.4% lower than it would have been under conventional public sector delivery, assuming the same time-frames for both methods of delivery (*Table 1*).

## 1.2 Processes for selecting and contracting with the private sector parties

### 1.2.1 Shortlisting of proponents

On 17 April 2004 the NSW Department of Health, the Corrections Health Service (as Justice Health was then known) and the NSW Department of Corrective Services issued a *Call for Expressions of Interest* in the development of the Long Bay forensic and prison hospitals as a privately financed project.

*Expressions of Interest* were received, by the closing date of 14 May 2004, from five consortia:

- Australasian Health Services (GEO Group, Thiess, Bligh Voller Nield and Westpac)
- Bay Health Partnership (Bilfinger Berger, Baulderstone Hornibrook, United KG, Advanced, MSJ/Perumal Pedavoli and Macquarie Bank)
- Plenary Care (Plenary Group, Hansen Yuncken, Advanced, Spotless, Tempo, STH DJ and Deutsche Bank)
- PPP Solutions (Multiplex Infrastructure, Babcock & Brown, Multiplex Constructions, Honeywell, Sodexo, HPI and Bates Smart), and
- The Upperclass Group (Upperclass Group, Allen Jack & Cottier, Ashe Morgan Winthrop and Balmain NB).

These *Expressions of Interest* were evaluated by an Evaluation Committee comprising Mr Glenn Monckton, the Corrections Health Service's Project Director, Ms Julie Babineau, the Acting Chief Executive Officer of the Corrections Health Service, Mr Peter Hay, the Acting Director, Facilities Management of the Department of Corrective Services, and Mr Tony Miller, a Principal Adviser from the NSW Treasury's Private Projects Branch, with assistance from PricewaterhouseCoopers (financial issues), NSW Treasury Corporation (risk management and financial issues) and Milliken Berson Madden (technical issues).

The Evaluation Committee's activities were overseen by a Project Steering Committee, comprising Mr David Gates (the Department of Health's Director, Asset and Contract Services), Mr Glenn Monckton (Project Director), Mr Danny Graham (NSW Treasury's Director, Private Projects Branch), Mr Gerry Schipp (the Department of Corrective Service's

Executive Director, Finance and Asset Management) and Mr Richard Matthews (the Department of Health's Acting Deputy Director, General Strategic Development), and by an independent probity auditor, Mr Warwick Smith of Deloitte Touche Tohmatsu.

The *Expression of Interest* evaluation criteria, and their relative weightings, were:

- The respondents' structures, allocations of responsibilities and risks and acceptance of commercial principles proposed in the *Call for Expressions of Interest* (15% weighting)
- The understanding of the respondents, and their participants and key personnel, of the public-private interface and other matters likely to affect the project as a privately financed social infrastructure project, the respondents' strategies to provide certainty of delivery of the project's objectives and their ability to work with the public sector in a cooperative and harmonious partnership over the long term (20% weighting)
- The understanding of the respondents, and their participants and key personnel, of the project's design and construction requirements, and the respondents' experience, expertise, capacities and strategies for procuring and managing design and construction of the hospital facilities so as to provide certainty of delivery of the project's objectives (25% weighting)
- The understanding of the respondents, and their participants and key personnel, of the project's operation and maintenance requirements, and the respondents' experience, expertise, capacities and strategies for procuring and managing the operation and maintenance of the hospital facilities so as to provide certainty of delivery of the project's objectives (25% weighting)
- The understanding of the respondents, and their participants and key personnel, of the project's financial requirements, and the respondents' experience, expertise and strategies for providing certainty of delivery of these requirements (15% weighting)
- The financial capacities of the respondent and their participants, security providers, subcontractors and guarantors (assessed on a pass/fail basis), and
- The preservation of effective competition and probity between and within the respondents (assessed on a pass/fail basis).

Three of the respondents, Australasian Health Services, the Bay Health Partnership and PPP Solutions, were shortlisted to submit detailed proposals for the project.

### 1.2.2 Selection of the preferred proponent

On 21 September 2004 the Department of Health, Justice Health and the Department of Corrective Services issued a

Request for Detailed Proposals to the three shortlisted proponents.

On 1 and 21 October 2004 and 17 December 2004 the participants in the shortlisted consortia executed Deeds of Disclaimer, warranting to the Department of Health, the Health Administration Corporation, Justice Health and the Department of Corrective Service that in preparing their Detailed Proposals they would not be relying on the Request for Detailed Proposals' documents, or other specified documents provided to them by the Department of Health, and promising to comply with confidentiality requirements.

All of the shortlisted consortia submitted Detailed Proposals on the closing date, 22 December 2004, with the PPP

Solutions consortium's participants now including the Compass Group instead of Sodexo.

The Detailed Proposals were evaluated by an Evaluation Panel comprising Mr Glenn Monckton, Justice Health's Project Director, Ms Julie Babineau, Justice Health's Director, Corporate Services and Finance, Mr Alan O'Brien, a Project Director from the Department of Corrective Services, and Mr Tony Miller, a Principal Adviser from the NSW Treasury's Private Projects Branch, with assistance from Blake Dawson Waldron (legal issues), PricewaterhouseCoopers and the NSW Treasury Corporation (financial issues), Leighton Irwin (design and planning issues), CCD Australia/Sinclair Knight Merz (security and building services issues), Milliken

**Table 1. "Value for money" comparison between public sector and private sector project delivery**

Delivery method	"Public sector comparator" (PSC) <i>(hypothetical, risk-adjusted estimate of the cost of the most efficient likely method of public sector delivery)</i>			Private sector delivery
	"PSC best case" <i>(95% probability that PSC cost would be higher than this)</i>	"PSC most likely case" <i>(mean of PSC cost estimates)</i>	"PSC worst case" <i>(95% probability that PSC cost would be lower than this)</i>	
Estimated net present value of the financial cost of the project (over 28 years) to the NSW public sector	\$296.8 m	\$302.9 m	\$309.5 m	\$301.8 m
Estimated saving achieved through private sector delivery	-1.7%	+0.4%	+2.6%	

The "most likely" cost estimate for the "public sector comparator" (PSC) of \$302.9 million includes a "raw" capital cost estimate with a present value (@6.14% pa) of \$117.7 million, a capital risk adjustment of \$19.5 million, a "raw" operational cost of \$146.4 million, an operational risk adjustment of \$18.2 million and a competitive neutrality adjustment of \$1.1 million.

The cost estimate for private sector delivery of \$301.8 million includes a notional upward adjustment of \$2.2 million, reflecting NSW Treasury estimates of the value of risks not accepted by the private sector parties, so as to permit a "like for like" comparison with the cost estimates for the "public sector comparator". Its present value has been estimated using an evaluation discount rate that incorporates a systemic risk premium of 0.92%, in accordance with NSW Treasury policies on the assessment of complying proposals.

Approximately 170 separate risks were evaluated to determine the various risk adjustments for the project.

The most significant components of the capital risk adjustment related to the risks that:

- There might be documentation errors during the design process (poor coordination between specifications and drawings)
- Budget estimates might be exceeded through the design development
- The design might adversely affect clinical functionality
- The design might not facilitate appropriate logistics, staging and functionality
- Construction costs might materially change as a result of changes in the underlying costs of labour and/or materials

- There might be a structural failure in the buildings
- Construction might commence later than planned
- Hospital operations (clinical services) might be disrupted during construction, and/or
- The buildings might not be fit-for-purpose.

The most significant components of the operational risk adjustment related to the risks that:

- The necessary approvals might not be obtained or might be subject to unanticipated conditions which might have adverse cost consequences
- Design and/or construction quality might be inadequate, resulting in higher than anticipated maintenance costs
- Operating costs and/or industry standards for the provision of services might change over the term of the project
- Security operating costs might have been underestimated
- Facility management costs might have been underestimated
- The volumes of electricity and gas used might be greater than anticipated
- The services performed might not fully meet their specifications
- The design life of the hospital infrastructure might prove to be shorter than anticipated, resulting in accelerating refurbishment expenses or a failure to meet specified asset handover conditions
- The delivery of core clinical services might adversely affect the delivery of the contracted services by the private sector parties
- Insurance claims might result in excess payments, and/or
- A sub-contractor might become insolvent.

Berson Madden (costings and services issues), Marsh (insurance issues) and a range of other specialists, including Mr Tom Dalton, a corporate lawyer for the Victorian Institute of Forensic Mental Health (Forensicare), and forensic and prison health care specialists from Justice Health and the NSW Department of Corrective Services.

The Evaluation Panel's activities were overseen by a Project Evaluation Committee, comprising Mr David Gates (the Department of Health's Director, Asset and Contract Services), Dr Richard Matthews (Justice Health's Chief Executive), Mr Gerry Schipp (the Department of Corrective Service's Executive Director, Finance and Asset Management) and Mr Danny Graham (NSW Treasury's Director, Private Projects and Asset Management), and by the independent probity auditor, Mr Warwick Smith of Deloitte Touche Tohmatsu.

The *Detailed Proposals* were evaluated in terms of:

- Four design, construction and commissioning criteria (compliance with the project's technical specifications and relevant laws, codes and Government policies; certainty of delivery; the ability of the facilities to support high-quality, effective and efficient health care throughout the term of the project; and the minimisation of disruption during construction) (30% weighting)
- Five service delivery criteria (compliance with the project's services specifications and relevant laws, codes and Government policies; certainty of delivery; certainty of cooperative relationships with Justice Health, the Department of Corrective Services and other stakeholders; transitional arrangements for Justice Health staff and unions; and the minimisation of disruption to health and custodial services at the Long Bay Correctional Complex) (30% weighting)
- Three commercial criteria (compliance with the project's draft contracts; certainty of delivery of commercial arrangements; and understanding and acceptance of the project's payment mechanisms) (20% weighting), and
- Two financial criteria (financial strength and certainty of funding) (20% weighting).

The results of the evaluations against these weighted criteria were then compared with the Net Present Value of the payments to be made to the private sector parties under each *Detailed Proposal*, adjusted for the risk allocations in the relevant *Proposal*, to obtain an overall "value for money" assessment.

"Value for money" was also assessed through:

- Comparisons with a "public sector comparator", a risk-adjusted benchmark costing of a hypothetical "reference project" representing the most efficient likely method of public sector delivery of the specified services (*Table 1*

summarises this type of comparison for the finally approved project)

- Analyses of the financial and risk consequences of each *Detailed Proposal*, and
- Analyses of each *Detailed Proposal's* compliance with affordability constraints.

On 1 February 2005 all three of proponents were advised that although none of the "complying" proposals they had submitted as part of their *Detailed Proposals* had fully complied with the State's requirements, as set out in the *Request for Detailed Proposals*, the State would nonetheless consider these proposals, along with any "variant" (deliberately non-complying) proposals they had submitted as part of their *Detailed Proposals*.

On 30 May 2005, after extensive investigations into the feasibility of an alternative construction methodology suggested by one of the proponents, the Evaluation Panel reported to the Project Evaluation Committee that all of the *Detailed Proposals* involved significant departures from the State's design and construction specifications, preferred risk allocations and affordability limits and that "value for money" had not yet been demonstrated. It recommended, however, that negotiations should be conducted with two of the proponents, the Bay Health Partnership and PPP Solutions, to rectify the deficiencies in their *Proposals* and improve their offers.

The Project Evaluation Committee responded by adopting a negotiation process, in accordance with arrangements set out in the *Request for Detailed Proposals*, under which the initial negotiations would be exclusively with the Bay Health Partnership consortium, in the presence of the independent probity auditor, and would be followed by negotiations with the "reserve" bidder, the PPP Solutions consortium, if and only if the initial negotiations with Bay Health Partnership failed to satisfactorily resolve the material deficiencies identified by the Evaluation Panel.

The proponents were notified of these processes on 3 June 2005, and on 8 June 2005 Bay Health Partnership was issued with a formal *Request for Revised Proposal*, detailing the matters that were still to be resolved.

Bay Health Partnership's *Revised Proposal* was submitted on the specified closing date, 22 July 2005. Negotiations continued until 23 August 2005, when Bay Health was formally advised that because one of the State's key requirements was still not satisfied its selection as the "preferred" proponent would not be confirmed, and that negotiations would instead be commenced with the "reserve" proponent, PPP Solutions.

On 24 August 2005 PPP Solutions was notified of this decision and issued with its own formal *Request for Revised Proposal*, again detailing the matters still to be resolved. The

closing date for the submission of this *Revised Proposal* was originally 7 October 2005, but this deadline was later extended to 7 November 2005, and PPP Solutions' *Revised Proposal* was submitted on this date.

Following further negotiations, PPP Solutions was confirmed as the preferred proponent for the project, and this selection was publicly announced by the Minister Assisting the Minister for Health (Mental Health), Ms Cherie Burton, and the Minister for Justice, Mr Tony Kelly, on 16 December 2005.

### **1.2.3 Execution of the contracts**

The project's main contract, the Long Bay Forensic and Prison Hospitals Project Deed, and several other project contracts involving public sector parties—a Labour Services Agreement, three Side Deeds with construction and operational subcontractors, a Development Approvals Deed and a State Security—were executed on 23 January 2006.

A Deed of Amendment amending the Project Deed, in line with changes foreshadowed in a Side Letter executed on 23 January, was executed on 24 January 2006, and two further Deeds of Amendment amending the Project Deed were executed on 8 May 2006 and 19 July 2006.

Nine further contracts involving public sector parties—an Independent Certifier Deed, three Collateral Warranty

Deeds, a Financiers Tripartite Deed, a Securitisation Agreement, a Master Rental Agreement, a Payment Directions Deed and an Interest Adjustment Agreement—were executed on 7 and 8 May 2006.

A Deed of Guarantee under the Public Authorities (Financial Arrangements) Act (NSW) was executed on 18 July 2006, and a final project contract involving public sector parties, a Side Letter to the Master Rental Agreement, was executed on 19 July 2006.

All of the contracts involving public sector parties, other than the Project Deed, took effect from the dates they were executed. The Project Deed, as amended by the three Deeds of Amendment, took effect when approvals under the Public Authorities (Financial Arrangements) Act were finalised on 10 November 2006 (see section 2.3 below).

## **1.3 The structure of this report**

Section 2 of this report summarises the structuring of the Long Bay forensic and prison hospitals project and explains the inter-relationships of the various agreements between the public and private sector parties.

Sections 3, 4, 5 and 6 then summarise the main features of the agreements affecting public sector rights and liabilities and the sharing of the project's benefits and risks.



## 2 Overview of the project's contracts

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### 2.1 The participants in the project

#### 2.1.1 Public sector parties to the contracts

The public sector parties to the Long Bay forensic and prison hospitals project contracts (*Figure 1*) are:

- The **Minister for Justice**, representing the Crown in the State of New South Wales, who has entered into various project contracts for the purpose of achieving the provision of the Prison Hospital and its related services
- The **Health Administration Corporation** (ABN 45 100 538 161) (“**the HAC**”), a statutory corporation sole (the Director-General of the NSW Department of Health) established by section 9 of the Health Administration Act (NSW), which has entered into various project contracts for the purpose of achieving the provision of the Forensic Hospital and its related services
- The **Minister for Health**, representing the Crown in the State of New South Wales, who has executed a State guarantee of the HAC’s performance of its obligations under the project’s contracts (see section 6)
- The **Minister for Lands**, representing the Crown in the State of New South Wales, who has entered into several of the project’s contracts, as the Minister administering the Crown Lands Act (NSW), for the purposes of the project’s construction and hospital site licensing, leasing and occupational health and safety arrangements, and
- **Justice Health** (ABN 70 194 595 506), a statutory health corporation established under section 41 of the Health Services Act (NSW) and charged under section 53 of that Act with responsibility for the provision of health services in NSW correctional centres, periodic detention centres, police cell complexes, courts and community and juvenile justice facilities, which will provide health care and mental health services in the new hospitals and has entered into a contract with the private sector parties for them to manage Justice Health employees providing some non-clinical services.

In most of the project’s contracts the Minister for Justice and the HAC are collectively termed “**the State Parties**”, and this convention is followed in this report.

The Minister for Justice’s powers to enter into the project’s contracts include his powers as a “constructing authority” under the Public Works Act (NSW), with “authorised works” under section 34(6) of that Act expressly including the provision of hospitals, mental hospitals and other institutions for the treatment of the physically or mentally ill.

Similarly, the functions of the Director-General of the Department of Health (and hence the HAC) under the Health Administration Act include facilitation of the provision of health services, subject to the control and direction of the Minister for Health, and the HAC’s powers expressly include the powers to enter into contracts, employ staff and acquire and dispose of interests in land.

The Minister for Lands’ powers to grant the project’s site licences and leases are derived from, among other things, the Crown Lands Act (NSW) and processes undertaken in accordance with that Act.

On 10 May 2006 the NSW Treasurer granted an initial approval for the HAC to enter into the project’s financing arrangements, in accordance with section 20(1) of the Public Authorities (Financial Arrangements) Act (NSW), and exemptions, under sections 10 of that Act, permitting the Minister for Justice and the HAC to participate in the project’s “securitised lease” arrangements, which are described later in this report.

On 10 November 2006 the Treasurer granted further approvals, under section 20(1) of the Public Authorities (Financial Arrangements) Act, for the Minister for Justice, the HAC and the Minister for Lands to enter into the project’s financing arrangements, which by that time incorporated changes introduced by the 8 May and 19 July 2006 amendments to the project’s principal contract, the Project Deed, and a further exemption under section 10 of that Act, permitting the Minister for Justice, the Minister for Lands and the HAC to participate in the project’s revised “securitised lease” arrangements.



## 2.1.2 Private sector parties to the contracts

The private sector parties which have contracted with one or more of the public sector parties listed above are (Figure 1):

- **PPP Solutions (Long Bay) Nominee Pty Limited** (ACN 117 641 513, ABN 49 117 641 513) (“**the Project Company**”)—a special purpose vehicle which was established for this project and which may not conduct any other business—on behalf of, and in its capacity as the nominee and agent of and attorney for, the **PPP Solutions (Long Bay) Partnership** (ABN 24 092 387 604).

This partnership was established on 23 January 2006 by a Partnership Deed PPP Solutions (Long Bay) Partnership (“**the Partnership Deed**”) between its two partners—**PPP Solutions (Long Bay) Services #1 Pty Limited** (ACN 117 592 328), acting in its capacity as the trustee of the PPP Solutions (Long Bay) Trust #1, which was formed on 20 December 2005, and **Multiplex Long Bay Pty Limited** (ACN 117 604 252), acting in its capacity as the trustee of the Multiplex Long Bay Trust, which was formed on 21 December 2005—and their nominee, the Project Company.

In the project’s contracts, and in this report, unless the context otherwise dictates all references to the “Project Company” are references to each of PPP Solutions (Long Bay) Nominee Pty Limited and the PPP Solutions (Long Bay) Partnership.

PPP Solutions (Long Bay) Nominee Pty Limited is 50% owned by PPP Solutions (Long Bay) Services #1 Pty Limited and 50% owned by Multiplex Long Bay Pty Limited.

All the shares in PPP Solutions (Long Bay) Services #1 Pty Limited and all the units in PPP Solutions (Long Bay) Trust #1 are owned by PPP Solutions (Long Bay) Holding Company #1 Pty Limited (ACN 117 585 369), which is 99% owned by Babcock & Brown PPP Investments Pty Limited (ACN 112 282 907, ABN 33 112 282 907) and 1% owned by Babcock & Brown DCS Pty Limited (ACN 117 585 010).

In turn, Babcock & Brown PPP Investments Pty Limited is wholly owned by Babcock & Brown Australia Pty Limited (ACN 002 348 521, ABN 49 002 348 521), which is wholly owned by Babcock & Brown Australia Group Pty Limited (ACN 115 059 188, ABN 26 115 059 188), which is wholly owned by Babcock & Brown International Pty Limited (ACN 108 617 483, ABN 76 108 617 483), which is 30% owned by a range of individual shareholders and 70% owned by Babcock & Brown Limited (ACN 108 614 955, ABN 53 108 614 955), a public company listed on the Australian Stock Exchange, while Babcock & Brown DCS Pty Limited is wholly owned by Babcock & Brown Europe Holdings Limited,

an unregistered entity which is wholly owned by Babcock & Brown Investment Holdings Pty Limited (ACN 110 013 851, ABN 84 110 013 851), which is wholly owned by Babcock & Brown International Pty Limited.

Similarly, all the shares in Multiplex Long Bay Pty Limited and all the units in the Multiplex Long Bay Trust are owned by Multiplex Infrastructure Fund Long Bay Investments Pty Limited (ACN 117 602 221), which is wholly owned by Multiplex Infrastructure Investment Management No 1 Limited (ACN 113 813 522), which is wholly owned by Multiplex Infrastructure Pty Limited (ACN 105 313 817), which is wholly owned by Multiplex Limited (ACN 008 687 063, ABN 96 008 687 063), which, together with the Multiplex Property Trust (ABN 89 799 069 491), is part of the Multiplex Group, which is listed on the Australian Stock Exchange.

- **Multiplex Constructions Pty Limited** (ACN 107 007 527, ABN 70 107 007 527) (“**the Construction Contractor**”), which is obliged to design, construct and commission the hospitals and the project’s other works for the Project Company, thereby enabling the Project Company to meet its design, construction and commissioning obligations to the State Parties and the Minister for Lands.

Multiplex Constructions Pty Limited is wholly owned by Multiplex Limited.

- **Multiplex Limited** (ACN 008 687 063, ABN 96 008 687 063) (“**the Construction Contractor Guarantor**”), which has provided a parent company guarantee of Multiplex Constructions’ performance of its design, construction and commissioning obligations to the Project Company and has entered into an associated side contract with the State Parties.
- **Incoll Management Pty Limited** (ACN 093 516 619, ABN 66 093 516 619) (“**the Independent Certifier**”), which will carry out specified inspection and certification obligations during the completion of construction and commissioning of the hospital and other facilities.
- **Honeywell Limited** (ACN 000 646 882, ABN 74 000 646 882) (the “**Facilities Management Operator**” or “**FM Operator**”, also termed the “**Hard Services Contractor**” in some of the contracts) and **Medirest (Australia) Pty Limited** (ACN 114 320 615, ABN 79 114 320 615) (the “**Services Operator**”, also termed the “**Soft Services Contractor**” in some of the contracts)—together, “**the Operators**”—which are obliged to deliver specified operational-phase services for the Project Company, thereby enabling the Project Company to meet its services obligations to the State Parties and the Minister for Lands.

Honeywell Limited, an unlisted public company, is a wholly owned subsidiary of Honeywell International Inc, a large and diversified Delaware corporation.

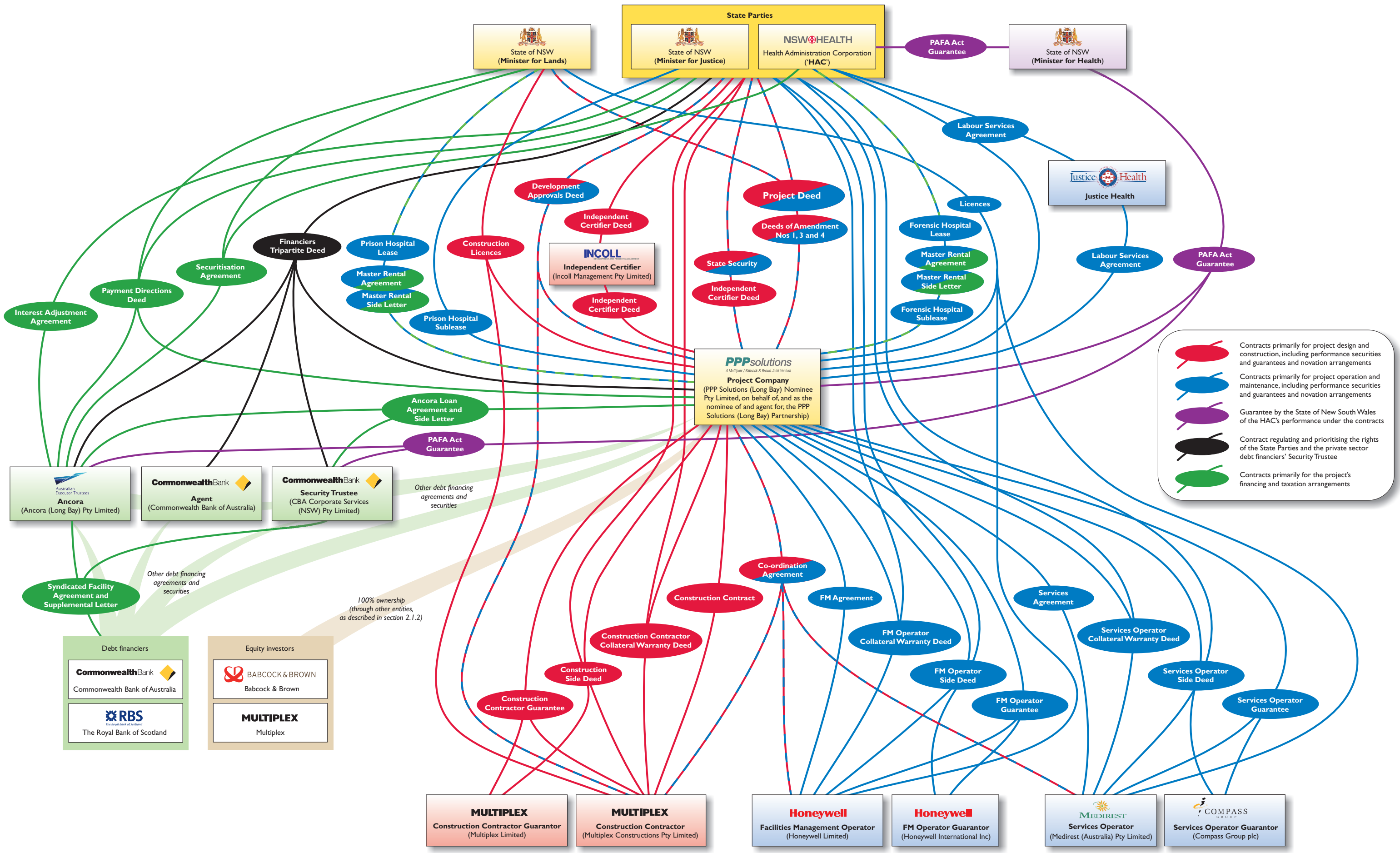


Figure 1. Overview of the structure of the Long Bay Forensic and Prison Hospitals project's contracts from a public sector perspective, focussing on the contracts which currently have (or in some cases potentially might have) public sector parties or which otherwise directly affect public sector benefits and risks.

Medirest (Australia) Pty Limited is wholly owned by Compass Group (Australia) Pty Limited (ACN 000 683 125, ABN 41 000 683 125), which in turn is wholly owned by Compass Group plc, a major international food services company listed on the London Stock Exchange.

- **Honeywell International Inc** (“the FM Operator Guarantor”) and **Compass Group plc** (“the Services Operator Guarantor”)—together, “the Operator Guarantors”—which have given the Project Company parent company guarantees of the performance of the Operators’ service obligations to the Project Company and have entered into associated side contracts with the State Parties.
- **Ancora (Long Bay) Pty Limited** (ACN 117 602 490, ABN 16 117 602 490) (“Ancora”), which has entered into a series of agreements with the Minister for Lands, the HAC and the Minister for Justice as part of financing and taxation arrangements for the project.

Ancora is wholly owned by Ancora Securitisation Holdings Pty Limited (ACN 119 357 327), acting as the trustee of an Ancora Holdings Discretionary Trust formed on 24 April 2006, the beneficiaries of which are the Australian Red Cross Society (ABN 50 169 561 394) and The Salvation Army Australia Eastern Territory Social Work (ABN 63 968 822 144).

In turn, Ancora Securitisation Holdings Pty Limited is wholly owned by AET SPV Management Pty Limited (ACN 088 261 349, ABN 67 088 261 349), which is wholly owned by Australian Executor Trustees Limited (ACN 007 869 794, ABN 84 007 869 794), which is ultimately owned by Australian Wealth Management Limited (ACN 111 116 511, ABN 53 111 116 511), a public company listed on the Australian Stock Exchange.

- **CBA Corporate Services (NSW) Pty Limited** (ACN 072 765 434, ABN 25 072 765 434) (“the Security Trustee”), as the trustee of a Project Security Trust (Long Bay) and also as the trustee of a Senior Security Trust (Long Bay). These trusts were established, for the benefit of the project’s debt financiers, issuers and underwriters, under a Security Trust Deed (Long Bay) dated 3 May 2006.

The Security Trustee is owned by the Commonwealth Bank of Australia (ACN 123 123 124, ABN 48 123 123 124).

- The **Commonwealth Bank of Australia** (ACN 123 123 124, ABN 48 123 123 124), as the agent for the project’s debt financiers (“the Agent”).

## 2.2 Contractual structure

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

The principal contract is the **Long Bay Forensic and Prison Hospitals Project Deed** (“the Project Deed”), dated 23 January 2006, between the State Parties, the Minister for Lands and the Project Company, as amended by three later deeds of amendment:

- The **Long Bay Forensic and Prison Hospitals Deed of Amendment No 1** between the State Parties, the Minister for Lands and the Project Company, dated 24 January 2006 (“the Deed of Amendment No 1”)
- The **Long Bay Forensic and Prison Hospitals Deed of Amendment No 3** between the State Parties, the Minister for Lands and the Project Company, dated 8 May 2006 (“the Deed of Amendment No 3”), and
- The **Long Bay Forensic and Prison Hospitals Deed of Amendment No 4**, between the State Parties, the Minister for Lands and the Project Company, dated 19 July 2006 (“the Deed of Amendment No 4”).

A draft of another amendment deed, in the form of a letter from the State Parties to the Project Company (“the Deed of Amendment No 2”) dated 5 May 2006, was agreed to by the Project Company on 18 May 2006 but was never executed by the Minister for Lands, a prerequisite for its becoming effective, and was fully superseded by the Deed of Amendment No 4 on 19 July 2006.

The Project Deed, as amended, sets out the terms under which:

- (a) The Project Company must **finance, design, construct and commission the hospitals and associated facilities and other specified works.**

The Project Company will satisfy these obligations to the State Parties and the Minister for Lands through:

- Equity investments by Babcock & Brown and Multiplex, through their subsidiaries described in section 2.1.2.

In accordance with restrictions imposed by the NSW Government’s *Working with Government: Guidelines for Privately Financed Projects*, the details of the project’s equity investments and underwritings are generally beyond the scope of this report.

- Loans to the Project Company by Ancora under a **Long Bay Ancora Loan Agreement** between the Project Company, Ancora and the Security Trustee, dated 5 May 2006 (“the Ancora Loan Agreement”),



and an associated **Ancora Loan Side Letter**, dated 19 July 2006, supported by:

- Loans to Ancora by the Commonwealth Bank of Australia and The Royal Bank of Scotland under a **Long Bay Syndicated Facility Agreement** between Ancora, these banks, the Security Trustee and the Agent, dated 19 July 2006 (“**the Syndicated Facility Agreement**”), and a **Supplemental Letter** to this agreement, also dated 19 July 2006 (“**the Syndicated Facility Agreement Supplemental Letter**”), and
- Following the completion and opening of all the facilities, quarterly payments by the State Parties to the debt financiers’ Agent (as directed by Ancora) of the amount, if any, by which the quarterly interest payments Ancora must make to the banks to repay a term loan under the Syndicated Facility Agreement (with floating interest rates) exceed the quarterly interest payments Ancora will receive from the Project Company under the Ancora Loan Agreement (with fixed interest rates)—or equivalent payments by Ancora to the State Parties if the fixed interest rate payments exceed the floating interest rate payments—under arrangements set out in an **Interest Adjustment Agreement: Long Bay Forensic and Prisons Hospital Public Private Partnership Project** between the State Parties and Ancora, dated 8 May 2006 (“**the Interest Adjustment Agreement**”).

The provisions of the Interest Adjustment Agreement are described in section 4 of this report, but in accordance with restrictions imposed by the NSW Government’s *Working with Government: Guidelines for Privately Financed Projects* and the confidentiality provisions of the project’s contracts (see section 3.4.6) the other details of the project’s debt financing arrangements are generally beyond the scope of this report.

- The performance by the Construction Contractor of its obligations to the Project Company under the **Long Bay Forensic and Prison Hospitals Construction Contract** between the Project Company and the Construction Contractor, dated 23 January 2006 (“**the Construction Contract**”), as amended by an Amending Deed between these parties dated 26 May 2006.
- The performance by the Construction Contractor of its obligations to the Project Company and the Operators under the **Long Bay Forensic and Prison Hospitals Co-ordination Deed** between the Project Company, the Construction Contractor,

the Facilities Management Operator and the Services Operator, dated 23 January 2006, concerning the co-ordination of the construction and operational aspects of the project (“**the Co-ordination Agreement**”).

- The performance of any other construction contractors appointed by the Project Company.

The Construction Contractor’s performance of its obligations to the Project Company under the Construction Contract and the Co-ordination Agreement has been guaranteed to the Project Company by the Construction Contractor Guarantor in a **Contractor Performance Guarantee** between the Construction Contractor Guarantor and the Project Company, dated 27 June 2006 (“**the Construction Contractor Guarantee**”).

This parent company guarantee also covers the Construction Contractor’s performance of its obligations to the Project Company under a Construction Side Deed, discussed after (f) below.

The Construction Contractor has promised the State Parties, in a **Long Bay Forensic and Prison Hospitals Collateral Warranty Deed** between the State Parties, the Project Company and the Construction Contractor executed on 7 May 2006 (“**the Construction Contractor Collateral Warranty Deed**”), that it will satisfy a series of obligations set out in that deed, covering, among other things, the quality of its work, materials and equipment, insurance requirements, the provision of information to the State Parties, the notification of defaults to the State Parties and arrangements following any early termination of the Project Deed.

The Minister for Lands must grant **Construction Licences** giving the Project Company, the Construction Contractor and any other subcontractors and sub-subcontractors access to the construction sites and associated access and egress areas during the construction phase of the project.

The **Long Bay Forensic and Prison Hospitals Independent Certifier Deed** between the State Parties, the Project Company and the Independent Certifier (“**the Independent Certifier Deed**”), dated 8 May 2006, sets out the terms of the Independent Certifier’s appointment by the State Parties and the Project Company and specifies its inspection and certification obligations during the completion of construction and commissioning of the hospital and other facilities.

- (b) Each of the State Parties must make a “construction payment” to the Project Company following the completion of all of the works.

Under the **Long Bay Forensic and Prison Hospitals Payment Directions Deed** between the State Parties, the Minister for Lands, the Project Company and Ancora, dated 8 May 2006 (“**the Payment Directions Deed**”), these obligations will be fully satisfied by diverting, to the Project Company, two “securitisation payments” that would otherwise have to be made by Ancora, on the same day, to the Minister for Lands (or to the State Parties as directed by the Minister for Lands) and to the HAC, under arrangements outlined in (e) below.

- (c) The Project Company must **provide building maintenance and refurbishment, grounds maintenance, security, utility, cleaning, catering, pest control, non-clinical waste management and linen and laundry services**, and associated management, performance monitoring, reporting, inspection, auditing, equipment transfer, handover, helpdesk and employee and training services, from the completion and opening of each relevant stage of the facilities until 19 July 2034 (or any earlier date set for the conclusion of the operations phase of the project under arrangements applying if construction of the hospitals and associated facilities is completed early), or until any earlier termination of the project’s contracts.

The Project Company will satisfy these obligations to the State Parties and the Minister for Lands through:

- The performance by the Operators of their obligations to the Project Company under the **Long Bay Forensic and Prisons Hospital FM Agreement** between the Project Company and the Facilities Management Operator, dated 23 January 2006 (the “**Facilities Management Agreement**” or “**FM Agreement**”), as amended by two Amending Deeds between these parties dated 5 May 2006, and the **Long Bay Forensic and Prisons Hospitals Services Agreement** between the Project Company and the Services Operator, dated 23 January 2006 (“**the Services Agreement**”), as amended by an Amending Deed between these parties dated 5 May 2006
- The performance by the Operators of their obligations to the Project Company and the Construction Contractor under the Co-ordination Agreement
- The performance of any other operators appointed by the Project Company, and
- The management and supervision by the Project Company of non-clinical Justice Health staff pro-

viding cleaning, catering and linen and laundry services at the Forensic Hospital, under terms set out in the **Long Bay Forensic Hospital Labour Services Agreement** between the HAC, Justice Health and the Project Company, dated 23 January 2006 (“**the Labour Services Agreement**”).

The performances of the Operators under the FM Agreement, the Services Agreement and the Co-ordination Agreement have been guaranteed to the Project Company by their respective Operator Guarantors in a **Guarantee Agreement** between the FM Operator Guarantor and the Project Company, dated 23 February 2006 (the “**FM Operator Guarantee**”), and a **Services Operator Guarantee** between the Services Operator Guarantor and the Project Company, dated 5 May 2006.

These parent company guarantees also cover the Operators’ performance of their obligations to the Project Company under two Operator Side Deeds, discussed after (f) below.

The Operators have promised the State Parties, in a **Long Bay Forensic and Prisons Hospitals Collateral Warranty Deed—FM Operator** between the State Parties, the Project Company and the Facilities Management Operator, dated 8 May 2006 (“**the FM Operator Collateral Warranty Deed**”) and a **Long Bay Forensic and Prisons Hospitals Collateral Warranty Deed—Services Operator** between the State Parties, the Project Company and the Services Operator, also dated 8 May 2006 (“**the Services Operator Collateral Warranty Deed**”), that they will satisfy a series of obligations set out in these deeds, covering, among other things, the quality of their services, materials and equipment, insurance requirements, the provision of information to the State Parties, the notification of defaults to the State Parties and arrangements following any early termination of the Project Deed.

- (d) The State Parties must make specified performance-based payments to the Project Company, throughout the operations phase of the project, for providing these services, with deductions if the Project Company does not satisfy specified standards, and the Project Company must pay the HAC specified wage and salary and related costs for the Justice Health employees the Project Company manages and supervises at the Forensic Hospital.
- (e) The Minister for Lands must lease the Prison Hospital buildings to the Project Company under a **Lease** commencing on the date the Prison Hospital is completed (“**the Prison Hospital Lease**”) and the HAC must lease the Forensic Hospital site to the Project



Company under another Lease commencing on the date the existing Long Bay prison hospital site ceases to be part of the Long Bay Correctional Complex (“the Forensic Hospital Lease”).

These leases will continue to as-yet-undetermined dates to be specified in each lease, but not until later than 19 July 2034 (or any other date set for the conclusion of the operations phase of the project under arrangements applying if construction of the hospitals and associated facilities is completed early), and will be subject to automatic termination if there is any earlier termination of the Project Deed.

The Project Company must lease the Prison Hospital buildings back to the Minister for Justice and the Forensic Hospital site back to the HAC under two Subleases (the “Prison Hospital Sublease” and the “Forensic Hospital Sublease”), again until as-yet-undetermined dates to be specified in these subleases.

The Minister for Lands must also grant Licences giving the Project Company, the Operators and any other operations-phase subcontractors and sub-subcontractors access to other specified areas during the operations phase of the project.

The rents the Project Company must pay to the Minister for Lands and the HAC under the Leases are specified in the **Master Rental Agreement: Long Bay Forensic and Prison Hospitals Public Private Partnership Project** between the Minister for Lands, the HAC and the Project Company, dated 8 May 2006 (“the Master Rental Agreement”), and an associated **Master Rental Side Letter** executed by the Minister for Lands, the HAC and the Project Company on 19 July 2006.

However, under the **Securitisation Agreement: Long Bay Forensic and Prison Hospitals Public Private Partnership Project** between the Minister for Lands, the HAC and Ancora, dated 8 May 2006 (“the Securitisation Agreement”), Ancora has agreed to purchase the rights of the Minister for Lands and the HAC to receive these rent payments, and other specified payments under the Leases, in return for one-off “securitisation payments” by Ancora to the Minister for Lands (or to the State Parties as directed by the Minister for Lands) and the HAC following the completion of all the project’s works and, in specified circumstances, additional “securitised variation payments” during the operations phase of the project. (Among other things, these “securitised lease” arrangements are designed to address the application of section 51AD and Division 16D of the Income Tax Assessment Act (Cth) to the project. These tax-

ation laws govern the availability of tax deductions for interest, depreciation and investment allowances when the end user of leased property is tax exempt.)

As already indicated in (b) above, the “securitisation payments” to be made by Ancora to the Minister for Lands (or as directed by him or her) and the HAC will be diverted to the Project Company, in accordance with the Payment Directions Deed, to satisfy the State Parties’ Project Deed obligations to make “construction payments” to Ancora (or as directed by Ancora) on the same day. These payments to the Project Company will then be further diverted back to Ancora, again in accordance with the Payment Directions Deed, in order to satisfy Project Company repayment obligations under the Ancora Loan Agreement.

- (f) On 19 July 2034 or any other date set for the conclusion of the operations phase of the project under arrangements applying if construction of the hospitals and associated facilities is completed early, or upon any earlier termination of the Project Deed, the Project Company must hand over the hospitals’ facilities to the State Parties or to others as directed by the State Parties.

Most of the provisions of the Project Deed and most of the other project contracts did not take effect until a series of conditions precedent had been satisfied or had been waived by the State Parties, as described in section 2.3 below. One of these conditions precedent was the obtaining of all necessary development approvals for the project under the Environmental Planning and Assessment Act (NSW), in accordance with the requirements of a **Long Bay Forensic and Prison Hospitals PPP Project—Development Approvals Deed** between the State Parties, the Project Company and the Construction Contractor, dated 23 January 2006 (“the Development Approvals Deed”). This agreement set out requirements for the State Parties to submit a revised *Master Plan* for the Long Bay Correctional Complex to Randwick City Council and for the Construction Contractor, on behalf of the State Parties, to apply for and obtain the project’s development approval(s) by specified dates, subject to reviews of the draft applications by a Project Director appointed by the State Parties, specified intellectual property arrangements and specified procedures to be followed and cost-sharing and other relief arrangements to be applied if the project were terminated because of a failure to satisfy the conditions precedent or if the project’s proposed or final development approval(s) were subject to defined “adverse” conditions.

A development approval application under Part 3A of the Environmental Planning and Assessment Act was lodged with the NSW Department of Planning on 16 March 2006,

and the development approval granted by the Minister for Planning on 6 July 2006 did not include any of these defined “adverse” conditions. The Development Approvals Deed therefore has no continuing substantive practical effect on the project, and accordingly it is not further summarised in this report.

Should the Project Company default on its obligations to the State Parties and the Minister for Lands during the project’s design and construction phase or its obligations to the Construction Contractor under the Construction Contract, or should there be an emergency or should the Project Deed be terminated during the design and construction phase, then under the Project Deed, the Construction Contractor Collateral Warranty Deed and the **Long Bay Forensic and Prison Hospitals Construction Side Deed** between the State Parties, the Project Company, the Construction Contractor and the Construction Contractor Guarantor, dated 23 January 2006 (“**the Construction Side Deed**”), the State Parties will be able to “step in” or (in the last of these situations) place a new contractor into the shoes of the Project Company under the Construction Contract, so that design and construction of the hospitals’ facilities can continue.

Similarly, should the Project Company default on its obligations to the State Parties and the Minister for Lands during the project’s operations phase, its obligations to the Facilities Management Operator under the FM Agreement or its obligations to the Services Operator under the Services Agreement, or should there be an emergency or should the Project Deed be terminated during the operations phase, then under the Project Deed, the FM Operator Collateral Warranty Deed, the Services Operator Collateral Warranty Deed, the **Long Bay Forensic and Prison Hospitals Operator Side Deed** between the State Parties, the Project Company, the Facilities Management Operator and the FM Operator Guarantor, dated 23 January 2006 (“**the FM Operator Side Deed**”) and the **Long Bay Forensic and Prison Hospitals Operator Side Deed** between the State Parties, the Project Company, the Services Operator and the Services Operator Guarantor, dated 23 January 2006 (“**the Services Operator Side Deed**”) the State Parties will be able to “step in” or (in the last of these situations) place a new contractor into the shoes of the Project Company under the FM Agreement and/or the Services Agreement, as relevant, so that the provision of non-clinical services at the hospitals can continue.

Some of the rights and obligations of the State Parties under the Project Deed, the Construction Side Deed, the FM Operator Side Deed and the Services Operator Side Deed are subject to restrictions or additional process requirements under the **Long Bay Forensic and Prison Hospitals Financiers Tripartite Deed** between the State Parties, the Project Company, Ancora, the Security Trustee and the Agent, dated 8 May 2006 (“**the Financiers Tripartite Deed**”).

As an example, this agreement requires the State Parties to notify the Security Trustee before they terminate the Project Deed for a default by the Project Company, giving it an opportunity to cure the default.

Under the **Long Bay Forensic and Prison Hospitals Fixed and Floating Charge (“the State Security”)**, an agreement between the State Parties and the Project Company dated 23 January 2006, all of the obligations of the Project Company to the State Parties under the project’s contracts are secured by a charge over the assets, undertakings and rights of the Project Company and the two partners in the PPP Solutions (Long Bay) Partnership for which the Project Company is the nominee, PPP Solutions (Long Bay) Services #1 Pty Limited and Multiplex Long Bay Pty Limited.

Priorities between this State Security and securities held by the project’s private sector debt financiers are governed by the Financiers Tripartite Deed, which also:

- Records the State Parties’ consent to the private sector securities and the Security Trustee’s consent to the State Security
- Records the consents of the State Parties and the Security Trustee to each others’s “step in” rights under the project’s contracts
- Regulates the exercise of these “step in” rights, and
- Records the Project Company’s consent to these arrangements.

The Construction Contractor, the Construction Contractor Guarantor, the Facilities Management Operator, the FM Operator Guarantor, the Services Operator and the Services Operator Guarantor have also expressly consented to the State Security, in the Construction Side Deed, the FM Operator Side Deed and the Services Operator Side Deed.

A **Long Bay Forensic and Prison Hospital PPP Project Deed of Guarantee** between the Minister for Health (on behalf of the State of NSW), the HAC, the Project Company, Ancora and the Security Trustee, dated 18 July 2006 (“**the PAFA Act Guarantee**”), provides a guarantee by the State of NSW, in accordance with section 22B of the Public Authorities (Financial Arrangements) Act (NSW), of the HAC’s performance of its obligations under the Project Deed (as amended by the Deed of Amendment No 1, the Deed of Amendment No 3 and the Deed of Amendment No 4), the Development Approvals Deed, the Construction Side Deed, the Independent Certifier Deed, the Construction Licences executed by the HAC, the FM Operator Side Deed, the Services Operator Side Deed, the Labour Services Agreement, the Licences executed by the HAC, the Forensic Hospital Lease, the Forensic Hospital Sublease, the Interest Adjustment Agreement, the Securitisation Agreement, the Master Rental Agreement, the Master Rental Side Letter, the Payment Directions Deed, the State Security, the Financiers

Tripartite Deed and any other documents approved, in writing, by the NSW Treasurer in the future.

The major contracts for the project other than its private sector financing agreements, the Construction Contractor Collateral Warranty Deed, the FM Operator Collateral Warranty Deed, the Services Operator Collateral Warranty Deed and the PAFA Act Guarantee—in other words, the Project Deed, the Deed of Amendment No 1, the Deed of Amendment No 3, the Deed of Amendment No 4, the Construction Contract, the Construction Side Deed, the Development Approvals Deed, the Construction Contractor Guarantee, the Independent Certifier Deed, the Construction Licences, the FM Agreement, the FM Operator Side Deed, the Services Agreement, the Services Operator Side Deed, the Co-ordination Agreement, the Labour Services Agreement, the Licences, the Prison Hospital Lease, the Prison Hospital Sublease, the Forensic Hospital Lease, the Forensic Hospital Sublease, the Interest Adjustment Agreement, the Securitisation Agreement, the Master Rental Agreement, the Master Rental Side Letter, the Payment Directions Deed, the State Security and the Financiers Tripartite Deed—are collectively referred to in most of the project contracts as “the project documents”, and this terminology is adopted in this report.

## 2.3 Conditions precedent

Although the Project Deed was executed on 23 January 2006, no part of it was to become legally binding until:

- The NSW Treasurer had approved the Project Deed, and all the other “project documents” to which the Minister for Justice and/or the Minister for Lands were or would become parties, under section 20 of the Public Authorities (Financial Arrangements) Act (NSW). This condition precedent was satisfied on 10 November 2006 (see section 2.1.1).
- The PAFA Act Guarantee had been executed, at least insofar as it guaranteed the obligations of the HAC under the Project Deed. This condition precedent was satisfied on 18 July 2006.
- A deed amending the Project Deed, in ways set out in a schedule to a **Side Letter** executed by the State Parties and the Project Company on 23 January 2006, had been executed by no later than 31 January 2006. This condition precedent was satisfied, through the execution of the Deed of Amendment No 1, on 24 January 2006.

In addition, the Project Deed—once it took effect on 10 November 2006—stipulated that most of the provisions of the Project Deed (other than specified exceptions), and all of the provisions of the other “project documents” (including the “project documents” to which the State Parties and the Minister for Lands were not and would not become parties),

were not to become binding until a further series of conditions precedent had been satisfied or had been waived by the State Parties.

These additional conditions precedent were:

- The provision, to the State Parties’ Project Director, of a copy of each development approval for the project, satisfying the requirements of the Development Approvals Deed. This condition precedent was satisfied on 6 July 2006.
- The execution and delivery to the State Parties of originals of all of the “project documents”, other than the Leases and the Subleases, and certified copies of specified private sector financing agreements. This condition precedent was satisfied on 19 July 2006.
- The completion of a specified series of formalities associated with any authorisations required by the Project Company, the Construction Contractor, the Construction Contractor Guarantor, the Facilities Management Operator, the FM Operator Guarantor, the Services Operator, the Services Operator Guarantor and the project’s financiers (or any trustee or agent on their behalf) to enter into and perform the project’s contracts, the authorisation of representatives of the Project Company, the registration of the State Security, the provision to the State Parties of evidence of the payment of stamp duty associated with the “project documents”, and the provision to the State Parties of evidence about the structure of, and equity and/or subordinated debt arrangements between, the Project Company and its shareholders.

These conditions precedent were satisfied on 19 July 2006.

- If necessary, the provision, to the State Parties’ Project Director, of a certified copy of an unconditional approval by the Australian Treasurer advising that there is no objection, under the Foreign Acquisitions and Takeovers Act (Cth), to the foreign ownership of the Project Company or its interests in the project. This condition precedent was satisfied before 19 July 2006.
- The provision, to the State Parties’ Project Director, of binding rulings by the Australian Taxation Office on the taxing of the proposed project structures and arrangements, including the application of section 51AD and Division 16D of the Income Tax Assessment Act (Cth) and the deductibility of rent payments by the Project Company. This condition precedent was satisfied on 20 February 2006.
- The completion by the Project Company of a dilapidation survey of existing infrastructure, as specified in a schedule to the Project Deed, and the provision of details

on this survey to the State Parties' Project Director. This condition precedent was satisfied on 19 July 2006.

- An updating of the Project Deed's *Technical Specification* for the project's works, as specified in the Project Deed, and approval of the updated *Technical Specification* by the State Parties and the Project Company under arrangements specified in the Project Deed. This condition precedent was satisfied, through the execution of the Deed of Amendment No 4, on 19 July 2006.
- An updating of construction-phase access management plans annexed to the Project Deed, as specified in the Project Deed, and the provision of these updated and approved access management plans to the State Parties' Project Director. This condition precedent was satisfied on 19 July 2006.
- The provision, to the State Parties' Project Director, of a \$3 million bank or insurance company guarantee as a construction works security bond in accordance with the Project Deed (see section 3.2.18). This condition precedent was satisfied on 19 July 2006.
- The taking out, and maintenance in full force, of insurance policies required under the Project Deed for the design and construction phase of the project. This condition precedent was satisfied on 19 July 2006.
- The completion of a *Works Program* for Stage 1 of the project's works, the construction of the Prison Hospital's gatehouse, as specified in the Project Deed. This condition precedent was satisfied on 19 July 2006.
- The provision, to the State Parties' Project Director, of the Project Company's charging rates for the pricing of specified types of services that will be subject to "benchmarking" under the Project Deed (see section 3.3.8). This condition precedent was satisfied on 19 July 2006.

- The provision, to the State Parties' Project Director, of any other opinions, certificates or other documents he or she had reasonably requested. There were no such requests.
- The provision, to the State Parties' Project Director, of evidence that the project's private sector financing facilities had become unconditional and available, or would do so immediately upon the satisfaction (or waiver by the State Parties) of all the other additional conditions precedent. This condition precedent was satisfied on 19 July 2006.
- The provision of copies of the private sector participants' audited "base case" financial model for the project (as adjusted in accordance with the *Financial Close Protocol* agreed to by the Minister for Lands, the State Parties and the Project Company on 23 January 2006 and amended by the Deed of Amendment No 4) and associated materials, as specified in the Project Deed, including an auditor's certificate on terms acceptable to the State Parties' Project Director. This condition precedent was satisfied on 19 July 2006.

The State Parties' Project Director certified on 19 July 2006—the project's date of "financial close"—that all of these additional conditions precedent had been satisfied.

As a result, by the time the Project Deed (as amended by the Deeds of Amendment Nos 1, 3 and 4) took effect on 10 November 2006, with the finalisation of the NSW Treasurer's approvals under the Public Authorities (Financial Arrangements) Act (see section 2.1.1), its additional preconditions for *all* of the provisions of the Project Deed to become binding, along with the provisions of all the other "project documents" to which the Minister for Justice and/or the Minister for Lands are parties, had already been accepted by all the parties as having been satisfied.\*

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\* The accepted satisfaction of all of the additional conditions precedent on or before 19 July 2006 also rendered redundant provisions in the Project Deed which stipulated—once the Project Deed took effect on 10 November 2006—that the Project Company was obliged to procure the satisfaction of all the additional conditions precedent by a "drop dead date" of 21 July 2006, a later date as decided by the State Parties' Project Director in his or her absolute discretion or a later date determined under the "relief event" and "compensation event" provisions of the Project Deed described in sections 3.4.10 and 3.4.11 of this report. Had this deadline not been met, through either the satisfaction of the conditions precedent or their waiver by the State Parties, the Project Director would have become entitled to terminate the Project Deed and the other "project documents" at any time, in his or her absolute discretion.



# 3 The Project Deed and associated certification, lease, labour, payment, step-in and novation arrangements

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## 3.1 General obligations on and acceptance of risks by the Project Company

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### 3.1.1 The Project Company's principal obligations

As already indicated in section 2.2, the main obligations of the Project Company under the Project Deed are for it to:

- Finance, design, construct and commission specified hospital facilities and other works—
  - At its own cost, apart from the State Parties' subsequent assumption of interest rate risks under the Interest Adjustment Agreement described in section 4 of this report
  - By dates specified in two schedules to the Project Deed and, in greater detail, in design and works programs to be developed by the Project Company, and
  - In accordance with detailed requirements set out in a *Technical Specification*, another schedule to the Project Deed.

The “facilities” and other works to be designed and constructed by the Project Company are described in section 3.2.1 below.

- Provide building maintenance and refurbishment, grounds maintenance, security, utility, cleaning, catering, pest control, non-clinical waste management and linen and laundry services, and associated management, performance monitoring, reporting, inspection, auditing, equipment transfer, handover, helpdesk and employee and training services, in accordance with detailed requirements set out in a *Services Specification*, another schedule to the Project Deed, from the completion and opening of each relevant stage of the facilities until 19 July 2034 or any other date set for the conclusion of the operations phase of the project under arrangements applying if construction of the hospitals and associated facilities is completed early (see sections 3.2.7.1 and

3.3.1.1), or until any earlier termination of the project's contracts.

In providing these services the Project Company will use both its own employees and subcontractors, in accordance with requirements set out in the Project Deed, and employees of Justice Health, in accordance with the Labour Services Agreement.

- Hand over the hospital facilities to the State Parties, or a new contractor nominated by the State Parties, on 19 July 2034 or any other date set for the conclusion of the operations phase of the project under arrangements applying if construction of the hospitals and associated facilities is completed early (sections 3.2.7.1 and 3.3.1.1), or upon any earlier termination of the Project Deed (see sections 3.5.1, 3.5.2, 3.5.4 and 3.5.5).

### 3.1.2 Project objectives and cooperation

The State Parties, the Minister for Lands and the Project Company have undertaken to perform their obligations under the Project Deed with the aim of satisfying “objectives” and “intentions” that:

- In return for “construction payments” by the State Parties upon the completion of all the works, the Project Company will finance, design, construct and commission the hospital “facilities” in accordance with the Project Deed
- The State Parties and Justice Health will provide “core” functions and services at these facilities
- The Project Company will provide specified types of services in accordance with the Project Deed
- The State Parties will pay fees to the Project Company for the provision of these services in accordance with the Project Deed
- The Project Company will pay rent for each hospital, for the term of its Lease, in accordance with the Master Rental Agreement
- The design, construction and commissioning of the hospital facilities and the provision of these facilities and



the Project Company's services will allow the State Parties and Justice Health to provide high-quality clinical, clinical support and non-clinical support administration functions (other than the Project Company's services) at both of the hospitals, including all activities and services reasonably connected with the care, treatment and rehabilitation of their patients, access by Justice Health staff and contractors and hospital-related State-provided or State-procured custodial, correctional, security, containment and related services at the Long Bay Correctional Complex (the Project Deed calls these functions "hospital functions", and specifies them in more detail in *State Functionality Statements* in a schedule to the Project Deed)

- In carrying out its obligations under the Project Deed, the Project Company must facilitate the provision of these "hospital functions", must not substantially interfere with these functions or other State-provided or State-procured custodial, correctional, security, containment and related services at the Long Bay Correctional Complex, and must not increase requirements for the provision of any of these functions, and
- The Project Company will transfer possession of the hospital facilities and its facilities management responsibilities to the State Parties, or as directed by the State Parties, at the end of the operations phase of the project, in accordance with the Project Deed.

The State Parties, the Minister for Lands and the Project Company have agreed to cooperate with each other to facilitate the performance of the project's contracts. In particular, they have promised to avoid unnecessary complaints, disputes and claims and (subject to each other party's performing its obligations and the State Parties' "step in" and contract termination rights) not to hinder, prevent or delay each other's performance of its obligations.

They have also agreed that whenever they become entitled to assert a claim or seek a remedy against the other party they must take reasonable and appropriate steps to mitigate, prevent or eliminate the effects of the event or circumstance giving rise to the claim or remedy.

Throughout the project the State Parties and the Project Company must participate in an eight-person Project Co-ordination Group (PCG), chaired by the person appointed by the State Parties as their Project Director for the project\* and meeting at least monthly, that will discuss and review the project's progress and operations and play an initial role in resolving any disputes (see section 3.4.8). Except for its dispute resolution role, the decisions of this PCG will not

affect the rights or obligations of the State Parties or the Project Company under the project's contracts and the PCG will not have the power to require any of them to act or refrain from acting in any way.

Unless the project contracts expressly state otherwise, the Project Company may not unreasonably withhold or delay any decision or exercise of its discretion under the contracts.

Similarly, the State Parties and their Project Director must act reasonably concerning any decision or exercise of their discretion they are required to make, including any conditions they may impose, under the Project Deed, the Independent Certifier Deed, the Financiers Tripartite Deed, the Construction Side Deed, the FM Operator Side Deed and the Services Operator Side Deed. These contracts make it clear, however, that the State Parties and their Project Director will not be acting "unreasonably" if they are acting in accordance with relevant government policies, adopt a "whole of government" approach or act to protect the reputation of the State of NSW.

### 3.1.3 No restrictions on statutory powers, the hospitals' 'hospital functions' or prison operations

Except in terms of the project-specific commitments made by the State Parties in the project's contracts and summarised in this report, the Project Deed does not fetter the discretion of the State Parties or Justice Health to exercise any of their functions under any laws.

More specifically, the Project Deed makes it clear that the project's contracts and pre-contractual information documents do not contain any undertakings by the State—or the State Parties' Project Director or any other persons administering or managing the project for the State Parties, or the Department of Health, Justice Health or the Department of Corrective Services, or any employees, agents or contractors of the Minister for Justice, the HAC, the Department of Health, Justice Health or the Department of Corrective Services (other than Justice Health employees who are being managed and supervised by the Project Company under the Labour Services Agreement), or any hospital patients or any persons visiting the hospitals at the invitation of Justice Health or the Department of Corrective Services—that the hospitals' "hospital functions" or any other State-provided or State-procured custodial, correctional, security, containment and related services at the Long Bay Correctional Complex will be carried out at all or carried out in a particular manner or at a particular time.

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\* The State Parties' Project Director is the agent of the State Parties and may delegate his or her powers, duties, discretions and authorities under the Project Deed. References in this report to the Project Director should therefore be understood as references both to the Project Director and to any of his or her delegates whose appointment has been notified to the Project Company.

The only exception to this is a requirement for the State Parties to occupy the hospital facilities on or around their dates of completion if the construction and commissioning of these facilities is completed earlier than targeted and if procedures described in section 3.2.7.1 are observed.

### 3.1.4 General acceptance of risks by the Project Company

The Project Company has expressly acknowledged in the Project Deed that:

- It bears the risks of carrying out the project's construction works and providing its services so as not to substantially interfere with the hospitals' "hospital functions" or other State-provided or State-procured custodial, correctional, security, containment and related services at the Long Bay Correctional Complex, or increase requirements for the provision of any of these functions
- Subject to any specific terms in the Project Deed, the State, the State Parties, the Department of Health, Justice Health, the Department of Corrective Services and their agents, contractors, advisers and employees:
  - Have not made any representations or promises or given any advice to the Project Company about the accuracy, completeness or current applicability of any information, concerning the project, the sites, the works, the site access areas or the hospital facilities, which they had provided to the Project Company or its agents, contractors, advisers, employees or invitees prior to the execution of the Project Deed
  - Have assumed no duty of care or other responsibility for this pre-contractual information
  - Will not be liable for any inaccuracy, omission, unfitness, inadequacy or incompleteness in this pre-contractual information, or for any reliance on the information by the Project Company, any related corporations, any subcontractors or sub-subcontractors of the Project Company, any of these organisations' officers, employees or agents, any invitees of the Project Company, its subcontractors or sub-subcontractors or any Justice Health employees who are being managed and supervised by the Project Company under the Labour Services Agreement, even if the information were "misleading or deceptive" or "false or misleading" under the Trade Practices Act (Cth) or equivalent State legislation, and
  - Will not be liable for any failure to make information about the project available to the Project Company.
- In entering into the Project Deed, the Project Company:
  - Has not relied on any pre-contractual information from the State Parties or anyone else on their behalf, or any other information for which the State Parties are or might be responsible.
  - Has examined the Project Deed, its *Technical Specification* and *Services Specification*, the hospital sites, their access areas, the Long Bay Correctional Complex, their surroundings and any other information made available by the State Parties or anyone on their behalf, but has relied solely on its own investigations, assessments, skill, expertise and enquiries concerning all information that is relevant to the project's risks, contingencies and circumstances and its obligations under the project contracts.
  - Has been given the opportunity to undertake, and request others to undertake, tests, enquiries and investigations, for design and other purposes, into the matters addressed in pre-contractual information supplied by the State Parties, their Project Director, any other persons administering or managing the project for the State Parties, the Department of Health, Justice Health or the Department of Corrective Services, any employees, agents or contractors of the Minister for Justice, the HAC, the Department of Health, Justice Health or the Department of Corrective Services, and in particular has been given access, as required, to the hospital sites and access areas and has been given a full and adequate opportunity to review the project's draft *Technical Specification*, *Services Specification* and contracts and identify and correct any defects, omissions and inconsistencies prior to executing the Project Deed.
  - Has satisfied itself that it will be able to satisfy its project obligations and has adequately allowed for the costs of doing so, that the *Technical Specification* and the *Services Specification* contain no defects, omissions or inconsistencies which would prevent it performing its obligations and that there is no inconsistency between the *Technical Specification* and its ability to fulfil its obligations under the project's contracts.
  - Has informed itself on all of the project's employment and industrial relations matters.
- The Project Company has not relied and will not be relying on any statement, representation or warranty by or on behalf of the Minister for Lands, other than any

implied warranties that may not be contracted out of and any representations or warranties in the Leases.

- The State Parties will have no liability for any loss or damage suffered by the Project Company as a result of incorrect or inaccurate assumptions by anyone concerning:
  - Existing taxation requirements
  - The availability of taxation rulings
  - Project revenues, or
  - Project costs

*unless* the incorrectness or inaccuracy is caused by, or constitutes, a “compensation event”, such as a serious breach of the Project Deed by the State Parties which makes it impossible for the Project Company to perform its obligations, as discussed in section 3.4.11 below.

### **3.1.5 General indemnity by the Project Company**

The Project Company has undertaken to indemnify the State Parties, the Department of Health, Justice Health, the Department of Corrective Services and their officers, employees and agents, on demand, against any claims, losses or liabilities—including any claims or liabilities associated with any deaths, personal injuries or property losses or damage—arising directly or indirectly from:

- The Project Company’s design, construction, operation or maintenance activities
- The Project Company’s performance or non-performance of its obligations under the project’s contracts
- The presence of the Project Company, its related corporations, its subcontractors or sub-subcontractors, any of these organisations’ officers, employees or agents, any invitees of the Project Company, its subcontractors or sub-subcontractors or any Justice Health employees who are being managed and supervised by the Project Company under the Labour Services Agreement on the hospital sites, access areas, construction works or facilities, or their possession of or access to these sites, areas, works or facilities, or
- Any contamination or pollution on or from any of the hospital sites or access areas (subject to some exceptions described in sections 3.2.5, 3.2.11, 3.3.1.3 and 3.4.11)

*but excluding* any claims, losses or liabilities to the extent that they are caused by:

- Any malicious damage by the State Parties’ Project Director, or any other persons administering or managing the project for the State Parties, or the Department of Health, Justice Health or the Department of Corrective Services, or any employees, agents or contractors of the Minister for Justice, the HAC, the Department of Health, Justice Health or the Department of Corrective Services (other than Justice Health employees who are being

managed and supervised by the Project Company under the Labour Services Agreement), or any hospital patients, any inmates of the Long Bay Correctional Complex or any persons visiting the hospitals at the invitation of Justice Health or the Department of Corrective Services, provided the damage did not result from a failure by the Project Company to provide its services

- Any breach by the State Parties of their express obligations under the Project Deed
- Any negligence by the State Parties, or their Project Director any other persons administering or managing the project for the State Parties, or the Department of Health, Justice Health or the Department of Corrective Services, or any employees, agents or contractors of the Minister for Justice, the HAC, the Department of Health, Justice Health or the Department of Corrective Services (other than Justice Health employees who are being managed and supervised by the Project Company under the Labour Services Agreement), or any hospital patients or any persons visiting the hospitals at the invitation of Justice Health or the Department of Corrective Services, or
- In the case of actions or claims against the State Parties by a third party, the Project Company’s compliance with an express direction by the State Parties or their Project Director, issued in accordance with the Project Deed.

The Project Company’s liability under the Project Deed for any claim or loss is, however, capped at \$50 million, indexed to the Consumer Price Index (CPI) from the June quarter of 2005, or any other amount agreed to by the State Parties and the Project Company in writing.

## **3.2 Design, construction and commissioning of the hospitals’ facilities**

### **3.2.1 Scope of the works**

As indicated in sections 2.2 and 3.1.1, the Project Company must design, construct and commission specified hospital “facilities” and other specified works:

- At its own cost, apart from the State Parties’ subsequent assumption of interest rate risks under the Interest Adjustment Agreement described in section 4
- By dates specified in two schedules to the Project Deed and, in greater detail, in design and works programs to be developed by the Project Company (see sections 3.2.3.1 and 3.2.7.2), and
- In accordance with detailed requirements set out in the *Technical Specification*, another schedule to the Project Deed.



The “facilities” to be designed, constructed and commissioned by the Project Company are:

- The 135-bed Forensic Hospital, including a new Operations Building for Justice Health, a new Pharmacy Building and a new gatehouse
- The new 85-bed Prison Hospital, including a new gatehouse, and
- All their associated facilities, buildings, utilities, other infrastructure, walls, fencing, fixtures, fittings, equipment, electrical goods, furniture, grounds, paths and gardens, other than items and fixtures which the State Parties specify as items that will be provided by the State Parties and/or Justice Health.

The Project Company must also design, construct and commission permanent works outside the two hospital sites, in addition to works for the provision of utilities to the hospitals, as specified in the *Technical Specification*.

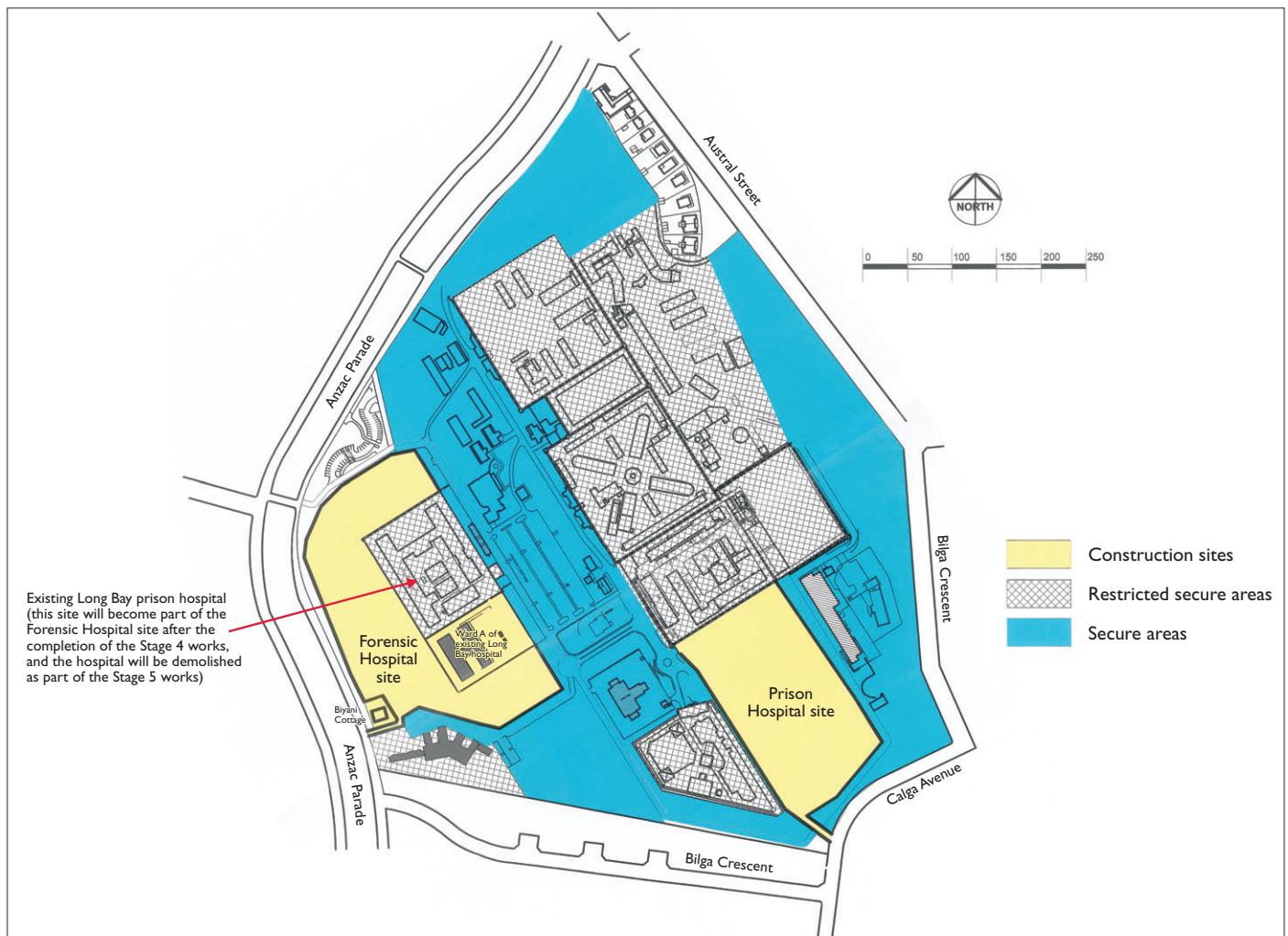
The hospital facilities and the off-site works are to be built in five stages:

- “Stage 1”, the Prison Hospital’s gatehouse, is to be completed by 4 August 2008.

- “Stage 2”, the Forensic Hospital’s Justice Health Operations Building and Pharmacy Building, is to be completed by 29 August 2008.
- “Stage 3”, the rest of the Prison Hospital, is to be completed by 13 September 2008.
- “Stage 4”, the rest of the Forensic Hospital (other than its landscaped areas) and the permanent off-site works, is to be completed by 11 November 2008.
- “Stage 5”, the demolition of the existing Long Bay prison hospital and the landscaping of the Forensic Hospital grounds, including the area occupied by the demolished hospital, is to be completed by 18 February 2009.

Changes to the scope of the works and/or the “target completion date” for each stage may be made by the State Parties or the Project Company only in accordance with “change procedures” described in section 3.2.14 below, in “relief event” or “compensation event” circumstances as described in sections 3.4.10 and 3.4.11 and/or under arrangements for bringing “target completion dates” forward as described in section 3.2.7.1.

The Project Company must use all reasonable endeavours to complete each stage of the works at least two months before its “target completion date”, as extended or brought forward (if at all), but may not complete a stage more than





four months before its original “target completion date”, as listed above.

### **3.2.2 Planning and other approvals**

As discussed in sections 2.2 and 2.3, one of the Project Deed's conditions precedent was the obtaining of all necessary development approval(s) for the project under the Environmental Planning and Assessment Act (NSW), in accordance with the requirements of the Development Approvals Deed. Development approval was granted by the Minister for Planning on 6 July 2006, and the Development Approvals Deed has no continuing substantive practical effect on the project.

Under the Project Deed the Project Company must comply with all the conditions of this development approval and ensure the approvals comply with Randwick City Council's *Master Plan* for the Long Bay Correctional Complex and any applicable conservation plans.

It must also:

- Obtain all other statutory, court and tribunal approvals, licences and consents required for the project, including construction, occupation and building certificates under the Environmental Planning and Assessment Act, any necessary environmental protection licences and any necessary approvals under the Heritage Act, Roads Act, Water Act or Water Management Act
- Give the State Parties' Project Director copies of all the approvals, licences and consents it obtains, and
- Comply with the terms of these approvals, licences and consents and ensure the project is carried out without any breaches of their terms.

If the *Master Plan* for the Long Bay Correctional Complex is modified, withdrawn, revoked or replaced, for reasons other than any action or inaction by the Project Company, any related corporation, any subcontractor or sub-subcontractor of the Project Company or any of these organisations' officers, employees, agents or invitees (including any application for a new or amended development approval or any other consent), the State Parties may be liable to compensate the Project Company, and/or to provide relief from its contractual obligations, under the “compensation event” arrangements described in section 3.4.11.

### **3.2.3 Design obligations and intellectual property**

#### **3.2.3.1 Development of detailed designs**

The Project Company's principal design obligations are to develop and complete detailed designs for each stage of the works in accordance with:

- The Project Company's *Proposals* for the project, as reproduced in a schedule to the Project Deed
- The Project Deed's *Technical Specification*

- Timeframes set out in a *Works Program* to be prepared by the Project Company for each stage of the works (see section 3.2.7.2 below)
- Design review procedures set out in the Project Deed, described below
- Good industry practices, and
- A *Quality Standards (Works)* plan to be developed by the Project Company as specified in the *Technical Specification* (see section 3.2.9.1 below),

so that:

- The constructed stages of the works will be fit for their intended purposes (in the case of the hospitals, the provision of services by the Project Company in accordance with the *Services Specification* and the provision of “hospital functions” by the State Parties and Justice Health, but *not* necessarily “hospital functions” of types which the Project Company was not aware of before 23 January 2006 and which could not have reasonably been foreseen by a prudent, competent and experienced hospital and mental health facility construction and maintenance contractor in the same situation, particularly if, for guidance on any State-provided or State-procured custodial, correctional, security, containment and related services at the Long Bay Correctional Complex of relevance to the hospital in question, the Project Company had relied on the Project Deed's *State Functionality Statements*)
- The hospital facilities and the services to be provided by the Project Company will meet or exceed the requirements of the *Services Specification*, and
- The works will comply with all applicable development approvals, all other applicable approvals, licences and consents and all other applicable legal requirements.

As part of its development of the detailed designs the Project Company may be directed by the State Parties' Project Director to meet and consult with and/or give presentations to “stakeholders” and their consultants and advisers. If the Project Company believes any concerns or requirements raised by these stakeholders can be accommodated only by varying the *Technical Specification*, the *Services Specification*, any completed detailed design(s), a *Works Program* (other than as described in section 3.2.7.2 below), the project's *Policy and Procedures Manuals* (see section 3.3.5.1) or the project's works or services, it must inform the State Parties' Project Director and may submit a formal proposal for such a variation only if this is requested by the Project Director.

The Project Company must give the Project Director drafts of its detailed design documentation, including information specified in the Project Deed, the *Technical Specification* and a *Detailed Design Program* set out in a schedule to the Project Deed, within timeframes specified in the *Detailed Design Program*, and must provide any further information

on the development of the detailed designs reasonably requested by the Project Director.

The Project Director may, but need not, review these drafts and provide comments and recommendations to the Project Company, limited to matters affecting the compliance of the drafts with the Project Deed, within five to ten business days of receiving the drafts, as specified for different design development stages in a *Design Interface* set out in a schedule to the Project Deed. If he or she does so, the Project Company must amend the draft detailed designs to reflect these comments and recommendations and resubmit them to the Project Director, and may not proceed to the next stage of design development in accordance with its *Works Programs* or construct the works set out in the draft designs unless it does so. If the Project Director chooses to respond to the resubmitted designs, he or she must do so within three business days.

If a draft design seeks to better a minimum requirement set out in the *Technical Specification*, the Project Company must provide details on how it will do this and how the change will provide value for money to the State Parties. The Project Director may decide whether the design does in fact better the *Technical Specification's* requirement, and whether it does offer value for money, in his or her sole discretion.

On all other issues, if the Project Company and the Project Director cannot agree on appropriate amendments to a draft design the dispute must be settled in accordance with the dispute resolution procedures described in section 3.4.8. If this results in a final and binding determination that the original draft detailed designs did comply with the Project Deed, or if the actions of the State Parties' Project Director constitute a breach of the Project Deed by the State Parties and substantially frustrate the ability of the Project Company to perform its obligations under the Project Deed, the State Parties may be liable to compensate the Project Company, and/or to provide relief from its contractual obligations, under the "compensation event" arrangements described in section 3.4.11.

If the Project Director, any other representatives of the State Parties or any other "stakeholders" choose to participate in these processes, they will not assume any duty to ascertain errors, omissions, defects or non-compliances in the designs, and the Project Company will remain solely responsible for ensuring its designs comply with the *Technical Specification* and the other requirements of the Project Deed.

### **3.2.3.2 Intellectual property and moral rights**

The Project Company has warranted to the State Parties and the Minister for Lands that its development and use of detailed designs and any other documents or articles for the project's design, approvals, construction, commissioning, operation or facilities management will not infringe any

intellectual property rights, moral rights or other legal rights or give rise to any liability to make royalty or other payments.

It has also:

- Granted the State Parties an irrevocable, perpetual, royalty-free and non-exclusive licence to use any of these materials for the purposes of the project or any other project involving the current project's works, facilities or sites (ownership of the intellectual property in the materials will remain with the Project Company and/or the applicable third parties)
- Warranted that it holds all the rights and interests in these licensed materials or has the rights to sub-license rights and interests owned by others, that there are and will be no encumbrances over its rights and interests preventing the licensed materials from being used in accordance with the licence, and that it will not deal with its rights and interests in the licensed materials in any way that would conflict with or reduce these rights and interests
- Indemnified the State Parties and their employees, agents, contractors and permitted sub-licensees against any claims or losses resulting from a breach of these intellectual property and moral rights warranties, and
- Undertaken not to register or patent any intellectual property rights which it develops, discovers or first puts into practice during the project if this would conflict with or derogate from the licence granted to the State Parties.

Similarly, the State Parties have warranted to the Project Company that its use of materials made available to it by the State Parties will not infringe any intellectual property rights, moral rights or other legal rights or give rise to any liability to make royalty or other payments, and have granted the Project Company a non-exclusive licence, for the purposes of the project, to use design drawings made available to it by the State Parties or related parties before the Project Deed was executed. Ownership of the intellectual property and moral rights in these drawings will remain with the State Parties, but any modifications to or adaptations of the drawings by the Project Company will be subject to the same arrangements as those for other materials it develops or uses for the project, summarised above.

### **3.2.4 Construction site access and site security**

The Minister for Lands must grant the Project Company, the Construction Contractor, its subcontractors and their officers, advisers, employees and agents exclusive Construction Licences to enter and access each construction site and associated construction compounds and non-exclusive Construction Licences to enter and access defined access

areas, subject to terms set out in a schedule to the Project Deed and, in some cases, additional security requirements.

If the HAC becomes the owner of the Forensic Hospital site before the site of the existing Long Bay prison hospital ceases to be part of the Long Bay Correctional Complex, it must grant a Construction Licence for the Forensic Hospital site on the same terms.

If the Project Company needs access to any other land to carry out the project, this will be its sole responsibility and entirely at its own risk. The State Parties and the Minister for Lands will not be liable for any claims, losses or delays incurred by the Project Company, the Construction Contractor or any other construction subcontractors or sub-subcontractors if they cannot obtain unrestricted access to the additional land.

Notwithstanding the exclusive nature of the Construction Licences for the construction sites and compounds, the Project Company acknowledged, when it executed the Project Deed, that access to the Prison Hospital construction site might be restricted, from time to time, by works by Multiplex Constructions Pty Limited—the Project Company’s Construction Contractor for the Forensic and Prisons Hospitals project—to remove fuel tanks from this site and remediate the site under a separate contract between Multiplex Constructions and the Minister for Health dated 27 February 2006 (“**the Fuel Tanks Remediation Agreement**”). The Project Company undertook not to hinder these removal and remediation works and to use its best endeavours to integrate them with the Prison Hospital works, and generally released the State, the State Parties, the Department of Health, Justice Health, the Department of Corrective Services and their delegates, employees, contractors and agents from any liability for any delays to the Prison Hospital works or any other losses as a result of the removal and remediation works. This release would not have applied, however, if a breach of the Fuel Tanks Remediation Agreement by the State Parties—neither of which was a party to that agreement—had substantially frustrated or prevented the Project Company’s performance of its obligations under the Project Deed, in which case the State Parties might have been liable to compensate the Project Company, grant extensions of time and/or provide other relief from its Project Deed obligations under “compensation event” arrangements described in section 3.4.11. However, the completion of Multiplex Constructions’ works under the Fuel Tanks Remediation Agreement prior to the Project Deed’s becoming effective on 10 November 2006 means these provisions no longer have any practical effect.

The Project Company will have full responsibility for the security of the construction sites, construction compounds and any access areas on which utilities are being connected or installed or any construction work is being carried out.

### 3.2.5 Site conditions and contamination

The Project Company has accepted the project’s construction sites, access areas and adjacent areas, including their existing grounds, structures, utilities and other infrastructure, in their current physical condition, expressly including any historical artefacts and any existing contamination *other than* existing contamination that:

- Was not expressly identified in an *Environmental Site Assessment* report prepared by Coffey Geosciences Pty Limited in August 2005, *or* was not foreshadowed in this report on the basis of testing (as distinct from assessments of probabilities based on the location and past and current uses of the site in question), *or* was beyond the scope of the Coffey report, *and*
- Was not within the scope of contamination that was to be remedied by Multiplex Constructions under the Fuel Tanks Remediation Agreement, *and*
- Has not been caused or contributed to, directly or indirectly, by any action or inaction by Multiplex Constructions in connection with its works under the Fuel Tanks Remediation Agreement, *and*
- Has to be remediated, in compliance with an environmental law direction or order by a court, tribunal or relevant government authority, the Project Deed (including the *Technical Specification*) or any other legal requirements imposed on the Project Company, the HAC, the Minister for Justice, the Construction Contractor or any other Project Company subcontractor or sub-subcontractor, *and*
- Either:
  - Has not been disturbed by the Project Company’s works or services, and would not be disturbed by the Project Company’s works or services were it not for the remediation requirement, *or*
  - Is in one or more “berms” (fill stockpiles) identified in the Coffey report, is disturbed only by Project Company works that are in accordance with good industry practice, and has to be remediated off-site in order to comply with the remediation requirement, *or*
  - Originates in an access area rather than a construction site, and is not caused or contributed to, directly or indirectly, by any action or inaction by the Project Company, any related corporations, any subcontractors or sub-subcontractors of the Project Company, any of these organisations’ officers, employees or agents, any invitees of the Project Company, its subcontractors or sub-subcontractors or any Justice Health employees who are being managed and supervised by the Project Company



under the Labour Services Agreement (see section 3.3.4).

In these exceptional circumstances, the State Parties may be liable to compensate the Project Company, grant extensions of time and/or provide other relief from its Project Deed obligations under “compensation event” arrangements described in section 3.4.11.

These “compensation event” arrangements may also apply if contamination is created during the course of the project in the same exceptional circumstances.

### 3.2.6 General construction obligations

The Project Company must construct each stage of the works and carry out all its associated construction works in accordance with:

- The Project Company’s *Proposals* for the project, as reproduced in a schedule to the Project Deed
- The Project Deed and its *Technical Specification*
- Timeframes set out in the *Works Program* to be prepared by the Project Company for each stage of the works (see section 3.2.7.2)
- The detailed designs (see section 3.2.3.1)
- Construction-phase management plans, including the *Quality Standards (Works)* plan, to be developed, maintained and updated by the Project Company (see section 3.2.9.1)
- All applicable laws, including the Building Code of Australia and the building requirements of the Environmental Planning and Assessment Act (NSW), and
- Good industry practices,

and with good workmanship, using good quality new and undamaged materials—except for the project’s temporary works and any items of existing equipment from the existing Long Bay prison hospital that are nominated by the State Parties’ Project Director and accepted by the Project Company under arrangements described in section 3.2.16 below—and exercising the skills, care and diligence reasonably expected of professional engineers and builders for facilities of this nature, so that:

- The works do not substantially interfere with the hospitals’ “hospital functions” or other State-provided or State-procured custodial, correctional, security, containment and related services at the Long Bay Correctional Complex, or increase requirements for the provision of any of these functions
- The works do not interrupt the supply of water, electricity, gas, communications, drainage, sewerage and other utility services to any part of the Long Bay Correctional Complex

- The works do not damage any existing infrastructure, other than the existing prison hospital during its Stage 5 demolition, or any of the new facilities, the construction sites, their access areas or any areas used by the prison’s inmates
- The completed hospital facilities and other works will be fit for their intended purposes (in the case of the hospitals, the provision of services by the Project Company in accordance with the *Services Specification* and the provision of reasonably foreseeable “hospital functions” by the State Parties and Justice Health)
- The completed hospital facilities and other works and the services able to be provided by the Project Company will meet or exceed the requirements of the *Technical Specification* and the *Services Specification*, and
- The completed hospital facilities and other works will comply with all applicable development approvals, all other applicable approvals, licences and consents and all other applicable legal requirements.

The Project Company must consult with the State Parties from time to time on the best way to integrate and coordinate its works with the hospitals’ “hospital functions” and other State-provided or State-procured custodial, correctional, security, containment and related services at the Long Bay Correctional Complex, and must obtain the written consent of the State Parties’ Project Director before it may modify its work practices in any way which might substantially disrupt these functions, increase requirements for the provision of these functions, increase their costs or otherwise increase the costs of operating the hospitals.

The State Parties and the Project Company have agreed to comply with a *Partnering Protocol* annexed to the Project Deed, setting out both general principles and specific actions for minimising any disruption the Project Company’s works might cause to the operation of the Long Bay Correctional Complex, including the existing Long Bay prison hospital, and other construction works at the complex.

As already indicated, the facilities to be constructed or installed by the Project Company include the hospitals’ buildings, utilities, other infrastructure, walls, fencing, fixtures, fittings, equipment, electrical goods, furniture, grounds, paths and gardens, but the State Parties may specify items (including fixtures) that will be provided by the State Parties and/or Justice Health. If they do so, they must ensure the items comply with the *Technical Specification*, the Project Company’s *Commissioning Plans* (see section 3.2.15.1) and, where relevant, the Project Company’s *Post-Completion Decanting Plans* (see section 3.2.16), and must ensure the items are either delivered and installed by specialist contractors or made available for removal and installation by the Project Company.



If an item to be provided by the State Parties and/or Justice Health under these arrangements is not made available, the Project Company may be entitled to compensation, and/or other relief from its Project Deed obligations, under the “compensation event” arrangements described in section 3.4.11 below, provided these circumstances have not been caused, directly or indirectly, by any action or inaction by the Project Company, its related corporations, the Construction Contractor, the Operators, the Project Company’s other subcontractors and sub-subcontractors, any of their officers, employees, agents or invitees or any Justice Health employees who are being managed and supervised by the Project Company under the Labour Services Agreement (see section 3.3.4).

The Project Deed makes it clear, however, that the State Parties have made no other representations or promises about any items to be provided by the State Parties and/or Justice Health, that the Project Company will not be entitled to any compensation or other relief from its obligations as a result of these items’ location, condition, age or fitness-for-purpose or any effects they may have on the Project Company’s operations-phase services, and that (other than under the “compensation event” circumstances described above) the State Parties, Justice Health and their officers, employees, contractors and agents will not be liable for any claims or losses suffered by the Project Company in connection with the items.

All chattels and other non-fixtures forming part of the hospital facilities will (as between the State Parties and the Project Company) become the property of the State Parties.

In addition to its obligations to the Project Company under the Construction Contract and the Co-ordination Agreement, the Construction Contractor has made a series of promises directly to the State Parties, under the Construction Contractor Collateral Warranty Deed, concerning, among other things, the quality of its work, materials and equipment, its selection and supervision of its employees, agents, contractors and suppliers, its insurance arrangements, its provision of information to the State Parties and, if requested, its extension to the State Parties of any performance guarantees and warranties it has provided to the Project Company. The Project Company must ensure identical undertakings are made by any other significant construction subcontractors and sub-subcontractors appointed by the Project Company under arrangements described in section 3.2.8.2.

### **3.2.7 Construction timeframes**

#### **3.2.7.1 Target completion dates**

The Project Company must complete the five stages of the works, and specified “milestone” components of the works

within each stage, by “**target completion dates**” specified in a schedule to the Project Deed.

As already indicated, the “target completion dates” for the stages are 4 August 2008 for “Stage 1”, the Prison Hospital’s gatehouse, 29 August 2008 for “Stage 2”, the Forensic Hospital’s Justice Health Operations Building and Pharmacy Building, 13 September 2008 for “Stage 3”, the rest of the Prison Hospital, 11 November 2008 for “Stage 4”, the rest of the Forensic Hospital (other than its landscaped areas) and the permanent off-site works, and 18 February 2009 for “Stage 5”, the demolition of the existing Long Bay prison hospital and the landscaping of the Forensic Hospital site, including the area occupied by the demolished hospital.

These deadlines may be extended if there are changes to the *Technical Specification*, the *Services Specification*, the Project Company’s *Proposals*, the completed detailed designs, the works or the *Works Programs* (other than the routine *Works Program* changes discussed immediately below) under the “change procedures” arrangements described in section 3.2.14, or if a “relief event” or “compensation event” occurs, under the arrangements described in sections 3.4.10 and 3.4.11.

As also already indicated, the Project Company must use all reasonable endeavours to complete each stage of the works at least two months before its “target completion date”, as extended (if at all), but not more than four months before its original “target completion date”, as listed above.

Six months before the “target completion date” for each stage of the works, the Project Company may notify the State Parties’ Project Director that it proposes to complete the stage by an earlier date two or more months before its current “target completion date”, as extended (if at all), but not more than four months before its original “target completion date”, as listed above. If it does so, the stage’s “target completion date” will automatically become this earlier notified date.

If this occurs with the last stage of the works to be completed—if the works proceed as planned, this will be Stage 5—and all the works are in fact completed earlier than this stage’s previous “target completion date”, as extended (if at all),

- The State Parties must occupy the hospitals’ facilities on or around their early completion dates
- The Project Company must make a payment to the State Parties as described in section 3.2.15.3 below, provided the State Parties have occupied the hospitals’ facilities, and
- The date for the conclusion of the operations phase of the Project will be moved forward, from 19 July 2034, by the same period of time as the period by which the actual completion date is earlier than the previous “target

completion date”, as extended (if at all) (see section 3.3.1.1).

### 3.2.7.2 Works Programs

Within this overall “target completion date” framework, the Project Company must develop, maintain, update and comply with detailed *Works Programs* for each stage of the works, the requirements for which are set out in the Project Deed, the *Technical Specification*, the Project Company’s *Proposals*, another schedule to the Project Deed and the *Partnering Protocol* annexed to the Project Deed.

As part of its development of the *Works Programs* the Project Company may be directed by the State Parties’ Project Director to meet and consult with and/or give presentations to “stakeholders” and their consultants and advisers. If the Project Company believes any concerns or requirements raised by these stakeholders can be accommodated only by varying the *Technical Specification*, the *Services Specification*, any completed detailed design(s), one or more of the *Works Programs* (other than as described below), the project’s *Policy and Procedures Manuals* (see section 3.3.5.1) or the project’s works or services, it must inform the State Parties’ Project Director and may submit a formal proposal for such a variation only if this is requested by the Project Director.

An initial draft of each *Works Program* must be provided to the Project Director at least four weeks before the Project Company commences the relevant stage of the works, and the Project Company must provide any further information on the development of the *Works Program(s)* reasonably requested by the Project Director.

The Project Director may, but need not, review these drafts and provide comments and recommendations to the Project Company, limited to matters affecting the compliance of the drafts with the Project Deed, within ten business days of receiving the drafts. If he or she does so, the Project Company must amend the draft *Works Program(s)* to reflect these comments and recommendations and resubmit them to the Project Director, and may not proceed to the next stage of design development in accordance with its *Works Program(s)* or construct the relevant works unless it does so. If the Project Director chooses to respond to the resubmitted *Works Program(s)*, he or she must do so within three business days.

If the Project Company and the Project Director cannot agree on appropriate amendments to a draft *Works Program*, the dispute must be settled in accordance with the dispute resolution procedures described in section 3.4.8.

If the Project Director, any other representatives of the State Parties or any other “stakeholders” choose to participate in these processes, they will not assume any duty to ascertain errors, omissions, defects or non-compliances in the *Works Program(s)*, and the Project Company will remain

solely responsible for ensuring its designs and works comply with the *Technical Specification* and the other requirements of the Project Deed.

The initial *Works Programs* established under these arrangements must then be updated by the Project Company when it finalises the detailed designs for each relevant stage of the works and then on a monthly basis, with the amended *Works Programs* being promptly submitted to the State Parties’ Project Director, in the latter case at least seven business days before the end of each month.

The “target completion dates” for each “milestone” and stage of the works may be altered under these updating arrangements only if they have been changed more generally under the “change procedures” described in section 3.2.14, following a “relief event” or “compensation event” under the arrangements described in sections 3.4.10 and 3.4.11 or under the arrangements for bringing “target completion dates” forward described in section 3.2.7.1.

If the State Parties’ Project Director reasonably believes an updated *Works Program*:

- Would be likely to substantially disrupt the hospitals’ “hospital functions” or other State-provided or State-procured custodial, correctional, security, containment and related services at the Long Bay Correctional Complex, or
- Would change the obligations of the State Parties, or the Project Director or any other persons administering or managing the project for the State Parties, or the Department of Health, Justice Health or the Department of Corrective Services, or any employees, agents or contractors of the Minister for Justice, the HAC, the Department of Health, Justice Health or the Department of Corrective Services (other than Justice Health employees who are being managed and supervised by the Project Company under the Labour Services Agreement), or any hospital patients or any persons visiting the hospitals at the invitation of Justice Health or the Department of Corrective Services,

he or she may, within five business days, direct the Project Company to amend the updated *Works Program*, telling it why the amendments are required and specifying a reasonable time within which they must be made. The Project Company must then comply with this direction and resubmit an amended *Works Program* for review by the Project Director.

In addition, the Project Director may direct the Project Company to meet and consult with relevant “stakeholders” concerning any of the updated *Work Programs* it has submitted, and may then direct it to make further amendments under the arrangements described above.

The Project Director may also, at any time during the construction of a stage of the project, direct the Project Company to reschedule any of the works in the stage's *Works Program* if:

- This is expressly permitted in the *Technical Specification*
- He or she believes, in his or her discretion, that they might or would disrupt the hospitals' "hospital functions" or other State-provided or State-procured custodial, correctional, security, containment and related services at the Long Bay Correctional Complex
- A prison riot or commotion, an act of terrorism or a similar incident necessitates increased security arrangements, a "lockdown" or similar measures, or
- The Project Company fails to deliver its security-related services (see section 3.3.1.2).

If he or she issues such a direction and the Project Company suffers a delay, cost or liability as a result, the State Parties may be liable to compensate the Project Company, and/or to provide relief from its contractual obligations, under the "compensation event" arrangements described in section 3.4.11. They will not, however, be liable to provide compensation or relief for any part of the delay, cost or liability associated with any failure by the Project Company to comply with the *Partnering Protocol*.

### 3.2.7.3 Responses to delays

If the Project Company fails to complete a "milestone" component of the works by its "target completion date", it must submit a written *Construction Milestone Failure Report* to the State Parties' Project Director, within five business days, setting out the reasons the deadline was not met, the date by which completion of the works component is now expected and the effects of the delay on the completion of the relevant stage of the works and the completion of all of the works, and must give a copy of this report to the debt financiers' Security Trustee within five business days.

If the Project Director believes (in response to a *Construction Milestone Failure Report* or, more generally, at any time) that the Project Company will not complete a stage of the works by its "target completion date", he or she must direct the Project Company, in writing, to prepare and submit a draft *Corrective Action Plan* to him or her within ten business days, detailing the current state of the works and the actions it will pursue in order to meet the "target completion date".

Within ten business days of receiving the draft *Corrective Action Plan* the Project Director must either approve the plan, in which case the Project Company must diligently pursue the actions set out in the plan, amending the relevant *Works Program(s)* accordingly, or reject the plan and advise the Project Company of the reasons for this rejection, in which case the Project Director and the Project Company

must meet to discuss and establish an acceptable *Corrective Action Plan*.

The Project Company must give copies of any documents it issues or receives under these arrangements to the Security Trustee within five business days.

If the Project Director and the Project Company cannot agree on a *Corrective Action Plan*, the dispute resolution procedures summarised in section 3.4.8 will apply.

These arrangements will not relieve the Project Company of any of its other obligations under the Project Deed or any other legal requirement.

## 3.2.8 The Project Company's construction workforce and subcontractors

### 3.2.8.1 Employment conditions

The Project Company must comply with a series of conditions concerning its own employees, the employees of the Construction Contractor and the employees of any other subcontractors and sub-subcontractors appointed to carry out the works under arrangements summarised in section 3.2.8.2 below. (The term "employee" includes anyone engaged in the project, including independent contractors.)

These conditions, set out in two schedules to the Project Deed, cover matters such as employees' qualifications, skills, experience, training, security awareness and induction processes; pre-employment security, criminal record, medical and employment history investigations; the rights of the State Parties' Project Director to deny employment on the project if these investigations produce unsatisfactory findings; the Project Director's rights to carry out his or her own investigations, including police checks, with the consent of the prospective employee(s), and require the dismissal of employees from the project on reasonable grounds, including any prior criminal conviction; the Project Director's right to refuse to admit any person to the construction sites, hospital facilities and access areas if he or she believes their admittance would be undesirable; compliance with Department of Health, Justice Health and Department of Corrective Services legal requirements and staff codes of conduct, ethics policies, guidelines, policies and procedures; disciplinary actions; the sole responsibilities of the Project Company and its contractors and subcontractors for the employment and conditions of their employees; industrial relations policies; and compliance with employment laws.

### 3.2.8.2 Subcontracting

In addition to the Project Company's Construction Contract with the Construction Contractor, the Project Company may enter into contracts with other "subcontractors" for the development, construction and/or commissioning of any part of the works.



If it does so, the Project Company must:

- Ensure the subcontractor and any sub-subcontractor(s) are reputable, have (or have access to) sufficient experience and expertise to perform their obligations to the standards required by the Project Deed, and take out workers' compensation, public liability and professional indemnity insurance consistent with the Project Company's own insurance obligations under the Project Deed (see section 3.4.2.1), as applicable to the relevant works
- Ensure the subcontract includes arrangements which give full effect to the Project Deed's intellectual property and moral rights provisions (see section 3.2.3.2)
- Ensure the subcontract includes undertakings by the subcontractor to:
  - Rectify any defects, omissions or defaults in its works at its own cost, and
  - Provide guarantees, warranties and maintenance and operating manuals as required by the Project Company
- Ensure the subcontract and any sub-subcontract(s) include undertakings by the subcontractor or each sub-subcontractor, as relevant, to:
  - Apply the employment conditions outlined in section 3.2.8.1 and
  - Assign the benefit of the subcontract or sub-subcontract to the State Parties if the Project Deed is terminated and the State Parties' Project Director asks them to do so (see section 3.5)
- Ensure the subcontractor executes a side deed with the State Parties and the Project Company on terms equivalent to the Construction Side Deed already executed by the current Construction Contractor, Multiplex Construction, and a co-ordination agreement with all other construction subcontractors and operators on terms equivalent to the Co-ordination Agreement already executed by the current Construction Contractor and the two current Operators, Honeywell and Medirest
- Comply with its obligations under the subcontract and ensure the subcontractor does likewise, both under the subcontract and under any sub-subcontract(s), and
- Provide monthly reports to the Project Director on its payments to each subcontractor and any formal disputes with a subcontractor or sub-subcontractor.

In addition, in the case of construction-phase subcontracts and sub-subcontracts which the Project Deed calls "**material subcontracts**"—subcontracts and sub-subcontracts for which the total contract sum, or the aggregate value of all the project contracts with the same subcontractor or sub-subcontractor and its related corporations, will exceed \$500,000,

and subcontracts and sub-subcontracts of any value for particular types of works specified in the Project Deed—the Project Company must:

- Promptly give the State Parties' Project Director a copy of each proposed or executed subcontract or sub-subcontract, excluding the contract price and any methods of working the Project Company or the subcontractor/sub-subcontractor reasonably believes to be "commercial in confidence" (this information must be provided separately, however, and may be accessed by the State Parties only if they are considering whether to exercise their "step in" or contract termination rights under arrangements described in sections 3.4.9 and 3.5 below)
- Ensure the subcontractor executes a collateral warranty deed, in favour of the State Parties, on terms set out in a schedule to the Project Deed and equivalent to those already executed by the current Construction Contractor or under the existing Construction Contractor Collateral Warranty Deed
- Obtain the Project Director's prior written consent to any departure from or variation, amendment, assignment, replacement or termination of the subcontract or sub-subcontract (this restriction also applies to the Co-ordination Agreement and any other equivalent co-ordination agreements), and
- Immediately notify the Project Director of any termination or material amendment of the subcontract.

These Project Company obligations also apply in the case of the existing Construction Contract, which is a "material subcontract".

### **3.2.9 Construction management plans, records, reports, inspections and audits**

#### **3.2.9.1 Management plans and records**

The Project Company must develop construction-phase management plans, as specified in the *Technical Specification*, in accordance with:

- The Project Company's *Proposals* for the project, as reproduced in a schedule to the Project Deed
- The *Technical Specification*
- Timeframes set out in a schedule to the Project Deed
- Procedures set out in the Project Deed and described below, and
- The requirements of the *Quality Standards (Works)* plan, which is one of the construction-phase management plans to be developed by the Project Company, and one of the operations-phase plans to be developed by the Project



Company, a *Quality Standards (Services)* plan (see section 3.3.5.1),

and with an “appropriate” level of professional care, so that the works comply with the project’s development approval, all other relevant approvals, licences and consents and all other legal requirements.

The management plans required under these arrangements are a *Project Management Plan*, a *Construction Management Plan*, the *Quality Standards (Works)* plan, a *Cost Plan*, a *Staging Plan*, a *Construction Security Management Plan* (see section 3.2.4), a *Community Consultation and Public Relations Plan*, an *Energy and Water Management Plan*, an *Environmental Management Plan* (see section 3.2.11), an *Occupational Health and Safety Plan* (see section 3.2.10), an *Industrial Relations Management Plan*, *Project Training Management Plan* and *Project Aboriginal Participation Plan* (see section 3.2.8.1) and a *Local Industry Participation Plan*.

As part of its development of these plans the Project Company may be directed by the State Parties’ Project Director to meet and consult with and/or give presentations to “stakeholders” and their consultants and advisers. If the Project Company believes any concerns or requirements raised by these stakeholders can be accommodated only by varying the *Technical Specification*, the *Services Specification*, any completed detailed design(s), one or more of the *Works Programs* (other than as described in section 3.2.7.2), the project’s *Policy and Procedures Manuals* (see section 3.3.5.1) or the project’s works or services, it must inform the State Parties’ Project Director and may submit a formal proposal for such a variation only if this is requested by the Project Director.

An initial draft of each management plan must be provided to the Project Director at least four weeks before the Project Company commences each stage of the works, and the Project Company must provide any further information on the development of the management plan(s) reasonably requested by the Project Director.

The Project Director may, but need not, review these drafts and provide comments and recommendations to the Project Company, limited to matters affecting the compliance of the drafts with the Project Deed. If he or she does so, the Project Company must amend the draft management plan(s) to reflect these comments and recommendations and resubmit them to the Project Director, and may not proceed to the next stage of design development in accordance with its *Works Program(s)* or construct the relevant works unless it does so.

If the Project Company and the Project Director cannot agree on appropriate amendments to a draft management plan, the dispute must be settled in accordance with the dispute resolution procedures described in section 3.4.8.

If the Project Director, any other representatives of the State Parties or any other “stakeholders” choose to participate in these processes, they will not assume any duty to ascertain errors, omissions, defects or non-compliances in the management plan(s), and the Project Company will remain solely responsible for ensuring its designs and works comply with the *Technical Specification* and the other requirements of the Project Deed.

The Project Company must audit its compliance with its *Quality Standards (Works)* plan at least every three months, in accordance with an audit program that has been agreed with the Project Director. The quality of the works will also be independently audited, as described in section 3.2.9.4 below.

### **3.2.9.2 Construction reports**

The Project Company must give the State Parties’ Project Director monthly reports, for each stage of the works and by the fifth business day of each month, on the progress of construction, revisions to the stage’s *Works Program* (see section 3.2.7.2), expenditures and any significant items potentially affecting the *Works Program*, any adjustments to its progressive payment or drawdown schedules, the status of activities, budgets, works, payments and any disputes under the Construction Contract and all other subcontracts and sub-subcontracts, the results on any quality assurance audits in the preceding month, any serious accidents or dangerous events and the progress of any works by a government or council authority on the extension, adjustment or relocation of water, electricity, gas, communication or other utilities.

The Project Director may, but need not, review these reports and give the Project Company written comments and recommendations concerning the compliance of the works with the requirements of the Project Deed. If he or she does so, he or she will not become responsible in any way for ascertaining errors, omissions, defects or non-compliances in the works.

The Project Company must also:

- Advise the Project Director, 15 months and 12 months before the “target completion date” of each stage of the works (section 3.2.7.1), on the likely date of completion of the relevant stage
- If requested by the Project Director, give him or her copies of site-specific occupational health and safety records, registers and documents, as described in section 3.2.10 below, and
- Promptly inform the Project Director about any material defects or damage to the sites, works or hospitals’ facilities for which the cost of repairs is more than \$3,000 (indexed to the CPI from the June quarter of 2005), the actions it is taking to correct the damage or defect and the estimated time the correction will require (see also

section 3.4.2.2). The Project Company must give copies of any such notices to the debt financiers' Security Trustee within five business days.

### **3.2.9.3 Site inspections, site meetings and State Parties' comments**

In addition to the monthly or more frequent meetings of the Project Co-ordination Group (see section 3.1.2),

- The State Parties' Project Director and his or her representatives may enter any of the construction sites to inspect the works at any reasonable time and after giving reasonable notice, provided they comply with reasonable safety and security requirements and do not cause unnecessary disruption
- The Project Company must give the Project Director and his or her representatives an opportunity to attend monthly or more frequent site meetings
- The Project Director may, but need not, give the Project Company written comments and recommendations concerning the compliance of the works with the requirements of the Project Deed, and
- If he or she does so, the Project Company and the Project Director must meet to discuss and establish rectification measures or changes to the works, and if they cannot agree the dispute resolution procedures summarised in section 3.4.8 will apply.

If the Project Director exercises his or her rights to inspect or make comments on the works he or she will not become responsible in any way for ascertaining errors, omissions, defects or non-compliances in the works.

The Independent Certifier, acting independently, must:

- Attend any inspections of the works by the Project Director and make representations at these inspections, if requested to do so by the Project Director, and
- Attend all regular meetings of the Project Co-ordination Group and inspect the works before or after each meeting.

### **3.2.9.4 Independent and State Parties' audits**

In addition to its own quality audits, as referred to in section 3.2.9.1, the Project Company must have its compliance with its *Quality Standards (Works)* plan audited at least every 12 months by an independent auditor acceptable to the State Parties' Project Director.

The Project Director or his or her representative will be entitled to be present during these audits and an audit report must be delivered to the Project Director within a reasonable time.

The State Parties will also have the right to conduct their own quality audits, at their own cost, at any time prior to the completion of all the works. Should such an audit reveal any

non-compliance with quality assurance plans by the Project Company, the Construction Contractor, any other subcontractor or any sub-subcontractor, the Project Company must reimburse the State Parties for their auditing costs.

These quality assurance and audit arrangements will not relieve the Project Company of any of its other obligations under the Project Deed.

### **3.2.10 Occupational health and safety**

For the purposes of the Occupational Health and Safety Regulation (NSW), the Project Company has been appointed as the "principal contractor" for the project's construction work and may exercise any powers of the State Parties and the Minister for Lands that are necessary for it to discharge this responsibility.

This appointment is not affected by the Construction Contract or any other subcontracting of the construction work by the Project Company.

If the Project Company fails to comply with its duties as a "principal contractor", the State Parties and/or the Minister for Lands may carry out these duties themselves, or have them carried out by others, and the Project Company must pay them for the costs incurred, as a debt, upon demand.

If requested by the State Parties' Project Director, the Project Company must give him or her copies of its site-specific *Occupational Health, Safety and Rehabilitation Plans* (section 3.2.9.1), the *Safe Work Method Statements* which it, the Construction Contractor and any other construction work subcontractors and sub-subcontractors have prepared and all other registers, records and documents which the Project Company must prepare and maintain as the "principal contractor".

The Project Company must notify the Project Director of any serious accidents or dangerous occurrences, confirming that WorkCover has also been notified as required.

### **3.2.11 Environmental requirements**

Throughout the construction phase of the project, and in most cases during the subsequent operational phase as well, the Project Company must, in performing the construction works and providing its services,

- Comply with all environmental laws and all relevant industry standards and codes of practice
- Not contaminate or pollute any construction site, hospital facility or access area
- Not bring any waste onto any construction site, hospital facility or access area
- Keep the construction sites, hospital facilities and access areas in a good and safe condition, so that they do not present any health, safety or environmental risk

- Undertake any remediation work that is needed to ensure that upon the completion of work at each construction site the site presents no risk of harm to the environment and is suitable for use as a hospital
- Ensure the safety of people and protect the environment from harm
- Immediately notify the State Parties' Project Director if there is an incident that might breach an environmental law or there is a complaint about contamination or pollution
- Give the Project Director any information they have about contamination or pollution
- Promptly comply with any environmental law direction or order served on the Project Company or a State Party by any court, tribunal or relevant government authority (this liability will continue after the end of the project if it arises because of contamination, pollution or waste disposal during the term of the project), and
- Give the Project Director a copy of any environmental law direction it receives within seven days, and then promptly give him or her, as requested, copies of all reports, invoices and other documents relating to the direction or its compliance with the direction.

As already indicated, the Project Company has accepted the project's construction sites, access areas and adjacent areas in their current physical condition, expressly including any existing contamination, subject to the potential liability of the State Parties to compensate the Project Company, grant extensions of time and/or provide other relief from its Project Deed obligations under the "compensation event" arrangements described in section 3.4.11 in the event of existing or newly created contamination in specified exceptional circumstances, as described in section 3.2.5.

As part of the procedures preceding final completion of the Prison Hospital (Stage 3 of the works), the main Forensic Hospital facilities (Stage 4) and the demolition of the existing Long Bay prison hospital and landscaping of this area and other sections of the Forensic Hospital grounds (Stage 5), described in section 3.2.15.2 below, the Project Company must undertake a final assessment of contamination on the site in question, undertake any remediation work which this assessment shows is required, and subject its assessment and remedial actions to independent review by an accredited site auditor under the Contaminated Land Management Act, jointly appointed by the State Parties and the Project Company.

### 3.2.12 Native title claims

If there is a native title claim over any part of the construction sites or their access areas, the Project Company must continue to perform its obligations under the Project Deed

unless it is ordered not to by the State Parties' Project Director, a court, tribunal or other relevant authority or any other legal requirement.

If the Project Company has to suspend its performance of these obligations, it may be entitled to compensation and/or relief from its contractual obligations under the "compensation event" arrangements described in section 3.4.11.

### 3.2.13 Heritage artefacts

Any heritage artefacts discovered on or under any of the construction sites or access areas will (as between the State Parties and the Project Company) be the absolute property of the State Parties.

The Project Company must:

- Take every precaution to prevent the removal, disturbance, damaging or destruction of any artefacts
- Immediately notify the State Parties' Project Director if any artefacts are discovered, and
- Comply with any directions concerning these artefacts by the Project Director or a court, tribunal or other relevant authority.

If the discovery of heritage artefact(s) forces the Project Company to suspend the performance of its obligations under the Project Deed for more than two weeks, the Project Company may be entitled to compensation and/or relief from its contractual obligations under the "compensation event" arrangements described in section 3.4.11.

### 3.2.14 Variations

If a State Party or the Project Company wishes to make any change to the works, the *Technical Specification*, the Project Company's *Proposals*, a completed detailed design or a *Works Program* (other than under the procedures described in section 3.2.7.2 above), he, she or it may do so only in accordance with a formal and detailed "change procedure" set out in a schedule to the Project Deed.

The Project Deed's "change procedure" also applies to:

- Changes which any of these parties wishes to make to the services to be provided by the Project Company during the operations phase of any of the facilities, the *Services Specification*, the operations-phase aspects of the Project Company's *Proposals* or an operations-phase *Policy and Procedures Manual* (other than under the procedures described in section 3.3.5.1 below) (see sections 3.3.9 and 3.4.2.3)
- Changes identified by the Project Company which it *must* propose, even if it does not wish to, because the changes would result in an "improvement, innovation or time or cost saving", and

- Changes which are *deemed* to be changes requested by the State Parties, even if they are in practice requested by the Project Company, because the proposed change:
  - Has been directly necessitated by a “compensation event” (see section 3.4.11)
  - Has been directly necessitated by proposed or actual “hospital functions” at the Forensic and/or Prison Hospitals, and/or State-provided or State-procured custodial, correctional, security, containment and related services at adjacent sections of the Long Bay Correctional Complex, of types which the Project Company was not aware of before 23 January 2006 and which could not have reasonably been foreseen by a prudent, competent and experienced “correctional” hospital and mental health facility construction and maintenance contractor in the same situation, or
  - Is for a site or facility affected by a *force majeure* event for more than 210 days to no longer be subject to the Project Deed (see section 3.4.12.2).

The only exceptions to the requirement to use the formal “change procedure”, other than those referred to above, are “minor changes”, directed by the State Parties’ Project Director, with an estimated cost effect—as determined in accordance with a schedule to the Project Deed, and in aggregate in the case of changes which in substance amount to a single variation—of \$3,000 or less, indexed to the CPI from the June quarter of 2005. In these cases, the Project Company will not be entitled to any extension of time or other relief from its obligations concerning the changed matters, and will be entitled to be compensated only for the amounts it actually incurs in relation to the change.

For variations under the “change procedure” the processes to be followed, the procedural cost-sharing arrangements, the types of compensation and/or other relief available, the adjustments to be made to the “construction payments” and “securitisation payments” under the arrangements described in section 3.2.19 (and the associated rent payments specified in the Leases and the Master Rental Agreement, under the arrangements described in section 3.3.2.3 and 3.3.2.4), the adjustments to be made to the State Parties’ operations-phase payments to the Project Company under the arrangements described in section 3.3.7.1 (either way, depending on whether the change is expected to produce additional costs or savings), the variation financing and compensation payment arrangements and (in some situations) the right (or otherwise) of the State Parties to terminate the Project Deed during the procedures and pay compensation as if this termination were a “voluntary” termination as described in section 3.5.2 all vary, depending on:

- The type of change being contemplated

- The party requesting or deemed to be requesting the change
- Whether the State Parties initially and finally accept or reject the Project Company’s variation proposals (which must be prepared by them even for changes initiated by the State Parties)
- The estimated cost effects of the change (as calculated in accordance with a detailed “estimated cost effect” schedule to the Project Deed)
- Whether “additional work” is involved (i.e. additional capital works on a site or facility, beyond the current project’s works)
- Whether the State Parties choose to have the Project Company carry out part or all of any such “additional work” or call for tenders from third parties
- Whether the change is a “facilities removal” variation would make a site or facility no longer subject to the Project Deed (see sections 3.4.2.3 and 3.4.12.2)
- Whether the change has arisen from a change in a policy, rule, guideline, standard, procedure or requirement of the Commonwealth Government, the NSW Government, the Department of Health, Justice Health or the Department of Corrective Services that was not reasonably foreseeable on 23 January 2006 (see section 3.4.7)
- Whether the State Parties’ Project Director has notified the Project Company that it need not comply with such a change in policy (see section 3.4.7)
- Whether the change affects the “Stage 5” works, and
- Whether the Project Company has taken all reasonably necessary steps to mitigate and minimise the effects of the change.

In broad terms, however,

- Variations requested or deemed to be requested by the State Parties and variations compulsorily requested by the Project Company because they would result in an “improvement, innovation or time or cost saving” will potentially entitle the Project Company to an extension of time, relief from its other obligations and/or compensation payments, with the details depending on the “change procedure” and “estimated cost effect” schedules to the Project Deed, but
- Other variations requested by the Project Company will not entitle it to any extensions of time, other relief or compensation, unless otherwise agreed by the State Parties.

In the case of a variation that produces a cost saving, other than a “facilities removal” variation, the saving must be equally shared by the State Parties and the Project Company if the variation was proposed by the Project Company, but if the variation was proposed by the State Parties or deemed to



be proposed by the State Parties the State Parties will be entitled to all of the saving.

If the State Parties' Project Director accepts a variation proposal the Project Company must give him or her a revised and audited "base case" financial model for the project and a revised schedule of payments for the Project Company's services during the operations phase of the project (see section 3.3.7.1), both of them reflecting the approved change. The Project Director may then either approve these revisions, in which case the amended versions will replace their earlier equivalents, or propose amendments, in which case the Project Company and the Project Director must consult in good faith and use reasonable endeavours to establish agreed amendments. If they cannot agree within ten business days, the dispute must be referred to an independent expert under the dispute resolution procedures summarised in section 3.4.8.

If the State Parties engage a party other than the Project Company to carry out "additional work",

- The Project Company must not hinder or delay the State Parties and this contractor from undertaking the work
- The State Parties may request the Project Company to enter into a coordination and interface agreement with the contractor concerning part or all of the design, construction, commissioning, completion, handing over and facilities management of the "additional work", and
- The Project Company must comply with all reasonable requests of this nature.

### **3.2.15 Commissioning and completion of the works**

#### **3.2.15.1 Commissioning Plans**

The Project Deed sets out requirements and procedures for the Project Company to:

- Submit a draft *Commissioning Plan* for each stage of the works to the State Parties' Project Director and the Independent Certifier at least three months before the stage's "target completion date" (see section 3.2.7.1), detailing, in accordance with the *Technical Specification* and the *Quality Standards (Works)*, how the Project Company will commission and test plant, equipment and facilities and train Justice Health, Department of Corrective Services and other State employees, contractors, consultants and licensees so that the hospital facilities will be fit for their foreseeable "hospital functions" and comply with the *Technical Specification*, the *Services Specification* and all applicable development approvals, consents and other legal requirements
- Amend these draft plans if directed to do so by the Project Director or the Independent Certifier under

review and amendment arrangements similar to those for the construction-phase management plans described in section 3.2.9.1, but with only five business days for each of the reviews by the Project Director and the Independent Certifier, and

- Develop, amend and update the *Commissioning Plans* throughout the rest of the construction phase for each stage, submitting each amended plan to the Project Director and the Independent Certifier and further developing, amending and updating the plans if directed to do so, with the dispute resolution procedures described in section 3.4.8 applying if the Project Director, the Independent Certifier and the Project Company cannot agree on the necessary amendments.

The Independent Certifier, acting independently, must review and comment on the draft *Commissioning Plans* if requested to do so by the Project Director.

#### **3.2.15.2 Commissioning and completion**

The Project Deed and the Independent Certifier Deed set out detailed requirements and procedures for the completion of each stage of the works, including:

- The Independent Certifier's attendance at commissioning activities and review of their results, acting independently, if requested to do so by the State Parties' Project Director.
- The final site contamination assessments, remediation works and independent reviews described in section 3.2.11, with copies of the contamination assessment and review reports being given to the State Parties' Project Director and the Independent Certifier.
- The obtaining of all consents, approvals and licences required for the occupation of the stage's works and the satisfaction of any conditions attached to these consents. (In the case of the last stage to be completed, a building certificate under Environmental Planning and Assessment Act (NSW) is not required until after the formal certification of "completion", as described below.)
- The identification and listing of minor omissions and defects which, in aggregate, will not adversely affect occupation of the relevant facility or the provision of the hospitals' "hospital functions".
- Formal notification by the Project Company once it considers it has completed the construction and commissioning of the stage's works, apart from the correction of minor omissions and defects, and satisfied all the Project Deed's other requirements for "completion" of these works.
- Following this, specified consultations and information exchanges, site visits and inspections, testing, training and support; the installation, by any specialist contractors

appointed by the State Parties' Project Director, of items or equipment provided by the State Parties and/or Justice Health (see section 3.2.6); the verification by the Independent Certifier, acting independently but with the assistance of the Project Director, that all items and equipment provided by the State Parties and/or Justice Health have been commissioned and tested (if applicable); and the verification by the Project Company, with the State Parties' assistance, that all items or equipment provided by the Project Company have been commissioned and tested (if applicable) and that all the education, training and support specified in the Project Deed's requirements for "completion" have been satisfied.

- The rectification by the Project Company of any deficiencies identified by the Independent Certifier, acting independently.
- Following further inspection(s), certification by the Independent Certifier, acting independently, that all the requirements for "completion" of the stage's works have in fact been satisfied.
- Within two business days of this certification, the issuing by the State Parties' Project Director of a notice:
  - Formally confirming to the Project Company that "completion" of the stage's works has occurred, and
  - Specifying a "commencement date" for the stage, which must be the later of the date of the notice and the "target completion date" for the stage (see section 3.2.7.1).

The Project Deed makes it clear that the Project Director's notification of the completion of a stage's works will not constitute an approval by the State Parties of the Project Company's performance of its obligations or evidence that the relevant facilities comply with or are capable of satisfying the *Technical Specification* or the *Services Specification*.

- In the case of the last stage of the works to be completed, the obtaining of a building certificate under Environmental Planning and Assessment Act (NSW) within one month of this stage's "commencement date". If the Project Company is unable to satisfy this requirement solely because of a delay by the State Parties in fulfilling their obligations under a *Stormwater Management Plan* set out in the *Technical Specification*, completion of all stages of the works will be deemed to have occurred.

Any remaining minor omissions or defects identified and listed under these arrangements must be completed or rectified to the reasonable satisfaction of the Independent Certifier, acting independently, as soon as practicable, and in any event by no later than 20 business days after the date on

which the Project Company formally notified completion of the stage.

The costs and expenses of the Independent Certifier, including its fees, must be paid equally by the State Parties, on the one hand, and the Project Company, on the other. The Independent Certifier's obligations may be amended, added to or deleted by the State Parties and the Project Company through joint notices, which may be issued at any time under arrangements set out in the Independent Certifier Deed.

Within 60 days of the "commencement date" for a stage of the project the Project Company must give the State Parties' Project Director a complete set of "as executed" drawings of the stage in hard copy and electronic form, and within 180 days of the "commencement date" it must give him or her a detailed survey of the completed facilities by a registered surveyor nominated by the Project Director, with the surveyor's certification that the completed works are located in accordance with the relevant detailed designs.

### 3.2.15.3 *Payments to the State Parties if there is an early completion of all the works*

If:

- All the hospitals' facilities are completed before the "target completion date" for the last stage of the works to be completed (if the works proceed as planned, this will be Stage 5)—as extended (if at all) in accordance with "change procedures" described in section 3.2.14 or in the "relief event" or "compensation event" circumstances described in sections 3.4.10 and 3.4.11—but not more than four months before the project's original final "target completion date" of 18 February 2009 (i.e. not before 18 October 2008), and
- The State Parties occupy the hospitals' facilities on or around their completion dates, and
- A series of formalities set out in the Syndicated Facility Agreement Supplemental Letter are completed,

the Project Company must, on the "commencement date" of the last stage of the works to be completed (the Project Deed calls this date the "full service commencement date"), pay the State Parties:

- The lesser of \$2,071,679 and any undrawn amounts available to the Project Company under its construction loan facility with Ancora under the Ancora Loan Agreement (and, in turn, any undrawn amounts available to Ancora under its construction loan facility with the project's debt financiers under the Syndicated Facility Agreement) that are not required to pay construction costs incurred before the "full service commencement date", *plus*
- If these undrawn amounts not required to pay construction costs exceed \$2,071,679, half of the portion (if

any) of this excess that remains after *deducting* from the excess, in turn,

- A sum of up to \$500,000 for the fees and costs incurred by the Project Company (and, in turn, Ancora) for professional advisers on the project, *provided* (a) the Project Company gives the State Parties evidence that the amount to be deducted was paid upon financial close on 19 July 2006 and that it exceeded the amount budgeted for this purpose in the private sector participants' "base case" financial model for the project, and (b) the debt financiers who are providing two-thirds or more of the project's debt financing commitments agree to this deduction, and
- Another sum of up to \$240,000, shared between the Construction Contractor and the Project Company/Ancora.

### **3.2.16 Post-completion 'decanting'**

The Project Deed sets out arrangements for the 'decanting' (relocation) of specified existing equipment, furniture and fixtures from the existing Long Bay prison hospital to the new Prison Hospital following the completion of Stage 3 of the works and to the new Forensic Hospital following the completion of Stage 4.

The State Parties will be responsible for procuring the transfer of the existing hospital's patients, their own staff, the personal effects of patients and staff, a Department of Corrective Services armoury, medical and inmate records and any other items nominated by the State Parties' Project Director, and the Project Company will be responsible for transferring other items, including, in particular,

- Items of existing equipment from the existing Long Bay prison hospital notified to the Project Company by the State Parties at least six months before the "target completion date" for the Prison Hospital ("Stage 3") and nominated by the Project Company, at least three months before this "target completion date", as items which it wishes to use in its works, and
- Other items, including fixtures, which the State Parties specify as items that are to be provided for the project by the State Parties and/or Justice Health (see section 3.2.6).

The State Parties must give the Project Company copies of their plans for their own "decanting" processes, and the Project Company must integrate its processes with these processes and facilitate the continued functioning of the existing hospital until the new Prison Hospital is ready.

The Project Company must submit a draft *Post-Completion Decanting Plan* to the State Parties Project Director, for each of Stages 3 and 4, at least three months before the

"target completion date" for the relevant stage of the works (section 3.2.7.1), and must provide any further information on the development of these plans reasonably requested by the Project Director.

As part of its development of these plans, the Project Company may be directed by the Project Director to meet and consult with and/or give presentations to "stakeholders" and their consultants and advisers, under arrangements similar to those for the development of construction-phase management plans described in section 3.2.9.1.

The Project Company must then:

- Amend its draft plan(s) if directed to do so by the Project Director, under review and amendment arrangements similar to those for the construction-phase management plans described in section 3.2.9.1
- Further develop, amend and update its *Post-Completion Decanting Plans* if directed to do so by the Project Director, with the dispute resolution procedures described in section 3.4.8 applying if the Project Director and the Project Company cannot agree on the necessary amendments
- Ensure that the Governor of the Long Bay Correctional Complex has copies of its *Post-Completion Decanting Plans* and that Justice Health and Department of Corrective Services staff are made aware of relevant parts of these plans, and
- Start its "decanting" services for Stages 3 and 4 of the works one week after the "commencement date" for the relevant stage (section 3.2.15.2) and finish them within one week.

If the Project Company's "decanting" processes are delayed, interfered with or unable to be provided because items of existing equipment nominated by the Project Company or other items specified by the State Parties as items to be provided by the State Parties and/or Justice Health are not made available, or because of a delay to or rescheduling of the State Parties' own "decanting" processes, the Project Company may be entitled to compensation, and/or other relief from its Project Deed obligations, under the "compensation event" arrangements described in section 3.4.11 below, provided these circumstances have not been caused, directly or indirectly, by any action or inaction by the Project Company, its related corporations, the Construction Contractor, the Operators, the Project Company's other subcontractors and sub-subcontractors, any of their officers, employees, agents or invitees or any Justice Health employees who are being managed and supervised by the Project Company under the Labour Services Agreement (see section 3.3.4).

The Project Deed makes it clear, however, that the State Parties have made no other representations or promises about any items of existing equipment nominated by the



Project Company or the State Parties' decanting processes, that the Project Company will not be entitled to any compensation or other relief from its obligations as a result of these items' location, condition, age or fitness-for-purpose, any effects they may have on the Project Company's operations-phase services or any effects of the State Parties' decanting processes, and that (other than under the "compensation event" circumstances described above) the State Parties, Justice Health and their officers, employees, contractors and agents will not be liable for any claims or losses suffered by the Project Company in connection with the nominated items of existing equipment.

The State Parties must reasonably endeavour to ensure the site of the existing Long Bay prison hospital will cease to be part of the Long Bay Correctional Complex—thereby allowing the whole of the Forensic Hospital site to be transferred to the HAC and then leased by the HAC to the Project Company (see section 3.3.2.1 below)—as soon as the Project Company completes its Stage 3 "decanting" processes. The Project Company has acknowledged, however, that this might not be possible if there are delays in its works.

### **3.2.17 Post-completion correction of defects**

In addition to the arrangements for the rectification of minor defects described in section 3.2.15.2, the Project Company must rectify all defects in each stage of the works, including latent defects, which are discovered, become apparent or are reasonably apparent during a 12-month "defects liability period" commencing on the stage's "completion date" (section 3.2.15.2).

If it fails to do so, the State Parties' Project Director may direct it to correct any of these defects which existed on the "completion date" or were discovered in the following 12 months. This direction may specify reasonable periods within which each these defects must be rectified, and may also specify an additional "defects liability period" for each of the rectified defects of not more than 12 months, starting on the date each defect is rectified.

If the Project Company does not comply with this direction, the Project Director may elect to have the defect rectified by the State Parties or a person nominated by the Project Director, in which case the costs incurred will be payable by the Project Company to the State Parties as a debt and may be set off by them against any amounts they would otherwise have to pay to the Project Company, other than their "construction payments", described in section 3.2.19, any "securitised variation payments", described in section 3.3.2.4, and any payments under the Interest Adjustment Agreement, described in section 4.

The defects rectification requirements and procedures described above will apply again if any defects are discov-

ered, become apparent or are reasonably apparent during any of the relevant extended "defects liability periods".

### **3.2.18 Construction works security bond**

In addition to the securities granted to the State Parties under the State Security (see section 5.1), the Project Company has given the State Parties an unconditional insurance company guarantee of \$3 million in their favour to secure its performance of the construction works.

If it is not drawn upon, this guarantee is to be reduced to \$1 million 20 business days after the "commencement date" of the last stage of the works to be completed, ignoring any inability by the Project Company to obtain a building certificate under Environmental Planning and Assessment Act if this is caused solely by a delay by the State Parties in fulfilling their obligations under the *Stormwater Management Plan* set out in the *Technical Specification*. The guarantee must then be released entirely 20 business days after the last "defects liability period" has expired.

The Project Company may not take any action to restrain any demands or payments under the insurance company guarantee or any use by the State Parties of any money they receive under the guarantee.

### **3.2.19 'Construction' and 'securitisation' payments**

Under the Project Deed each of the State Parties must pay the Project Company a "construction payment" on the "commencement date" of the last stage of the works to be completed. (As already indicated, the Project Deed calls this date the "full service commencement date". If the works proceed as planned, it will be the "commencement date" for Stage 5 of the works.)

Under the Payment Directions Deed, however, these obligations will be fully satisfied by diverting—to the Project Company, or, in the HAC's case, as directed by the Project Company—two "securitisation payments" that would otherwise have to be made by Ancora, on the same day, to the Minister for Lands (or to the State Parties, as a result of a direction by the Minister for Lands) and to the HAC, in return for Ancora's purchase, under the Securitisation Agreement, of the rights of the Minister for Lands and the HAC to receive rent payments under the operations-phase Leases (as specified in the Master Rental Agreement and the Master Rental Side Letter) and their rights to receive "early payout amounts" under these Leases if the Project Deed is terminated before 19 July 2034, or before any other date set for the conclusion of the operations phase of the project under arrangements applying if construction of the hospitals and associated facilities is completed early (see sections 3.2.7.1 and 3.3.1.1), because of a Project Company default (see sections 3.3.2.3 and 3.5.4).



The payments from Ancora that are diverted to the Project Company or as directed by the Project Company will then be further diverted back to Ancora or as directed by Ancora, again in accordance with the Payment Directions Deed, in order to satisfy the Project Company’s repayment obligations to Ancora under the Ancora Loan Agreement.

The State Parties will have no obligation to pay their “construction payments” unless the Minister for Lands and the HAC have become entitled to receive the “securitisation payments” from Ancora under the Securitisation Agreement, and will not be liable to pay any “construction payment” amounts exceeding the “securitisation payment” amounts the Minister for Lands and the HAC have become entitled to receive.

The State Parties may not set off any amounts due and payable to them by the Project Company against the “construction payments”.

The amounts to be paid by the State Parties as the “construction payments” and paid to the Minister for Lands and the HAC as the “securitisation payments” may be adjusted only if:

- A variation is agreed, under the arrangements described in sections 3.2.14 or 3.3.9, prior to the “full service commencement date” (see section 3.3.2.4), or
- The State Parties, the Minister for Lands and the Project Company otherwise agree to the adjustment, in writing, prior to the “full service commencement date”.

If the “construction payments” are increased or decreased, the “securitisation payments” must be increased or decreased by the same amount, with the rents that would otherwise be payable to the Minister for Lands and the HAC under the Leases, as specified in the Master Rental Agreement, being adjusted so as to achieve this result.

Any and all Project Company rights, titles or interests in the Prison Hospital facilities will pass to the Minister for Lands and any and all Project Company rights, titles or interests in the Forensic Hospital facilities will pass to the HAC when the “construction payments” are made, through the diversion of Ancora’s “securitisation payments”, on the “full service commencement date”.

## 3.3 Facilities management and other operational services

### 3.3.1 The Project Company’s general ‘operations phase’ obligations

#### 3.3.1.1 *Duration of services*

The Project Company must provide services specified in the *Services Specification* at the various stages of the Forensic and Prison Hospitals throughout their “operations phases”, from

each stage’s “commencement date” (section 3.2.15.2) until the earliest of:

- 19 July 2034
- Any other date set for the conclusion of the operations phase of the project if:
  - As described in section 3.2.7.1, the Project Company notifies the State Parties’ Project Director six months before the current “target completion date” for the final stage of the works—as extended (if at all) in accordance with the “change procedures” described in section 3.2.14 or in the “relief event” or “compensation event” circumstances described in sections 3.4.10 and 3.4.11—that it proposes to complete the works by a date two or more months before this current “target completion date” but not more than four months before the original “target completion date” for the final stage of the works, 18 February 2009, with the result that the “target completion date” is automatically moved forward to the notified date
  - The actual “commencement date” for the final stage of the works, as specified by the Project Director under the procedures described in section 3.2.15.2 (in other words, the actual “full service commencement date”), is earlier than the previous “commencement date” for this stage, as extended (if at all), and
  - The State Parties comply with their obligation, as described in section 3.2.7.1, to occupy the Forensic Hospital’s facilities on or around the early “full service commencement date”,

with the revised date for the conclusion of operations being moved forward from 19 July 2034 by the same period of time as the period by which the actual “full service commencement date” is earlier than the previous “target full service commencement date”, and

- Any earlier termination of the Project Deed for any of the reasons described in sections 3.5.1, 3.5.2, 3.5.4 and 3.5.5.

#### 3.3.1.2 *Types of services*

The services the Project Company must provide are:

- Maintenance and refurbishment services for the buildings, furniture, fixtures and equipment of both of the hospitals (including the Forensic Hospital’s Justice Health Operations Building and Pharmacy Building), comprising planned preventative and programmed maintenance services, annual or more frequent condition-based surveys, reactive maintenance services, a building maintenance and control system, building engineering services, inspection and testing services and the

preparation, maintenance and updating of a *Maintenance Manual*

- Grounds and gardens maintenance services for both of the hospital sites
- Utility services for both of the hospitals, including the procurement, maintenance and supply of electricity, gas, fuel oil, water, sewerage, communications and surface water, stormwater and in-ground water disposal utilities and associated metering, management, reporting, safety, efficiency and environmental services
- Pest control services at both of the hospitals
- Security services at the Forensic Hospital, including the development of a security risk management program, the development and maintenance of a *Security Procedures Manual*, security patrols, escort services, the controlling of access to the Forensic Hospital site, the provision, operation and maintenance of security management systems such as access control systems, alarms, communication systems and CCTV systems, responses to alarms and security and safety incidents, access card and identification systems, traffic management, incident reporting and monthly and daily performance reports
- Cleaning services at the Forensic Hospital, including scheduled, periodic and reactive cleaning services, the implementation of infection controls, regular inspections, the provision and storage of cleaning materials and equipment, pest reporting, environmental auditing and the production of a *Cleaning Procedures Manual*
- Catering services at the Forensic Hospital, in accordance with specified food quality, procurement, storage, preparation, equipment, cleaning, menu development, food distribution and delivery and waste removal requirements and including the development and implementation of a *Catering Services Procedures Manual* and a *Food Safety Program*
- Non-clinical waste management services at the Forensic Hospital, including waste segregation, collection, transportation, storage and disposal
- Linen services at the Forensic Hospital, including the provision and storage of clean linen, the segregation, collection and laundering of used linen, linen maintenance and *ad hoc* laundering of patients' clothing, and
- Associated "general" services, comprising—
  - The post-completion "decanting" services already described in section 3.2.16
  - Specified management services, including the preparation of a *Quality Standards (Services)* plan, asset management services, occupational health, safety and rehabilitation services, disaster and emergency management services, information management services, financial management serv-

ices, heritage and environmental management services, risk management services and the preparation, maintenance and updating of a *Policy and Procedures Manual* for each of the hospitals (see section 3.3.5.1)

- Performance monitoring, reporting and inspection services, including compliance with the findings of audits (see sections 3.3.5.2 to 3.3.5.4)
- Helpdesk services
- Employee and training services (see sections 3.3.3.1 and 3.3.4)
- Materials and workmanship management services
- The development and implementation of an *Industrial Relations Plan*, and
- Handover services for the last three months of operations (see section 3.3.11).

### 3.3.1.3 General Project Company obligations

All of the Project Company's services must be provided punctually and in accordance with:

- Detailed requirements in the *Services Specification*, including plans prepared in accordance with this *Specification*
- The *Policy and Procedures Manuals*
- The *Quality Standards (Services)* plan
- The detailed designs (section 3.2.3.1), the construction-phase *Works Programs* (section 3.2.7.2) and the construction-phase management plans described in section 3.2.9.1
- Good industry practices
- The requirements of all of the project's major contracts (the "project documents" listed at the end of section 2.2), including the Labour Services Agreement, and
- All applicable approvals, licences, other consents and other legal requirements,

so that the hospital facilities are fit for their intended purposes (the provision of the Project Company's services and the provision of each hospital's "hospital functions" by the State Parties and Justice Health, but *not* necessarily "hospital functions" of types which the Project Company was not aware of before 23 January 2006 and which could not have reasonably been foreseen by a prudent, competent and experienced hospital and mental health facility construction and maintenance contractor in the same situation, particularly if, for guidance on any State-provided or State-procured custodial, correctional, security, containment and related services at the Long Bay Correctional Complex of relevance to the hospital in question, the Project Company had relied on the Project Deed's *State Functionality Statements*).

Consistently with the general commitments to cooperation described in section 3.1.2, the services must be performed in

an “appropriate, effective and efficient, dependable and co-operative” manner.

The Project Company must obtain and maintain all the court, tribunal and statutory approvals, licences and other consents required for the provision of its services, continue to comply (as applicable) with the environmental requirements described in section 3.2.11, allocate all the resources and staff needed for the provision of its services, ensure the hospitals’ facilities and sites are available 24 hours per day and seven days per week in accordance with the *Services Specification*, ensure the continuous supply of specified utility services for the hospitals and pay for these utility services, other than the water supply charges, provide access for and otherwise reasonably assist activities by the State Parties to ensure the provision of utility services to the Long Bay Correctional Complex, monitor its performance of its services in accordance with procedures set out in the *Services Specification* and have its compliance with its operations-phase management plans, manuals and programs audited as required by the *Services Specification* (see section 3.3.5.4).

More generally, the Project Company must ensure the hospital facilities are available at all times to the Department of Health, Justice Health, the Department of Corrective Services and all Justice Health and Corrective Services staff, patients, visitors and other persons authorised to carry out the relevant hospital’s “hospital functions”.

The Project Company may use the hospitals’ facilities and sites only for the purposes of delivering its services, facilitating the delivery of the hospitals’ “hospital functions” and other State-provided or State-procured custodial, correctional, security, containment and related services at the Long Bay Correctional Complex, and, if necessary, facilitating construction works on other sites, and may permit others to use the facilities and sites only for these purposes.

The Project Company must consult with the State Parties, from time to time, on the best method of integrating its services with the hospitals’ “hospital functions” and other State-provided or State-procured custodial, correctional, security, containment and related services at the Long Bay Correctional Complex, and the resultant integration requirements must be reflected in each hospital’s *Policy and Procedures Manual* (see section 3.3.5.1).

In addition, the Project Company must obtain the written consent of the State Parties’ Project Director before it may modify its work practices or services in any way which might substantially disrupt these functions, increase requirements for the provision of these functions, increase their costs or otherwise increase the costs of operating the hospitals.

If a State Party or the Project Company wishes to change the *Services Specification*, the services to be provided by the Project Company, the *Policy and Procedures Manuals* (other

than under the procedures described in section 3.3.5.1), the Project Company’s *Proposals* or the hospitals’ facilities, it must use the formal “change procedure” described in section 3.2.14, unless the change constitutes a “minor change” as discussed in section 3.2.14 (see section 3.3.9).

However, the State Parties’ Project Director or his or her nominee may at any time direct the Project Company to reschedule any maintenance or other services in that month’s monthly maintenance program or cleaning schedules. If they do so, the formal “change procedure” will not apply and the Project Company must implement the required rescheduling, amend its relevant schedules, programs and plans and resubmit them to the Project Director under arrangements summarised in section 3.3.5.1.

Changes to the services and the *Policy and Procedures Manual(s)* etc may also be able to be made following a “relief event” or a “compensation event”, under the arrangements described in sections 3.4.10 and 3.4.11.

In addition to their obligations to the Project Company under the FM Agreement, the Services Agreement and the Co-ordination Agreement, the Project Company’s operations-phase subcontractors, the Facilities Management Operator and the Services Operator, have made a series of promises directly to the State Parties, under the FM Operator Collateral Warranty Deed and the Services Operator Collateral Warranty Deed, concerning, among other things, the quality of their work, materials and equipment, their selection and supervision of their employees, agents, contractors and suppliers, their insurance arrangements, their provision of information to the State Parties and, if requested, their extension to the State Parties of any performance guarantees and warranties they have provided to the Project Company.

The Project Company must ensure identical undertakings are made by any other significant operations subcontractors and sub-subcontractors appointed by the Project Company under arrangements described in section 3.3.3.2.

### **3.3.2 Operations-phase leases and licences**

#### **3.3.2.1 Granting of the Leases and Subleases**

On a date on or before the Prison Hospital’s Stage 3 “commencement date” (section 3.2.15.2),

- The Minister for Lands must lease the Prison Hospital’s buildings to the Project Company under the Prison Hospital Lease, and
- The Project Company must lease these buildings back to the Minister for Justice under the Prison Hospital Sublease.

Similarly, after the Project Company has completed its Stage 3 “decanting” processes (section 3.2.16), on the date on which the site of the existing Long Bay prison hospital ceases

to be part of the Long Bay Correctional Complex, permitting this land to be transferred to the HAC and making it part of the Forensic Hospital's site,

- The HAC must lease the whole Forensic Hospital site to the Project Company under the Forensic Hospital Lease, and
- The Project Company must lease this site back to the HAC under the Forensic Hospital Sublease.

The Project Deed sets out procedures for the preparation, execution, registration and provision of certified copies of these leases, which must be in forms set out in a schedule to the Project Deed.

If the Minister for Lands were unable to grant the Prison Hospital Lease on the Stage 3 "commencement date", the Minister for Lands and the Project Company would nonetheless be bound as if the Prison Hospital Lease and Sublease had been executed. Similarly, if the HAC were unable to grant the Forensic Hospital Lease on the date on which the site of the existing Long Bay prison hospital ceases to be part of the Long Bay Correctional Complex, the HAC and the Project Company would nonetheless be bound as if the Forensic Hospital Lease and Sublease had been executed, and if the HAC were not yet the owner of the land occupied by the existing Long Bay prison hospital the Minister for Lands would also be bound in this way.

The Leases and Subleases will apply until as-yet-undetermined dates to be specified in each Lease and Sublease, but until no later than 19 July 2034 or any other date set for the conclusion of the operations phase of the project under the arrangements applying if construction of the hospitals and associated facilities is completed early (see sections 3.2.7.1 and 3.3.1.1). All of the Leases and Subleases will be automatically terminate if there is any earlier termination of the Project Deed (see sections 3.5.1, 3.5.2, 3.5.4 and 3.5.5), and each of the Leases will also automatically terminate if there is any earlier termination of the relevant Sublease.

Arrangements concerning the rents payable under the Leases are discussed in sections 3.3.2.3 and 3.3.2.4 below. The rent payable by the Minister for Justice or the HAC to the Project Company under each of the Subleases will be \$1 per year.

### 3.3.2.2 Operations-phase Licences

The Minister for Lands must grant the Project Company, the Operators, their subcontractors and their officers, advisers, employees and agents:

- A non-exclusive Licence to enter and access the Forensic Hospital site, during the period any part of this site is still owned by the Minister for Lands between the "commencement date" for Stage 2 (the Forensic Hospital's Justice Health Operations Building and Pharmacy Building) and the "commencement date" for Stage 5 (the

completion of all the other Forensic Hospital works), as reasonably necessary for the purpose of providing, or in anticipation of, the Project Company's Forensic Hospital services, and

- A non-exclusive Licence to enter and access the Prison Hospital site (and any Prison Hospital buildings not subject to the Prison Hospital Lease), during the period from the Stage 3 (Prison Hospital) "commencement date" to the end of the project's operations phase, as reasonably necessary for the purpose of providing the Project Company's Prison Hospital services.

These Licences must be subject to terms set out in a schedule to the Project Deed and, in some cases, additional security requirements.

If the HAC becomes the owner of the Forensic Hospital site before the site of the existing Long Bay prison hospital ceases to be part of the Long Bay Correctional Complex (i.e. before it grants the Forensic Hospital Lease), it must grant a Licence for the Forensic Hospital site on the same terms as the first of the Licences referred to above.

### 3.3.2.3 Initial 'securitised lease' arrangements

As already indicated, the rents payable to the Minister for Lands and the HAC under the Leases are specified in the Master Rental Agreement.

These rents will apply only from the project's "full service commencement date" (section 3.2.15.3), and will be calculated, at the time of each quarterly rent payment date specified in the Master Rental Agreement, by applying fixed proportions for each of the Leases, as specified in a schedule to the Master Rental Agreement, to a total daily rent payment rate specified in a schedule to the associated Master Rental Side Letter. This daily rent payment rate was originally determined on 19 July 2006, as required by the Project Deed, in accordance with the *Financial Close Protocol*, and it must be adjusted, on the "full service commencement date", to reflect any variations, under the arrangements described in sections 3.2.14 and 3.3.9, prior to that date and any other agreements between the State Parties, the Minister for Lands and the Project Company to adjust the rent payment rates and the "construction payments" (section 3.2.19) prior to that date.

However, under the Securitisation Agreement, which is part of "securitised lease" arrangements that are designed to address the application of section 51AD and Division 16D of the Income Tax Assessment Act (Cth) to the project, Ancora has agreed that by making "securitisation payments" to the Minister for Lands and the HAC on the project's "full service commencement date", calculated as specified in the



Securitisation Agreement, it will, on that date, purchase their rights to receive:

- The rents payable under the Leases, as set under Master Rental Agreement, including any upward or downward adjustments to the rents set under the Master Rental Agreement as a result of any variation (sections 3.2.14 and 3.3.9) or “compensation event” (section 3.4.11) prior to the “full service commencement date”, and
- Any “early payout amounts”, as specified in the schedule to the Master Rental Side Letter, that would be payable by the Project Company to the Minister for Lands and the HAC under the Leases if the Project Deed were terminated before 19 July 2034, or before any other date set for the conclusion of the operations phase of the project under the arrangements applying if construction of the hospitals and associated facilities is completed early (see sections 3.2.7.1 and 3.3.1.1), because of a Project Company default (see section 3.5.4).

As already discussed in section 3.2.19,

- The “securitisation payments” to be made by Ancora to the Minister for Lands and the HAC on the “full service commencement date” for the purchase of these rights will be equal to the “construction payments” which the Project Deed requires the State Parties to make to the Project Company on the same day
- Under the Payment Directions Deed, the State Parties’ obligations to make these “construction payments” will be fully satisfied if Ancora, acting in accordance with directions issued by the Minister for Lands and the HAC in the Payment Directions Deed, pays the “securitisation payments” directly to the Project Company (or, in the HAC’s case, as directed by the Project Company), instead of the Minister for Lands and the HAC, and
- Under the Payment Directions Deed, the payments from Ancora that are diverted to the Project Company or as directed by the Project Company must then be diverted by the Project Company back to Ancora or as directed by Ancora, in order to satisfy the Project Company’s repayment obligations to Ancora under the Ancora Loan Agreement.

#### **3.3.2.4 *Effects of variations and ‘compensation events’ on the ‘securitised lease’ arrangements***

As already indicated, if there is a variation (sections 3.2.14 and 3.3.9) prior to the “full service commencement date” the Lease rents specified by the Master Rental Agreement and the Master Rental Side Letter, the “securitisation payments” specified by the Securitisation Agreement and the “construction payments” required under the Project Deed must all be adjusted, on the “full service commencement date”, to reflect the variation. Similar adjustments must be made if there are changes in the project’s costs or operations-phase

payments (section 3.3.7.1) as a result of a “compensation event” (section 3.4.11) prior to the “full service commencement date”, or if there are any other agreements between the State Parties, the Minister for Lands and the Project Company to make adjustments prior to that date.

If there is a variation (section 3.3.9) or a “compensation event” (section 3.4.11) *after* the “full service commencement date” and this results in an *increase* in the operations-phase payments the State Parties must make to the Project Company under the arrangements described in section 3.3.7.1, on the day the variation’s works or any works implemented in relation to the “compensation event” are completed:

- Under the Securitisation Agreement, Ancora must purchase the rights of the Minister for Lands and the HAC to receive any increase in the rents payable by the Project Company under the Leases and the Master Rental Agreement, with the purchase price being calculated using the same methodology as that used to calculate the initial “securitisation payments” on the “full service commencement date” but with variables to be determined at the time, in accordance with the “estimated cost effect” schedule to the Project Deed and as notified to the Minister for Lands and the HAC by Ancora
- Under the Project Deed, the State Parties must make “securitised variation payments” to the Project Company, on the same date, equal to the purchase price paid by Ancora
- The specifications in the Master Rental Agreement and the Master Rental Side Letter for the rents that would otherwise be payable to the Minister for Lands and the HAC under the Leases, were it not for the “securitised lease” arrangements, must be adjusted so that the purchase price paid by Ancora as a result of the variation or “compensation event”, calculated as described above, will be equal to the State Parties’ “securitised variation payments”
- Under the Payment Directions Deed, the State Parties’ obligations to make their “securitised variation payments” will be fully satisfied if Ancora, acting in accordance with directions issued by the Minister for Lands and the HAC in the Payment Directions Deed, pays its purchase price directly to the Project Company (or, in the HAC’s case, as directed by the Project Company), instead of the Minister for Lands and the HAC, and
- Under the Payment Directions Deed, the payments from Ancora that are diverted to the Project Company or as directed by the Project Company must then be diverted by the Project Company back to Ancora or as directed by Ancora, in order to satisfy the Project Company’s

repayment obligations to Ancora under the Ancora Loan Agreement.

The State Parties will have no obligation to pay their “securitised variation payments” unless the Minister for Lands and the HAC have become entitled to receive their payments from Ancora under the Securitisation Agreement, and will not be liable to pay any “securitised variation payment” amounts exceeding the amounts the Minister for Lands and the HAC have become entitled to receive from Ancora.

The State Parties may not set off any amounts due and payable to them by the Project Company against their “securitised variation payments”.

Any and all Project Company rights, titles or interests in a contract variation or works associated with a “compensation event” related to the Prison Hospital will pass to the Minister for Lands when the Minister for Justice pays his or her “securitised variation payment”, through the diversion of Ancora’s payment to the Minister for Lands, and any and all Project Company rights, titles or interests in a contract variation or works associated with a “compensation event” related to the Forensic Hospital will pass to the HAC when it pays its “securitised variation payment”, through the diversion of Ancora’s payment to the HAC.

In addition to these general arrangements, the Project Deed, the Securitisation Agreement and the Master Rental Agreement set out special provisions for changes to the project’s “securitised lease” arrangements if an “uninsurable” risk eventuates or there is a *force majeure* event, affecting some but not all of the hospitals’ facilities or sites, and as a result there is a “facility removal” contract variation under which the affected facility/facilities or site(s) cease to be subject to the Project Deed. These provisions are described in sections 3.4.2.3 and 3.4.12.2.

### **3.3.3 The Project Company’s operations phase workforce and subcontractors**

#### **3.3.3.1 Employment conditions**

The Project Company must comply with a series of conditions concerning its own employees, the employees of the Facilities Management Operator and the Services Operator and the employees of any other subcontractors and sub-subcontractors appointed to provide the Project Company’s services under arrangements summarised in section 3.3.3.2 below. (The term “employee” includes anyone engaged in the project, including independent contractors.)

These conditions are essentially the same as those already described for construction-phase employees in section 3.2.8.1.

They will *not* apply to:

- “Justice Health employees” managed and supervised by the Project Company under the Labour Services Agree-

ment, whose employment conditions will be protected under the arrangements described in section 3.3.4 below, or

- Any Department of Health or Justice Health employees providing the hospitals’ “hospital services”, for whom the Project Company will have no employment or employment condition responsibilities.

#### **3.3.3.2 Subcontracting**

In addition to the Project Company’s FM Agreement with the Facilities Management Operator and Services Agreement with the Services Operator, the Project Company may enter into contracts with other “subcontractors” for the performance of any part of its services.

If it does so, the Project Company must:

- Ensure the subcontractor and any sub-subcontractor(s) are reputable, have (or have access to) sufficient experience and expertise to perform their obligations to the standards required by the Project Deed, and take out workers’ compensation and public liability insurance consistent with the Project Company’s own insurance obligations under the Project Deed (see section 3.4.2.1), as applicable to the relevant services
- Ensure the subcontract includes arrangements which give full effect to the Project Deed’s intellectual property and moral rights provisions (see section 3.2.3.2)
- Ensure the subcontract includes undertakings by the subcontractor to:
  - Rectify any defects, omissions or defaults in its services at its own cost, and
  - Provide guarantees, warranties and maintenance and operating manuals as required by the Project Company
- Ensure the subcontract and any sub-subcontract(s) include undertakings by the subcontractor or each sub-subcontractor, as relevant, to:
  - Apply the employment conditions outlined in sections 3.3.3.1 and 3.2.8.1 and
  - Assign the benefit of the subcontract or sub-subcontract to the State Parties if the Project Deed is terminated and the State Parties’ Project Director asks them to do so (see section 3.5)
- Ensure the subcontractor executes a side deed with the State Parties and the Project Company on terms equivalent to the FM Operator Side Deed and Services Operator Side Deed already executed by the current Facilities Management Operator, Honeywell, and the current Services Operator, Medirest, and a co-ordination agreement with all other operators and construction subcontractors on terms equivalent to the Co-ordination Agreement already executed by the current Operators and the

current Construction Contractor, Multiplex Constructions

- Comply with its obligations under the subcontract and ensure the subcontractor does likewise, both under the subcontract and under any sub-subcontract(s), and
- Provide monthly reports to the Project Director on its payments to each subcontractor and any formal disputes with a subcontractor or sub-subcontractor.

In addition, in the case of operations-phase subcontracts and sub-subcontracts which the Project Deed calls “**material subcontracts**”—subcontracts and sub-subcontracts for which the total contract sum, or the aggregate value of all the project contracts with the same subcontractor or sub-subcontractor and its related corporations, will exceed \$500,000 per year, indexed to the CPI from the June quarter of 2005, and subcontracts and sub-subcontracts of any value for particular types of services specified in the Project Deed—the Project Company must:

- Promptly give the State Parties’ Project Director a copy of each proposed or executed subcontract or sub-subcontract, excluding detailed breakdowns of the contract price and any methods of working the Project Company or the subcontractor/sub-subcontractor reasonably believes to be “commercial in confidence” (this information must be provided separately, however, and may be accessed by the State Parties only if they are considering whether to exercise their “step in” or contract termination rights under arrangements described in sections 3.4.9 and 3.5 below)
- Ensure the subcontractor executes a collateral warranty deed, in favour of the State Parties, on terms set out in a schedule to the Project Deed and equivalent to those already executed by the current Operators under the existing FM Operator Collateral Warranty Deed and Services Operator Collateral Warranty Deed
- Obtain the Project Director’s prior written consent to any departure from or variation, amendment, assignment, replacement or termination of the subcontract or sub-subcontract (this restriction also applies to the Co-ordination Agreement and any other equivalent co-ordination agreements), and
- Immediately notify the Project Director of any termination or material amendment of the subcontract.

These Project Company obligations also apply in the case of the existing FM Agreement and Services Agreement, both of which are “material subcontracts”.

### **3.3.4 The Labour Services Agreement**

The Labour Services Agreement sets out the terms under which selected Justice Health employees will provide non-clinical cleaning, catering and linen services at the Forensic

Hospital under the management and supervision of the Project Company and, through the Project Company, the Facilities Management Operator, the Services Operator and any other operations-phase subcontractors and sub-subcontractors.

It is intended to give formal effect to general principles for the use of public sector employees in projects of this nature announced by the then Minister for Health, Mr Morris Iemma, on 16 March 2004.

The Project Deed and other project contracts call the selected Justice Health employees “**Health employees**”, but the Labour Services Agreement calls them “**Justice Health employees**” and the latter term is adopted in this report.

The “Justice Health employees” will continue to be employed by Justice Health, under employment terms and conditions set out in relevant NSW awards and industrial agreements, the Industrial Relations Act (NSW), the Annual Holidays Act (NSW), the Long Service Leave Act (NSW) and Justice Health and Department of Health workplace policies specified in a schedule to the Labour Services Agreement, as detailed below.

The Project Company may employ its own employees, subject to the conditions discussed in section 3.3.3.1, as necessary to manage its services, including the management and supervision of the “Justice Health employees”. “Justice Health employees” may apply for these positions, but if they are successful they will become employees of the Project Company.

#### ***3.3.4.1 Initial appointments of ‘Justice Health employees’***

The Project Company must determine how many “Justice Health employees” it will need prior to the “commencement date” (section 3.2.15.2) for Stage 2 of the project’s works (the Forensic Hospital’s Justice Health Operations Building and Pharmacy Building).

It must accept as “Justice Health employees” all employees of Justice Health, as at 23 January 2006, who are advised that they may choose to become “Justice Health employees” and elect to do so. Justice Health must keep the Project Company informed, until six months before the project’s “full service commencement date” (section 3.2.15.3), about the numbers of employees who have chosen to become “Justice Health employees”.

If more “Justice Health employees” are required, the Project Company may recruit them, on behalf of Justice Health and in accordance with the specified workplace policies, and these recruits will become employees of Justice Health (and “Justice Health employees” for the purposes of the Labour Services Agreement).

Justice Health must make these self-selected or recruited “Justice Health employees” available to the Project Company at agreed times and instruct them to provide their



services under the supervision and management of the Project Company in accordance with the Labour Services Agreement.

#### **3.3.4.2 Redeployment of surplus 'Justice Health employees'**

The Project Company may restructure the ways its services are provided after the Stage 2 “commencement date”, provided this is done in accordance with relevant NSW awards and industrial agreements and the specified Justice Health and Department of Health workplace policies and provided it liaises and consults with Justice Health before taking this action.

If such a restructuring reduces the number of “Justice Health employees” required, the surplus “Justice Health employees” must be redeployed by Justice Health in accordance with the specified workplace policies.

#### **3.3.4.3 Replacement and additional 'Justice Health employees'**

If the Project Company needs a permanent replacement for a “Justice Health employee” for any reason at any time after the Stage 2 “commencement date”, it will be responsible for recruiting the replacement on behalf of Justice Health, in accordance with the specified workplace policies, and the replacement will become an employee of Justice Health (and a “Justice Health employee” for the purposes of the Labour Services Agreement).

The same arrangements will apply if the Project Company needs additional permanent personnel in order to provide its services, provided Justice Health first approves their hiring. Justice Health must give its approval if it receives evidence that the additional personnel are necessary to assure the provision of the services.

If the Project Company needs *temporary* personnel in order to provide its services, it may temporarily obtain the services of current employees of Justice Health, provided they satisfy the specified workplace policies and will be covered by relevant NSW awards and industrial agreements. If it is not reasonably practicable in the circumstances for the Project Company to procure the temporary personnel it needs on this basis, it may still hire temporary employees, including persons who are not currently Justice Health employees, but in these cases it will be responsible for all the costs of doing so.

If the Project Company needs *casual* personnel to provide its services as a result of an unexpected absence of a “Justice Health employee” or unexpected demand, it may hire these personnel but will be responsible for all the costs.

#### **3.3.4.4 Management of 'Justice Health employees'**

The Project Company will be responsible for all “Justice Health employees”—regardless of the time they start

providing their services at the Forensic Hospital—from the Stage 2 “commencement date”.

This includes responsibility for their training and development, their rostering and working arrangements and ensuring they have access to uniforms, protective clothing, vehicles, equipment, materials and anything else they need to perform their work.

The “Justice Health employees” will be subject to the day-to-day direction and control of the Project Company, including its direction and control on management, discipline and performance issues.

Except for a situation where Justice Health reasonably believes there is an immediate risk to safety, Justice Health may not direct or control any “Justice Health employee” without first obtaining the Project Company’s approval, which may not be unreasonably withheld.

More generally, Justice Health may not take any action in relation to any “Justice Health employee” unless it is an action contemplated by the Labour Services Agreement or required by legislation and is not a responsibility passed on to the Project Company.

#### **3.3.4.5 Employment conditions for 'Justice Health employees'**

As continuing employees of Justice Health the terms and conditions of “Justice Health employees” will be governed by relevant NSW awards and industrial agreements, the Industrial Relations Act (NSW), the Annual Holidays Act (NSW), the Long Service Leave Act (NSW) and the specified Justice Health and Department of Health workplace policies, as amended, replaced or added to from time to time.

In its dealings with “Justice Health employees” the Project Company is expressly required to comply with these specified workplace policies.

It may ask Justice Health to review any workplace policy if it can demonstrate or provide evidence that it has an adverse effect on its ability to effectively or efficiently provide its services. Justice Health must then review the policy, but is not obliged to make any amendments as a result of the review.

“Justice Health employees” will continue to be paid by Justice Health, which must maintain a “Justice Health employees” payroll system.

The Project Company may not pay or give “Justice Health employees” any benefits beyond those provided in their industrial awards and agreements and the specified workplace policies unless it has the HAC’s prior written consent.

The Project Company must maintain personnel records for its “Justice Health employees” on behalf of Justice Health and must do everything legally possible to obtain and maintain the information needed for Justice Health to comply with its obligations to pay the “Justice Health employees”



and keep employee records in accordance with applicable industrial awards, agreements and laws.

The Labour Services Agreement sets out detailed requirements concerning workers compensation arrangements and occupational health and safety provisions for “Justice Health employees”, including requirements for the development of occupational health and safety management systems, consultations on these systems and the notification of incidents (see also section 3.3.6) and provisions permitting Justice Health to intervene directly if it reasonably believes there is an immediate risk to safety, by taking action to control or eliminate the risk and/or by ordering the temporary withdrawal of “Justice Health employees”.

The Project Company must make fortnightly payments to the HAC, on behalf of Justice Health and under arrangements described in section 3.3.7.2, to cover the salary, fringe benefits, workers compensation and related costs, to Justice Health, of employing its “Justice Health employees”.

#### **3.3.4.6 Industrial relations**

The Project Company has undertaken:

- To comply with all awards and industrial agreements applying to the “Justice Health employees”, and
- Not to commence any proceedings against a union or a “Justice Health employee”, seeking damages, compensation, fines or penalties, other than for material property damage, personal injury, defamation, an act or omission by a union official or member when they are not acting in that capacity or an action for fraud, misrepresentation, conversion or detainee.

The Justice Health has appointed the Project Company as its authorised nominee and agent for the purpose of resolving issues with “Justice Health employees” under any grievance, disciplinary or dispute resolution procedures in any applicable award or industrial agreement or any of the specified workplace policies.

The HAC, Justice Health and the Project Company have expressly acknowledged that of the parties to the Labour Services Agreement only the HAC may negotiate new or amended industrial awards or agreements covering “Justice Health employees”.

If such an amendment includes productivity improvements or other performance requirements, the Project Company must use its best endeavours to implement these improvements or requirements among its “Justice Health employees”.

Justice Health must consult with the Project Company before applying to any court or industrial relations tribunal on any matter, award or industrial agreement concerning any “Justice Health employee”.

From the Stage 2 “commencement date” the Project Company will be responsible for managing any industrial disputes arising solely from the performance of services by “Justice Health employees” and/or its management of the “Justice Health employees”.

In managing any such “site issue” disputes the Project Company must first comply with any dispute resolution procedures in relevant awards or industrial agreements. If this fails to resolve the dispute, it may then notify the dispute to the relevant industrial tribunal. If the industrial tribunal fails to resolve the dispute, the Project Company may commence proceedings in a court concerning any actual or threatened industrial action only if a relevant union or the “Justice Health employees” have not complied with the tribunal’s recommendations and/or directions. At each stage of these processes the Project Company must notify Justice Health and give it any information it reasonably requires about the dispute and the steps it proposes to take. (These requirements are in addition to more generally applicable requirements for the notification of industrial disputes, described in section 3.3.6.)

The Project Company must meet all the costs associated with its management of any “site issue” disputes, including any litigation costs.

Notwithstanding the arrangements discussed above, the HAC, Justice Health or any part of the Department of Health may elect to manage any actual or threatened industrial action arising from a “site issue” dispute if it affects or is likely to affect their operations, beyond the services provided by the Project Company.

Justice Health will be responsible for managing any industrial actions by “Justice Health employees” on any other issues, and will be responsible for all the associated costs.

#### **3.3.4.7 Dismissal of ‘Justice Health employees’**

As the employer of the “Justice Health employees” Justice Health will retain its absolute rights to dismiss any “Justice Health employee” in accordance with the law.

The Project Company may recommend to Justice Health, at any time, that the services of a “Justice Health employee” should be terminated on the grounds of misconduct or unsatisfactory performance or for disciplinary reasons, provided the Project Company has complied with all the legal requirements for dismissals of its own employees, including unfair dismissal laws, and any grievance, disciplinary or dispute resolution procedures applying to the “Justice Health employee” under an industrial award or agreement or the Justice Health and Department of Health workplace policies specified in the Labour Services Agreement.

Justice Health may not unreasonably reject such a recommendation.

If it does decide not to dismiss the “Justice Health employee”, for reasons other than non-compliance by the Project Company with the required procedures, Justice Health must redeploy the employee at its own cost and in accordance with the specified workplace policies.

If Justice Health decides to dismiss the “Justice Health employee” but a court or tribunal orders their reinstatement, or if the employee is dismissed on the grounds that a workplace injury has rendered them unfit for employment but they successfully apply for reinstatement doing work they are fit to carry out, in accordance with section 92 of the Industrial Relations Act, the Project Company must re-engage the “Justice Health employee” unless the court or tribunal orders otherwise. The Project Company may not seek an order preventing such a re-engagement as a “Justice Health employee” and must oppose any application for such an order.

### **3.3.5 Operations phase management plans, manuals, monitoring, reports, inspections and audits**

#### **3.3.5.1 Management plans and Policy and Procedures Manuals**

As already indicated in section 3.3.1.3, the Project Company must develop, complete, comply with and from time to time amend and update a large number of operations-phase plans, programs, protocols and manuals.

In particular, it must develop, complete, comply with and from time to time amend and update a *Policy and Procedures Manual* for each of the hospitals, detailing how it intends to comply with its service obligations, in accordance with the *Services Specification*, its *Proposals* for the project and its *Quality Standards (Services)* plan.

Among other things, these *Policy and Procedures Manuals* must include all the plans, programs, protocols and manuals stipulated in the *Services Specification* for each of the services listed in section 3.3.1.2.

The Project Company must submit a draft of its initial *Policy and Procedures Manual* for each stage of the hospitals’ facilities, for review by the State Parties’ Project Director, at least six months before the stage’s “commencement date” (section 3.2.15.2), and must provide any further information on the development of the draft *Manuals* reasonably requested by the Project Director.

The Project Director may, but need not, review these drafts and provide comments and recommendations to the Project Company, limited to matters affecting the compliance of the drafts with the Project Deed, within five business days of receiving the drafts. If he or she does so, the Project Company must amend the draft *Policy and Procedures*

*Manual(s)* to reflect these comments and recommendations and resubmit them to the Project Director.

If the Project Company and the Project Director cannot agree on appropriate amendments, the dispute must be settled in accordance with the dispute resolution procedures described in section 3.4.8.

If the Project Director, any other representatives of the State Parties or any other “stakeholders” choose to participate in these processes they will not assume any duty to ascertain errors, omissions, defects or non-compliances in the *Policy and Procedures Manual(s)*, and the Project Company will remain solely responsible for ensuring its services comply with the *Services Specification* and the other requirements of the Project Deed.

During the course of the operations phase of the project the initial *Policy and Procedures Manuals* must be updated by the Project Company, whenever necessary and in any event at least once every 12 months, to take account of any changes in law (see section 3.4.7), any changes in the project’s approvals, licences and other consents, any changes in government, council, government department, statutory authority, court or tribunal policies, guidelines and requirements or the requirements of utility providers, any changes in the manner in which the relevant facilities are being used, any changes in the manner in which the relevant hospital’s “hospital functions” are being provided, any changes in good industry practices, any variations (see sections 3.2.14 and 3.3.9), any omissions from or deficiencies in the *Manuals* and, more generally, as required by the *Services Specification*. Each updated *Policy and Procedures Manual* must be promptly submitted for review by the State Parties’ Project Director (in the case of annual updates, at least four weeks before the anniversary of the relevant stage’s “commencement date”).

The Project Director may require the Project Company, as part of its development and updating of the *Policy and Procedures Manuals*, to meet and consult with relevant “stakeholders” and/or conduct workshops and meetings and make presentations and submissions to the Project Director, other representatives of the State Parties, other “stakeholders” and their consultants and advisers. If he or she does so, the Project Company must address the comments and requirements of these parties and accommodate them in the *Manuals*, provided they are consistent with the Project Deed.

The Project Company must provide copies of the relevant *Policy and Procedures Manual(s)* to Justice Health’s Chief Executive Officer and the Governor of the Long Bay Correctional Complex. It must also ensure the State Parties’ Project Director, any other persons administering or managing the project for the State Parties, the Department of Health, any relevant employees, agents or contractors of the Minister for Justice, the HAC, the Department of Health, Justice Health and the Department of Corrective Services

(other than “Justice Health employees” who are being managed and supervised by the Project Company under the Labour Services Agreement) and any relevant persons visiting the hospitals at the invitation of Justice Health or the Department of Corrective Services are:

- Made aware of relevant provisions of the *Policy and Procedures Manual(s)*, and
- Given adequate training concerning the Project Company’s practices and procedures in providing its services.

If the State Parties’ Project Director reasonably believes:

- Operations complying with a *Policy and Procedures Manual* would no longer comply with the Project Deed or would disrupt the relevant hospital’s “hospital functions”, or
- The Project Company has failed to update a *Policy and Procedures Manual* as required,

he or she may direct the Project Company to amend or further amend the *Policy and Procedures Manual*, telling it why the amendments are required and specifying a reasonable time within which they must be made. The Project Company must then comply with this direction and resubmit an amended version of the *Policy and Procedures Manual* for review by the Project Director.

### 3.3.5.2 Project Company monitoring and reports

The Project Company must monitor its performance of its services in accordance with detailed requirements in the *Services Specification*.

The *Services Specification* specifies many requirements for regular (daily, monthly and annual) and event-triggered reporting to the State Parties, Project Director on specific aspects of the Project Company’s services, too numerous and detailed for inclusion in this summary of the contracts.

In addition, as already indicated, the Project Company must give the State Parties’ Project Director monthly reports on its payments to its subcontractors (see section 3.3.3.2) and any disputes with these subcontractors, and financial reports are also required, as described in section 3.4.3 below.

### 3.3.5.3 Inspections

The State Parties’ Project Director and his or her representatives may carry out inspections of the hospitals and any related systems, registers, manuals, records, plans and programs to assess whether the Project Company is complying with its obligations under the Project Deed.

Unless there are circumstances potentially leading to termination of the Project Deed under the arrangements described in sections 3.5.3 and 3.5.4, or unless an earlier inspection has revealed any other non-compliance(s) with the Project Deed, these inspections may be carried out at each hospital no more than twice each calendar year.

The Project Director must give the Project Company at least five business days’ written notice of each inspection, and must consider any reasonable requests by the Project Company for an inspection to be carried out on a different date because it would materially prejudice its ability to provide its services, provided these requests are made at least two business days before the scheduled inspection.

The Project Company must provide reasonable assistance for the inspections, including making records etc available, and the inspectors must minimise their disruption of the Project Company’s services as much as reasonably practicable.

If an inspection reveals a breach of the Project Deed’s requirements, the Project Director must notify the Project Company, providing details and specifying a reasonable period for the breach to be remedied. The Project Company must comply with this notice and remedy the breach, and the Project Director may carry out a further inspection to check whether it has.

The State Parties will bear the costs of these inspections unless such a breach is discovered, in which case the Project Company must reimburse these costs and any reasonable associated administrative costs, or unless there are continuing circumstances potentially leading to termination of the Project Deed under the arrangements described in sections 3.5.3 and 3.5.4.

### 3.3.5.4 Independent and State Parties’ audits

In addition to its own monitoring and auditing of its performance, the Project Company must have its compliance with its management plans, programs, manuals, procedures, standards, policies, systems and records independently audited in accordance with requirements set out in the *Services Specification*.

Further, in addition to their inspection rights, described above, the State Parties may, at any time, audit the Project Company’s compliance with its *Policy and Procedures Manuals* or any part of these *Manuals*, giving it at least 20 business days’ notice.

Financial audits are also required, as described in section 3.4.3 below.

### 3.3.6 Notification of safety and industrial relations issues, emergencies, defects and damage

Throughout the operations phase of each stage of the project the Project Company must:

- Identify and enquire into any activity performed as part of its services which might give rise to health and safety risks for “Justice Health employees” (section 3.3.4), its own officers, employees, agents and consultants, its subcontractors and sub-subcontractors and their officers, employees, agents and consultants, and notify the State

Parties' Project Director as soon as reasonably practicable if any are identified

- Identify and enquire into any accidents or other incidents involving any loss, injury, death or damage, or risk of loss, injury, death or damage, to persons or property as a result of, or in connection with, its services, and again give the Project Director a detailed written report as soon as reasonably practicable
- Regularly inform the Project Director about any industrial action that might affect its services
- Promptly inform the Project Director if industrial action causes a suspension or cessation of its services, providing information about the actions it has taken or proposes to take to overcome or minimise the effects
- Promptly inform the Project Director if industrial action affecting the Project Company, the Facilities Management Operator, the Services Operator any other subcontractor or sub-subcontractor or any of their employees might impede the hospitals' "hospital functions" or other State-provided or State-procured custodial, correctional, security, containment and related services at the Long Bay Correctional Complex
- Immediately inform the Project Director about any incident that might jeopardise the security or safety of either of the hospitals or its patients, any triggering of a security or safety alarm, any escape or attempted escape of a prisoner or any actual or potential criminal act, and the action the Project Company has taken or proposes to take to respond to, overcome or minimise the effects of this event
- Immediately inform the Project Director about any "emergency", as defined in the Project Deed, meaning any situation which, in the Project Director's opinion,
  - Constitutes a prison riot or commotion, an act of terrorism or a similar incident necessitating increased security arrangements, a "lockdown" or similar measures
  - Constitutes a failure by the Project Company to deliver its security-related services
  - Seriously threatens, has caused or will cause material damage or disruption to any person's health and safety, the environment, property or the safe and secure operation of the hospitals, or
  - Will require the provision of materially greater services,if this "emergency":
  - Causes the Project Company to suspend or stop performing any of its services, or
  - Might impede the hospitals' "hospital functions" or other State-provided or State-procured custodial,

correctional, security, containment and related services at the Long Bay Correctional Complex,

advising the Project Director of the action the Project Company has taken or proposes to take to respond to, overcome or minimise the effects of the "emergency", and

- Promptly inform the Project Director about any material defects or damage to the hospitals' facilities for which the cost of repairs is more than \$3,000 (indexed to the CPI from the June quarter of 2005), the actions it is taking to correct the damage or defect and the estimated time the correction will require (see also section 3.4.2.2). The Project Company must give copies of any such notices to the debt financiers' Security Trustee within five business days.

### 3.3.7 Payments

#### 3.3.7.1 *Monthly payments by the State Parties to the Project Company*

The State Parties must make payments to the Project Company for the period between the Stage 1 "commencement date" (section 3.2.15.2) and the start of the next calendar month, and then for each successive calendar month until 19 July 2034 or any other date set for the conclusion of the operations phase of the project under arrangements applying if construction of the hospitals and associated facilities is completed early (see sections 3.2.7.1 and 3.3.1.1), or until any earlier termination of the Project Deed (see sections 3.5.1, 3.5.2, 3.5.4 and 3.5.5), *provided* the Project Company is punctually making fortnightly payments to the HAC, on behalf of Justice Health, to cover the salary, fringe benefits, workers compensation and related costs, to Justice Health, of employing its "Justice Health employees" (section 3.3.4), under arrangements applying from the Stage 2 "commencement date" and described in section 3.3.7.2.

Each of these monthly payments will comprise:

- A performance-based "**monthly service payment**" for the relevant hospital—for the HAC, the Forensic Hospital, from the Stage 2 "commencement date", and for the Minister for Justice, the Prison Hospital, from the Stage 1 "commencement date"—calculated in each case in accordance with a "service payment calculation" schedule to the Project Deed, and
- Adjustments to reflect any amounts owing to the relevant State Party by the Project Company under other provisions of the Project Deed, if the State Party chooses to exercise its rights of set-off, and/or any GST.

Under the "service payment calculation" schedule to the Project Deed, the starting bases for calculating each State



Party's "monthly service payment", in all cases prior to any performance-based adjustments, are:

- "Quarterly service payments" for the relevant hospital, as calculated from tables in a separate "gross service payment components" schedule to the Project Deed. The amounts shown in these tables are to be adjusted by applying indexation formulae which are also set out in that schedule, with some payment amounts increasing in line with increases in the consumer price index (CPI) from the June quarter of 2006, others (for the Forensic Hospital only) increasing in line with increases in wage rates for "Justice Health employees", as determined from relevant awards and industrial agreements, and others remaining unchanged.
- "Lifecycle refurbishment" components and "insurance" components of these "quarterly service payments", as identified in the tables in the "gross service payment components" schedule to the Project Deed, with the "insurance" components being determined as described in section 3.4.2.1 below, and as indexed in both cases in line with the CPI.
- "Incremental monthly payments" for each operational stage of each hospital, applying only while construction works for subsequent stages of the relevant hospital are still underway and then, following the completion of Stage 3 at the Prison Hospital and Stage 4 at the Forensic Hospital, until the end of the relevant "decanting" period (section 3.2.16), as specified for each stage of each hospital in the tables in the "gross service payment components" schedule to the Project Deed and as adjusted by applying other indexation formulae in this schedule and taking account of the number of days in the month for which the stage is operational.
- "Insurance" components of the first of these "incremental monthly payments" for each hospital, as specified in the "gross service payment components" schedule to the Project Deed.
- For the Forensic Hospital only, a "volume adjustment" for the month, depending on the numbers of different categories of patient meals delivered as part of the Project Company's Forensic Hospital catering services and the numbers of different categories of linen service "units" provided as part of its Forensic Hospital linen services. This adjustment is to be calculated using prices specified in the "gross service payment components" schedule and formulae specified in the "service payment calculation" schedule.
- A quarterly gas and electricity "energy payment" for each hospital, similarly calculated using prices specified in the "gross service payment components" schedule and

formulae specified in the "service payment calculation" schedule.

- For the Forensic Hospital only, an "additional payment" for:
  - Groceries and "theme" meals (at Christmas, Easter, etc), provided as part of the Project Company's Forensic Hospital catering services, and escort services requested by the State Parties and provided as part of the Project Company's Forensic Hospital security services, again calculated using prices specified in the "gross service payment components" schedule and formulae specified in the "service payment calculation" schedule, and
  - Any costs incurred by the Project Company as a result of a backdating of changes to an award or industrial agreement governing any "Justice Health employees" (section 3.3.4) in accordance with a Department of Health *Information Bulletin*.

The "monthly service payment" to be made to the Project Company by the HAC for the **Forensic Hospital services** is then calculated, in accordance with a formula in the "service payment calculation" schedule, by:

- Adding:
  - The month's share of the relevant quarter's "quarterly service payment" for the Forensic Hospital, *not* counting its "lifecycle refurbishment" and "insurance" components, as calculated by dividing the number of days in the month (or, where relevant, the shorter payment period) by the number of days in the quarter
  - The month's "incremental monthly payments" for the Forensic Hospital, if any, with a reduction of 10% for the post-Stage 4 "decanting" period if it falls during the month
  - The month's "volume adjustment", if any, and
  - The relevant quarter's "energy payment" for the Forensic Hospital, if and only if the month is the third calendar month of the quarter
- Reducing this sum to reflect any "**quality failures**" in the Project Company's Forensic Hospital services for the month, as described below
- Adding to the resultant amount:
  - The month's "additional payment", if any
  - The "lifecycle refurbishment" component of the relevant quarter's "quarterly service payment" for the Forensic Hospital, if and only if the month is the third calendar month of the quarter
  - The "insurance" component of the relevant quarter's "quarterly service payment" for the Forensic

Hospital, if and only if the month is the first calendar month of the quarter, and

- The “insurance” component of the first “incremental monthly payment” for the Forensic Hospital, if and only if this first payment is to be made during the month in question, and
- Subtracting, from the resultant amount, deductions, described below, for:
  - Any “**unit failures**” at the Forensic Hospital for the month, as defined in the *Services Specification*
  - Any multiple repetitions of “unit failures” at the Forensic Hospital within the last three months (“**repeated failures**”), and
  - Any failures to accurately report earlier Forensic Hospital “quality failures” or “unit failures” (“**reporting failures**”).

Similarly, the “monthly service payment” to be made to the Project Company by the Minister for Justice for the **Prison Hospital services** is to be calculated, in accordance with another formula in the “service payment calculation” schedule, by:

- Adding:
  - The month’s share of the relevant quarter’s “quarterly service payment” for the Prison Hospital, *not* counting its “lifecycle refurbishment” and “insurance” components, as calculated by dividing the number of days in the month (or, where relevant, the shorter payment period) by the number of days in the quarter
  - The month’s “incremental monthly payments” for the Prison Hospital, if any, with a reduction of 10% for the post-Stage 3 “decanting” period if it falls during the month, and
  - The relevant quarter’s “energy payment” for the Prison Hospital, if and only if the month is the third calendar month of the quarter
- Reducing this sum to reflect any “quality failures” in the Project Company’s Prison Hospital services for the month, as described below
- Adding to the resultant amount:
  - The “lifecycle refurbishment” component of the relevant quarter’s “quarterly service payment” for the Prison Hospital, if and only if the month is the third calendar month of the quarter
  - The “insurance” component of the relevant quarter’s “quarterly service payment” for the Prison Hospital, if and only if the month is the first calendar month of the quarter, and
  - The “insurance” component of the first “incremental monthly payment” for the Prison Hospital, if

and only if this first payment is to be made during the month in question, and

- Subtracting, from the resultant amount, deductions, described below, for:
  - Any “unit failures” at the Prison Hospital for the month, as defined in the *Services Specification*
  - Any “repeated failures” at the Prison Hospital, and
  - Any “reporting failures” at the Prison Hospital.

“**Quality failures**” are failures to comply with quality-related “key performance indicators” (“KPIs”) specified in the *Services Specification* for most of the building maintenance and refurbishment services, selected grounds and gardens maintenance services, selected utility services, selected pest control services, all security services, most of the cleaning services, all non-clinical waste management services, all linen services and all “general” services, *other than* failures that are the direct and intended consequence of planned maintenance or refurbishment in accordance with the relevant *Policy and Procedures Manual*, failures contemplated by and resulting from a variation requested by the State Parties or deemed to have been requested by them (see sections 3.2.14 and 3.3.9) and failures arising from an instruction by the State Parties’ Project Director not to provide specified services or not to comply with a KPI.

The reduction in payments resulting from any quality failures is to be calculated in accordance with scores specified for each relevant KPI in the *Services Specification* and formulae specified in the “service payment calculation” schedule.

If an event causes a failure to meet the same “quality failure” KPI in both of the hospitals, it will be deemed to have occurred on both sites and will reduce the payments to be made by both of the State Parties.

If a “quality failure” is not rectified within a time specified for the relevant KPI in the *Services Specification*, a further “quality failure” deduction will be incurred at the end of this period.

The reductions in payments are to be lessened for any “quality failures” in the Forensic Hospital’s catering, cleaning or linen services during the first four weeks of operations at the Forensic Hospital—i.e. immediately following the Stage 2 (Justice Health Operations Building and Pharmacy Building) “commencement date”—through the application of progressively less generous “bedding-in factors” that are specified in the “service payment calculation” schedule. There are no equivalent “bedding in” allowances for “quality failures” in any of the other services at either hospital.

“**Unit failures**” are failures to comply with any of the other “key performance indicators” specified in the *Services Specification* for the building maintenance and refurbishment services, grounds and gardens maintenance services, utility services, pest control services, all security services and cleaning

services, again *other than* failures that are the direct and intended consequence of planned maintenance or refurbishment in accordance with the relevant *Policy and Procedures Manual*, failures contemplated by and resulting from a variation requested by the State Parties or deemed to have been requested by them (see sections 3.2.14 and 3.3.9) and failures arising from an instruction by the State Parties' Project Director not to provide specified services or not to comply with a KPI.

For each hospital the reduction in the "monthly service payment" payments resulting from unit failures is to be the sum of "unit failure deductions" for each "functional unit" (room or space) that has been subjected to a failure during the month in question, calculated using:

- Weightings set out in tables in a "functional area table" schedule to the Project Deed, and
- Formulae for applying these weightings, specified in the "service payment calculation" schedule to the Project Deed.

The weightings and the formulae are designed to produce the greatest deductions for the most serious failures. They take account of:

- The general "functional area" within which the failure occurred, with the percentage weightings for failures in these areas being set out in the "functional area table" schedule
- More specifically, the room or space within this area within which the failure occurred, again with the percentage weightings for failures in these units being set out in the "functional area table" schedule
- The "level" or seriousness of the effects of the failure, within ranges specified for each KPI and as defined for each of five levels (A to E) in the *Services Specification*, with the percentage weightings for the different failure levels being specified in the "service payment calculation" schedule, and
- A time weighting, to be applied if there is a failure to respond to or rectify the failure within timeframes which:
  - Are specified in the *Services Specification*, for different "levels" of failures applying to different types of services, but
  - Are also subject to arrangements for extensions and/or temporary fixes, as set out in the "service payment calculation" schedule.

The reductions in payments for "unit failures" are also subject to the "bedding-in factors" described above for the Forensic Hospital's catering, cleaning or linen services, ameliorating the deductions for "unit failures" during the first four weeks after the Stage 2 "commencement date". There are no equivalent "bedding in" allowances for "unit failures" in any of the other services at either hospital.

The minimum deduction for any "unit failure" at either hospital is \$100, indexed to the CPI from the June quarter of 2005.

The weightings, response times and rectification times referred to above may be jointly reviewed at any time at the request of the State Parties or the Project Company, but not more than once in each financial year, and any agreed changes will take effect at the start of the next financial year. If the parties cannot agree on an adjustment, the arrangements must remain unchanged.

"**Repeated failure**" deductions from the State Parties' monthly payments to the Project Company will be applied, in accordance with formulae in the "service payment calculation" schedule, if the same unit failure, a substantially similar unit failure or a unit failure with the same underlying cause occurs on more than six occasions in any two months within any three consecutive months, even if all of these failures are responded to and rectified within the specified timeframes.

"**Reporting failure**" deductions will be applied if there has been a failure to report a "quality failure" or "unit failure" that would otherwise have led to a deduction in a previous month, unless the reporting failure was rectified before the relevant State Party made its payment. Again, the deductions to be applied are specified in the "service payment calculation" schedule.

It is possible, at least in theory, for the application of all of the deductions described above to reduce the total of the performance-based monthly payments by the two State Parties to the Project Company to zero, but not to less than zero. If the deductions for one of the hospitals exceed the payment that would otherwise have to be made for this hospital (before taking account of its "energy payment", if any, or, in the case of the Forensic Hospital, its "volume adjustment" or "additional payment", if any), the excess will be deducted from the payment for the other hospital.

Under procedural requirements in the Project Deed for implementing these payment arrangements,

- The bases for the payment adjustments and deductions, if any, must be presented in a monthly *Performance and Payment Report* which the Project Company must submit to the State Parties' Project Director before the eighth day of each operating month
- The Project Company must submit invoices in a form specified in the Project Deed, and
- The State Parties must pay the Project Company within 20 business days of receiving the *Performance and Payment Report* and their invoices, unless an invoice shows a net amount is owed to the HAC or the Minister for Justice (as a result of the combined effects of the adjustments and deductions), in which case the Project Com-

pany must pay the relevant State Party within 20 business days unless the State Parties' Project Director permits it to carry the amount over to the following month, offsetting the State Party's future liabilities.

The State Parties may retain or set off any amounts payable to either of them by the Project Company, other than their "construction payments" (section 3.2.19), any "securitised variation payments" (section 3.3.2.4) and any payments under the Interest Adjustment Agreement (section 4), but the Project Company may not retain or set off any amounts payable to it by a State Party. Any late payments will attract daily interest at 3% pa above the BBSY bank bill rate.

If the State Parties' Project Director disputes any amount set out in a monthly invoice, the relevant State Party may withhold its payment of the disputed amount while the issue is resolved under the dispute resolution procedures described in section 3.4.8, but it will be liable to pay the Project Company daily interest (at 3% pa above the BBSY bank bill rate) if it is determined that the Project Company was entitled to the disputed amount. Conversely, if it is determined that the Project Company has been overpaid, it must pay interest at this rate on the overpaid amount, on top of its repayment to the relevant State Party.

#### **3.3.7.2 Fortnightly payments by the Project Company to the HAC**

The Project Company must make fortnightly payments to the HAC, from the Stage 2 "commencement date" (section 3.2.15.2), to cover the salary, fringe benefits, workers compensation and related costs, to Justice Health, of employing the "Justice Health employees" who will be managed and supervised by the Project Company under the Labour Services Agreement (section 3.3.4).

The costs to be reimbursed are specified in a formula in the "gross service payment components" schedule to the Project Deed.

Initial estimates of these costs for the "Justice Health employees" to be managed and supervised by the Project Company, based on estimates of the numbers of these employees required to provide different services, are also set out in the Project Deed. These estimates must be adjusted to reflect actual "Justice Health employee" employment costs every six months.

The HAC must submit its invoices for these payments, on behalf of Justice Health, at least ten business days before the end of each fortnightly period following the Stage 2 "commencement date" and the payments must be made by the end of the same fortnight. The Project Company may not retain or set off any amounts payable to it by a State Party. Any late payments will attract daily interest at 3% pa above the BBSY bank bill rate.

If the Project Company disputes any amount set out in a fortnightly invoice, it may withhold its payment of this amount while the issue is resolved under the dispute resolution procedures described in section 3.4.8, but it will be liable to pay the HAC interest (at 3% pa above the BBSY bank bill rate) if it is determined that the HAC was entitled to the disputed amount.

If the HAC is overpaid because of an error in a fortnightly "Justice Health employee costs" invoice caused by the provision of incorrect information by the Project Company, the Project Company must recover the overpayment from the relevant "Justice Health employee(s)" and meet any costs associated with doing so.

If the HAC is overpaid because of an error in a fortnightly "Justice Health employee costs" invoice caused by the HAC or Justice Health, the HAC must repay the excess, plus interest at 3% pa above the BBSY bank bill rate, to the Project Company.

#### **3.3.8 Benchmarking and market testing of services**

The Project Company may conduct a "benchmarking" exercise, to determine the relative quality and competitiveness of its security, cleaning, catering, linen, non-clinical waste management and pest control services, and its "general" services related to these services (section 3.3.1.2), during any or all of the years preceding 19 July 2014, 19 July 2019, 19 July 2024 and 19 July 2029. The Project Company *must* do so if directed by the State Parties' Project Director at least 20 business days before any of these dates.

Any such "benchmarking" exercise must be conducted in good faith and in accordance with procedures specified in the Project Deed and a schedule to the Project Deed and agreed between the State Parties and the Project Company, with each party bearing its own costs.

Under these procedures the differences (if any) between the Project Company's costs for each of the benchmarked services and the costs of "reputable organisations possessing an appropriate degrees of skill resources, reputation and financial standing" in the provision of equivalent services in hospitals are to be agreed between the Project Director and the Project Company. If they cannot agree, the Project Director may require the relevant services to be subjected to competitive market testing, as described below. If he or she does not take this course, either party may refer the matter for determination under the dispute resolution procedures summarised in section 3.4.8.

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



Timeframes and procedures for any market testing—including “grouping” of the services to be tendered, the identification and selection of tenderers and the awarding of contract(s) to the tenderer(s) identified by the Project Company as providing the best value for money—are set out in the same schedule to the Project Deed. The successful tenderer(s) will replace the Project Company’s previous subcontractor(s) or sub-subcontractor(s) in providing the relevant services.

If a benchmarking exercise (or any subsequent market testing exercise) shows the Project Company’s costs for any of the particular services in question have been more than 5% above or below the market costs of providing the same services, there must be adjustments to the State Parties’ “monthly service payments” to the Project Company (section 3.3.7.1) to reflect this difference, using procedures set out in the “benchmarking” schedule to the Project Deed, and the private sector parties’ “base case” financial model for the project must also be amended, so as to preserve the original “base case” equity return.

If the difference between the Project Company’s costs and the market costs is 5% or less, no adjustments will be made.

The Project Deed also sets out arrangements for additional “benchmarking” of any part of the Project Company’s Forensic Hospital linen services that is subcontracted by the Services Operator or any other operational subcontractor to a third party sub-subcontractor, within 60 days of the first anniversary of the project’s “full service commencement date” (section 3.2.15.3). At least three competitive tenders must be sought. If the current sub-subcontractor submits or matches the lowest compliant tender price, its services may be retained, but if it does not the tenderer submitting the lowest compliant tender price must be appointed in its place. There must also be adjustments to the State Parties’ “monthly service payments” to the Project Company (section 3.3.7.1) to reflect the revised price and any revisions to the laundry volumes handled by the sub-subcontractor, using procedures set out in the Project Deed.

### **3.3.9 Changes to the services**

If a State Party or the Project Company wishes to make any change to the hospitals’ facilities, the *Services Specification*, the services to be provided by the Project Company (other than the rescheduling of services by the State Parties’ Project Director or his or her nominee as described in section 3.3.1.3) or a *Policy and Procedures Manual* (other than under the procedures described in section 3.3.1.3 and 3.3.5.1), it may do so only in accordance with the Project Deed’s formal “change procedure”, set out in a schedule to the Project Deed, which has already been discussed in section 3.2.14.

As indicated in section 3.2.14, the only exceptions to the requirement to use the “change procedure”, other than those referred to above, are “minor changes”, directed by the State Parties’ Project Director, with an estimated cost effect—as determined in accordance with a schedule to the Project Deed, and in aggregate in the case of changes which in substance amount to a single variation—of \$3,000 or less, indexed to the CPI from the June quarter of 2005. In these cases, the Project Company will not be entitled to any other relief from its obligations concerning the changed matters, and will be entitled to be compensated only for the amounts it actually incurs in relation to the change.

If a variation *prior to* the “full service commencement date” (section 3.2.15.3) results in an increase or reduction in the “monthly service payments” the State Parties must make to the Project Company (section 3.3.7.1), or if a variation *after* the “full service commencement date” results in an increase in these “monthly service payments”, the project’s “securitised lease” arrangements must be adjusted as described in sections 3.3.2.3 and 3.3.2.4.

If additional capital works, beyond the current project’s works, need to be carried out during the operations phase of the relevant hospital facility or facilities, the State Parties may propose a variation to cover this “additional work”. If the State Parties’ Project Director and the Project Company cannot agree on the terms of this variation, the State Parties may undertake the “additional work” themselves or appoint another contractor to carry out the work, in which case:

- The Project Company must not hinder or delay the State Parties and this contractor from undertaking the work
- The State Parties may request the Project Company to enter into a coordination and interface agreement with the contractor concerning part or all of the design, construction, commissioning, completion, handing over and facilities management of the “additional work”, and
- The Project Company must comply with all reasonable requests of this nature.

### **3.3.10 Special arrangements for the last four years of operations**

Approximately four years before the termination of the Project Deed on 19 July 2034 or any other date set for the conclusion of the operations phase of the project under the arrangements applying if construction of the hospitals and associated facilities is completed early (see sections 3.2.7.1 and 3.3.1.1), and again approximately one year before this date, the State Parties’ Project Director may procure an audit of the hospitals and their sites to:

- Assess whether the hospitals and the hospital sites, and in particular the buildings, plant and equipment with a

life cycle of 15 years or more, have been and are being maintained as required under the Project Deed, and

- Determine the amount of money that will need to be spent during the remaining period to 19 July 2034 or any other date set for the conclusion of the operations phase of the project—beyond any components of the State Parties “monthly service payments” (section 3.3.7.1) that are to be paid for scheduled maintenance or life-cycle replacements—in order to:
  - Ensure the hospitals and hospital sites will be in the condition they should be in if the Project Company complies with its obligations under the Project Deed, the *Technical Specification* and the *Services Specification*
  - More particularly, ensure that during the six years starting on 19 July 2034 or any other date set for the conclusion of the operations phase of the project there will be no life cycle failure or expiry of any part of the hospitals’ buildings, plant or equipment with a normal life cycle of 15 years or more, and
  - Rectify any breaches of the Project Company’s obligations.

The State Parties’ Project Director must give the Project Company at least ten business days’ notice of the date on which he or she wishes such a “termination audit” to be conducted. He or she must consider any reasonable request by them for the audit to be carried out on a different date in order to avoid material prejudice to their ability to provide their services, provided this request is made at least five business days before the originally notified date.

The independent auditor is to be appointed by agreement between the State Parties and the Project Company or, if they cannot agree within two business days of a nomination by the State Parties, the President of the Australian Institute of Quantity Surveyors. The State Parties must meet half of the audit’s costs and the Project Company must pay for the balance.

The Project Company must provide reasonable assistance, free of charge, to any person carrying out the audit, and the Project Director must promptly give it a copy of the audit report when he or she receives it.

Within 20 days of receiving the audit report the Project Company must give the Project Director an unconditional bank guarantee, in favour of the State Parties and satisfactory to them, from an Australian bank with specified minimum credit ratings, expiring no earlier than 19 July 2034 or any other date set for the conclusion of the operations phase of the project and with a face value of no less than the amount of money the auditor reports as being necessary for the purposes described above.

If the Project Company is unable to obtain such a bank guarantee, the State Parties may establish a “retention fund” by deducting, from their “monthly service payments” to the Project Company, 120% of the total amount assessed as being required, divided by the number of months remaining until 19 July 2034 or any other date set for the conclusion of the operations phase of the project.

If the termination audit reveals rectification work is required, the State Parties’ Project Director must notify the Project Company of the required work, specifying a reasonable period within which it must be completed, and the Project Company must carry out this work within the specified period, at its own cost.

If the Project Company complies with these obligations and a retention fund has been established,

- The monthly deductions to be paid into the retention fund in the future will be reduced to reflect a reduction in the total amount of money required, as originally estimated by the termination audit, by an amount equal to the auditor’s estimates of the costs of the relevant rectification work
- The Project Company will have its costs reimbursed from the fund or, if the fund is insufficient at the time, from amounts subsequently placed into the fund as a result of subsequent deductions from the Project Company’s “monthly service payments”
- If there is still insufficient money in the fund to fully reimburse the Project Company on 19 July 2034 or any other date set for the conclusion of the operations phase of the project under the arrangements applying if construction of the hospitals and associated facilities is completed early (see sections 3.2.7.1 and 3.3.1.1), the Project Company will bear the balance of the costs itself, and
- Any money remaining in the fund on 19 July 2034 or any other date set for the conclusion of the operations phase of the project (or, if it is later, the date by which all the works were to be completed) must be paid to the Project Company as soon as practicable.

If the Project Company fails to carry out the necessary rectification and/or maintenance work with appropriate professional care, in accordance with good industry practice and within the notified timeframe, or is not diligently pursuing these works, the State Parties may carry out the works themselves or procure others to do so. The Project Company will then be liable to pay the costs incurred as a debt to the State Parties, which may deduct or set off this amount against any amount payable to the Project Company—including the retention fund if there is one, but excluding any “securitised variation payments” (section 3.3.2.4) and any payments under the Interest Adjustment Agreement (section 4)—or take

enforcement action, including action under the bank guarantee, if the debt is not paid.

### **3.3.11 Transition to the State Parties or another contractor**

During the three months ending on 19 July 2034 or any other date set for the conclusion of the operations phase of the project under the arrangements applying if construction of the hospitals and associated facilities is completed early (see sections 3.2.7.1 and 3.3.1.1), or during the period after any notice by the State Parties that they are terminating the Project Deed under “voluntary” termination arrangements described in section 3.5.2 or terminating the Project Deed for a breach by the Project Company under arrangements described in section 3.5.4, and then for the following 12 months, the Project Company must fully cooperate with the transfer of any or all of its services to the State Parties or any new contractor providing the same or similar services.

Among other things, it must:

- Transfer all its title to and interests and rights in the project, the works, the hospitals’ facilities and the hospitals’ sites to the State Parties or the new contractor, free of any encumbrances
- Liaise with the State Parties’ Project Director and/or the new contractor and provide reasonable assistance and advice concerning the services and their transfer
- Give the new contractor access to the hospitals’ facilities and sites at reasonable times and on reasonable notice, provided this does not interfere with its services
- Give the Project Director and/or the new contractor all the information about the works, the facilities, the sites and the services needed for an efficient transfer, and
- More generally, facilitate a smooth transfer of responsibility for the services and take no action at any time, before or after the expiry or early termination of the Project Deed, to prejudice or frustrate the transfer.

The Project Company must also ensure, by no later than 19 July 2034 or any other date set for the conclusion of the operations phase of the project, or by no later than any earlier termination of the Project Deed, that all documents and computer records which contain information on the hospitals’ patients or State employees, agents, contractors, subcontractors and consultants at the hospitals, and which are in its own possession, custody or control or the possession, custody or control of any of its subcontractors or sub-subcontractors, are delivered to the State Parties’ Project Director.

## **3.4 Miscellaneous general provisions of the Project Deed and the State Parties’ other project contracts**

### **3.4.1 Liabilities for taxes, rates, charges and stamp duty**

As between the State Parties and the Project Company, the State Parties will be liable for all rates, land taxes and other charges levied by reference to the hospitals or their sites, other than headworks costs and other contributions levied by reference to the Project Company’s works or services. This includes rates etc on the sites’ access areas.

The State Parties will also be liable to pay:

- Water supply charges for each stage of the project from the stage’s “commencement date” (section 3.2.15.2), and
- All NSW stamp duty on the Project Deed, the Leases, the Subleases, the Construction Licences, the other Licences, the Securitisation Agreement, the Master Rental Agreement, the Interest Adjustment Agreement and security interests granted to secure the Project Company’s obligations to Ancora under the Ancora Loan Agreement and Ancora’s obligations to other project debt financiers under the Syndicated Facility Agreement and other financing agreements, but not any stamp duty on the other project contracts or any fines or penalties for late lodgment etc.

The Project Company will be liable to pay:

- All utility service charges, other than water supply charges, for each stage of the project from its “commencement date” (although the Project Company will be reimbursed for the hospitals’ electricity and gas charges through quarterly “energy payments” as part of the “monthly service payments” by the Minister for Justice and the HAC, as described in section 3.3.7.1), and
- All other taxes, levies and charges, other than GST (for which there are separate arrangements) and income tax, in connection with the negotiation, preparation, execution, stamping and registration of the Project Deed and the other “project documents” (section 2.2), the transactions contemplated in these contracts and any amendments to or consents, approvals, waivers, releases or discharges of or under the contracts.

### **3.4.2 Insurance and loss or damage**

#### **3.4.2.1 Insurance**

The Project Company must take out and maintain the following insurance policies, as specified in an “insurances” schedule to the Project Deed:

- Contracts works all risks insurance for the full reinstatement value of each stage of the construction works, from the start of the stage's works until the end of its defects liability period (section 3.2.17)
- Advance consequential loss insurance covering any loss of anticipated gross profit and increased costs arising from any construction delays, for an amount not less than the full project financing and claim preparation costs arising from a delay, from the start of each stage's works until the project's "full service commencement date" (section 3.2.15.3)
- Asbestos removalists liability insurance for any intended asbestos removal work, and any other insurance a responsible corporation would take out to cover unintentional disruption of asbestos or other potentially harmful substances, for the period while asbestos removal works are in progress
- Public and products liability insurance for at least \$100 million per occurrence until the Stage 1 "commencement date" (section 3.2.15.2) and at least \$200 million per occurrence, or a higher amount directed by the State Parties' Project Director under arrangements described below, after that date, throughout the rest of the project
- Compulsory third party motor vehicle insurance, throughout the project
- Third party property damage plant and vehicle insurance for at least \$20 million per occurrence until the Stage 1 "commencement date" and then at least \$20 million per occurrence, or a higher amount directed by the State Parties' Project Director, after that date, throughout the rest of the project
- Workers' compensation insurance, including coverage for common law claims of at least \$50 million per event, or a higher amount directed by the State Parties' Project Director, throughout the project
- Professional indemnity insurance, covering the Construction Contractor and its employees, subcontractors, consultants and agents, for at least \$20 million per claim and \$40 million in total, until seven years after the "full service commencement date"
- All risks property insurance, for the full reinstatement value of the completed works and all of the Project Company's plant and equipment, and also for lost revenue and increased costs of working during a business interruption period of 26 weeks, until one year after the "full service commencement date", and
- Industrial special risks insurance, for the full reinstatement value of the hospitals and their facilities and all of the Project Company's plant and equipment, and also for lost revenue and increased costs of working during a business interruption period of 26 weeks, from the Stage 1

"commencement date" and then throughout the rest of the project.

The terms of these insurance policies must comply with requirements set out in the "insurances" schedule to the Project Deed, including requirements for their coverage of the State Parties.

The Project Company must use its best endeavours to ensure the Construction Contractor, the Facilities Management Operator, the Services Operator, its other subcontractors and its agents and consultants maintain insurance policies on the same terms, as appropriate for the nature of their work or services.

The Project Company's operations-phase insurance policies must be obtained using procedures permitting the State Parties' Project Director to review competitive proposals and premium quotations, as set out in the Project Deed, and the resultant premiums will be used to determine the "insurance components" of the "quarterly service payments" that are specified in the "gross service payment components" schedule to the Project Deed and taken into account in calculating the State Parties' "monthly service payments" to the Project Company (section 3.3.7.1). Disputes arising during these procedures must be referred for independent expert determination under the dispute resolution procedures summarised in section 3.4.8.

The premiums for the Project Company's operations-phase insurance policies, other than its workers' compensation policies, will then be subject to competitive "benchmarking" during three-month periods leading up to every third anniversary of the "full service commencement date", under analogous procedures set out in the Project Deed, and if the premiums have changed in real terms the "insurance components" of the "quarterly service payments" must be adjusted accordingly, disregarding any increase in the premiums attributable to negligence, fraud, wilful misconduct or any breach of any "project document" (section 2.2) by the Project Company, the Facilities Management Operator, the Services Operator or any other subcontractor of the Project Company.

The State Parties' Project Director may increase the required insurance cover for the workers' compensation insurance and/or the operations-phase public and products liability insurance and/or plant and vehicle third party property damage insurance if he or she obtains an opinion from a reputable broker that this is necessary under contemporary prudent insurance practices, but may not do so more than once every three years.

#### 3.4.2.2 Loss or damage

The Project Company generally bears the risks of loss or damage to its construction works, existing structures in or on which these works are carried out and the completed hospi-



tals, and has undertaken to provide related indemnities, on demand, against loss, damage or injury claims or liabilities incurred by the State Parties, the Department of Health, Justice Health, the Department of Corrective Services and their officers, employees and agents, subject to a number of exceptions, as already described in section 3.1.5.

In particular, the Project Company will not be entitled to compensation, under the “compensation event” arrangements described in section 3.4.11, for any loss or damage to any part of the hospitals’ facilities or sites by a State Party, or the Project Director or any other persons administering or managing the project for the State Parties, or the Department of Health, Justice Health or the Department of Corrective Services, or any employees, agents or contractors of the Minister for Justice, the HAC, the Department of Health, Justice Health or the Department of Corrective Services (other than “Justice Health employees” who are being managed and supervised by the Project Company (section 3.3.4)), or any hospital patients or any persons visiting the hospitals at the invitation of Justice Health or the Department of Corrective Services.

However, if there is *malicious* damage to a hospital facility or site during the operations phase for the facility,

- The Project Company must meet the first \$10,000 per year of any reasonable replacement and reinstatement costs not covered by insurance under the requirements described in section 3.4.2.1, including any relevant insurance deductibles (indexed to the CPI from the June quarter of 2005)
- The Project Company must meet 10% of the portion (if any) of any reasonable replacement and reinstatement costs not covered by insurance under the requirements described in section 3.4.2.1, including any insurance deductibles, that falls between \$10,000 and \$100,000 per year (indexed to the CPI from the June quarter of 2005), and the State Parties must pay it the other 90% on demand
- The State Parties must meet all of the portion (if any) of any reasonable replacement and reinstatement costs not covered by insurance under the requirements described in section 3.4.2.1, including any insurance deductibles, that exceeds \$100,000 per year (indexed to the CPI from the June quarter of 2005), and
- If the malicious damage is caused by a State Party or any of the State-related parties listed above and in section 3.1.5, including hospital patients and inmates, and did not result from a failure by the Project Company to provide its services, the Project Company will not be liable to indemnify the State Parties etc against any resultant claims, losses or liabilities under the indemnity arrangements described in section 3.1.5.

As indicated in sections 3.2.9.2 and 3.3.6, the Project Company must promptly inform the State Parties’ Project Director about any material defects or damage to the works, the sites or the hospitals’ facilities for which the cost of repairs is more than \$3,000 (indexed to the CPI from the June quarter of 2005), the actions it is taking to correct the damage or defect and the estimated time the correction will require, and must give copies of any such notices to the debt financiers’ Security Trustee within five business days.

The Project Company must promptly repair any loss or damage to any part of the works or the hospitals’ facilities so that, to the greatest possible extent, it can continue to comply with its obligations under the project’s contracts. In doing so, it must minimise any impacts on the works, the hospitals’ facilities, sites or “hospital functions” or other State-provided or State-procured custodial, correctional, security, containment or related services at the Long Bay Correctional Centre, and it must keep the State Parties’ Project Director informed of its progress.

All insurance proceeds received for loss or damage to any part of the project’s works, the hospitals’ facilities or the hospitals’ sites must be applied by the Project Company to repair, reinstate and/or replace the relevant works or the affected parts of the hospitals’ facilities or sites. The project debt financiers’ Security Trustee has promised the State Parties that, notwithstanding any other provisions in the project’s financing agreements, any insurance proceeds placed into an insurance account as required under these agreements will be released only for these purposes, and no action will be taken to prevent the release of these amounts.

If an event causing loss or damage to the works or any of the hospitals’ facilities is causing or is likely to cause a delay in the completion of a construction “milestone” or stage of the works by its “target completion date” (section 3.2.7.1) or is adversely affecting the ability of the Project Company to perform its obligations under the Project Deed, the Project Company may be entitled to seek relief from its contractual obligations under the “relief event” arrangements described in section 3.4.10. In more extreme circumstances, the *force majeure* provisions described in section 3.4.12 may apply.

#### 3.4.2.3 Uninsurable risks

Notwithstanding the insurance requirements described above, the Project Company is not required to insure against risks which are, or become, “uninsurable” risks, in the sense that:

- The insurance otherwise required under the Project Deed is not available, in the recognised international insurance market, for that risk, or
- The insurance premium for the risk would be so high or the terms and conditions so onerous that the risk is generally not being insured against, in the recognised international insurance market, by prudent, competent

and experienced providers of services similar to those of the Project Company.

If a risk that would otherwise have to be covered by an insurance policy becomes uninsurable, the Project Company must notify the State Parties' Project Director within five business days.

If the State Parties and the Project Company agree that the risk is uninsurable and that the "uninsurability" has not been caused by the Project Company, its related corporations, any subcontractors or sub-subcontractors of the Project Company, any of these organisations' officers, employees or agents, any invitees of the Project Company, its subcontractors or sub-subcontractors or any "Justice Health employees" who are being managed and supervised by the Project Company under the Labour Services Agreement (section 3.3.4), or if these are the conclusions of dispute resolution procedures as summarised in section 3.4.8, the State Parties and the Project Company must meet to discuss how the risk should be managed, including possible self-insurance.

Provided these requirements are satisfied, if an uninsurable risk that would otherwise have to be insured under an operations-phase public and products liability insurance policy, plant and vehicle third party property damage insurance policy, compulsory third party motor vehicle insurance policy or industrial special risks insurance policy then eventuates, but the State Parties and the Project Company cannot agree on how to manage it,

- The Project Deed will continue
- The quarterly "insurance components" of the State Parties' "monthly service payments" to the Project Company (section 3.3.7.1) must be adjusted to deduct amounts equal to the premiums payable for the risk immediately before it became uninsurable, and
- The State Parties' Project Director must, at his or her option, either:
  - Pay the Project Company an amount equal to the insurance proceeds it would have received had the insurance continued to be available, in which case the Project Company must apply this payment to repair, reinstate and/or replace the affected works or parts of the hospitals' facilities or sites, *or*
  - If only part(s) of the hospitals' facilities or sites are affected, request a "facility removal" contract variation, under the "change procedures" discussed in sections 3.2.14 and 3.3.9, under which the affected facility/facilities or site(s) would cease to be subject to the Project Deed, *or*
  - If all of the hospitals' facilities and sites are affected, terminate the Project Deed and pay the Project Company an amount specified in a "termi-

nation payments" schedule to the Project Deed and described in section 3.5.1.

If the State Parties' Project Director requests a "facility removal" contract variation, he or she may not decide not to proceed with the variation. The Project Company's compensation under this variation must be calculated as a percentage of the compensation that would be payable for a full termination of the Project Deed for an uninsurable risk (see section 3.5.1.2) and must be paid as a lump sum, and the Minister for Justice (on behalf of the Minister for Lands) and the HAC must also make "securitisation refund payments" to Ancora within 90 days of the variation, again calculated as a percentage of the compensation that would be payable for a full termination of the Project Deed for an uninsurable risk under arrangements described in section 3.5.1.2.

In addition, the *Services Specification*, the Project Company's *Proposals*, the rents payable under the Master Rental Agreement (sections 3.3.2.3 and 3.3.2.4), the State Parties' "monthly service payments" to the Project Company (section 3.3.7.1) and the "functional area tables" used to calculate "unit failure" deductions from these payments (section 3.3.7.1) must be similarly amended to reflect the excision of the relevant facility or facilities from the project.

### **3.4.3 Financial reporting and audits**

The Project Deed sets out requirements for the Project Company to:

- Maintain accounts and other financial and financial planning records and have them audited annually
- Ensure the Construction Contractor, Facilities Management Operator, Services Operator and any replacement subcontractors do likewise
- Make its financial records available to the State Parties' Project Director for inspection, on five business days' notice, as described in section 3.3.5.3
- Submit annual business plans and budgets to the Project Director, by no later than the preceding 1 April, for each financial year during the operations phase of each stage of the hospitals' facilities, both for itself and for the Facilities Management Operator, Services Operator and any replacement operations-phase subcontractors
- Provide unaudited financial statements to the State Parties' Project Director every six months
- Provide annual audited financial statements to the Project Director, for itself, for the Construction Contractor and any replacement construction subcontractors during the construction phases of the project's stages and for the Facilities Management Operator, the Services Operator and any replacement operational subcontractors during the stages' subsequent operations phases, and

- Promptly give the Project Director copies of all the documents, reports, plans, materials, certificates and notices it provides to the project’s financiers.

The State Parties’ Project Director may arrange an independent financial audit of the Project Company’s annual financial statements and other financial information, giving it notice of this audit at any time until 19 January 2035 or a date six months after any earlier termination of the Project Deed.

If the Project Director takes this action, the auditor will be appointed by the Project Director and the audit will be carried out at the State Parties’ cost. If the audit uncovers inaccuracies or incompleteness in the accounts or records, the Project Company must fix these deficiencies, appropriate adjustments must be made to the State Parties’ “monthly service payments” (section 3.3.7.1) if the deficiencies have affected past payments, and the Project Company must reimburse the State Parties for the costs of the audit.

### **3.4.4 Substitutions and restrictions on changes of ownership or control, assignments, encumbrances and refinancing**

#### **3.4.4.1 Changes in entities, ownership or control**

If any authority, institution, association or body referred to in the Project Deed is reconstituted, renamed or replaced, or its powers or functions are transferred to another organisation, the Project Deed will be taken to refer to that new organisation. Similarly, if the authority etc ceases to exist, the Project Deed will be taken to refer to the organisation which serves the same purpose or objects.

The Project Company has promised the State Parties that there will be no changes in:

- The legal or beneficial ownership of the Project Company and the entities that own it, as described in section 2.1.2 (the “Project Company group”), other than changes in the ownership of shares, units or other equity interests listed on a prescribed financial market or transfers of equity interests between related corporations, or
- The ownership structure described in section 2.1.2 without the prior written consent of the State Parties’ Project Director.

If an entity ultimately controlling any member of the Project Company group is listed on a prescribed financial market, and there is a change in the control of the Project Company or any other member of the Project Company group as a result of a change in the ownership of this listed entity, the Project Company must promptly notify the State Parties’ Project Director, providing full details and any other information reasonably needed by the State Parties for them to decide whether to consent to the change.

The State Parties will then have ten business days to notify their acceptance or rejection of the change in control. If they reject the change, the Project Company must, within 90 days, procure an end to the equity holdings, voting power or other control that produced the change in control, without causing any further change in control other than a reversal or a change approved in advance by the State Parties.

Similarly, if there is a change in the control of the Facilities Management Operator, the Services Operator, any replacement subcontractor or any other provider of the Project Company’s security and essential building services, for any reason, the Project Company must promptly notify the State Parties’ Project Director, providing full details and any other information reasonably needed by the State Parties for them to decide whether to consent to the change.

If the State Parties reject the change—which they may do in their absolute discretion—the Project Company must, at its own cost and within 60 days, terminate the relevant subcontract and appoint a replacement subcontractor to carry out the same services, in accordance with the subcontracting arrangements described in section 3.3.3.2 and tendering procedures set out in a schedule to the Project Deed.

If the Independent Certifier Deed is terminated, under arrangements set out in that deed, or if an incumbent Independent Certifier ceases to act in this role, the State Parties’ Project Director and the Project Company must, unless they agree otherwise, appoint a replacement by no later than ten business days after the termination or cessation. If they cannot agree on the identity of the replacement, they must appoint a nominee of the President of the Royal Australian Institute of Architects.

#### **3.4.4.2 Transfers and encumbrances**

The State Parties and the Project Company may not deal separately with their interests under the Project Deed, the Leases or the Subleases, and any dealings with their interests under these documents must occur at the same time, on substantially the same terms and with the same parties.

The State Parties must not grant any security interest or encumbrance over or otherwise dispose of any or all of their rights, obligations or interests under the “project documents” (section 2.2) without the Project Company’s prior written consent, except in the case of a transfer of their interests under the contracts to any governmental body, agency or department constituting the State of NSW or guaranteed by the State.

Similarly, the Project Company must not grant any security interest or encumbrance over or otherwise dispose of any or all of its rights, obligations or interests under the “project documents” without the State’s prior written con-

sent, except in the case of the granting of security interests in accordance with the project's financing agreements.

The Security Trustee and its representatives may not assign or dispose of any property that is subject to the project financiers' securities except in accordance with the Financiers Tripartite Deed.

More specifically, the Security Trustee has agreed in the Financiers Tripartite Deed that:

- It will not transfer or dispose of any of its rights or obligations under the project's financing agreements, including the Financiers Tripartite Agreement, unless the transferee is:
  - Acceptable to the State Parties, *or*
  - A related corporation of the Security Trustee that is a qualified and authorised security trustee carrying on a business similar to that of the Security Trustee, *and* has entered into a tripartite deed with the State Parties on substantially the same terms as the Financiers Tripartite Deed
- It will not permit any of the project's financiers to transfer or dispose of any of their rights or obligations under the project's financing agreements unless the transferee is a bank or financial institution in an OECD country with specified minimum credit ratings or is otherwise acceptable to the State Parties, and
- It will not declare a trust over or otherwise create an interest in their rights under the Financiers Tripartite Deed without the State Parties' consent.

In addition,

- There are restrictions, under the Project Deed, on the assignment or replacement of the Construction Contract, the FM Agreement, the Services Agreement or any other "material" subcontract and sub-subcontract if there is likely to be an effect on the State Parties' rights or the ability of the Project Company to meet its Project Deed obligations, as already described in sections 3.2.8.2 and 3.3.3.2
- The Construction Contractor, the Facilities Management Operator and the Services Operator have promised, in the Construction Contractor Collateral Warranty Deed, the FM Operator Collateral Warranty Deed and the Services Operator Collateral Warranty Deed, that they will not transfer or otherwise deal with these deeds without the State Parties' consent, and
- The Construction Contractor, the Construction Contractor Guarantor, the Facilities Management Operator, the FM Operator Guarantor, the Services Operator and the Services Operator Guarantor have promised, in the Construction Side Deed, the FM Operator Side Deed and the Services Operator Side Deed, that they will not dispose of their rights under these deeds or declare a trust over or

otherwise create an interest in these rights without the State Parties' consent.

#### 3.4.4.3 Refinancing

The project's financing agreements may be materially amended or waived by the Project Company only in accordance with these agreements and only with the consent of the State Parties' Project Director.

The Project Director's consent is also required before the Project Company may enter into any new financing agreements other than debt obligations incurred in the ordinary course of business.

More specifically, the Project Company may not refinance the project without the Project Director's consent, except through adjustments to margins under the project's financing agreements following any change in the rating of the project or its debts or through other any other action already contemplated in the financing agreements and the private sector participants' "base case" financial model as it was on 19 July 2006, if this would:

- Produce a financial gain for the project's equity investors, after deducting the direct costs of the refinancing to the State Parties and the Project Company and making other adjustments specified in the Project Deed, or
- Increase or change the profile of the State Parties' liabilities under the Project Deed or any other "project document" (section 2.2).

If such a refinancing is proposed, the Project Company must submit a "refinancing report" to the State Parties' Project Director, explaining the proposal and its impacts on the State Parties' actual and contingent liabilities under the "project documents" and providing detailed financial information as specified in the Project Deed, including a calculation of the total expected refinancing gain, expressed in net present value terms.

If the proposed refinancing is in response to a finance default by the Project Company under the Ancora Loan Agreement or a finance default by Ancora under the Syndicated Facility Agreement, and does not increase the project's financing facilities by more than \$3 million in aggregate over the full term of the project, the State Parties must accept or reject the proposal within ten business days of receiving this report. In other situations there is no explicit deadline for the State Parties to accept or reject a refinancing proposal, beyond their general obligation to act reasonably (section 3.1.2).

If the State Parties consent to a proposed refinancing, they will be entitled to receive 50% of the estimated refinancing gain. They may elect to take this as lump sum payments when the refinancing occurs, or through reductions in their "monthly service payments" to the Project Company under



the arrangements described in section 3.3.7.1, or through a combination of both of these approaches.

The Project Company must ensure that the benefits of any reduction in Ancora's debt service obligations as a result of a refinancing are passed through to the Project Company (see section 4).

### **3.4.5 Amendments to and waivers of the State Parties' project contracts**

The terms of the Project Deed may be amended only by a document signed by or on behalf of the State Parties, the Minister for Lands and the Project Company. Analogous provisions are included in most of the other project contracts to which the State Parties and/or the Minister for Lands are parties, and the State Parties have also agreed, in the Financiers Tripartite Deed, that they will not materially amend the Project Deed or any of the other "project documents" (section 2.2) in ways that might affect the interests of the project's financiers without the Security Trustee's consent, which may not be unreasonably withheld or delayed.

Any non-exercise of or delay in exercising a power or right under the Project Deed or most of the other contracts will not operate as a waiver, and a full or partial waiver or consent by any of the parties will be effective only if it is given or confirmed in writing.

The Project Deed reinforces these general principles with several specific denials of waivers that might otherwise be suggested by State Party actions or inaction, some of which have already been cited.

The Project Deed makes it clear that the State Parties' Project Director and his or her representatives have no authority to orally waive any of the obligations of the Project Company or release it from these obligations, and that any waiver or release by the State Parties must be expressly identified as such, in writing, and signed personally by the Project Director and not by any of his or her delegates.

There are also restrictions, under the Project Deed, on amendments to and waivers of rights under the Construction Contract, the FM Agreement, the Services Agreement, any other "material subcontract" or the Co-ordination Agreement, as already described in sections 3.2.8.2 and 3.3.3.2.

### **3.4.6 Confidentiality**

The Project Deed, the Construction Side Deed, the Independent Certifier Deed, the FM Operator Side Deed, the Services Operator Side Deed, the Financiers Tripartite Deed and the Securitisation Agreement all contain confidentiality restrictions applying to specified contents of the project's contracts.

These confidentiality restrictions are, however, subject to a series of exemptions, including:

- The tabling of the major project contracts in State Parliament
- Disclosures required by law
- Disclosures of documents which the Project Company, acting reasonably, has agreed do not contain any information about the project's financing facilities, the Project Company's cost structures or profit margins, the project's detailed designs, *Works Programs, Policy and Procedures Manuals* or other proprietary material created by or for the Project Company, or any other commercially sensitive information that provides a substantial competitive advantage or unique characteristic to the Project Company, its shareholders, its financiers or its subcontractors
- Disclosures by the State Parties' Project Director to any State Government department or agency
- Disclosures to prospective investors and financiers, and
- Disclosures to the NSW Auditor-General in accordance with the Public Finance and Audit Act (NSW).

### **3.4.7 Changes in law**

The Project Deed's definition of "change in law" encompasses:

- Legislation (including subordinate legislation and legally enforceable guidelines) that was not reasonably foreseeable on 23 January 2006
- Court decisions that change binding precedents
- New or amended rules, guidelines, regulations, policies, standards, procedures and requirements, by the Commonwealth or NSW Governments, the NSW Department of Health, Justice Health or the Department of Corrective Services, that were not reasonably foreseeable on 23 January 2006, and
- New or amended industrial awards or industrial agreements that were not reasonably foreseeable on 23 January 2006 and apply to "Justice Health employees" who are being managed and supervised by the Project Company (section 3.3.4).

The Project Company is not generally entitled to any compensation, extension of time or other relief from its obligations under the Project Deed as a result of any such "change in law".

However,

- The State Parties must use all reasonable endeavours to give the Project Company access to any relief, implementation arrangements or programs that are extended to Justice Health, for Justice Health-operated hospitals in general, in response to a "change in law"

- If the “change in law” is a new or amended policy, rule, guideline, standard, procedure or requirement of the Commonwealth Government, the NSW Government, the Department of Health, Justice Health or the Department of Corrective Services that was not reasonably foreseeable on 23 January 2006, the State Parties’ Project Director may issue a written notice to the Project Company directing it not to comply with the “change in law”
- If a “change in law” of this type or any amendment or repeal of section 51AD or Division 16D of the Income Tax Assessment Act (Cth) results in cost savings for the project, the “monthly service payments” by the State Parties to the Project Company (section 3.3.7.1) must be adjusted to reflect this saving, with all of the savings flowing to the State Parties
- If a “change in law” is a “**discriminatory change in law**”—applying to this project but not to other similar projects procured by the State, applying to the Project Company but not to others, applying to any or all of this project’s construction sites, access areas, works or hospital facilities but not to other similarly situated land, works or facilities, or applying to privately financed projects in NSW but not to other projects—the Project Company may be entitled to apply for relief from its obligations, and/or claim compensation, under the “compensation event” arrangements described in section 3.4.11, and
- The Project Company may also be entitled to apply for relief from its obligations and/or claim compensation under these “compensation event” arrangements if the “change in law” is a “**qualifying change in law**”, meaning any “change in law”, other than a change in tax law, that requires the Project Company to incur:
  - Capital expenditure at any of the hospitals’ facilities during the facility’s operations phase, or
  - Additional operating expenditure at any of the hospitals’ facilities during its operations phase, other than cost increases affecting businesses generally.

Although compensation may be payable by the State Parties under the “compensation event” arrangements following a “discriminatory change in law” or a “qualifying change in law”, the State Parties can be liable for (at most) only a portion of the Project Company’s net increase in costs, as specified in the “estimated cost effect” schedule to the Project Deed (see sections 3.2.14, 3.3.9 and 3.4.11).

### **3.4.8 Dispute resolution**

The Project Deed sets out detailed procedures which may (and in specified circumstances must) be followed for the resolution of disputes between the State Parties and the Project Company, other than disputes concerning the Independent Certifier Deed, which must be settled under

different dispute resolution procedures set out in the Independent Certifier Deed.

The Project Deed’s dispute resolution procedures essentially involve three sequential stages, with the procedures starting in most cases at the first stage. In some situations, however, the Project Deed stipulates that a dispute may or must be resolved through procedures starting at the second stage, so in these situations the first stage may or must be bypassed, and in three situations the Project Deed stipulates that a dispute may or must be resolved through independent expert determination, one of the options for the third stage, so in these situations the first two stages may or must be bypassed.

The “normal” sequence of stages is:

- (1) Any dispute between the State Parties and the Project Company, other than the exceptions described above, may be referred by any of these parties for resolution by the Project Co-ordination Group, whose other roles are described in section 3.1.2, simply by giving the other parties a notice to this effect, providing reasonable details about the nature of the dispute.

The Project Co-ordination Group may resolve disputes only through unanimous decisions.

- (2) If the Project Co-ordination Group fails to resolve a dispute referred to it within five business days, the dispute may be referred by the State Parties or the Project Company for determination by the chief executive officers of the HAC and the Project Company (or their delegates).

These persons must then meet to resolve the dispute. If they do resolve the dispute, they must issue their joint decision in writing and it will be contractually binding on the parties.

- (3) If the chief executive officers or their delegates do not resolve a dispute within five business days of its referral to them, or if they do not meet within this period, the Project Co-ordination Group must, within the next two business days, refer the dispute to independent expert determination or arbitration, under arrangements set out in the Project Deed, or to some other dispute resolution procedure.

If the chief executive officers or their delegates have not met, or if they cannot agree about which of the three options for “stage 3” dispute resolution should be adopted by the Project Co-ordination Group and/or which expert or arbitrator to appoint, they may ask the President of The Institute of Arbitrators and Mediators Australia to choose the dispute resolution method and nominate a panel of three experts or three arbitrators (as appropriate) from which the State Parties’ Project Director may select the expert or arbitrator to be

appointed. If the Project Director fails to make this selection within three business days of the nomination of the panel, the Project Company may make the selection.

The processes for independent expert determinations and arbitrations are set out in the Project Deed. Arbitrations must be conducted in accordance with the Commercial Arbitration Act (NSW).

Any determination by an independent expert will be binding on all the parties unless the dispute is referred to arbitration or litigation within ten business days of the decision. Any award by an arbitrator will be final and binding on the parties.

The State Parties and the Project Company must continue to perform their obligations under the Project Deed, notwithstanding the dispute, throughout all these dispute resolution processes.

If a “formal” dispute or difference arises under the Construction Contract, the FM Agreement, the Services Agreement or any other subcontract or sub-subcontract, the Project Company must immediately inform the State Parties’ Project Director of the dispute and its effects, if any, on the operation of the Project Deed. If the State Parties consent, the Project Company and the relevant subcontractor or sub-subcontractor may use the dispute resolution procedures set out in the Project Deed, provided the subcontractor or sub-subcontractor agrees to be bound by the results.

Under the Independent Certifier Deed’s dispute resolution procedures—which that deed states must be exhausted before a dispute may be litigated—if a dispute arises any of the parties may refer it for resolution by the relevant chief executive officers by giving the other parties a notice to this effect, providing reasonable details about the matters in dispute. The chief executive officers or their delegates must then meet and use reasonable endeavours, acting in good faith, to resolve the dispute within seven business days or any later date agreed to by the parties. If they do resolve the dispute, they must issue their joint decision in writing and it will be contractually binding on the parties. The Independent Certifier must continue to perform its obligations while the dispute is being resolved.

### **3.4.9 Emergencies**

As already indicated in section 3.3.6, throughout the “operations” phase of each stage of the project the Project Company must immediately inform the State Parties’ Project Director about any “emergency”, meaning any situation which, in the Project Director’s opinion,

- Constitutes a prison riot or commotion, an act of terrorism or a similar incident necessitating increased security arrangements, a “lockdown” or similar measures

- Constitutes a failure by the Project Company to deliver its security-related services
- Seriously threatens, has caused or will cause material damage or disruption to any person’s health and safety, the environment, property or the safe and secure operation of the hospitals, or
- Will require the provision of materially greater services, if this “emergency”:
  - Causes the Project Company to suspend or stop performing any of its services, or
  - Might impede the hospitals’ “hospital functions” or other State-provided or State-procured custodial, correctional, security, containment and related services at the Long Bay Correctional Complex,advising the Project Director of the action the Project Company has taken or proposes to take to respond to, overcome or minimise the effects of the “emergency”.

If an emergency of this nature occurs, the Project Director may instruct the Project Company to:

- Immediately suspend its services
- Perform any of its services for which it is not fulfilling its obligations, and/or
- Procure additional or alternative services, as and when required by the Project Director,

to deal with the emergency and ensure normal operation of the relevant hospital facilities and site(s) resumes as soon as reasonably practicable.

The Project Company must give the financiers’ Security Trustee a copy of any such direction.

If the emergency was caused, directly or indirectly, by any negligence, wilful misconduct or contractual breach by the Project Company, a related corporation, a subcontractor or sub-subcontractor of the Project Company, any of these organisations’ officers, employees or agents, any invitees of the Project Company, its subcontractors or sub-subcontractors or any “Justice Health employees” who are being managed and supervised by the Project Company (section 3.3.4), the Project Company must bear the costs of any additional or alternative services it is directed to provide.

Otherwise, however, the State Parties must pay for any additional third party costs incurred by the Project Company or its subcontractors and sub-subcontractors in providing any additional or alternative services as directed.

If the State Parties’ Project Director:

- Reasonably believes action must be taken to respond to an emergency as described above, but the Project Company has either failed to promptly remedy a breach of its obligations that caused the emergency or is unable or unwilling to provide additional or alternative services as directed, or

- Reasonably believes that the Project Company must suspend its services and/or that the State Parties must “step in” in order to deal with a prison riot or commotion, an act of terrorism, a similar incident necessitating increased security arrangements, a “lockdown” or similar measures or a failure by the Project Company to deliver its security-related services, or in order to a discharge a legislative, public or constitutional duty,

he or she may exercise specific emergency State Parties’ “step in” rights that are set out in a schedule to the Project Deed.

These rights are in addition to the State Parties’ general “step in” powers described in sections 3.5.3.1 and 3.5.3.3 to 3.5.3.5 and any “step in” rights that might be able to be exercised by the debt financier’s Security Trustee in the circumstances, under arrangements described in sections 3.5.3.5 and 3.5.3.6.

If the State Parties’ Project Director decides to exercise the State Parties’ emergency “step in” rights, he or she must notify the Project Company of the action the State Parties wish to take, the reasons for and likely timeframes of this action and, if practicable, the effects of the proposed action on the Project Company and its obligations to provide its services. The Project Company must give the Security Trustee a copy of this notice.

The State Parties may then take the notified action and any additional, consequential action they reasonably believe to be necessary, and the Project Company must provide all reasonable assistance.

If the action taken by the State Parties prevents the Project Company from providing any part of its services, the Project Company will be relieved of these particular obligations during the period they cannot be performed. If the State Parties’ action is being taken because of a breach of the Project Deed by the Project Company, the costs incurred by the State Parties in taking the action and any savings made by the Project Company through its not providing the affected services will be deducted from the “monthly service payments” to the Project Company by the State Parties (section 3.3.7.1). On the other hand, if the State Parties’ action was not necessitated by a Project Company breach the Project Company may be entitled to compensation and/or relief from its Project Deed obligations under the “compensation event” arrangements described in section 3.4.11.

During their emergency “step in” the State Parties may also “step in” to assume the rights of the Project Company under the Construction Contract, the FM Agreement and/or the Services Agreement, and if they do so they may also procure the novation of these subcontract(s) and their associated parent company guarantee(s) (the Construction Contractor Guarantee, the FM Operator Guarantee and the

Services Operator Guarantee) from the Project Company to a substitute contractor, as described in sections 3.5.3.3 and 3.5.3.4 below. These rights of the State Parties under the side deeds will be suspended, however, if the Security Trustee exercises its own “step in” rights under Financiers Tripartite Deed arrangements described in section 3.5.3.5 or section 3.5.3.6.

The State Parties must reasonably endeavour to complete their emergency “step in” action promptly, except in the case of an action that is being taken because of a breach of the Project Deed by the Project Company. The State Parties’ Project Director must give the Project Company reasonable notice of the completion or cessation of the “step in” action, the Project Company must give copies of this notice to the Security Trustee, and the State Parties must complete or end their “step in” action in accordance with the notice, after which the Project Company must immediately resume any services it had been prevented from carrying out.

#### 3.4.10 ‘Relief events’

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

- Fire, explosion, storm, lightning, flood, ionising radiation, earthquake, war, armed conflict, terrorism, riot, civil commotion or protest
- Nuclear, chemical or biological contamination or infectious disease outbreak which substantially frustrates the Project Company’s performance of any of its obligations under the Project Deed, or makes it impossible for the Project Company to perform any of its obligations
- Failure by any government, council, government department, statutory authority, court or tribunal or any electricity, gas, communications, water, sewerage, drainage or other utility service provider to carry out works or provide services
- Shortage of power, fuel or transport
- Event causing loss or damage to the works or a hospital facility (see section 3.4.2.2)
- Supersonic shock waves
- Blockade or embargo
- Official or unofficial strike, lockout, “go slow” or other industrial dispute affecting the construction industry, the facilities management industry or significant sectors of these industries in general, but not any industrial action affecting only one or more of the project’s sites, access areas, stages or hospital facilities and not any industrial action constituting a “compensation event” (see section 3.4.11 below), or



- Event beyond the control of the State Parties or the Project Company which prevents possession of or access to one or more of the project's sites

other than any such event directly or indirectly caused by any action or inaction by:

- The Project Company, a related corporation, a subcontractor or sub-subcontractor of the Project Company, any of these organisations' officers, employees or agents, any invitees of the Project Company, its subcontractors or sub-subcontractors or any "Justice Health employees" who are being managed and supervised by the Project Company (section 3.3.4), or
- Multiplex Constructions under the Fuel Tanks Remediation Agreement (section 3.2.4).

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

- Causes or is likely to cause a delay in the completion of any "milestone" or stage of the Project Company's works by the relevant "target completion date", as specified in a schedule to the Project Deed (section 3.2.7.1) or as extended under the arrangements described in sections 3.2.14, 3.4.10 (see below) and/or 3.4.11 and/or as brought forward under the arrangements described in section 3.2.7.1, or
- Affects the ability of the Project Company to perform any of its obligations under the Project Deed,

the Project Company may apply for relief from its Project Deed obligations, in accordance with rights, obligations and procedures set out in a "relief event" schedule to the Project Deed.

Any claim for relief in these circumstances must be lodged by the Project Company as soon as practicable and by no later than ten business days after it first becomes aware of the "relief event" and its effects. Full details must then be provided to the State Parties' Project Director within five business days of this claim, or every two months if the "relief event" has continued and then within five business days of the end of the "relief event".

Provided these notification requirements are met, the Project Director must grant reasonable extensions to the relevant "target completion dates" (section 3.2.7.1) and provide other reasonable relief under the Project Deed, but only to the extent that would be required if the Project Company were taking reasonable steps to mitigate the effects of the "relief event", even if it is not doing so.

The Project Company will not be entitled to any compensation for increased costs or lost revenue, and the State Parties' rights to make performance-based deductions from their "monthly service payments" to the Project Company will not be affected. However, if the Project Company is excused from performing an obligation following a "relief event" other than a shortage of power, fuel or transport, and

its non-performance of this obligation causes a "unit failure" (section 3.3.7.1), the deduction for this failure must be reduced in ways specified in the "service payment calculation" schedule to the Project Deed and the failure will not count towards "repeated failures". Similarly, if a "quality failure" (section 3.3.7.1) is caused by a "relief event" of any type, or by its effects, the associated deductions must be reduced in ways specified in the "service payment calculation" schedule.

If the Project Company is more than five business days late in notifying the Project Director of the "relief event" or providing full details, it will not be entitled to any relief for the period of the delay.

If the Project Company becomes aware of any new information about the "relief event", it must notify the Project Director and the relief granted must be amended accordingly.

If the parties disagree about whether a "relief event" has occurred, whether there is an entitlement to relief or the extent of the relief required, either of them may refer the matter for resolution under the dispute resolution procedures summarised in section 3.4.8.

If a "relief event" or its effects continue or can reasonably be expected to continue for a continuous period of more than 180 days, directly causing the State Parties, the Minister for Lands or the Project Company to be unable to comply with their obligations under the Project Deed, the *force majeure* provisions described in section 3.4.12 will apply.

### **3.4.11 'Compensation events'**

"Compensation events" are defined in the Project Deed as any:

- State Party breach of the Project Deed which substantially frustrates the Project Company's performance of its obligations under the Project Deed or makes it impossible for the Project Company to perform these obligations
- Modification, withdrawal, revocation or replacement of the *Master Plan* for the Long Bay Correctional Complex, for reasons other than any action or inaction by the Project Company, any related corporation, any subcontractor or sub-subcontractor of the Project Company or any of these organisations' officers, employees, agents or invitees (including any application for a new or amended development approval or any other consent)
- Failure by the State Parties' Project Director and the Project Company to agree on appropriate amendments to a draft detailed design by the Project Company, in response to comments by the Project Director on the draft's compliance with the Project Deed (see section 3.2.3.1), followed by a final and binding determination

by an independent expert under the dispute resolution procedures described in section 3.4.8 that the original draft detailed design *did* comply with the Project Deed

- Native title claim that causes the Project Company to suspend the performance of its obligations under the Project Deed (see section 3.2.12)
- Discovery of a heritage artefact that causes the Project Company to suspend the performance of its obligations under the Project Deed for more than two weeks (see sections 3.2.5 and 3.2.13)
- Environmental law direction or order issued by a court, tribunal or relevant government authority, or any other requirement under the Project Deed or any other law, requiring the Project Company, the HAC, the Minister for Justice, the Construction Contractor, the Facilities Management Operator, the Services Operator or any other Project Company subcontractor or sub-subcontractor to remediate any contamination that:
  - Was not within the scope of contamination on the Prison Hospital site to be remedied by Multiplex Constructions under the Fuel Tanks Remediation Agreement (section 3.2.4), *and*
  - Has not been caused or contributed to, directly or indirectly, by any action or inaction by Multiplex Constructions in connection with its works under the Fuel Tanks Remediation Agreement, *and*
  - *Either:*
    - (a) was not expressly identified in the *Environmental Site Assessment* report prepared by Coffey Geosciences in August 2005, *or* was not foreshadowed in this report on the basis of testing (as distinct from assessments of probabilities based on the location and past and current uses of the site in question), *or* was beyond the scope of the Coffey report, *and either* (b) has not been disturbed by the Project Company's works or services, and would not be disturbed by the Project Company's works or services were it not for the remediation requirement, *or* (c) is in one or more "berms" (fill stockpiles) identified in the Coffey report, is disturbed only by Project Company works that are in accordance with good industry practice, and has to be remediated off-site in order to comply with the remediation requirement, *or*
    - (d) originates in the Long Bay Correctional Complex, and not in the hospitals' facilities or their sites, *and* (e) is not caused or contributed to, directly or indirectly, by the Project Company, any related corporations, any subcontractors or sub-subcontractors of the Project Company, any

of these organisations' officers, employees or agents, any invitees of the Project Company, its subcontractors or sub-subcontractors or any "Justice Health employees" who are being managed and supervised by the Project Company (section 3.3.4)

- State Party breach of the Fuel Tanks Remediation Agreement (section 3.2.4) which substantially frustrates the Project Company's performance of its obligations under the Project Deed or makes it impossible for the Project Company to perform these obligations (the completion of Multiplex Constructions' works under the Fuel Tanks Remediation Agreement prior to the Project Deed's becoming effective on 10 November 2006, and the fact that neither of the State Parties has ever been a party to that agreement, mean this provision has no practical effect)
- Additional capital works on a site or a hospital facility, beyond the current project's works, by anyone other than the Project Company, but excluding Multiplex Constructions' fuel tanks removal and site remediation works on the Prison Hospital site under the Fuel Tanks Remediation Agreement
- Direction by the State Parties' Project Director to the Project Company to reschedule any of the works in any of its *Works Programs* on the basis, as described at the end of section 3.2.7.2, that:
  - This is expressly permitted in the *Technical Specification*
  - He or she believes, in his or her discretion, that the works might or would disrupt the hospitals' "hospital functions" or other State-provided or State-procured custodial, correctional, security, containment or related services at the Long Bay Correctional Complex
  - A prison riot or commotion, an act of terrorism or a similar incident has necessitated increased security arrangements, a "lockdown" or similar measures, *or*
  - The Project Company has failed to deliver its security-related services,but excluding any additional delay, cost or liability effects of the rescheduling caused by any failure by the Project Company to comply with the *Partnering Protocol* (section 3.2.6)
- Failure by the State Parties and/or Justice Health to make available any item that the State Parties have specified is to be provided by the State Parties and/or Justice Health (section 3.2.6), *unless* this failure is caused, directly or indirectly, by any action or inaction by the Project Company, any related corporations, any subcontractors or

sub-subcontractors of the Project Company, any of these organisations' officers, employees or agents, any invitees of the Project Company, its subcontractors or sub-subcontractors or any "Justice Health employees" who are being managed and supervised by the Project Company (section 3.3.4)

- Delay to, interference with or inability to provide the Project Company's "decanting" services (section 3.2.16) because items of existing equipment nominated by the Project Company or other items specified by the State Parties as items to be provided by the State Parties and/or Justice Health are not made available, or because of a delay to or rescheduling of the State Parties' own "decanting" processes, again *unless* these circumstances are caused, directly or indirectly, by any action or inaction by the Project Company, its related corporations, the Construction Contractor, the Operators, the Project Company's other subcontractors and sub-subcontractors, any of their officers, employees, agents or invitees or any "Justice Health employees" who are being managed and supervised by the Project Company (section 3.3.4)
- "Discriminatory change in law" (section 3.4.7)
- "Qualifying change in law" (section 3.4.7)
- Official or unofficial strike, lockout, "go slow" or other dispute by "Justice Health employees" (section 3.3.4) as a result of matters wholly unrelated to the performance of the Project Company's services or the management of the "Justice Health employees" by the Project Company or any of its subcontractors or sub-subcontractors
- Official or unofficial strike, lockout, "go slow" or other dispute by Department of Health, Justice Health or Department of Corrective Services employees *other than* "Justice Health employees" who are being managed and supervised by the Project Company (section 3.3.4), *unless* the dispute is caused, directly or indirectly, by any action or inaction by the Project Company, its related corporations, the Construction Contractor, the Operators, the Project Company's other subcontractors and sub-subcontractors, any of their officers, employees, agents or invitees or any "Justice Health employees", or
- Exercise by the State Parties of their emergency "step in" rights, as described in section 3.4.9, *unless* the State Parties' action is being taken because of a Project Company breach of the Project Deed or any of the other "project documents" (section 2.2).

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

- Causes or is likely to cause a delay in the completion of any "milestone" or stage of the Project Company's works by the relevant "target completion date", as specified in a schedule to the Project Deed (section 3.2.7.1) *or* as extended under the arrangements described in sections

3.2.14, 3.4.10 and/or 3.4.11 (see below) *and/or* as brought forward under the arrangements described in section 3.2.7.1

- Affects the ability of the Project Company to perform any of its obligations under the Project Deed, or
- Causes the Project Company to incur additional costs or lose revenue associated with the project,

the Project Company may apply for relief from its obligations under the Project Deed, and/or claim compensation, in accordance with rights, obligations and procedures set out in a "compensation event" schedule to the Project Deed.

Any claim for relief and/or compensation in these circumstances must be lodged by the Project Company as soon as practicable and by no later than 15 business days after it first became aware of the "compensation event" and its effects.

Full details, including the steps taken to mitigate, prevent or eliminate the effects of the "compensation event", must then be provided to the State Parties' Project Director within ten business days of this claim or, if the "compensation event" is continuing and is not a "discriminatory change in law" or a "qualifying change in law", every two months until the end of the "compensation event" and its effects and then (in a final notice) within ten business days of the end of the event and its effects. The Project Director may request any further information he or she needs to assess the claim.

Provided these notification requirements are met, the Project Director must grant reasonable extensions to the relevant "target completion dates" (section 3.2.7.1), provide other reasonable relief from the Project Company's obligations under the Project Deed and pay the Project Company compensation as calculated in accordance with the "estimated cost effect" schedule to the Project Deed, but only to the extent that would be required if the Project Company were taking reasonable steps to mitigate the effects of the "compensation event", even if it is not doing so.

If the "compensation event" is a direction by the State Parties' Project Director to the Project Company to reschedule its works in a *Works Program*, as described in section 3.2.7.2, the Project Company will not be entitled to any relief or compensation for any additional delay, cost or liability effects of the rescheduling caused by any failure by the Project Company to comply with the *Partnering Protocol* (section 3.2.6).

If the Project Company is more than five business days late in notifying the Project Director of the "compensation event" or providing full details, it will not be entitled to any relief or compensation for the period of the delay.

If the Project Company becomes aware of any new information about the "compensation event" and its effects, it must notify the Project Director and the relief granted must be amended accordingly.



If the parties disagree about whether a “compensation event” has occurred, whether there is an entitlement to relief, the extent of any delay incurred, the extent to which the Project Company has been prevented from performing its other obligations under the Project Deed, the impact on costs or revenue or the extent of the relief and compensation sought, either of them may refer the matter for resolution under the dispute resolution procedures summarised in section 3.4.8.

### **3.4.12 Force majeure**

#### **3.4.12.1 General force majeure provisions**

A “relief event” (section 3.4.10) will become a “*force majeure event*”, as defined in the Project Deed, if it or its effects continue or can reasonably be expected to continue for a continuous period of more than 180 days, directly causing any of the parties to the Project Deed to be unable to comply with a material part or all of its obligations under the Project Deed.

If a “*force majeure event*” occurs, the affected party or parties must notify the other parties as soon as practicable, including details of the event, its effects and any actions proposed to mitigate the effects.

If the Project Company is the affected party, it must also provide evidence that the event has occurred, that it is unable to comply with its obligations, that the effects of the event could not reasonably have been mitigated or recovered from by acting in accordance with good industry practice but without incurring material expenditure, and that it is using its best endeavours to perform its obligations under the Project Deed.

The parties must then consult with each other, in good faith and as soon as practicable, and attempt to agree on appropriate terms to mitigate the effects of the “*force majeure event*” and facilitate continued performance of the Project Deed.

Following any “*force majeure event*” the State Parties, the Minister for Lands and the Project Company must at all times use reasonable endeavours to prevent and mitigate the effects of any delay and the Project Company must do everything required under good industry practice to overcome or minimise the effects of the event.

If the Project Company is unable to perform its obligations and has given the State Parties’ Project Director the evidence described above, the State Parties may grant it “appropriate” relief, taking account of the likely effects of delays.

If there is a dispute about whether a “*force majeure event*” has occurred or the relief to which the Project Company is entitled, the matter must be referred for resolution under the dispute resolution procedures described in section 3.4.8.

During any “*force majeure event*” none of the parties may bring any claim or terminate the Project Deed for a breach of the obligations rendered impossible by the event, and the affected party or parties will not incur any liabilities to the other parties for any losses or damage they suffer as a result of the inability of the affected party or parties to perform the affected obligations.

The Project Company must continue to meet its other obligations, expressly including its operations-phase service, rectification, reinstatement and replacement obligations, unless the “*force majeure event*” prevents it from doing so, and the State Parties will continue to be entitled to make performance-based deductions from their “monthly service payments” to the Project Company under the arrangements described in section 3.3.7.1. However, the deductions for any “unit failures” and “repeated failures” directly arising from the fact that an obligation is rendered impossible by the “*force majeure event*” and any “quality failures” caused by the “*force majeure event*” must be reduced in ways specified in the “service payment calculation” schedule to the Project Deed.

The Project Company must notify the State Parties’ Project Director if it becomes aware of any new information about a “*force majeure event*” or anything demonstrating any previously submitted information is materially inaccurate or misleading, and the relief previously granted by the Project Director must be amended accordingly.

If a “*force majeure event*” ends or no longer prevents the affected party or parties from performing their obligations under the Project Deed, they must notify the other parties as soon as practicable and from that point the Project Deed must continue to be performed on the same terms as immediately before the “*force majeure event*”.

#### **3.4.12.2 Force majeure ‘facility removal’ contract variations**

If a “*force majeure event*” prevents the Project Company from carrying out its Project Deed obligations at only one or some of the sites or hospital facilities, but not at all of them, and this continues to be the case 210 or more days after the occurrence of the “relief event” that has become a “*force majeure event*”, either party may propose a “facility removal” contract variation, under the “change procedures” discussed in sections 3.2.14 and 3.3.9, under which the affected site(s) and/or facility or facilities would cease to be subject to the Project Deed.

If such a variation is requested by the Project Company it will be deemed to be a request by the State Parties, entitling the Project Company to compensation and relief from its obligations, as already indicated in sections 3.2.14 and 3.3.9. Unlike most other variation proposals, however, the State Parties’ Project Director may not decide not to proceed with the variation. The Project Company’s compensation must be calculated as a percentage of the compensation that would



be payable for a full termination of the Project Deed for *force majeure* (sections 3.4.12.3 and 3.5.1.2) and must be paid as a lump sum, and the Minister for Justice (on behalf of the Minister for Lands) and the HAC must also make “securitisation refund payments” to Ancora within 90 days of the variation, again calculated as a percentage of the compensation that would be payable for a full termination of the Project Deed for *force majeure* (see sections 3.5.1.2).

In addition, the *Services Specification*, the Project Company’s *Proposals*, the rents payable under the Master Rental Agreement (sections 3.3.2.3 and 3.3.2.4), the State Parties’ “monthly service payments” to the Project Company (section 3.3.7.1) and the “functional area tables” used to calculate “unit failure” deductions from these payments (section 3.3.7.1) must be similarly amended to reflect the excision of the relevant facility or facilities from the project.

### 3.4.12.3 Notices of termination or continuation following a force majeure event

If the State Parties, the Minister for Lands and the Project Company cannot agree on how to mitigate the effects of a “*force majeure* event” and facilitate continued performance of the Project Deed within 180 days of the start of the relevant “relief event”, and the event and/or its effects are still continuing and have prevented the affected party or parties from complying with the Project Deed for more than 180 days, any of the parties to the Project Deed may give the others 20 business days’ notice that it intends to terminate the Project Deed for *force majeure*.

The Project Company must give the Security Trustee a copy of any such notice within five business days.

If the notice of termination is issued by the Project Company, the State Parties’ Project Director must either:

- Accept the notice, in which case the arrangements described in section 3.5.1 will apply, or
- Issue a notice in response, within ten business days, specifying that the whole of the Project Deed must continue.

If he or she chooses the latter course,

- The Project Company must give the Security Trustee a copy of the notice
- The State Parties’ “monthly service payments” to the Project Company (section 3.3.7.1) must be calculated, from the day after the date on which the Project Deed would have terminated had the Project Director accepted the notice of termination, as if the Project Company were satisfying all of its obligations under the Project Deed and the *Services Specification*, with the only permitted reductions in these payments being for any costs the Project Company does not incur, and

- The Project Deed will otherwise continue to apply unless the State Parties decide to terminate it, giving the Project Company at least 30 business days’ notice. If they do so, the Project Company must give a copy of the notice to the Security Trustee and the arrangements described in section 3.5.1 will apply.

## 3.5 Defaults and termination of the Project Deed

The following sections of this *Summary of Contracts* describe the main provisions of the Project Deed, the Financiers Tripartite Deed and the project’s other “side deeds” for:

- Termination of the project’s contracts for the occurrence of an uninsurable risk affecting all the sites or hospital facilities (section 3.4.2.3) or for *force majeure* (section 3.4.12.3)
- “Voluntary” termination of the project’s contracts by the State Parties
- The handling of breaches of the contracts, and
- Termination of the project’s contracts for various types of serious defaults.

### 3.5.1 Termination for an uninsurable risk or force majeure

#### 3.5.1.1 General termination arrangements

If the State Parties’ Project Director terminates the Project Deed following the occurrence of an uninsurable risk that would otherwise have to be insured under an operations-phase public and products liability insurance policy, plant and vehicle third party property damage insurance policy, compulsory third party motor vehicle insurance policy or industrial special risks insurance policy, in the circumstances described in section 3.4.2.3, or if the Project Deed is terminated for *force majeure* under the arrangements described in section 3.4.12.3,

- The Leases and Subleases will also terminate (if they have commenced)
- The Interest Adjustment Agreement (see section 4) will automatically terminate
- The State Parties must pay compensation to the Project Company, in the form of a “**termination payment**”, as prescribed in a “termination payments” schedule to the Project Deed and described in section 3.5.1.2 below
- The Minister for Justice (on behalf of the Minister for Lands) and the HAC must pay Ancora “**securitisation refund payments**” under arrangements set out in the Securitisation Agreement and the “termination payments” schedule to the Project Deed and described in section 3.5.1.2 below

- The State Parties' Project Director may require the Project Company, at no cost to the State Parties beyond their "termination payment", to:
  - Transfer its title, interests and rights in any of its works or any of the hospitals' facilities, and
  - Novate (transfer) the Construction Contract, the FM Agreement, the Services Agreement and/or any other replacement subcontracts to the State Parties or a replacement contractor, with the State Parties or the replacement contractor stepping into the shoes of the Project Company under these subcontracts, and
- The Project Company must facilitate a smooth transfer of responsibility for the services it was to have provided to the State Parties or any new contractor and take no action at any time, before or after the termination of the Project Deed, to prejudice or frustrate this transfer.

### 3.5.1.2 'Termination' and 'securitisation refund' payments

Under the Project Deed, following a termination of the Project Deed for an uninsurable risk or *force majeure* the Project Company will be entitled to receive a "termination payment" from the State Parties equal to:

- The amount payable by the Project Company to Ancora under the Ancora Loan Agreement on the termination date, *plus*
- Half of the par value of all share capital in the Project Company *plus* its subordinated debts, as shown on its balance sheet on the termination date, *less*
- Any gains which have accrued or will accrue to the Project Company as a result of the termination of the Project Deed and the other "project documents" (section 2.2), to the extent that these gains are not covered by the first item above, *less*
- Any amounts it owes to the State Parties or Justice Health under the "project documents" on the termination date, *less*
- The net amount of any insurance proceeds which it is entitled to recover and retain under the Project Deed,

with adjustments, if necessary, to avoid any "double payments" as a result of any earlier "compensation event" compensation payments (see section 3.4.11) and any other adjustments that are needed to avoid "double counting".

This "termination payment" must be paid as a single lump sum within 90 days of the termination of the Project Deed.

From the date of termination of the Project Deed until this payment is made, the State Parties must also pay the Project Company amounts calculated by applying an interest rate for Ancora's debts to the project's financiers under the Syndicated Facility Agreement, as specified in the project's

"base case" financial model, to the Project Company's debts to Ancora under the Ancora Loan Agreement.

The Minister for Justice (on behalf of the Minister for Lands) and the HAC must also make "securitisation refund payments" to Ancora, within 90 days of the termination of the Project Deed, equal to:

- Ancora's debts to the project's financiers under the Syndicated Facility Agreement on the termination date, *plus*
- Any amounts payable by the Project Company and Ancora to the project's financiers as a result of prepayments or unwindings under the project's financing agreements, provided the Project Company, Ancora and the financiers mitigate these costs as much as reasonably possible, *less*
- The Project Company's debts to Ancora under the Ancora Loan Agreement on the termination date, *less*
- Any bank account credit balances held by the financiers on behalf of the Project Company or Ancora on the termination date, *less*
- Any amounts payable by the project's financiers to the Project Company or Ancora as a result of prepayments or unwindings under the financing agreements,

with adjustments, if necessary, to avoid any "double counting".

Interest will accrue on unpaid "securitisation refund payment" amounts, from the termination date, at the interest rate for Ancora's debts under the Syndicated Facility Agreement, as specified in the "base case" financial model.

If the quantum of the State Parties' "termination payment" to the Project Deed, calculated as described above, is a negative amount, the Minister for Justice (on behalf of the Minister for Lands) and the HAC may deduct the absolute value of this amount from their combined "securitisation refund payments".

## 3.5.2 'Voluntary' termination by the State Parties

### 3.5.2.1 General termination arrangements

The State Parties may terminate the Project Deed at any time—even if there have been no defaults by the Project Company, no uninsurable risk events and no *force majeure* events—by giving the Project Company at least 120 business days' written notice.

If the State Parties issue such a "voluntary termination" notice, the Project Company must give the Security Trustee a copy of the notice and:

- The Project Deed—and, if they have commenced, the Leases and Subleases—will terminate at the end of the notice period

- The Interest Adjustment Agreement (section 4) will also terminate at the end of the notice period
- The State Parties must pay compensation to the Project Company, in the form of a “termination payment”, as prescribed in the “termination payments” schedule to the Project Deed and described in section 3.5.2.2 below
- The Minister for Justice (on behalf of the Minister for Lands) and the HAC must also pay Ancora “securitisation refund payments” under arrangements set out in the Securitisation Agreement and the “termination payments” schedule to the Project Deed, as already described in section 3.5.1.2
- The State Parties’ Project Director may require the Project Company, at no cost to the State Parties beyond their “termination payment”, to:
  - Transfer its title, interests and rights in any of its works or any of the hospitals’ facilities, and
  - Novate the Construction Contract, the FM Agreement, the Services Agreement and/or any other replacement subcontracts to the State Parties or a replacement contractor, with the State Parties or the replacement contractor stepping into the shoes of the Project Company under these subcontracts, and
- The Project Company must facilitate a smooth transfer of responsibility for the services it was to have provided to the State Parties or any new contractor and take no action at any time, before or after the termination of the Project Deed, to prejudice or frustrate this transfer.

In addition, during the notice period and then for the following 12 months the Project Company must fully cooperate with the transfer of its services to the State Parties or any new contractor providing the same or similar services.

Among other things, it must:

- Transfer all its title to and interests and rights in the project, the works, the hospitals’ facilities and the hospitals’ sites to the State Parties or the new contractor, free of any encumbrances
- Liaise with the State Parties’ Project Director and/or the new contractor and provide reasonable assistance and advice concerning the services and their transfer
- Give the new contractor access to the hospitals’ facilities and sites at reasonable times and on reasonable notice, provided this does not interfere with its services, and
- Give the Project Director and/or the new contractor all the information about the works, the facilities, the sites and the services needed for an efficient transfer.

### 3.5.2.2 ‘Termination’ and ‘securitisation refund’ payments

If a “voluntary” termination of the Project Deed by the State Parties occurs *before* the completion of Stage 2 of the

project’s facilities (the Forensic Hospital’s Justice Health Operations Building and Pharmacy Building), the Project Company will be entitled to receive a “termination payment” from the State Parties equal to:

- The Project Company’s design and construction costs on the project, including capitalised interest and fees, up to the termination date, *plus*
- Any costs reasonably incurred by the Project Company that are directly associated with the termination of the Project Deed or the termination or amendment other “project documents”, including redundancy payments for its employees, provided the Project Company reasonably endeavours to minimise these costs, *plus*
- Any costs reasonably incurred by the Project Company as a direct result of the termination of the project’s financing agreements, provided the Project Company has complied with any interest rate hedging arrangements and provided the Project Company and the financiers mitigate these costs as much as reasonably possible, *less*
- Any amounts the Project Company owes to the State Parties or Justice Health under the “project documents” on the termination date, *less*
- Any gains which have accrued or will accrue to the Project Company as a result of the termination of the Project Deed, the other “project documents” or the project’s financing agreements,

with adjustments, if necessary, to avoid any “double payments” as a result of any earlier “compensation event” compensation payments (see section 3.4.11) and any other adjustments that are needed to avoid “double counting”.

If a “voluntary” termination of the Project Deed by the State Parties occurs *after* the completion of Stage 2 of the project’s facilities (the Forensic Hospital’s Justice Health Operations Building and Pharmacy Building), the Project Company will be entitled to receive a “termination payment” from the State Parties equal to:

- The Project Company’s debts to Ancora under the Ancora Loan Agreement on the termination date, *plus*
- An amount which, in combination with any dividend, interest, principal or other payments made by the Project Company to the project’s equity investors prior to the termination of the Project Deed, will give these investors an internal rate of return equal to the return forecast in the project’s “base case” financial model, *plus*
- Any costs reasonably incurred by the Project Company that are directly associated with the termination of the Project Deed or the termination or amendment other “project documents”, including redundancy payments for its employees, provided the Project Company reasonably endeavours to minimise these costs, *less*

- Any amounts the Project Company owes to the State Parties or Justice Health under the “project documents” on the termination date, *less*
- Any gains which have accrued or will accrue to the Project Company as a result of the termination of the Project Deed and other “project documents”, other than the gains taken into account in calculating the “securitisation refund payments” to Ancora (as already described in section 3.5.1.2),

again with adjustments, if necessary, to avoid any “double payments” as a result of any earlier “compensation event” compensation payments (see section 3.4.11) and any other adjustments that are needed to avoid “double counting”.

The State Parties must notify the Project Company, at least five business days before they intend to pay it the “termination payment”, of any amounts which, to their knowledge, were owed by the Project Company to the State Parties or Justice Health under the “project documents” on the termination date.

In all other respects the arrangements for the payment of the “termination payment”, the State Parties’ interest liabilities until this payment is made, the formula for calculating the “securitisation refund payments” to Ancora, the arrangements for making these payments, the interest liabilities of the Minister for Justice (on behalf of the Minister for Lands) and the HAC until these payments are made and the arrangements for reducing the “securitisation refund payments” if the quantum of the “termination payment” (calculated as described above) is a negative amount are identical to those already described in section 3.5.1.2.

### 3.5.3 Actions to remedy Project Company contract ‘breaches’ and ‘defaults’

#### 3.5.3.1 The State Parties’ general power to seek remedies and perform the Project Company’s obligations if it breaches these obligations

If the Project Company fails to perform or comply with any of its obligations under the Project Deed or any other “project document” (section 2.2),

- The State Parties may pursue any statute-based, common law or equitable remedies available to them in the circumstances, and
- The State Parties may (but need not) themselves perform or secure the performance of these obligations, with the costs they incur in doing being payable by the Project Company, as a debt, on demand.

The State Parties’ Project Director must give the Project Company as much notice as practicable if they intend to take the latter action. If advance notice is not practicable, the Project Company must be promptly advised after the action is taken.

These general provisions are supplemented by much more detailed provisions allowing the State Parties and/or the Security Trustee to “step in” in particular circumstances, as already discussed for emergencies (section 3.4.9) and as detailed in the rest of this section 3.5.3.

#### 3.5.3.2 Procedures following contractual and other defined ‘breaches’ by the Project Company

The Project Deed specifies that a series of defined situations, in addition to failures by the Project Company to comply with its obligations under the Project Deed, will constitute “breaches” for the purposes of the Project Deed.

Under these provisions, a “breach” will occur if:

- The Project Company breaches any of its obligations under the Project Deed or any other “project document” (section 2.2) and the breach is “material in the context of this project”, but *not* if the breach is:
  - A failure to complete a “milestone” *within* a stage of the works by its “target completion date” (section 3.2.7.1)
  - A breach of a “key performance indicator” specified in the *Services Specification* (there are, however, “breaches” concerning “unit failures” and “quality failures”, as described below), or
  - Any of a series of more serious breaches potentially entitling the State Parties to terminate the Project Deed, as set out in the Project Deed’s definition of “Project Company termination events” and listed in section 3.5.3.5 below
- Any representation or warranty by the Project Company in the Project Deed or any other “project document” proves to be untrue
- The Project Company, the Construction Contractor, the Facilities Management Operator, the Services Operator or any other subcontractor or sub-subcontractor engages in fraud or misleading and deceptive conduct in performing any part of the project
- The Project Company fails to comply with a *Corrective Action Plan* produced in response to a potential failure to complete a stage of the works by its “target commencement date” (section 3.2.7.3)
- An obligation to provide debt financing for the project is terminated, withdrawn or cancelled as a result of a breach of any of the project’s financing agreements, or
- The Project Company incurs deductions from the State Parties’ “monthly service payments” (section 3.3.7.1), in any two months during any three consecutive months, that are:
  - In total, more than 4% of these two months’ gross monthly service payments (before any “volume adjustments”, “energy payments”, “additional pay-



ments” or deductions) for either or both of the hospitals

- o For “quality failure” deductions, more than 2.5% of these amounts, or
- o For “unit failure” deductions, more than 2.5% of these amounts.

If any of these “breaches” occurs, the State Parties’ Project Director may issue a formal “breach notice” to the Project Company, with a copy being sent by the Project Company to the Security Trustee, giving reasonable details of the breach.

If the “breach” can reasonably be remedied within five business days of this notice, the Project Company must do so.

If the “breach” can be remedied, but not reasonably within five business days, the Project Company must submit a detailed *Cure Plan* to the State Parties’ Project Director within five business days of his or her notice, setting out the steps it will take to remedy the breach and mitigate its effects. This *Cure Plan* must be acceptable to the Project Director, in his or her absolute discretion, and must be diligently implemented in accordance with its terms.

If the “breach” cannot be remedied, the Project Company must submit a detailed *Prevention Plan*, again within five business days of the Project Director’s notice, setting out the steps it will take to prevent any recurrence of the breach. This *Prevention Plan* must be acceptable to the Project Director, in his or her absolute discretion, and must be diligently implemented in accordance with its terms.

If the Project Company fails to remedy the “breach” or provide or implement a *Cure Plan* or *Prevention Plan*, as relevant, the State Parties may be entitled to terminate the Project Deed, subject to the rights of the Security Trustee under the Financiers Tripartite Deed, under the arrangements described in sections 3.5.3.5 and 3.5.4.

In addition to the State Parties’ rights to take action themselves following a Project Company breach, as described in section 3.5.3.1 above, and their rights to “step in” under the Construction Side Deed, the FM Operator Side Deed and the Services Operator Side Deed and then (if they choose) novate these subcontracts, as described in sections 3.5.3.3 and 3.5.3.4 below, the State Parties have expressly acknowledged and consented to the Security Trustee’s rights, under the project’s financing agreements, to remedy or procure the remedy of any breach of the Project Deed or any other “project document” by the Project Company.

These rights include “stepping in” by the Security Trustee, or an agent, manager, receiver, receiver/manager or administrator appointed by the Security Trustee, to assume the rights and obligations of the Project Company under the project’s contracts, in the specific circumstances described in

sections 3.5.3.5 and 3.5.3.6 and under arrangements described in those sections.

### ***3.5.3.3 The State Parties’ remedy, ‘step in’ and transfer rights under the Construction Side Deed during each stage’s construction phase***

Under the Construction Side Deed, if the Project Company breaches the Construction Contract the Construction Contractor may not terminate that contract, or give the Project Company a notice of termination under the terms of the Construction Contract, without giving the State Parties at least 60 days’ written notice of its intention to do so, providing details of the grounds for termination, the proposed termination date and any amounts owed or expected to be owed by the Project Company.

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

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

If the State Parties make this election, they must notify the Construction Contractor within a reasonable period and the Construction Contractor must then use its best endeavours to reach an agreement with the State Parties on these arrangements. The Construction Contractor may not terminate the Construction Contract, or exercise any of its other powers under the Construction Contract concerning the Project Company’s breach, unless:

- An agreement with the State Parties is not reached within 60 days of the State Parties’ notice, *and*
- The State Parties have not “stepped in” and taken over all the rights of the Project Company under the Construction Contract, under provisions described below, or exercised their powers under the State Security (see section 5.1)—subject to priorities set out in the Financiers Tripartite Deed (see section 5.2)—to appoint an agent, manager, receiver, receiver/manager or administrator to do likewise.

Under the Construction Side Deed the State Parties or an agent, manager, receiver, receiver/manager or administrator appointed under the State Security may, but need not, “step in” and assume the rights of the Project Company under the Construction Contract if:

- The State Parties are already exercising their “step in” rights following an emergency, as described in section 3.4.9, *or*

- The Construction Contractor has notified the State Parties of a Project Company breach of the Construction Contract and the 60-day period following this notice has not expired, *or*
- The Project Company has breached any of its obligations under the Project Deed, even if the Construction Contractor has never notified the State Parties of any Project Company breach of the Construction Contract, *and* the Security Trustee has not exercised its own “step in” rights under the Financiers Tripartite Deed arrangements described in section 3.5.3.5 or section 3.5.3.6 below.

If the State Parties decide to take this action, they must give the Construction Contractor and/or the Construction Contractor Guarantor at least two days’ written notice, including, where relevant, reasonable details of the background events.

During any “step in” by the State Parties or their agent, manager, receiver, etc under the Construction Contract,

- The Construction Contract and the Construction Contractor Guarantee will remain in full force, as though the State Parties were directly parties to the Construction Contract in the place of the Project Company.
- The Construction Contractor must continue to perform all its obligations under the Construction Contract.
- The State Parties may enforce any of the Project Company’s rights under the Construction Contract and the Construction Contractor Guarantee.
- The Construction Contractor may terminate the Construction Contract only if:
  - Before the “step in”, it had not been paid any amount owing to it under the Construction Contract at the time it originally notified the State Parties of the Project Company’s breach (as independently certified to the reasonable satisfaction of the State Parties and any agent/manager/receiver etc)
  - It is not paid any amount falling due to it under the Construction Contract during the 60 days after it originally notified the State Parties of the Project Company’s breach, or any other previously unknown amount which becomes payable to it after this original notification, within 30 days of notifying the State Parties of this liability (again as independently certified to the reasonable satisfaction of the State Parties and any agent/manager/receiver etc), or
  - Grounds for termination of the Construction Contract under its own terms arise after the “step in”.
- The State Parties may, with 30 days’ notice in writing to the Construction Contractor, procure the novation (trans-

fer) of the Project Company’s rights and liabilities under the Construction Contract and the Construction Contractor Guarantee to a substitute contractor nominated by the State Parties’ Project Director, provided the Construction Contractor notifies the State Parties that the substitute contractor satisfies suitability criteria set out in the Construction Side Deed. The Construction Contractor must provide its advice within 30 days of receiving all the information reasonably required for it to make this decision, and may not unreasonably withhold or delay its advice.

If the State Parties have “stepped in” but the Security Trustee then exercises its own “step in” rights under the Financiers Tripartite Deed arrangements described in section 3.5.3.5 or section 3.5.3.6, the State Parties must “step out” for the duration of the Security Trustee’s “step in” period, and may not exercise the novation and other rights described above during this period.

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

The Project Company must pay the State Parties, on demand, for all the costs, losses, liabilities, claims, expenses and taxes they incur in exercising their “step in” and other rights under the Construction Side Deed.

#### ***3.5.3.4 The State Parties’ remedy, ‘step in’ and transfer rights under the FM Operator Side Deed and the Services Operator Side Deed during each stage’s operations phase***

The State Parties’ rights and procedures for remedying operations-phase Project Company breaches of the FM Agreement under the provisions of the FM Operator Side Deed, including “stepping in” and/or novating the FM Agreement and the FM Operator Guarantee, and their rights and procedures for remedying operations-phase Project Company breaches of the Services Agreement under the provisions of the Services Operator Side Deed, including “stepping in” and/or novating the Services Agreement and the Services Operator Guarantee, are precisely analogous to the rights and procedures just described in section 3.5.3.3 for the Construction Side Deed.

#### ***3.5.3.5 The State Parties’ remedy, ‘step in’, transfer and termination rights and the Security Trustee’s ‘step in’ and transfer rights following a ‘Project Company termination event’***

Under the Project Deed a “**Project Company termination event**” will occur—or, in the first case, would have occurred had the Project Deed become enforceable by that time (see section 2.3)—if:

- The Project Company had not commenced its design and construction works by a “drop dead date” of 21 July

2006 (or a later date as decided by the State Parties' Project Director in his or her absolute discretion or as determined following a "relief event" or "compensation event" under the arrangements described in sections 3.4.10 and 3.4.11)

- The construction and commissioning of any stage of the project's works is not completed 12 months after the stage's "target completion date" (section 3.2.7.1), as extended (if at all) by any contract variation under the arrangements described in section 3.2.14 or following a "relief event" or "compensation event" under the arrangements described in sections 3.4.10 and 3.4.11 *and/or* as brought forward (if at all) under the "early completion" arrangements described in section 3.2.7.1
- The State Parties reasonably believe any stage of the works will not be completed by 12 months after its "target completion date" (section 3.2.7.1), as extended (if at all) or brought forward (if at all), or, if the Project Company disputes the State Parties' belief, this belief is confirmed by two independent experts in accordance with the Project Deed's dispute resolution procedures, described in section 3.4.8
- The Project Company abandons the project or displays an intention to permanently cease performing a material part or all of its obligations under the Project Deed
- There is a Project Company "insolvency event", as defined in detail in the Project Deed
- There is an "insolvency event" related to the Construction Contractor, the Construction Contractor Guarantor, the Facilities Management Operator, the Services Operator, the FM Operator Guarantor, the Services Operator Guarantor or any replacement for any of these subcontractors and guarantors, and the relevant organisation is not replaced, within 90 days, by a reputable and solvent subcontractor or guarantor that has the resources and experience to perform the relevant obligations and complies with the Project Deed's requirements for subcontractors (sections 3.2.8.2 and 3.3.3.2) or is otherwise acceptable to the State Parties
- There is a breach of the law by the Project Company, any related corporation, the Construction Contractor, the Facilities Management Operator, the Services Operator, any other subcontractor or sub-subcontractor of the Project Company, any of these organisations' officers, employees or agents, any invitees of the Project Company, its subcontractors or sub-subcontractors or any "Justice Health employee" who is being managed and supervised by the Project Company (section 3.3.4), including any failure to continue to hold all approvals, consents and licences required for the project, *and* the State Parties' Project Director believes this breach materially affects the performance of the Project Company's obligations under the Project Deed, *and* the breach is not remedied within 30 days
- The Project Deed or any of the other "project documents" (section 2.2) is revoked, repudiated or terminated, or ceases to be legal, valid and binding and enforceable against the Project Company or any other party other than the State Parties, *except* as contemplated by the "project documents"
- The Project Company, the Facilities Management Operator, the Services Operator or any other subcontractor or sub-subcontractor of the Project Company fails to pay the HAC any of the "Justice Health employee" costs that are due to the HAC under the fortnightly payment arrangements described in section 3.3.7.2, and then fails to make this payment within five business days of receiving a notice from the State Parties' Project Director requiring it to do so
- The Project Company breaches the Project Deed's restrictions on assignments, encumbrances and changes in ownership or control (section 3.4.4)
- The Project Company incurs "unit failure" deductions from the State Parties' "monthly service payments" (section 3.3.7.1) for more than four "unit failures" of the most serious type specified in the *Services Specification* ("level A") in any single calendar month or more than eight "level A" "unit failures" in any three consecutive calendar months
- The Project Company fails to remedy a "breach" (as defined in section 3.5.3.2) or provide or implement a *Cure Plan* or *Prevention Plan*, as relevant, under the arrangements described in section 3.5.3.2, or
- There is a "**persistent breach**" of the Project Deed by the Project Company, which under the definitions in the Project Deed may arise under either of the following situations:
  - The occurrence of a particular *type or class* of breach of the Project Company's obligations under the Project Deed or any other "project document" (section 2.2) more than once—not limited to the "breaches" defined in section 3.5.3.2, but not counting any breaches of a "key performance indicator" specified in the *Services Specification* or any breaches already amounting to a "Project Company termination event"—*followed by* the service of a formal warning notice by the State Parties' Project Director (with a copy being sent by the Project Company to the Security Trustee), *followed by* a continuation or recurrence of the same type or class of breach 30 days or more after this notice, *followed by* a final warning notice by the Project Director (again with

a copy being sent by the Project Company to the Security Trustee), *followed by* a continuation or four or more recurrences of the same type or class of breach within the next six months, *or*

- The *frequent* occurrence of breaches of the Project Deed, not necessarily of the same type or class, which, taken together, substantially frustrate the project's objectives (section 3.1.2), *or* impair the ability of the State Parties, the Department of Health, Justice Health or the Department of Corrective Services to provide the hospitals' "hospital functions" or any other State-provided or State-procured custodial, correctional, security, containment and related services at the Long Bay Correctional Complex, or otherwise have a material adverse effect on the State Parties' interests under the Project Deed *or* indicate the Project Company does not regard itself as being bound by the Project Deed, *followed by* the service of a formal warning notice by the State Parties' Project Director (with a copy being sent by the Project Company to the Security Trustee), *followed by* any other breach of the Project Deed within the next six months.

The Project Company must immediately notify the State Parties' Project Director if it becomes aware of a "Project Company termination event" or anything likely to become a "Project Company termination event", and it must give copies of this notification to the Security Trustee within five business days.

**(a) Action by the State Parties to overcome the effects of a 'Project Company termination event'**

The State Parties may take any action they consider appropriate or necessary to overcome the effects of a subsisting "Project Company termination event" or preserve the project, with the costs they incur in doing so being payable by the Project Company on demand.

Among other things, this action may include:

- State Parties' representatives' entering and remaining on or in a site, access area or hospital facility.
- "Stepping in" by the State Parties or an agent, manager, receiver, receiver/manager or administrator appointed under the State Security (section 5.1), as expressly permitted by the Construction Side Deed, the FM Operator Side Deed and the Services Operator Side Deed (sections 3.5.3.3 and 3.5.3.4), to assume the rights of the Project Company under the Construction Contract, the FM Agreement and/or the Services Agreement, *provided* the Security Trustee has not exercised its own "step in" rights under the Financiers Tripartite Deed arrangements described below. If the State Parties or their representative do "step in" under any of these Side

Deeds, the "step in", novation and "step out" arrangements described in section 3.5.3.3 and referred to in section 3.5.3.4 will apply.

- Novation (transferring) of the Project Company's rights and liabilities under the Construction Contract (and the Construction Contractor Guarantee), the FM Agreement (and the FM Operator Guarantee) and/or the Services Agreement (and the Services Operator Guarantee) to substitute contractor(s) nominated by the State Parties' Project Director, as expressly permitted by the Construction Side Deed, the FM Operator Side Deed and the Services Operator Side Deed even if the State Parties have not "stepped in", again *provided* the Security Trustee has not exercised its own "step in" rights under the Financiers Tripartite Deed arrangements described below. The procedures to be followed for these novations are identical to those applying for novations during any "stepping in" under the side deeds, as described in section 3.5.3.3 and referred to in section 3.5.3.4.

**(b) 'Stepping in' by the Security Trustee**

Under the Project Deed the State Parties may terminate the Project Deed for a subsisting "Project Company termination event" simply by giving the Project Company 20 business days' written notice (see section 3.5.4.1).

Under the Financiers Tripartite Deed, however, the State Parties have:

- Expressly acknowledged and consented to the rights of the Security Trustee, under the project's financing agreements, to remedy or procure the remedy of any Project Company breach of the Project Deed or any other "project document" (section 2.2), and
- Promised not to issue a termination notice for a subsisting "Project Company termination event" without first giving the Security Trustee at least 20 business days' written notice of their intention to do so, specifying the proposed date for the termination notice and providing details of the "Project Company termination event".

At any time after being notified by the State Parties that they intend to terminate the Project Deed for a "Project Company termination event", but no later than one business day before the date on which the State Parties' propose to issue their termination notice, the Security Trustee may—but need not—notify the State Parties that it intends to exercise its rights under the Financiers Tripartite Deed to "step in" itself, or have an agent, manager, receiver, receiver/manager or administrator appointed under the financing securities "step in", from a specified date within the next 20 business days.

If the Security Trustee decides not to "step in", and the "Project Company termination event" is still subsisting, the State Parties may issue a termination notice under the



Project Deed at any time after the latest date on which a “step in” notice may be given by the Security Trustee, and the arrangements described in section 3.5.4 will apply.

However, if the Security Trustee does issue a notice that it intends to “step in”, the State Parties may not terminate the Project Deed prior to the proposed “step in” date, the Security Trustee must give the State Parties details about its proposed agent, manager, receiver, receiver/manager or administrator and the State Parties and the Security Trustee must consult with each other, within five business days, to:

- Determine the content of a *Step-In Report* which they must jointly produce, at the Project Company’s cost, setting out:
  - The Project Company’s outstanding obligations to the State Parties under the Project Deed
  - A program to remedy breaches of the Project Deed and/or any other “project document” (and/or prevent the recurrence of breaches not able to be remedied)
  - Details on the proposed performance of the Project Company’s obligations during the “step in” period
  - Details of the timing of the “step in” period and the proposed actions, and
  - Details of proposed insurance arrangements, and
- Make any necessary arrangements if the State Parties choose to have an auditor and/or technical adviser verify any of the information in the *Step-In Report*.

A *Step-In Report* is not required, however, if the only “Project Company termination event” is a Project Company “insolvency event”.

Any “stepping in” agent, receiver, receiver/manager, administrator or other representative appointed by the Security Trustee must (in the State Parties’ Project Director’s opinion) be suitable and appropriate for carrying out the project and must satisfy the Project Director that, in conjunction with appropriate contractors, they will be able to carry out the obligations of the Project Company under the Project Deed during the “step in” period.

If the “Project Company termination event” leading to the “stepping in” is a Project Company “insolvency event”, the appointment of a representative of the Security Trustee under the project’s financing securities will be deemed to have cured the “insolvency event”, so long as this appointment continues and so long as the representative continues to satisfy the Project Director that, in conjunction with appropriate contractors, it will be able to carry out the obligations of the Project Company under the Project Deed.

(c) *The rights and obligations of the State Parties and the Security Trustee during the Security Trustee’s ‘step in’ period*

During the Security Trustee’s “step in” period,

- The State Parties’ rights and obligations under the Project Deed will continue, subject to the provisions of the Financiers Tripartite Deed
- The Security Trustee or its representative will “step into the shoes of” the Project Company under the project’s contracts, in accordance with details set out in the Financiers Tripartite Deed
- The Security Trustee and its representative must not knowingly exercise their rights in any manner which interferes with the provision of the project, the delivery of services under the Project Deed or the State Parties’ exercising of their powers, and they must minimise any disturbance to the delivery of the services, the hospitals’ “hospital functions” and other State-provided or State-procured custodial, correctional, security, containment and related services at the Long Bay Correctional Complex
- The Security Trustee must ensure its representative updates the *Step-In Report* and gives the State Parties’ Project Director detailed reports, at least monthly, on the status of the project and the implementation of the *Step-In Report*
- The Security Trustee must nominate a substitute representative if the State Parties’ Project Director notifies it that he or she does not approve of the original representative, and if the substitute is not acceptable to the State Parties and an acceptable substitute is not nominated by the Security Trustee within ten business days the “stepping in” by the Security Trustee will be deemed to have ended
- The State Parties may terminate the Project Deed, by written notice to the Project Company, the Security Trustee and the Security Trustee’s representative, only if:
  - The Security Trustee or its representative notifies the State Parties that it does not intend to cure the breach causing the “Project Company termination event”
  - Prior to the preparation of the *Step-In Report*, the representative and the Project Company are not, in the State Parties’ Project Director’s reasonable opinion, using all reasonable endeavours to remedy a continuing breach of the Project Deed or any other “project document” that would otherwise entitle the State Parties to terminate the Project Deed
  - After the preparation of the *Step-In Report*, the Security Trustee’s representative is not curing a “project document” breach that is identified in the

*Step-In Report* or was reasonably apparent when the *Step-In Report* was prepared or updated, or is not performing an obligation in accordance with the *Step-In Report*, as updated, or

- A new “Project Company termination event” occurs, and it does not arise from a “project document” breach that is identified in and is being remedied in accordance with the *Step-In Report* or was reasonably apparent when the *Step-In Report* was prepared or updated.

**(d) Extensions and termination of the Security Trustee’s ‘step in’ period**

The Security Trustee’s initial “step in” period may not exceed 180 days. The Security Trustee may, however, seek an extension of its “step in” period, giving the State Parties’ Project Director an updated *Step-In Report* with a detailed description of the steps being taken and proposed by the Security Trustee, and the Project Director may grant or reject this extension in his or her absolute discretion.

The Security Trustee’s representative may at any time terminate the “step in” by giving the State Parties ten days’ written notice.

If the “Project Company termination event” which led to the “step in” is still continuing when the “step in” ends or is deemed to have ended, the State Parties will become entitled to terminate the Project Deed, by giving the Project Company 20 business days’ written notice, and the arrangements described in section 3.5.4 will apply.

**(e) Transfer of the Project Deed from the Project Company to a new contractor nominated by the Security Trustee**

At any time during the Security Trustee’s “step in” period the Security Trustee may notify the State Parties that it wishes to procure the novation (transfer) of the Project Company’s rights and responsibilities under the Project Deed to a substitute contractor nominated by the Security Trustee and approved by the State Parties.

The State Parties’ Project Director must notify the Security Trustee whether the proposed transferee is acceptable within 30 days of receiving all the information the State Parties need to make this decision.

The State Parties may, however, withhold or delay their decision for any reason, including:

- Their not being reasonably satisfied the proposed substitute contractor:
  - Has the necessary legal capacity, power or authority
  - Has or has access to the necessary technical competence and financial standing or resources, and
  - Is a suitable or appropriate organisation to have an interest in the hospitals’ facilities and sites, and/or

- A belief by the State Parties that the proposed substitute contractor was a related corporation of the Project Company when the “Project Company termination event” occurred or will be a related corporation of the Project Company at the time of the proposed novation.

Once the State Parties have granted their consent, the Security Trustee may procure the novation of the Project Deed at any time that is at least 60 days after its original notice to the State Parties.

On the date of the novation the substitute contractor and the Security Trustee—or, if applicable, the project’s new financiers—must enter into a tripartite deed with the State Parties on substantially the same terms as the Financiers Tripartite Deed.

Once the novation of the Project Deed becomes effective,

- The “step in” will end but any existing grounds for the State to terminate the Project Deed will cease to have any effect, *provided* the substitute contractor remedies any continuing breaches within the times specified in the *Step-In Report*, and
- If requested by the State Parties, the Project Company must transfer its interests in the Construction Contract, the FM Agreement, the Services Agreement and/or any other subcontracts to the State Parties or a nominee of the State Parties, potentially but not necessarily the substitute contractor under the Project Deed.

**3.5.3.6 The Security Trustee’s ‘step in’ and transfer rights following a finance default**

The Security Trustee has “step in” and transfer rights following a default under the project’s private sector debt financing agreements which are closely analogous to its rights following a “Project Company termination event”, described in section 3.5.3.5 above.

The Security Trustee must notify the State Parties within two business days if it becomes aware of any finance default, providing reasonable details and indicating whether, when and how it intends to exercise its rights under the financing agreements. It must also promptly notify the State Parties if its intentions change or it is instructed to take action to enforce the debt financiers’ securities.

**3.5.4 Termination by the State Parties for a ‘Project Company termination event’**

**3.5.4.1 General termination arrangements**

If a “Project Company termination event” occurs and the Security Trustee decides not to “step in”, or the Security Trustee’s “step in” period has expired (see section 3.5.3.5), the State Parties may issue a termination notice to the

Project Company, giving it 20 business days' notice, and at the end of this notice period:

- The Project Deed will terminate
- The Leases and Subleases will also terminate, if they have commenced (as already indicated in section 3.3.2.3, under the project's "securitised lease" arrangements Ancora will, on the project's "full service commencement date" (section 3.2.15.3), purchase the rights of the Minister for Lands and the HAC to receive "early payout amounts" that are to be paid by the Project Company, under the Leases, if the Leases are terminated for a "Project Company termination event", so the Minister for Lands and the HAC will not be entitled to receive these payments)
- The Interest Adjustment Agreement (section 4) will automatically terminate
- The State Parties may elect to invite new tenders for the provision of the project's works and/or services, except in some specific circumstances discussed in section 3.5.4.2 below
- Unless the "Project Company termination event" leading to the termination of the Project Deed was an "abandonment" of the project as described in section 3.5.3.5, the State Parties must pay compensation to the Project Company, in the form of a "termination payment", as prescribed in the "termination payments" schedule to the Project Deed and described in sections 3.5.4.2 to 3.5.4.4 below
- The Minister for Justice (on behalf of the Minister for Lands) and the HAC must also pay Ancora "securitisation refund payments" under arrangements set out in the Securitisation Agreement and the "termination payments" schedule to the Project Deed, as already described in section 3.5.1.2
- Again unless the "Project Company termination event" leading to the termination of the Project Deed was an "abandonment" of the project as described in section 3.5.3.5, the State Parties may be liable to make monthly payments to the Project Company until they pay their "termination payment" or a new contractor is appointed, as prescribed in the "termination payments" schedule to the Project Deed and described in sections 3.5.4.2 to 3.5.4.4 below
- The State Parties' Project Director may require the Project Company, at no cost to the State Parties beyond their "termination payment", to:
  - Transfer its title, interests and rights in any of its works or any of the hospitals' facilities, and
  - Novate (transfer) the Construction Contract, the FM Agreement, the Services Agreement and/or any other replacement subcontracts to the State Parties

or a replacement contractor, with the State Parties or the replacement contractor stepping into the shoes of the Project Company under these subcontracts, and

- The Project Company must facilitate a smooth transfer of responsibility for the services it was to have provided to the State Parties or any new contractor and take no action at any time, before or after the termination of the Project Deed, to prejudice or frustrate this transfer.

In addition, during the notice period and then for the following 12 months the Project Company must fully cooperate with the transfer of its services to the State Parties or any new contractor providing the same or similar services.

Among other things, it must:

- Transfer all its title to and interests and rights in the project, the works, the hospitals' facilities and the hospitals' sites to the State Parties or the new contractor, free of any encumbrances
- Liaise with the State Parties' Project Director and/or the new contractor and provide reasonable assistance and advice concerning the services and their transfer
- Give the new contractor access to the hospitals' facilities and sites at reasonable times and on reasonable notice, provided this does not interfere with its services, and
- Give the Project Director and/or the new contractor all the information about the works, the facilities, the sites and the services needed for an efficient transfer.

#### ***3.5.4.2 The State Parties' right to elect to call new tenders following a termination for a 'Project Company termination event'***

If the State Parties terminate the Project Deed for a "Project Company termination event" they may elect to:

- Call new tenders for the provision of the project's works and/or services, as applicable, subject to conditions and procedures set out in the "termination payments" schedule to the Project Deed, *provided* criteria listed below are satisfied, or
- Require an expert determination of the "termination payment" payable to the Project Company, if any, as set out in the same schedule.

The option to call new tenders is available only if:

- The State Parties' Project Director notifies the Project Company that the State Parties intend to take this course within 20 business days after the termination of the Project Deed, *and*
- The Security Trustee did not exercise its "step in" rights, under the Financiers Tripartite Deed arrangements described in sections 3.5.3.5, for the "Project Company termination event" which has since entitled the State Parties to terminate the Project Deed, *and*

- The Project Company and the Security Trustee have not procured a novation of the Project Deed from the Project Company to a suitable substitute contractor under the Financiers Tripartite Deed arrangements described in sections 3.5.3.5, *and* have failed to use reasonable efforts to do so, *and*
- There is a “liquid” market, with at least two willing bidders for “public private partnership” or similar contracts for the provision of services similar to those specified in the Project Deed, that is sufficient for the price likely to be achieved through a tender to be a reliable indicator of “fair value”.

In deciding whether the last of these criteria is satisfied, the State Parties must take account of any *bona fide* attempts by the financiers to sell the project for its “fair value” and any *bona fide* attempts by the Project Company or the financiers to re-tender the services.

### 3.5.4.3 *Procedures and ‘termination’ and ‘securitisation refund’ payments if the State Parties call new tenders*

If the State Parties elect to call new tenders,

- The State Parties’ Project Director and the Project Company must follow procedures set out in the “termination payments” schedule to the Project Deed
- The State Parties’ “termination payment” to the Project Company—unless the “Project Company termination event” leading to the termination of the Project Deed was an abandonment of the project as described in section 3.5.3.5, in which case the Project Company will not be entitled to receive any payment—will be an amount equal to:
  - The highest capital sum offered by any tenderer complying with the tender’s qualification criteria, *plus*
  - All credit balances in bank accounts held by or on behalf of the Project Company on the date the successful tender was received, to the extent these amounts are not otherwise taken into account in the successful tender, *plus*
  - Any insurance proceeds and other amounts which are owed to the Project Company and which it is entitled to retain, to the extent these amounts are not included in the Project Company’s bank balances and to the extent they are not otherwise taken into account in the successful tender, *less*
  - The pre-deduction components of amounts paid to the Project Company by the State Parties during the same period under monthly post-termination payment arrangements described below, *less*

- The reasonable costs of the tender process and the estimation of the project’s “fair value” to the State Parties, *and less*
- Any amounts the State Parties are entitled to set off or deduct under the Project Deed, including all their reasonable costs associated with the “Project Company termination event”,

with adjustments, if necessary, to avoid any “double payments” as a result of any earlier “compensation event” compensation payments (section 3.4.11) and any other adjustments that are needed to avoid “double counting”.

- In the interim period between the termination of the Project Deed and the earlier of the date on which all of the “termination payment” is paid and the date on which a new contract with the successful tenderer is entered into, the State Parties must make monthly payments to the Project Company, again calculated in accordance with the “termination payments” schedule to the Project Deed, equal to:

- One-third of the relevant pre-deduction “quarterly service payments” that would have been used to calculate the Project Company’s “monthly service payments”, under the arrangements described in section 3.3.7.1, had the Project Deed continued, *plus*
- Any pre-deduction “incremental monthly payments” that would have been payable as part of the Project Company’s “monthly service payments”, under the arrangements described in section 3.3.7.1, at the date of termination of the Project Deed, had the Project Deed continued, *less*
- The performance-based deductions that would have been made from the Project Company’s “monthly service payments”, under the arrangements described in section 3.3.7.1, had the Project Deed continued, *less*
- Any reasonable rectification costs incurred by the State Parties in remedying any Project Company defaults or procuring performance of the project during the month or part of a month for which the payment is being made

*unless* the “Project Company termination event” leading to the termination of the Project Deed was an abandonment of the project as described in section 3.5.3.5, in which case the Project Company will not be entitled to receive any interim monthly payments.

If the “termination payment” amount is negative, the State Parties need not make any “termination payment” to the Project Company, the Project Company must pay the State Parties this amount and the State Parties will be released from all its liabilities to the Project Company for breaches



and/or termination of the Project Deed or any other “project document”.

Otherwise, the (positive) “termination payment” must be paid as a single lump sum within 90 days of the date on which a new contract with the successful tenderer is entered into.

From the date on which the new contract with the successful tenderer is entered into until this payment is made, the State Parties must also pay the Project Company amounts calculated by applying the interest rate for Ancora’s debts to the project’s financiers under the Syndicated Facility Agreement, as specified in the project’s “base case” financial model, to the Project Company’s debts to Ancora under the Ancora Loan Agreement.

Upon the payment of the “termination payment” the State Parties will be released from all their liabilities to the Project Company for breaches and/or termination of the Project Deed or any other “project document”.

The formula for calculating the “securitisation refund payments” to be made to Ancora by the Minister for Justice (on behalf of the Minister for Lands) and the HAC, the arrangements for making these payments and the interest liabilities of the State Parties until these payments are made are identical to those already described in section 3.5.1.2. There will not, however, be any rights to reduce the “securitisation refund payments” if the quantum of the State Parties’ “termination payment” to the Project Deed, calculated as described above, is a negative amount.

#### **3.5.4.4 Procedures and ‘termination’ and ‘securitisation refund’ payments if new tenders are not called**

If the State Parties elect to require expert determination of the “termination payment” that is payable to the Project Company, if any, or have no option but to use expert determination,

- The Project Company will be entitled to receive interim monthly payments, as described above, only if the State Parties initially elected to call tenders and the “Project Company termination event” leading to the termination of the Project Deed was *not* an abandonment of the project as described in section 3.5.3.5.
- The independent expert, appointed by both the State Parties and the Project Company, must estimate the fair market value of a contract on the same terms as the Project Deed, apart from specified exceptions, in accordance with formulae and other specifications in the “termination payments” schedule to the Project Deed. This determination will be final and binding.
- The State Parties’ “termination payment” to the Project Company—again unless the “Project Company termination event” leading to the termination of the Project Deed was an abandonment of the project as described

in section 3.5.3.5, in which case the Project Company will not be entitled to receive any payment—will be equal to the independent expert’s estimate of the fair market value of this hypothetical replacement for the Project Deed, but with adjustments, if necessary, to avoid any “double payments” as a result of any earlier “compensation event” compensation payments (section 3.4.11) and any other adjustments that are needed to avoid “double counting”.

If the “termination payment” amount is negative, the State Parties need not make any “termination payment” to the Project Company, the Project Company must pay the State Parties the absolute value of this amount and the State Parties will be released from all their liabilities to the Project Company for breaches and/or termination of the Project Deed or any other “project document”.

Otherwise, the (positive) “termination payment” must be paid by the State Parties to the Project Company, as a single lump sum, within 90 days of the date on which the independent expert estimates the fair market value of the hypothetical replacement for the Project Deed.

From the date on which the independent expert estimates the fair market value of the hypothetical replacement for the Project Deed until this payment is made, the State Parties must also pay the Project Company amounts calculated by applying the interest rate for Ancora’s debts to the project’s financiers under the Syndicated Facility Agreement, as specified in the project’s “base case” financial model, to the Project Company’s debts to Ancora under the Ancora Loan Agreement.

Upon the payment of the “termination payment” the State Parties will be released from all their liabilities to the Project Company for breaches and/or termination of the Project Deed or any other “project document”.

The formula for calculating the “securitisation refund payments” to be made to Ancora by the Minister for Justice (on behalf of the Minister for Lands) and the HAC, the arrangements for making these payments and the interest liabilities of the State Parties until these payments are made are identical to those already described in section 3.5.1.2. There will not, however, be any rights to reduce the “securitisation refund payments” if the quantum of the State Parties’ “termination payment” to the Project Deed, calculated as described above, is a negative amount.

#### **3.5.5 Termination by the Project Company for a default by the State Parties**

If:

- Any breach of the Project Deed by the State Parties substantially frustrates the Project Company’s performance of its obligations under the Project Deed or makes

it impossible for the Project Company to perform these obligations, in either case for a continuous period of two months or more

- There is an expropriation or requisition of a material part of the Project Company's assets and/or shares by a government, council, government department, statutory authority, court or tribunal in New South Wales, or
- The State Parties fail to pay the Project Company any undisputed amount specified in its monthly invoices (section 3.3.7.1)—or any other amount of money, totalling more than \$100,000 (indexed to the CPI from the June quarter of 2005), that is due to it under the Project Deed—within 20 business days of a formal demand by the Project Company,

the Project Company may issue a termination notice to the State Parties, within 20 business days of becoming aware of their default, giving them 120 days' notice that it intends to terminate the Project Deed for the default, as specified in the notice. Copies of this notice must be sent to the Security Trustee.

If the State Parties fail to rectify or overcome the effect of the default within the notice period,

- The Project Deed—and, if they have commenced, the Leases and Subleases—will terminate at the end of this notice period
- The Interest Adjustment Agreement (section 4) will also terminate at the end of the notice period
- The State Parties must pay compensation to the Project Company, in the form of a "termination payment", as prescribed in the "termination payments" schedule to the Project Deed and calculated on exactly the same basis as compensation payable following a "voluntary" termination of the Project Deed by the State Parties, as described in section 3.5.2.2
- The Minister for Justice (on behalf of the Minister for Lands) and the HAC must also pay Ancora "securitisation refund payments" under arrangements set out in the Securitisation Agreement and the "termination payments" schedule to the Project Deed, as already described in section 3.5.1.2
- The State Parties' Project Director may require the Project Company, at no cost to the State Parties beyond their "termination payment", to:
  - Transfer its title, interests and rights in any of its works or any of the hospitals' facilities, and

- Novate the Construction Contract, the FM Agreement, the Services Agreement and/or any other replacement subcontracts to the State Parties or a replacement contractor, with the State Parties or the replacement contractor stepping into the shoes of the Project Company under these subcontracts, and

- The Project Company must facilitate a smooth transfer of responsibility for the services it was to have provided to the State Parties or any new contractor and take no action at any time, before or after the termination of the Project Deed, to prejudice or frustrate this transfer.

In addition, during the notice period and then for the following 12 months the Project Company must fully cooperate with the transfer of its services to the State Parties or any new contractor providing the same or similar services.

Among other things, it must:

- Transfer all its title to and interests and rights in the project, the works, the hospitals' facilities and the hospitals' sites to the State Parties or the new contractor, free of any encumbrances
- Liaise with the State Parties' Project Director and/or the new contractor and provide reasonable assistance and advice concerning the services and their transfer
- Give the new contractor access to the hospitals' facilities and sites at reasonable times and on reasonable notice, provided this does not interfere with its services, and
- Give the Project Director and/or the new contractor all the information about the works, the facilities, the sites and the services needed for an efficient transfer.

The arrangements in these circumstances for the payment of the "termination payment", the State Parties' interest liabilities until this payment is made, the formula for calculating the "securitisation refund payments" to be made to Ancora by the Minister for Justice (on behalf of the Minister for Lands) and the HAC, the arrangements for making these payments, the interest liabilities of the State Parties until these payments are made and the arrangements for reducing the "securitisation refund payments" if the quantum of the "termination payment" (calculated as described in section 3.5.2.2) is a negative amount are identical to those already described in section 3.5.1.2.

## 4 The Interest Adjustment Agreement

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The Project Company's debts to Ancora under the Ancora Loan Agreement and the Securitisation Agreement will be subject to fixed interest rates, as specified, respectively, in the Ancora Loan Side Letter and the Master Rental Side Letter, while Ancora's debts to the project's debt financiers under the Syndicated Facility Agreement will be subject to floating interest rates.

The Interest Adjustment Agreement sets out arrangements under which the State Parties will assume the interest rate risk associated with the floating interest rates under the Syndicated Facility Agreement following the completion of all of the project's facilities on the "full service commencement date" (section 3.2.15.3).

From the "full service commencement date" until 19 July 2034 or any other date set for the conclusion of the operations phase of the project under the arrangements applying if construction of the hospitals and associated facilities is completed early (see sections 3.2.7.1 and 3.3.1.1), or until any earlier termination of the Project Deed (see sections 3.5.1, 3.5.2, 3.5.4 and 3.5.5),

- The State Parties must make quarterly payments to the Agent of the project's debt financiers, in accordance with an irrevocable direction by Ancora, equal to the amount, if any, by which the quarterly interest payments Ancora must make to the banks for its term loan facility under the Syndicated Facility Agreement (with floating interest rates) exceeds the total of:
  - Quarterly interest payments on the difference between:
    - The amount owing by the Project Company under the Ancora Loan Agreement, as specified in a schedule to the Ancora Loan Side Letter, and
    - Any repayments that will be payable by the Project Company under the term loan facility under the Ancora Loan Agreement on the same date, calculated using a fixed interest rate which is also specified in the Ancora Loan Side Letter, and
  - If there has been a termination of the Project Deed (and hence the Leases) for a "Project Company termination event" (sections 3.5.3.5 and 3.5.4), quarterly interest payments on the difference between—
    - The "early payout amounts" that will be payable by the Project Company to the Minister for

Lands and the HAC under the Leases in these circumstances (but which will become payable instead to Ancora, in accordance with the Securitisation Agreement, following its purchase, on the "full service commencement date", of their rights to receive these amounts (see sections 3.3.2.3 and 3.5.4.1)), and

- Any rents that will be payable by the Project Company to the Minister for Lands and the HAC under the Leases on the same date (again, these rents will be payable instead to Ancora, in accordance with the Securitisation Agreement, following its purchase, on the "full service commencement date", of their rights to receive these rents (section 3.3.2.3))

calculated using a fixed interest rate specified in a schedule to the Master Rental Side Letter, and

- Ancora must make equivalent payments to the State Parties if the fixed interest rate interest payments exceed the floating interest rate interest payments.

Ancora must give the State Parties at least ten business days' notice of any payments they must make under these arrangements. None of the parties may set off any amounts it is owed against its interest adjustment payments.

If a change in law or any other event makes it unlawful to continue these arrangements, the State Parties and the Project Company must immediately negotiate, in good faith, to find another, lawful way to comply with their obligations under the Interest Adjustment Agreement or make reasonable alternative arrangements.

These alternative arrangements may include relocations of the affected party's or parties' offices, changes to alternative sources or applications of funds and—with the consent of all the parties and the project's financiers—assignments of the rights and obligations of the affected party or parties under the Interest Adjustment Agreement.

The Interest Adjustment Agreement will automatically terminate on 19 July 2034 or any other date set for the conclusion of the operations phase of the project under the arrangements applying if construction of the hospitals and associated facilities is completed early (see sections 3.2.7.1 and 3.3.1.1), or upon any earlier termination of the Project Deed (see sections 3.5.1, 3.5.2, 3.5.4 and 3.5.5).

# 5 The State Security and interactions between the State Parties' securities and the debt financiers' securities

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## 5.1 The State Security

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Under the Long Bay Forensic and Prisons Hospitals Fixed and Floating Charge (“the State Security”) the Project Company has granted the State Parties fixed and floating charges over all the present and future real and personal property assets, undertakings and rights of the Project Company, the PPP Solutions (Long Bay) Partnership for which the Project Company is the nominee and agent and the two partners in this partnership, PPP Solutions (Long Bay) Services #1 Pty Limited and Multiplex Long Bay Pty Limited, including their interests under the project’s contracts, as security for:

- The prompt payment by the Project Company of all amounts owing to the State Parties under the Project Deed or other “project documents” (section 2.2), and
- The performance by the Project Company of all its other obligations to the State Parties under the Project Deed and the other “project documents”.

The Security Trustee, the Construction Contractor, the Construction Contractor Guarantor, the Facilities Management Operator, the FM Operator Guarantor, the Services Operator and the Services Operator Guarantor have expressly acknowledged and consented to the creation of the charges.

The Project Company has warranted that there are and will be no encumbrances over the charged property other than those created under the project’s private sector debt financing securities or the “project documents”, any lien arising in the ordinary course of business or any encumbrance which is expressly approved, in advance, by the State Parties and for which the amount secured and/or the time for payment do not increase beyond the terms of the State Parties’ approval.

The Project Company has also promised that it will not, without the State Parties’ consent, dispose of, permit the creation of an interest in or part with possession of any of the charged property, or deal with the charged property in any way other than in the ordinary course of its ordinary business, or permit anything that might render the charged property liable to surrender or forfeiture or otherwise materially decrease the value of the State Parties’ security.

The relative priorities of the charges created by the State Security and the debt financiers’ securities are governed by the Financiers Tripartite Deed, as discussed in section 5.2 below. Under these arrangements, the charges created by the

State Security rank behind the debt financiers’ securities but ahead of all other securities affecting the Project Company’s property.

To ensure the State Parties’ charges will have priority over any subsequently registered charges, unless the State Parties agree otherwise, the maximum prospective liability secured by the State Parties’ charges has been set, for the purpose of determining priorities between the charges under the Corporations Act (Cth) and *only* for this purpose, at \$250 million, a figure much higher than the value of all of the interests of the Project Company, the PPP Solutions (Long Bay) Partnership and its partners in the project. The State Security makes it clear that notwithstanding this provision, the State Parties’ charges may secure prospective liabilities that are higher than this “maximum” amount.

Subject to the priorities between securities and enforcement rights specified in the Financiers Tripartite Deed, the charges created by the State Security may be immediately enforced by the State Parties, without notice, if:

- A “Project Company termination event” occurs (section 3.5.3.5), or
- The Project Company fails to pay any amount owing to the State Parties under the Project Deed or any other “project document” within five business days of the due date.

In these circumstances, and again subject to the Financiers Tripartite Deed, the State Parties may appoint receiver(s) and/or receiver(s)/manager(s) of the charged property, exercising powers set out in the State Security, and the State Parties and their authorised representatives may exercise specified powers of attorney granted by the Project Company.

## 5.2 Consents to and priorities between the State Parties’ and debt financiers’ securities

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The Financiers Tripartite Deed formally records:

- The State Parties’ consent to the debt financiers’ securities under the project’s private sector debt financing agreements, and
- As already indicated in section 5.1, the Security Trustee’s consent to the charges created by the State Security.



With the exception of what are termed “State priority amounts”—any amounts the Project Company owes to either or both of the State Parties, under any of the “project documents”, prior to any “stepping in” by the Security Trustee under the arrangements described in section 3.5.3.5, and any amounts the Project Company owes to the State Parties because they have taken action to remedy a default by the Project Company or a representative/agent/receiver/manager appointed by the Project Company—each of the debt financiers’ securities has priority over the State Parties’ charges, up to the aggregate of all of the amounts outstanding under the financing agreements and all financing agreement enforcement costs. Beyond this limit, the financiers’ securities and the State Parties’ charges have equal priority.

Accordingly, any money received in enforcing the debt financiers’ securities or the State Parties’ charges must be applied:

- First, to pay any “State priority amounts”
- Second, to pay the sums secured by the debt financiers’ securities, up to the limit described above, and
- Third, and on a 50:50 basis, to pay all other sums of money (if any) secured by the financiers’ securities and the State Parties’ charges.

Until all the amounts secured by the debt financiers’ securities have been paid, the State Parties may not take any action to enforce their charges, apply for the winding up of the

Project Company or apply for the appointment of a liquidator to the Project Company unless the Security Trustee agrees, the only exceptions to this being actions by the State Parties under the State Security to:

- Enforce their rights to set off—against their payments to the Project Company, other than their “construction payments” (section 3.2.19), any “securitised variation payments” (section 3.3.2.4) and any payments under the Interest Adjustment Agreement (section 4)—any amounts owed to them by the Project Company, or to enforce the absence of an equivalent entitlement by the Project Company (sections 3.3.7.1 and 3.3.7.2)
- Enforce their rights following an emergency (section 3.4.9), or
- Enforce their rights to take any action they consider appropriate or necessary to overcome the effects of a subsisting “Project Company termination event” or preserve the project, with the costs they incur in doing so being payable by the Project Company on demand (section 3.5.3.5(a)), either:
  - Prior to any “stepping in” by the Security Trustee (section 3.5.3.5(b)), or
  - During any “stepping in” by the Security Trustee, upon the occurrence of any of the circumstances entitling the Project Company to terminate the Project Deed (section 3.5.3.5(c)).

## 6 The NSW Government's guarantee of the HAC's performance

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Under the PAFA Act Guarantee of 18 July 2006, between the Minister for Health (on behalf of the State of NSW), the HAC, the Project Company, Ancora and the Security Trustee, the State of NSW has granted the Project Company, Ancora and the Security Trustee an unconditional and irrevocable guarantee of the HAC's performance of all its obligations under the Project Deed (as amended by the Deed of Amendment No 1, the Deed of Amendment No 3 and the Deed of Amendment No 4), the Development Approvals Deed, the Construction Side Deed, the Independent Certifier Deed, the Construction Licences executed by the HAC, the FM Operator Side Deed, the Services Operator Side Deed, the Labour Services Agreement, the Licences executed by the HAC, the Forensic Hospital Lease, the Forensic Hospital Sublease, the Interest Adjustment Agreement, the Securitisation Agreement, the Master Rental Agreement, the Master Rental Side Letter, the Payment Directions Deed, the State Security, the Financiers Tripartite Deed and any other docu-

ments approved, in writing, by the NSW Treasurer in the future.

This guarantee is a continuing obligation. It will remain in force until seven months after the term of these contracts (i.e. until 19 February 2035 or seven months after any other expiration or termination of the contracts), regardless of any settlements, intervening payments or anything else which might otherwise affect the State's liability as guarantor at law or in equity.

The State must satisfy its obligations under its guarantee within 21 days of a demand made on it by the Project Company, Ancora or the Security Trustee. Such a demand may be made if a demand has previously been made on the HAC and the HAC has failed to perform within 21 days.

In turn, the HAC has indemnified the State, the NSW Government and the NSW Treasurer against any and all liabilities they may incur because of the PAFA Act Guarantee.

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In accordance with the public disclosure requirements of the NSW Government *Working with Government: Guidelines for Privately Financed Projects*, this report presents only summaries of, and *not* complete reports on, the Long Bay Forensic and Prison Hospitals project contracts of greatest relevance to the public sector, and does not cover matters which might disclose the private sector parties' cost structures, profit margins or intellectual property or otherwise place them at a disadvantage with their competitors.

This report was prepared for submission to the NSW Audit Office and is based on the contracts as they stood towards the end of the Audit Office's review on 10 November 2006. Subsequent amendments of or additions to these contracts, if any, are not reflected in this summary.

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