

Newcastle Mater Hospital project Public Private Partnership

Summary of contracts

as at 30 December 2005





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I Introduction

This report summarises the main contracts, from a public sector perspective, for a “public private partnership” to redevelop the Newcastle Mater Hospital.

It has been prepared by the New South Wales Department of Health in accordance with the public disclosure requirements 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 those contracts which the NSW Health Administration Corporation (the Director-General of the Department of Health) is a party, 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’ cost 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.

Two of the main contracts for the project, a Project Deed (with numerous schedules) and a Labour Services Agreement, were publicly released in January 2006, and may be downloaded from <https://tenders.nsw.gov.au/health>.

I.1 The project

The Newcastle Mater Hospital redevelopment project involves:

- The financing, design, construction and commissioning of new buildings and refurbishment of existing buildings by a special-purpose private sector “project partnership” on the site of the Newcastle Mater Misericordiae Hospital on Edith Street in Waratah, and
- Private sector facilities management and delivery of ancillary non-clinical services on the site until November 2033, with non-clinical staff at the hospital being managed by the private sector parties but continuing to be employed by the hospital’s owners, Mercy Health Care (Newcastle) Limited, or the Hunter and New England Area Health Service, as applicable,

in return for performance-based monthly payments to the private sector parties by the Health Administration Corporation during the operational phase of the project.



The private sector parties to the project's contracts are backed by Westpac, Abigroup/Bilfinger Berger, the Compass Group and Honeywell.

Health services at the hospital, the second largest in Newcastle, will continue to be delivered by Mercy Health Care (Newcastle) Limited and the Hunter and New England Area Health Service.

The new and upgraded facilities at the hospital will include new and refurbished hospital buildings, an upgrading and expansion of the hospital's cancer radiation therapy facilities, with three extra radiation therapy bunkers, two extra linear accelerators and a new brachytherapy unit, and a new 96-bed acute mental health facility, replacing outdated facilities at James Fletcher Hospital.

The Department of Health has estimated that these cancer therapy and mental health facilities will become available several years earlier than would have been possible had traditional public sector funding approaches been adopted, and the NSW Treasury has estimated that the net present cost of the hospital to the Government will be approximately 2% lower than it would have been under conventional public sector delivery, assuming the same time-frames for both methods of delivery (see *Table 1*).

The capital cost of the project's works is approximately \$132 million (2003 \$), or about \$80 million for the 176-bed hospital, \$34 million for the new mental health facility and \$18 million for the new radiotherapy facilities. This is equivalent to approximately \$150 million in 2005 \$.

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 <i>(as contracted)</i>
	"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 Department of Health	\$384.1 m	\$388.7 m	\$393.7 m	\$380.5 m
Estimated saving achieved through private sector delivery	0.9%	2.1%	3.4%	

The "most likely" cost estimate for the "public sector comparator" (PSC) of \$388.7 m includes a "raw" capital cost estimate with a present value (@5.63% pa) of \$119.7 m, a capital risk adjustment of \$16.0 m, a "raw" operational cost of \$233.8 m, an operational risk adjustment of \$18.3 m and a competitive neutrality adjustment of \$0.9 m.

The cost estimate for private sector delivery of \$380.5 m includes a notional upward adjustment of \$1.7 m, 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".

Approximately 230 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 underlying costs of labour and/or materials
- There might be structural failure in the building
- Construction might commence later than planned

- Hospital operations (clinical services) might be disrupted during construction, and
- The buildings might not be fit-for-purpose.

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

- The condition of the existing buildings might have been inaccurately assessed, necessitating higher maintenance costs than expected
- 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
- Occupational Health and Safety standards might be breached during operation
- The services performed might not fully meet their specifications
- Security operating costs might have been underestimated
- Cleaning operating costs might have been underestimated
- 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 contracted services by the private sector parties, and
- Sub-contractor insolvency.

1.2 Processes for selecting and contracting with the private sector parties

1.2.1 The initial decision to redevelop the Mater Hospital using a ‘public private partnership’

On 4 June 2003 an **Agreement for Lease and Initial Project Agreement for the Redevelopment of the Mater Hospital** was executed between the Health Administration Corporation (the Director-General of the NSW Department of Health), the Hunter Area Health Service, the Trustees of the Sisters of Mercy (Singleton), the then owners of the Mater Hospital Site, and Mercy Health Care (Newcastle) Limited, the current owner of the site.

This agreement—most of which has now been overtaken by the contracts summarised in this report—set out the broad parameters for redevelopment of the hospital as a privately financed project or, if that did not proceed, a conventionally procured project funded from the capital works budget of the Department of Health.

Following investigations and negotiations in accordance with this agreement, the NSW Government decided that the Mater Hospital should be redeveloped as a “public private partnership”, and this was announced by the then Minister for Health, Mr Morris Iemma, on 29 August 2003.

1.2.2 Shortlisting of proponents

On 13 October 2003, the Department of Health issued a *Call for Expressions of Interest* in the project.

Expressions of Interest were received, by the closing date of 25 November 2003, from six consortia:

- Integrated Health Group (Trinity, BankWest, Hansen Yuncken, Bligh Voller Nield and Johnson Controls)
- Mater Health Partnership (Bilfinger Berger, Macquarie Bank, Boulderstone Hornibrook, McConnell Smith & Johnson, Len Dockrill and United KG)
- Novacare (Mowlem, Westpac, Barclay Mowlem, Peddle Thorp and Walker, Suturs and Tempo)
- PPP Solutions (Multiplex Infrastructure, Babcock & Brown, Multiplex Constructions, Bates Smart, HPI and Multiplex Asset Management)
- Reliance Health (ABN AMRO, John Holland, Rice Daubney, Suturs and Spotless), and
- Sanesco (Leighton Contractors, Royal Bank of Scotland, Di Carlo Potts, Honeywell, Leighton Services and Compass Group).

These *Expressions of Interest* were evaluated by an Evaluation Committee comprising Mr Michael Dawson from Bovis Lend Lease, the Department of Health’s Mater PPP Project Manager, Mr Glenn Monckton, the Department of Health’s Acting Director, Procurement, Mr Stewart Leeman, the Hunter Area Health Service’s Manager, Capital Works and Physical Services, and Mr Tony Miller, a Principal Adviser from the NSW Treasury’s Private Projects Branch.

This Evaluation Committee was assisted by Bovis Lend Lease (assessments of design and construction experience), the Hunter Area Health Service (assessments of facilities management experience), the NSW Treasury Corporation



(assessments of structures, risk management and financial experience) and PricewaterhouseCoopers (assessments of financial experience and financial strategies). Its processes were overseen by a probity auditor, Mr Warwick Smith from Deloitte Touche Tohmatsu.

The six *Expressions of Interest* were evaluated in terms of:

- The respondents' structures, allocations of responsibilities and risks and demonstrated acceptance of the project's commercial principles (15% weighting)
- The appreciation by the respondents, and their key personnel, of social infrastructure public-private interfaces and other matters likely to affect the project, the respondents' strategies to provide certainty of delivery of the project's objectives and the respondents' abilities to work with the public sector in a cooperative and harmonious partnership over the long term (20%)
- The appreciation by the respondents, and their key personnel, of the project's design and construction requirements, the respondents' design and construction experience, expertise, capacities and strategies, and the respondents' appreciation of and experience with working with local businesses and industry in the implementation of projects (25%)
- The appreciation by the respondents, and their key personnel, of the project's operational and maintenance requirements, and the respondents' operational and maintenance experience, expertise, capacities and strategies for existing, new and refurbished facilities (25%)
- The appreciation by the respondents, and their key personnel, of the project's financial requirements, and respondents' financing experience, expertise and strategies (15%)
- The financial capacities of the respondents, their participants and their guarantors (assessed on a pass/fail basis), and
- The respondents' proposals to preserve probity and effective competition between related corporations (assessed on a pass/fail basis).

Three of the respondents, Reliance Health, Sanesco and Novacare, were shortlisted to submit detailed proposals for the project. The Sanesco consortium subsequently withdrew from the process.

1.2.3 Selection of the preferred proponent

1.2.3.1 Detailed Proposals

On 12 August 2004 the Department of Health issued a *Request for Detailed Proposals* to the two remaining shortlisted consortia.

At that time, and again on 20 December 2004, each of the participants of the Reliance Health consortium (or, on 20

December 2004, a special purpose vehicle established by them, Reliance Health Pty Limited) and each of the participants of the Novacare consortium executed Deeds of Disclaimer warranting that they had not relied on specified documents provided to them by the Department of Health and promising to comply with confidentiality requirements.

On the closing date, 20 December 2004, *Detailed Proposals* were received from the two consortia, whose principal participants by that stage had become:

- Reliance Health: ABN AMRO Australia Limited, John Holland Pty Limited and Spotless Services Australia Limited, and
- Novacare: Mowlem Aqumen (Asia Pacific) Pty Limited, Westpac Banking Corporation, Abigroup Contractors Pty Limited, Honeywell Limited and Compass Group (Australia) Pty Limited.

These *Detailed Proposals* were evaluated, in the first instance, by an RDP Evaluation Panel comprising Mr Michael Dawson from Bovis Lend Lease, the Mater PPP Project Manager, Mr Glenn Monckton, the Department of Health's PPP Adviser, Mr Frank Cordingley, the Hunter Area Health Service's Director, Corporate Services, and Mr Tony Miller, a Principal Adviser from the NSW Treasury's Private Projects Branch.

The RDP Evaluation Panel was assisted by four specialist advisory panels on financial, commercial, technical and services issues, with legal advice being provided by Clayton Utz, financial advice by PricewaterhouseCoopers, the NSW Treasury and the NSW Treasury Corporation, technical advice by Bovis Lend Lease and the Hunter Area Health Service, advice on services by Milliken Bersen Madden and the Hunter Area Health Service and advice on costs by Davis Langdon Australia.

The RDP Evaluation Panel's recommendations were then considered by an RDP Evaluation Committee, comprising Mr David Gates, the Department of Health's Director, Asset and Contract Services, Mr Frank Cordingley, the Hunter Area Health Service's Director, Corporate Services, Mr John Campbell, as a nominee of the General Manager of the Mater Hospital, and Mr Danny Graham, NSW Treasury's Director, Private Projects Branch.

These processes were overseen by two independent probity auditors, Mr Warwick Smith and Mr Ray Calligeros of Deloitte Touche Tohmatsu.

The two *Detailed Proposals* were evaluated in terms of:

- Five design, construction and commissioning criteria (compliance with the project's technical specifications and relevant laws, codes and Government policies; certainty of delivery; efficiency of staging of the works; 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)

- Four 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 the hospital’s operators and other stakeholders; and transitional arrangements for staff and unions) (30%)
- 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%), and
- Two financial criteria (financial strength and certainty of funding) (20%).

They were also evaluated, on a simple “pass or fail” basis, against three sets of unweighted criteria:

- Criteria concerning any proposals for additional commercial developments (suitability; the protection of service delivery should the additional developments not perform; delivery timelines and staging; impacts on the operations of the hospital and mental facility; compliance with the hospital site’s zoning requirements; net financial benefits for the Department of Health; and any other, non-financial risks and benefits).

In practice, although both of the proponents submitted preliminary concepts for additional commercial developments, none was considered sufficiently developed to permit detailed evaluation or of sufficient merit to warrant further investigation at that time.

- Compliance with probity requirements, including the findings of any probity or security investigations by the Department of Health.
- Any other criteria or matters which the Department of Health considered relevant to the evaluations (in practice, there was none).

The results of the evaluations of the weighted criteria and the last two of the criteria concerning additional commercial

developments were then compared with the Net Present Value of the payments to be made to the private sector parties under each *Proposal*, adjusted for the risk allocations in the *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 *Proposal*, and
- Analyses of each *Proposal’s* compliance with affordability constraints.

The RDP Evaluation Panel and RDP Evaluation Committee concluded that neither of the proponents had yet demonstrated “value for money”, and there was no clear basis for choosing either of them as the preferred bidder at that stage, but both of the *Proposals* might satisfy the HAC’s requirements for the project following negotiations to rectify their deficiencies.

Accordingly, it was decided that negotiations should continue with both proponents, in parallel, to rectify the identified deficiencies and improve their offers.

On 31 March 2005 the Department of Health wrote to both proponents, setting out its requirements and processes for these negotiations. Among other things, these letters specified that in order for the Mater Hospital project to proceed as a “public private partnership”:

- Its costs would have to be less than those of the “public sector comparator”
- Its risk allocations would have to be closer to the HAC’s preferred position than had been proposed so far

- Identified deficiencies in the technical, services and financial aspects of the proposals made so far would have to be rectified and qualifications concerning the technical and services aspects would have to be removed, and
- These matters would have to be resolved within eight weeks, so as not to compromise the timetable for the project.

The Reliance Health consortium agreed to the Department of Health's terms on 1 April 2005 and the Novacare consortium did likewise on 4 April 2005.

1.2.3.2 Revised Proposals

On 7 April 2005 a formal *Request for Revised Proposals* was issued to the Reliance Health and Novacare consortiums.

On the closing date, 2 June 2005, *Revised Proposals* were received from both consortiums, with Medirest (Australia) Pty Limited, a subsidiary of Compass Group (Australia) Pty Limited, replacing Mowlem Aquamen as part of the Novacare consortium.

In order to be selected as the preferred bidder the proponents first had to satisfy four conditions:

- Costs below those of the "public sector comparator"
- Compliance with the project's design requirements, as "represented" by the "reference project" and the project's technical specifications
- Compliance with the project's services requirements, in its services and technical specifications, and
- An "acceptable" risk position, documented in a draft Project Deed.

The *Revised Proposals* were evaluated, in the first instance, by an RRP Evaluation Panel comprising Mr Michael Dawson from Bovis Lend Lease, the Mater PPP Project Manager, Mr Glenn Monckton, the Department of Health's PPP Adviser, Ms Tracey McCosker, the Hunter and New England Area Health Service's Director, Corporate Services, and Mr Tony Miller, a Principal Adviser from the NSW Treasury's Private Projects Branch.

This panel was again assisted by four specialist advisory panels on financial, commercial, technical and services issues, with general commercial advice being provided by Mr John Armstrong, a consultant to the NSW Treasury, legal advice being provided by Clayton Utz, financial advice by PricewaterhouseCoopers, the NSW Treasury and the NSW Treasury Corporation, technical advice by Bovis Lend Lease and the Hunter and New England Area Health Service, and advice on services by Milliken Bersen Madden, the Hunter and New England Area Health Service and Mercy Health Care (Newcastle) Limited.

The RRP Evaluation Panel's recommendations were then considered by an RRP Evaluation Committee, comprising

Mr David Gates, the Department of Health's Director, Asset and Contract Services, Ms Tracey McCosker, the Hunter and New England Area Health Service's Director, Corporate Services, Mr John Campbell, as a nominee of the General Manager of the Mater Hospital, and Mr Danny Graham, NSW Treasury's Director, Private Projects Branch.

These processes were again overseen by two independent probity auditors, Mr Warwick Smith and Mr Ray Calligeros of Deloitte Touche Tohmatsu.

The *Revised Proposals* were evaluated against the same criteria, with the same weightings where relevant, as the criteria applied in assessing the earlier *Detailed Proposals*.

The RRP Evaluation Panel concluded that the Novacare *Revised Proposal* was superior to Reliance Health's, but that negotiations should continue in order to rectify identified deficiencies in the *Revised Proposals* and improve the proponents' offers. The proponents were advised that the initial negotiations, over a period of ten days, would be exclusively with the Novacare consortium, and that if its offer did not improve sufficiently negotiations would then commence with the Reliance Health consortium.

1.2.3.3 Final negotiations leading to the selection of the preferred proponent

Following the ten-day period of negotiations with the Novacare consortium, which ended on 8 July 2005, the Evaluation Panel concluded that a position acceptable to the State had now been reached.

The panel's recommendation that the Novacare consortium should be selected as the preferred proponent was accepted by the Evaluation Committee on 11 July 2005, and the selection was publicly announced by the Minister for Health, Mr Morris Iemma, on 27 July 2005.

1.2.4 Execution of the contracts

The project contracts to which the Minister for Health, the Health Administration Corporation and/or the Hunter and New England Area Health Service are parties were executed on 30 November 2005 and took effect immediately.

The execution of the contracts was publicly announced by the Minister for Finance and Minister for the Hunter, Mr Michael Costa, on 2 December 2005.

1.3 The structure of this report

Section 2 of this report summarises the structuring of the Mater Hospital redevelopment project and explains the inter-relationships of the various agreements between the public and private sector parties.

Sections 3, 4 and 5 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

2.1 The participants in the project

2.1.1 Public sector parties to the contracts

The public sector parties to the Mater Hospital redevelopment project contracts are:

- The **Minister for Health**, on behalf of the **State of New South Wales**
- 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 1982, and
- The **Hunter and New England Area Health Service** (ABN 24 500 842 605) (“**HNE**”), a statutory authority established under section 17 of the Health Services Act 1997.

The functions of the Director-General of the Department of Health under the Health Administration Act include facilitation of the provision of health services and complementary social welfare services, subject to the control and direction of the Minister for Health, and the HAC's powers include the power to enter into contracts, employ staff and acquire and dispose of interests in land.

2.1.2 Private sector parties to the contracts

The private sector parties to the Mater Hospital redevelopment project contracts are:

- **Novacare Solutions Pty Limited** (ACN 116 455 460, ABN 87 116 455 460), in its capacity as trustee of the **Novacare Solutions Trust** (ABN 12 419 476 479), an unlisted public unit trust, and **Novacare Health Solutions Pty Limited** (ACN 116 455 488, ABN 79 116 455 488), in its capacity as the trustee of the **Novacare Health Solutions Trust** (ABN 24 060 067 275), another unlisted public unit trust (“**the Project Partners**”).

All of the units in the Novacare Solutions Trust are held by the Novacare Solutions No 1 Trust (ABN 74 633 006 744), an unlisted public unit trust whose trustee is Novacare Solutions No 1 Pty Limited (ACN 116 455 200, ABN 41 116 455 200), a company which

also owns all the shares in the trustee of the Novacare Solutions Trust, Novacare Solutions Pty Limited. All of the units in the Novacare Solutions No 1 Trust and all of the shares in Novacare Solutions No 1 Pty Limited are held by Westpac Investment Vehicle Pty Limited (ACN 093 721 423, ABN 51 093 721 423), which is wholly owned by Sixty Martin Place (Holdings) Pty Limited (ACN 002 325 957, ABN 63 002 325 957), which in turn is wholly owned by Westpac Banking Corporation (ACN 007 457 141, ABN 33 007 457 141).

Similarly, all of the units in the Novacare Health Solutions Trust are held by the Novacare Health Solutions No 1 Trust (ABN 58 899 154 707), an unlisted public unit trust whose trustee is Novacare Health Solutions No 1 Pty Limited (ACN 116 455 246, ABN 37 116 455 246), a company which also owns all the shares in the trustee of the Novacare Health Solutions Trust, Novacare Health Solutions Pty Limited. All of the units in the Novacare Health Solutions No 1 Trust and all of the shares in Novacare Health Solutions No 1 Pty Limited are held by Westpac Investment Vehicle Pty Limited, which as described above is ultimately wholly owned by Westpac Banking Corporation.

- The **Novacare Solutions Partnership** (ABN 56 286 280 882) (“**the Project Partnership**”), a partnership established by the Project Partners under a Mater Hospital Equity Participants Deed of 22 November 2005.
- **Novacare Services Pty Limited** (ACN 116 498 027, ABN 88 116 498 027) (“**ServiceCo**”), which is owned 50:50 by Novacare Solutions No 1 Pty Limited and Novacare Health Solutions No 1 Pty Limited and thus ultimately by Westpac Banking Corporation.
- **Novacare Health Pty Limited** (ACN 116 455 479, ABN 77 116 455 479) (“**the Nominee Company**”), or an alternative appointed by the Project Partnership and ServiceCo, which will act as an agent of the Project Partnership and ServiceCo in a limited capacity and provide a common point for the invoicing and receipt of payments. Novacare Health Pty Limited is owned 50:50 by Novacare Solutions No 1 Pty Limited and Novacare

Health Solutions No 1 Pty Limited and thus ultimately by Westpac Banking Corporation.

- **Mercy Health Care (Newcastle) Limited** (ACN 081 149 126, ABN 75 081 149 126) (“**MHCN**”), the owner of the Newcastle Mater Misericordiae Hospital site.

MHCN has leased the site to the HAC until 2 December 2033, and some of its employees will be managed and supervised by the Project Partnership and ServiceCo during the operational phase of the project.

- **Abigroup Contractors Pty Limited** (ACN 000 201 516, ABN 40 000 201 516) (“**the Construction Contractor**”), which is obliged to design, construct and commission the project’s works for the Project Partnership, thereby enabling the Project Partnership to meet its design, construction and commissioning obligations to the HAC.

The Construction Contractor is wholly owned by Abigroup Limited (ACN 000 358 467, ABN 63 000 358 467), which is wholly owned by Bilfinger Berger Australia Pty Limited (ACN 106 594 816, ABN 52 106 594 816), which, in turn, is wholly owned by Bilfinger Berger Aktiengesellschaft (ARBN 081 929 473, Mannheim HRB 4444), a major German construction company listed on German stock exchanges.

- **Abigroup Limited and Bilfinger Berger Australia Pty Limited** (“**the Construction Contractor Guarantors**”), which have given the Project Partnership parent company guarantees of the performance of the Construction Contractor’s design, construction and commissioning obligations to the Project Partnership.

Bilfinger Berger AG has undertaken that if the Construction Contractor ceases to be its wholly owned subsidiary Bilfinger Berger AG will provide a guarantee on terms equivalent to the guarantees currently provided by the Construction Contractor Guarantors.

- **TSA Management Pty Limited** (ACN 099 000 272, ABN 71 099 000 272) (“**the Independent Certifier**”), which will carry out specified certification, inspection and enforcement obligations during the commissioning and completion of the project’s works.
- **Honeywell Limited** (ACN 000 646 882, ABN 74 000 646 882) (“**the Hard Services Contractor**”), which is obliged to deliver specified operational-phase services for the Project Partnership, thereby enabling the Project Partnership to meet its services obligations to the HAC.

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

- **Medirest (Australia) Pty Limited** (ACN 114 320 615, ABN 79 114 320 615) (“**the Soft Services Contractor**”), which is obliged to deliver specified operational-phase

services for ServiceCo, thereby enabling ServiceCo to meet its services obligations to the HAC.

Medirest 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 Hard Services Contractor Guarantor**”) and **Compass Group plc** (“**the Soft Services Contractor Guarantor**”), which have given the Project Partnership and ServiceCo parent company guarantees of the performance of the Hard and Soft Services Contractors’ service obligations to the Project Partnership and ServiceCo.
- **Permanent Custodians Limited** (ACN 001 426 384, ABN 55 001 426 384) (“**the Security Trustee**”), as the trustee of a security trust established under a **Newcastle Mater Hospital PPP Project Bond and Security Trust Deed**, dated 25 November 2005, for the benefit of the project’s private sector debt financiers and associated debt financing managers, agents and underwriters. Permanent Custodians is a wholly owned subsidiary of Trust Company of Australia Limited (ACN 004 027 749, ABN 59 004 027 749), a public company listed on the Australian Stock Exchange.

2.2 Contractual structure

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

The principal contract is the **Newcastle Mater Hospital Project Deed** (“**the Project Deed**”), dated 30 November 2005, between the HAC, the Project Partnership and ServiceCo.

This agreement sets out the terms under which:

- (a) The Project Partnership and ServiceCo must finance, design, construct, refurbish and commission specified hospital facilities.

The Project Partnership and ServiceCo will satisfy these obligations to the HAC through:

- Their appointment of the Nominee Company with powers to exercise their rights and perform their obligations under their contracts with the HAC
- Cross-guarantees of each other’s performance under the principal project contracts
- The performance by the Construction Contractor of its obligations to the Project Company under a **Design and Construction Deed for the Newcastle Mater Hospital** between the Construction

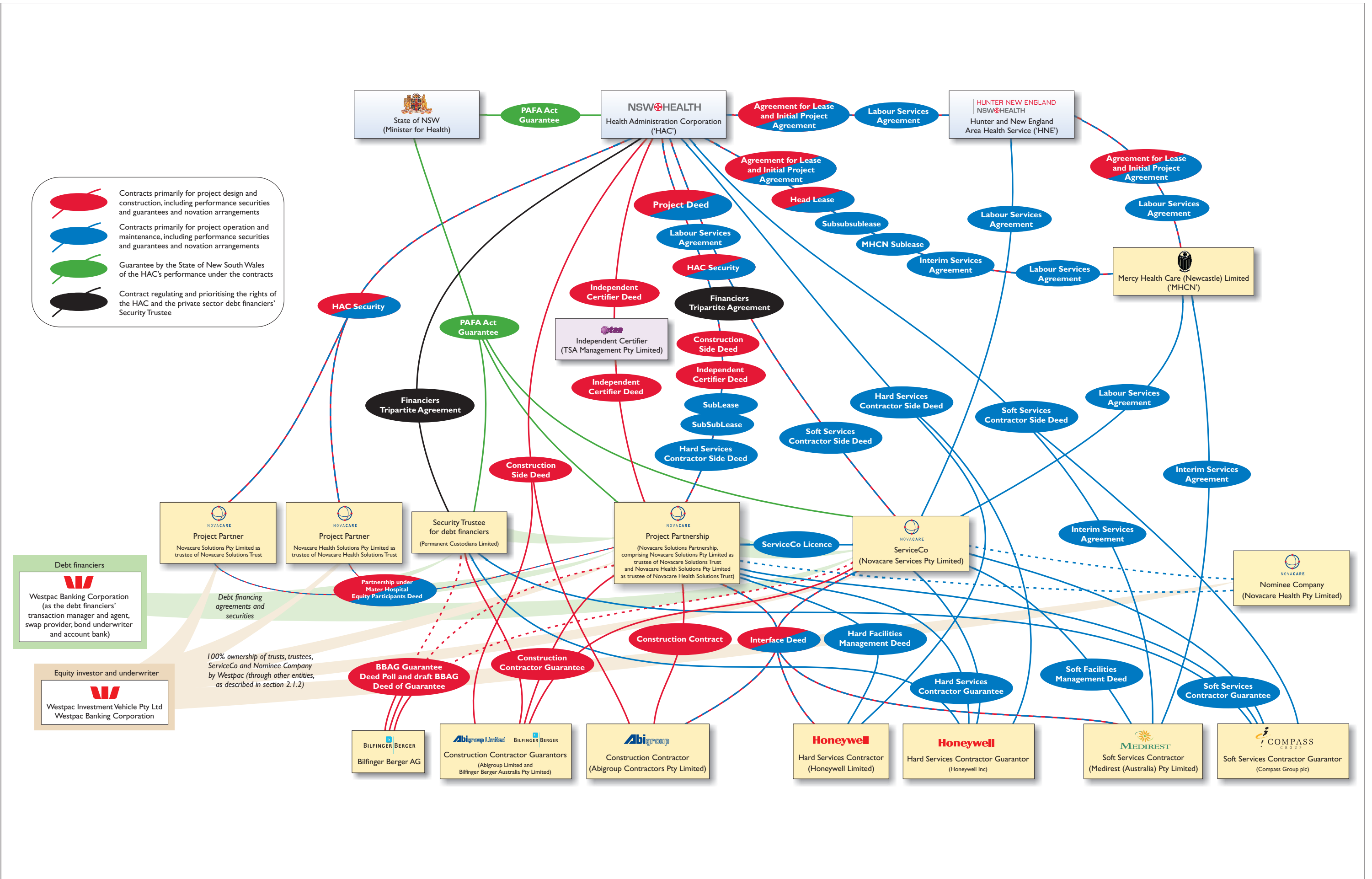


Figure 1. Overview of the structure of the Newcastle Mater Hospital Public Private Partnership project's contracts from a public sector perspective.

Contractor and the Project Partnership, dated 25 November 2005 (“the Construction Contract”)

- The performance of any other construction contractors appointed by the Project Partnership and/or ServiceCo
- The performance by the Construction Contractor of its obligations to the Project Partnership and ServiceCo under an **Interface Deed for the Newcastle Mater Hospital** between the Construction Contractor, the Project Partnership, ServiceCo, the Hard Services Contractor and the Soft Services Contractor, dated 25 November 2005, concerning the coordination of the construction and operational aspects of the project (“the **Interface Deed**”), and
- The provision of debt finance to the Project Partnership, supplementing Westpac’s equity investments, under private sector debt financing arrangements whose details, in accordance with restrictions imposed by the NSW Government’s *Working with Government: Guidelines for Privately Financed Projects*, are generally beyond the scope of this report.

The performance of the Construction Contractor under the Construction Contract and the Interface Deed has been guaranteed to the Project Partnership, ServiceCo and the debt financiers’ Security Trustee by the Construction Contractor’s immediate, Australian-based parent companies, the Construction Contractor Guarantors, under a **Deed of Guarantee**, dated 25 November 2005, between the Project Partnership, ServiceCo, the Security Trustee and the Construction Contractor Guarantors (“the **Construction Contractor Guarantee**”).

In addition, the Construction Contractor’s ultimate owner, Bilfinger Berger AG, has promised the Project Partnership, ServiceCo and the Security Trustee, in a **Deed Poll** in their favour dated 25 November 2005 (“the **BBAG Guarantee Deed Poll**”), that if the Construction Contractor ceases to be its wholly owned subsidiary Bilfinger Berger AG will execute an analogous parent company guarantee in their favour. A draft Deed of Guarantee to this effect (“the **draft BBAG Deed of Guarantee**”) is annexed to this Deed Poll.

The Construction Contractor Guarantee and the draft BBAG Deed of Guarantee also set out other parent company guarantees to the Project Partnership, ServiceCo and the Security Trustee concerning other aspects of the project, as indicated below.

The Independent Certifier, appointed under the **Newcastle Mater Hospital Independent Certifier Deed** between the HAC, the Project Partnership and the Independent Certifier, dated 30 November 2005 (“the **Independent Certifier Deed**”), will carry out specified certification, inspection and enforcement functions during the commissioning, testing and completion of the hospital facilities and the correction of minor defects in the facilities.

- (b) The Project Partnership and ServiceCo must provide specified building and equipment maintenance, facilities management, cleaning, grounds maintenance, utility, security, catering, materials management and general services to the HAC throughout the operations phase of the project, from the completion of the first stage of the construction works (or the Project Deed’s deadline for this stage to be completed, if this deadline is later) until 30 November 2033 or any earlier termination of the project contracts.

The Project Partnership and ServiceCo will satisfy these obligations to the HAC through:

- Their appointment of the Nominee Company with powers to exercise their rights and perform their obligations under their contracts with the HAC, HNE and MHCN
- Cross-guarantees of each other’s performance under the principal project contracts
- The performance by the Hard Services Contractor of its obligations under a **Newcastle Mater Hospital Hard Facilities Management Deed** between the Hard Services Contractor and the Project Partnership, dated 25 November 2005 (“the **Hard Facilities Management Deed**”)
- The performance by the Soft Services Contractor of its obligations under a **Newcastle Mater Hospital Soft Facilities Management Deed** between the Soft Services Contractor and ServiceCo, dated 25 November 2005 (“the **Soft Facilities Management Deed**”)
- The performance by the Hard Services Contractor and the Soft Services Contractor of their obligations to the Project Partnership and ServiceCo under the **Interface Deed**, concerning the coordination of the construction and operational aspects of the project, and
- The management and supervision by the Project Partnership and ServiceCo of HNE and MHCN non-clinical staff at the hospital, under terms set out in a **Labour Services Agreement** between the HAC, the HNE, MHCN, the Project Part-

nership and ServiceCo, dated 30 November 2005.

The performance of the Hard Services Contractor under the Hard Facilities Management Deed and the Interface Deed has been guaranteed to the Project Partnership, ServiceCo and the debt financiers' Security Trustee by the Hard Services Contractor Guarantor under a **Guarantee and Indemnity Deed**, dated 25 November 2005, between the Project Partnership, ServiceCo, the Security Trustee and the Hard Services Contractor Guarantor ("**the Hard Services Contractor Guarantee**").

Similarly, the performance of the Soft Services Contractor under the Soft Facilities Management Deed and the Interface Deed has been guaranteed to ServiceCo, the Project Partnership and the Security Trustee by the Soft Services Contractor Guarantor under a **Mater Newcastle Project Parent Company Guarantee**, dated 25 November 2005, between ServiceCo, the Project Partnership, the Security Trustee and the Soft Services Contractor Guarantor ("**the Soft Services Contractor Guarantee**").

The Hard Services Contractor Guarantee and the Soft Services Contractor Guarantee also set out other parent company guarantees to the Project Partnership, ServiceCo and the Security Trustee concerning other aspects of the project, as discussed below.

In a separate arrangement the HAC and MHCN have contracted directly with the Soft Services Contractor for the supply of limited cleaning, catering, materials-handling and other facilities management services in the period prior to the completion of the first stage of the construction works, under an Interim Services Soft Services Facilities Management Agreement ("**the Interim Services Agreement**") dated 24 November 2005. This is a conventional contract for the supply of services for a fee, and is therefore not itself part of the "public private partnership" contractual arrangements, but if the HAC and MHCN terminate the Interim Services Agreement before the completion of the first stage of the construction works the HAC's initial payments to the Project Partnership and ServiceCo for the first two weeks of their services under the Project Deed may be higher than they might otherwise be.

- (c) The HAC must pay the Project Partnership and ServiceCo specified performance-based fees, throughout the operational phase of the project, for providing the specified non-clinical services, with deductions if they do not satisfy specified standards, and the Project Partnership and ServiceCo must pay the

HAC specified wage and salary and related costs for each HAC and MHCN employee they manage and supervise at the hospital.

- (d) The HAC must lease the buildings on the hospital site—which it has itself leased from MHCN, under "**the Head Lease**", from 30 November 2005 until 2 December 2033—to the Project Partnership, under a **SubLease** between the HAC and the Project Partnership, from the date of completion of all the hospital's facilities (or the Project Deed's deadline for these works to be completed, if this deadline is later) until 30 November 2033 or any earlier termination of the project's contracts, and:
- o The Project Partnership must simultaneously lease these hospital buildings back to the HAC, under a **SubSubLease** between the HAC and the Project Partnership, until 29 November 2033 or any earlier termination of the project's contracts
 - o The HAC may lease areas of the hospital to MHCN, under an **MHCN Sublease** in the case of areas not subleased to the Project Partnership and under a **Subsubsublease** in the case of areas subleased to the Project Partnership and subsubleased back from the Project Partnership, and
 - o The Project Partnership may grant ServiceCo a licence ("**the ServiceCo Licence**") to access areas of the hospital it is subleasing from the HAC.
- (e) On 30 November 2033, or upon any earlier termination of the project's contracts, the Project Partnership and ServiceCo must transfer possession of the hospital and the hospital site, and their facilities management responsibilities, to the HAC or to another contractor as directed by the HAC.

General arrangements between the HAC, HNE and MHCN for the duration of the project were originally set out in the **Agreement for Lease and Initial Project Agreement for the Redevelopment of the Mater Hospital** of 4 June 2003, but most of the provisions of this contract—including all of its provisions concerning the then-possibility of a privately financed project and the leasing of the hospital site to the HAC—have been effectively overtaken by the contracts summarised in this report.

Should the Project Partnership default on its obligations to the HAC during the construction phase or its obligations under the Construction Contract, or should there be an emergency or should the Project Deed be terminated, under the Project Deed and the **Newcastle Mater Hospital Construction Side Deed** between the HAC, the Project Partnership, the Construction Contractor and the Construction Contractor Guarantors ("**the Construction Side Deed**"), dated 30 November 2005, the HAC will be able to "step in"

or (in the last of these situations) place a new contractor into the shoes of the Project Partnership under the Construction Contract, so that design, construction, refurbishment and commissioning of the hospital facilities can continue.

The performance of the Construction Contractor under the Construction Side Deed has been guaranteed to the Project Partnership, ServiceCo and the debt financiers' Security Trustee by the Construction Contractor Guarantors under the Construction Contractor Guarantee.

Similarly, should the Project Partnership or ServiceCo default on its obligations under the Project Deed, the Hard Facilities Management Deed or the Soft Facilities Management Deed during the project's operations phase, or should there be an emergency or should the Project Deed be terminated, under the Project Deed, the **Newcastle Mater Hospital Hard Services Contractor Side Deed** between the HAC, the Project Partnership, the Hard Services Contractor and the Hard Services Contractor Guarantor ("**the Hard Services Contractor Side Deed**"), dated 30 November 2005, and the **Newcastle Mater Hospital Soft Services Contractor Side Deed** between the HAC, ServiceCo, the Soft Services Contractor and the Soft Services Contractor Guarantor ("**the Soft Services Contractor Side Deed**"), dated 30 November 2005, the HAC will be able to "step in" or (in the last of these situations) place a new contractor into the shoes of the Project Partnership or ServiceCo under the Hard Facilities Management Deed or the Soft Facilities Management Deed, as relevant, so that the provision of services can continue.

The performance of the Hard Services Contractor under the Hard Services Contractor Side Deed has been guaranteed to the Project Partnership, ServiceCo and the debt financiers' Security Trustee by the Hard Services Contractor Guarantor under the Hard Services Contractor Guarantee, and the performance of the Soft Services Contractor under the Soft Services Contractor Side Deed has been guaranteed to ServiceCo, the Project Partnership and the Security Trustee by the Soft Services Contractor Guarantor under the Soft Services Contractor Guarantee.

Some of the rights and obligations of the HAC and the Project Company under the Project Deed, the Construction Side Deed, the Hard Services Contractor Side Deed and the Soft Services Contractor Side Deed are subject to restrictions or additional process requirements under the **Newcastle Mater Hospital Financiers Tripartite Deed** between the HAC, the Project Partnership, ServiceCo and the debt financiers' Security Trustee ("**the Financiers Tripartite Deed**"), dated 30 October 2005. As an example, this agreement requires the HAC to notify the Security Trustee before it terminates the Project Deed for a default by the Project Partnership or ServiceCo, giving them an opportunity to cure the default.

Under the **Newcastle Mater Hospital Fixed and Floating Charge ("the HAC Security")**, an agreement between the HAC, the Project Partners, the Project Partnership and ServiceCo dated 30 November 2005, the obligations of the Project Partnership and ServiceCo to the HAC under the Project Deed, the Independent Certifier Deed, the Labour Services Agreement, the SubLease, the SubSubLease, the HAC Security, the Construction Side Deed, the Hard Services Contractor Side Deed, the Soft Services Contractor Side Deed and the Financiers Tripartite Deed are secured by fixed and floating charges over the assets, undertakings and rights of the Project Partners (in their capacities as trustees of the Novacare Solutions Trust and the Novacare Health Solutions Trust), the Project Partnership and ServiceCo.

Priorities between these HAC securities and securities held by the project's private sector debt financiers are governed by the Financiers Tripartite Deed, which also:

- Records the HAC's consent to the private sector securities
- Records the consents of the HAC and the Security Trustee to each other's "step in" rights under the project contracts
- Regulates the exercise of these "step in rights", and
- Records the consents of the Project Partnership and ServiceCo to these arrangements.

A **Deed of Guarantee** between the Minister for Health (on behalf of the State of NSW), the HAC, the Project Partnership, ServiceCo and the Security Trustee ("**the PAFA Act Guarantee**"), dated 30 November 2005, provides a guarantee by the State of NSW, in accordance with section 22B the Public Authorities (Financial Arrangements) Act 1987, of the HAC's performance of its obligations under the Project Deed, the Independent Certifier Deed, the Labour Services Agreement, the SubLease, the SubSubLease, the HAC Security, the Construction Side Deed, the Hard Services Contractor Side Deed, the Soft Services Contractor Side Deed, the Financiers Tripartite Deed and any other documents approved by the NSW Treasurer in the future.

2.3 Conditions precedent

Most of the provisions of the Project Deed and the other major project contracts were not to become binding until:

- The NSW Treasurer/Minister for Finance had consented to the contracts under section 20 of the Public Authorities (Financial Arrangements) Act (NSW). This condition precedent was satisfied on 18 November 2005.
- The PAFA Act Guarantee had been executed. This condition precedent was satisfied on 30 November 2005.

- The completion of a specified series of formalities associated with the execution and delivery of copies of the project's contracts, any authorisations required by the Project Partners, the Project Partnership, the Construction Contractor, the Hard Services Contractor, the Soft Services Contractor, the Construction Contractor Guarantors, the Hard Services Contractor Guarantor, the Soft Services Contractor Guarantor and the project's financiers (or any agent or the Security Trustee on their behalf) to enter into and perform the project's contracts, the authorisation of representatives of each of the Project Partners, the Project Partnership, the Nominee Company and ServiceCo, the registration of the HAC Security, the provision of evidence of the payment of stamp duty and the provision of evidence about the structure of, and equity and/or subordinated debt arrangements between, the Project Partners, the Project Partnership, ServiceCo and their unitholders and shareholders.

These conditions precedent were satisfied on 30 November 2005, with the requirement for HAC to receive evidence of the payment of stamp duty being waived in the case of those contracts for which the HAC was or will be liable to pay stamp duty, including the Project Deed, the HAC Security, the SubLease, the SubSub-Lease and construction-phase licences to enter, occupy and use construction sites and access areas (see sections 3.3.4 and 3.5.1).

- Insurance policies required under the Project Deed for the construction phase of the project had been taken out and were in full force. This condition precedent was satisfied on 30 November 2005.
- An advance opinion by the Australian Taxation Office, concerning the effects on the project of section 51AD and Division 16D of the Income Tax Assessment Act (Cth), had been provided to the HAC.

This condition precedent was waived by the HAC, in the light of Project Deed requirements for the Project Partnership and ServiceCo to obtain a binding ruling from the ATO, by 30 May 2006, stating that section 51AD of the Income Tax Assessment Act will not apply to the project, or take other action as summarised in section 3.5.1 below.

- If necessary, the HAC had received 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 Partners, the Project Partnership, ServiceCo or their interests in the project.

This condition precedent was waived by the HAC, because the Australian Treasurer has deemed the foreign-

owned J P Morgan entities with investments in Westpac to be exempt foreign custodians for the purposes of the Foreign Acquisitions and Takeovers Act.

- The HAC had received 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 HAC) of all of the other conditions precedent. This condition precedent was satisfied on 30 November 2005.
- The Project Partnership had given the HAC a \$2 million construction works security bond in accordance with the Project Deed (see section 3.3.18). This condition precedent was satisfied on 30 November 2005.
- The Project Partnership and ServiceCo had advised the HAC of their rates for specified types of services that will be subject to "benchmarking" under the Project Deed (see section 3.4.9). This condition precedent was satisfied on 30 November 2005.
- The HAC had received any other opinions, certificates or documents it reasonably requested. The HAC made no such requests.
- The Project Partnership, ServiceCo, the Construction Contractor and the Hard Services Contractor had been provided with a copy of an 18 October 2004 report prepared by Meinhardt (NSW) Pty Limited, *Newcastle Mater Hospital PPP Project — Existing Buildings Detailed Condition Reports* ("the *Meinhardt Report*"). This condition precedent was satisfied on 30 November 2005.
- The HAC had provided the Project Partnership and ServiceCo with access to the construction site required by the Project Partnership for the first stage of the construction works. This condition precedent was satisfied on 30 November 2005.
- On the day the last of the conditions precedent were satisfied or waived ("financial close"), interest rates in the private sector participants' "base case" financial model for the project had been set as specified in the Project Deed, the model had been optimised in a manner specified in the Project Deed and the model's outputs had been used to complete tables of prices and charges payable by the HAC during the operational phase of the project.
- Following this, audited copies of the "base case" financial model for the project and associated materials, including an auditor's certificate, had been delivered to and approved by the HAC, in line with procedures specified in the Project Deed. This condition precedent was satisfied on 30 November 2005.
- The dates in the project's construction-phase works program and the Project Deed's "target completion dates" for the completion of various components of the works

had been adjusted to reflect the number of business days by which the date of “financial close” was later than 28 November 2005. This condition precedent was satisfied, through the application of two-day extensions, on 30 November 2005.

Accordingly, all the contracts to which the HAC is a party became binding as soon as they were executed by the HAC on 30 November 2005.

Once the conditions precedent concerning the Public Authorities (Financial Arrangements) Act approval and the PAFA Act Guarantee had been satisfied, the Project Partnership and ServiceCo became obliged to use all reasonable endeavours to ensure all the other conditions precedent would be satisfied by a “drop dead date” of 30 January 2006 or a later date decided by the HAC’s project director in his or her absolute discretion. Had this deadline not been met, through either the satisfaction of the conditions precedent or their waiving by (as relevant) the HAC or the Project Partnership and ServiceCo, the HAC’s Project Director would have become entitled to terminate all of the project

contracts to which the HAC was a party at any time. These provisions became redundant with the satisfaction or waiver of all of the conditions precedent by 30 November 2005.

2.4 Limits on the liabilities of the Project Partners

The Project Deed, the Independent Certifier Deed, Construction Side Deed, the Labour Services Agreement, the Hard Services Contractor Side Deed, the forms of the Sub-Lease and SubSubLease, the HAC Security and the Financiers Tripartite Deed all contain standard provisions limiting the scope of the liabilities of the Project Partners.

These provisions stipulate that each of these Project Partners has entered into these contracts solely in its capacity as trustee of its relevant trust, and that if it breaches any of these agreements it will be liable only to the extent of its right to be indemnified out of the assets of that trust, except to the extent that this indemnity is reduced because of fraud, negligence or a breach of trust by the trustee.

3 The Project Deed and associated lease, certification, novation and labour arrangements

3.1 The HAC's lease of the hospital site

The HAC has leased the hospital site from Mercy Health Care (Newcastle) Limited (MHCN), under the Head Lease dated 30 November 2005, until 2 December 2033.

The term of the Head Lease may be extended, at MHCN's complete discretion, if the HAC proposes this prior to 2 December 2032. Subject to any agreement for such an extension, the HAC may also, at MHCN's discretion, remain in occupation of the site on an annual tenancy basis after 2 December 2033, on terms equivalent to those in the Head Lease.

The HAC had to pay MHCN rent of \$1 for the full term of the lease by 30 November 2005, and did so on 30 November 2005.

As between the HAC and MHCN, the HAC is liable to pay all rates, land taxes, charges and levies imposed on the leased premises by any government authority, public utility or other authority, other than a body bound by the laws of the Roman Catholic Church.

Unless MHCN agrees otherwise, the HAC may use the leased premises only for demolition and construction required for hospital and health services, the operation of hospital and health services and "ancillary uses".

The HAC may sublease or license specified areas of land, or any parts of these areas, for periods that must end on or before 1 December 2033, provided the sublease(s) or licence(s) are for the approved uses of the site. It may not otherwise deal with its interest in the land without MHCN's consent, which may not be unreasonably withheld.

If MHCN needs to produce title deeds for the registration or transfer of any sublease, the HAC must bear the associated costs.

At the end of the term of the Head Lease all improvements on the site made by or for the HAC or its sublessee(s) or licensee(s) and any HAC fixtures, fittings, plant, equipment and furnishings not removed by the HAC will become the property of MHCN. In deciding what property it will remove from and leave on the premises, the HAC must act

reasonably, taking account of the need for continuity in the provision of public hospital services if this is what MHCN proposes to do.

Except as agreed to by MHCN for the purposes of the project, the HAC must not damage the premises or any MHCN property on the premises and must promptly repair any damage not caused by MHCN. In practice, this will be achieved through the Project Deed's requirements concerning the repair of damage, discussed in section 3.5.2 below.

3.2 General obligations on and acceptance of risks by the Project Partnership and ServiceCo

3.2.1 The principal obligations of the Project Partnership and ServiceCo

The main obligations on the Project Partnership and ServiceCo under the Project Deed are for:

- The Project Partnership and ServiceCo to design, construct, refurbish and commission specified hospital facilities, at their own cost,
 - By dates specified in an initial *Works Program* annexed to the Project Deed, as updated from time to time (see section 3.3.8), and
 - In accordance with detailed requirements in a *Technical Specification* annexed to the Project Deed (see section 3.3.1).

The new hospital "facilities" to be designed and constructed by the Project Partnership and ServiceCo are a new South Block, Radiation Oncology Unit, North Block and Mental Health facility and their associated buildings, fixtures, fittings, equipment, electrical goods, furniture, grounds, paths and gardens, *other than* two specified types of equipment that will be provided by the HAC:

- Major medical equipment such as the hospital's linear accelerator and CT scanners, and

- “Group 3” equipment, mostly loose items of furniture.

The hospital “facilities” to be refurbished by the Project Partnership and ServiceCo include parts of the existing Radiation Oncology Unit, the existing X-ray and medical reception ward, levels 3 to 7 of the convent, the McAuley Centre and their associated buildings, fixtures, fittings, equipment, electrical goods, furniture, grounds, paths and gardens, again excluding major medical equipment and “group 3” equipment that will be provided by the HAC.

- The Project Partnership and ServiceCo to provide building and equipment maintenance, facilities management, cleaning, grounds maintenance, utility, security, catering, materials management and general services to the HAC, in accordance with detailed requirements in a *Services Specification* annexed to the Project Deed, throughout the operations phase of the project, from the completion of the Stage 1 construction works until 30 November 2033 or any earlier termination of the project contracts.

In providing these services the Project Partnership and ServiceCo will use both their own employees and subcontractors, in accordance with requirements set out in the Project Deed, and employees of HNE and MHCN, in accordance with the Labour Services Agreement.

- The Project Partnership and ServiceCo to transfer possession of the hospital and the hospital site, and their facilities management responsibilities, to the HAC or to another contractor, as directed by the HAC, on 30 November 2033 or upon any earlier termination of the project’s contracts.

ServiceCo’s obligations, indemnities and warranties under the Project Deed, the Labour Services Agreement, the Financiers Tripartite Deed and the other major project contracts are expressly limited to the services which ServiceCo is to perform. The Project Partnership and ServiceCo have, however, given the HAC, HNE and MHCN unconditional and irrevocable guarantees of each other’s performance of their obligations under the Project Deed, the Labour Services Agreement, the Financiers Tripartite Deed and the other major project contracts, and each of them has indemnified the HAC, HNE and MHCN against any liabilities, losses or costs arising from any failure by either the Project Partnership or ServiceCo to perform its obligations under these contracts. ServiceCo’s guarantee and indemnity concerning the Project Partnership’s performance of its obligations is expressly *not* subject to the general limitation on the liabilities of the Project Partners described in section 2.4.

The Project Partnership may perform, and thereby satisfy, ServiceCo’s obligations under the Project Deed, the Labour Services Agreement and the Financiers Tripartite Deed, and *vice versa*.

In addition, the Nominee Company may:

- Perform, and thereby satisfy, the obligations of the Project Partnership and/or ServiceCo to the HAC, the HAC’s Project Director for the Mater Hospital project, MHCN, HNE, the Independent Certifier, the Construction Contractor, the Construction Contractor Guarantors, the Hard Services Contractor, the Hard Services Contractor Guarantor, the Soft Services Contractor, the Soft Services Contractor Guarantor or any other person, either in its own name or as the agent of either or both of them, as applicable, and
- Exercise the rights, powers and discretions of the Project Partnership and/or ServiceCo in relation to the HAC, the HAC’s Project Director, MHCN, HNE, the Independent Certifier, the Construction Contractor, the Construction Contractor Guarantors, the Hard Services Contractor, the Hard Services Contractor Guarantor, the Soft Services Contractor, the Soft Services Contractor Guarantor or any other person, either in its own name or as the agent of either or both of them, as applicable, other than their rights etc as participants in a Project Co-ordination Group comprising representatives of the HAC, the Project Partnership and ServiceCo (see section 3.2.2).

3.2.2 Project objectives and cooperation

The HAC, the Project Partnership and ServiceCo have undertaken to perform their obligations under the Project Deed with the aim of satisfying or facilitating “objectives” and “intentions” that:

- The Project Partnership will finance, design, construct, refurbish and commission the hospital facilities and provide its services in accordance with the Project Deed
- ServiceCo will provide specified types of non-clinical services
- The HAC, HNE and/or MHCN will continue to be responsible for providing all clinical, research, clinical support and non-clinical support administration functions at the hospital (the Project Deed calls these functions “**hospital functions**”)
- The Project Partnership’s design, construction, refurbishment and commissioning of the hospital facilities and provision of non-clinical services, and ServiceCo’s provision of other non-clinical services, will enable the HAC, HNE and/or MHCN to provide high-quality “hospital functions”, the only exceptions being functions of these types which the Project Partnership and ServiceCo were

not aware of before 30 November 2005 and which could not have reasonably been foreseen by a prudent, competent and experienced hospital and health facility construction and maintenance contractor in their situation

- The HAC will pay fees to the Project Partnership and/or ServiceCo for the services they provide
- The Project Partnership and ServiceCo must transfer possession of the hospital and the hospital site, and their facilities management responsibilities, to the HAC or to another contractor at the end of the operational phase of the project, and
- The Project Partnership and ServiceCo must not disrupt the “hospital functions”.

The HAC, the Project Partnership and ServiceCo have agreed to cooperate and work together 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 HAC’s “step in” and contract termination rights) not to hinder, prevent or delay each other party’s performance of its obligations.

They have also agreed that whenever they become entitled to assert a claim or seek a remedy against another 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 HAC, the Project Partnership and ServiceCo must participate in an eight-person Project Co-ordination Group (PCG), chaired by the HAC’s Project Director 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 3.5.9). Except for its dispute resolution role, the decisions of this PCG will not affect the rights or obligations of the HAC, the Project Partnership or ServiceCo 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 Partnership, ServiceCo and the Independent Certifier may not unreasonably withhold or delay any decision or exercise of their discretion under the contracts.

Similarly, the HAC and the HAC’s Project Director (under all the HAC’s contracts except the HAC Security), the Construction Contractor and the Construction Contractor Guarantors (under the Construction Side Deed), the Hard Services Contractor and the Hard Services Contractor Guarantor (under the Hard Services Contractor Side Deed) and the Soft Services Contractor and the Soft Services Contractor Guarantor (under the Soft Services Contractor Side Deed) must act reasonably concerning any decision or

exercise of their discretion they are required to make, unless they are expressly granted an “absolute” or “sole” discretion. The Project Deed makes it clear, however, that the HAC and its 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 HAC’s reputation.

3.2.3 No restrictions on HAC and HNE statutory powers or the hospital’s ‘hospital functions’

Except in terms of the project-specific commitments made by the HAC and/or HNE in the project’s contracts and summarised in this report, these contracts do not fetter the discretions of the HAC or HNE to exercise any of their functions under the Health Administration Act (NSW) or any other legislation.

More specifically, the project’s contracts and pre-contractual information documents do not contain any undertakings by the HAC, the HAC’s Project Director, any clinical staff, any other Department of Health, HNE or MHCN employees, agents or contractors, any of their invitees or any patients that the hospital’s clinical, research, clinical support and non-clinical support administration functions (“hospital functions”) will be carried out at all or carried out in a particular manner or at a particular time.

3.2.4 General acceptance of risks by the Project Partnership and ServiceCo

The Project Partnership and ServiceCo have expressly acknowledged in the Project Deed that:

- They bear the risks of carrying out the project’s construction works and providing their services so as not to cause any disruption to the “hospital functions”
- Subject to any specific terms in the Project Deed, the HAC, the Department of Health, HNE, MHCN, the State of NSW and their agents, contractors, advisers and employees:
 - Have not made any representations or promises or given any advice to the Project Partnership or ServiceCo about the accuracy, adequacy, completeness or current applicability of documents or any other information, concerning the project, the hospital or construction sites or the hospital, which they had provided to the Project Partners, the Project Partnership, ServiceCo or their agents, contractors, advisers, employees or invitees prior to the execution of the Project Deed.

The pre-contractual information covered by this acknowledgement expressly includes an initial survey of existing buildings, the 18 October 2004 *Meinhardt Report* (see section 2.3), which the Project

Partnership and ServiceCo have acknowledged as being accurate at the time, but excludes information about HNE and MHCN employees who will be managed by the Project Partnership or ServiceCo under the Labour Services Agreement (if the HAC agrees to this exclusion) and information and documents expressly forming part of the Project Deed.

- ◻ Have assumed no duty of care or other responsibility for this pre-contractual information.
- ◻ With the exception of Meinhardt (NSW) Pty Ltd concerning the *Meinhardt Report*, will not be liable for any inaccuracy, omission, unfitness, inadequacy or incompleteness in this pre-contractual information, or for any reliance by the Project Partnership, ServiceCo or their agents, contractors, advisers, employees or invitees on the information, even if it were “misleading or deceptive” or “false or misleading” under the Trade Practices Act (Cth) or equivalent State legislation.
- ◻ Again with the exception of Meinhardt (NSW) Pty Ltd concerning the *Meinhardt Report*, will not be liable for any failure to make information about the project available to the Project Partnership or ServiceCo.
- In entering into the Project Deed, the Project Partnership and ServiceCo:
 - ◻ Have not relied on any pre-contractual information from the HAC, the Department of Health, HNE, MHCN, the State of NSW or their agents, contractors, advisers and employees, other than information about HNE and MHCN employees who will be managed by the Project Partnership or ServiceCo under the Labour Services Agreement (if the HAC agrees to exempt this information) and information and documents expressly forming part of the Project Deed.
 - ◻ Have examined the construction and hospital sites and the hospital and have relied solely on their own investigations, assessments, skill, expertise and enquiries concerning all information that is relevant to the project’s risks, contingencies and circumstances and their obligations under the project contracts.
 - ◻ Have 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 to them by the HAC, the Department of Health, HNE, MHCN, the State of NSW and their agents, contractors, advisers and

employees, and in particular have been given access, as required, to the construction and hospital sites and the hospital.

- ◻ Have satisfied themselves that they have adequately allowed for the costs of meeting their project obligations, that there is no inconsistency between the project’s *Technical Specification* and *Services Specification* (see sections 3.3.1 and 3.4.1) and that they can satisfy the requirements of both.
- ◻ Have relied on their own information concerning all the project’s employment and industrial relations matters, the only exception to this being information provided to them about HNE and MHCN employees who will be managed by the Project Partnership or ServiceCo under the Labour Services Agreement (if the HAC agrees to this exception).
- The HAC will have no liability for any loss or damage suffered by the Project Partnership or ServiceCo 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 Project Deed expressly provides otherwise or unless the incorrectness or inaccuracy is caused by, or constitutes, a “compensation event”, such as a serious breach of the Project Deed by the HAC which makes it impossible for the Project Partnership or ServiceCo to perform its obligations, as discussed in section 3.5.12 below.

Analogous assumptions of risk have also been accepted by the Project Partnership and ServiceCo concerning specific aspects of the project, including the accuracy, adequacy and completeness of the project’s *Technical Specification* and their liability for any design defects in this *Specification* (see section 3.3.3 below).

3.3 Design, construction, refurbishment and commissioning of the hospital facilities

3.3.1 Scope of the works

As indicated in section 3.2.1, the Project Partnership and ServiceCo must design, construct, refurbish and commission specified hospital facilities, at their own cost,

- By dates specified in an initial *Works Program* annexed to the Project Deed, as updated from time to time (see section 3.3.8), and

- In accordance with detailed requirements in the project's *Technical Specification*, which is also annexed to the Project Deed.

The new hospital "facilities" to be designed and constructed by the Project Partnership and ServiceCo are a new South Block, Radiation Oncology Unit, North Block and Mental Health Facility and their associated buildings, fixtures, fittings, equipment, electrical goods, furniture, grounds, paths and gardens, *other than* two specified types of equipment that will be provided by the HAC:

- Major medical equipment such as the hospital's linear accelerator and CT scanners, and
- "Group 3" equipment, mostly loose items of furniture.

"Stage 1" of the works, to be completed by 9 January 2008, will involve construction of a new South Block with a medical day unit, operating suites and inpatient units, construction and refurbishment works for the Radiation Oncology Unit, construction of a central plant room, refurbishment of levels 4 to 7 of the convent, reconstruction of the Edith Street/ Lorna Street intersection and construction of a services link and temporary access link to the new South Block (see diagram below).

"Stage 2", to be completed by 3 February 2009, will involve the demolition of several existing buildings, refurb-

ishment of level 2 of the Radio Oncology building (clinical sciences, pathology and oncology), construction of a new North Block (emergency facilities, an intensive care unit, medical records and offices), construction of a new north carpark, construction of a services link to the new North Block and the first phases of construction of a new Mental Health building (see diagram overleaf).

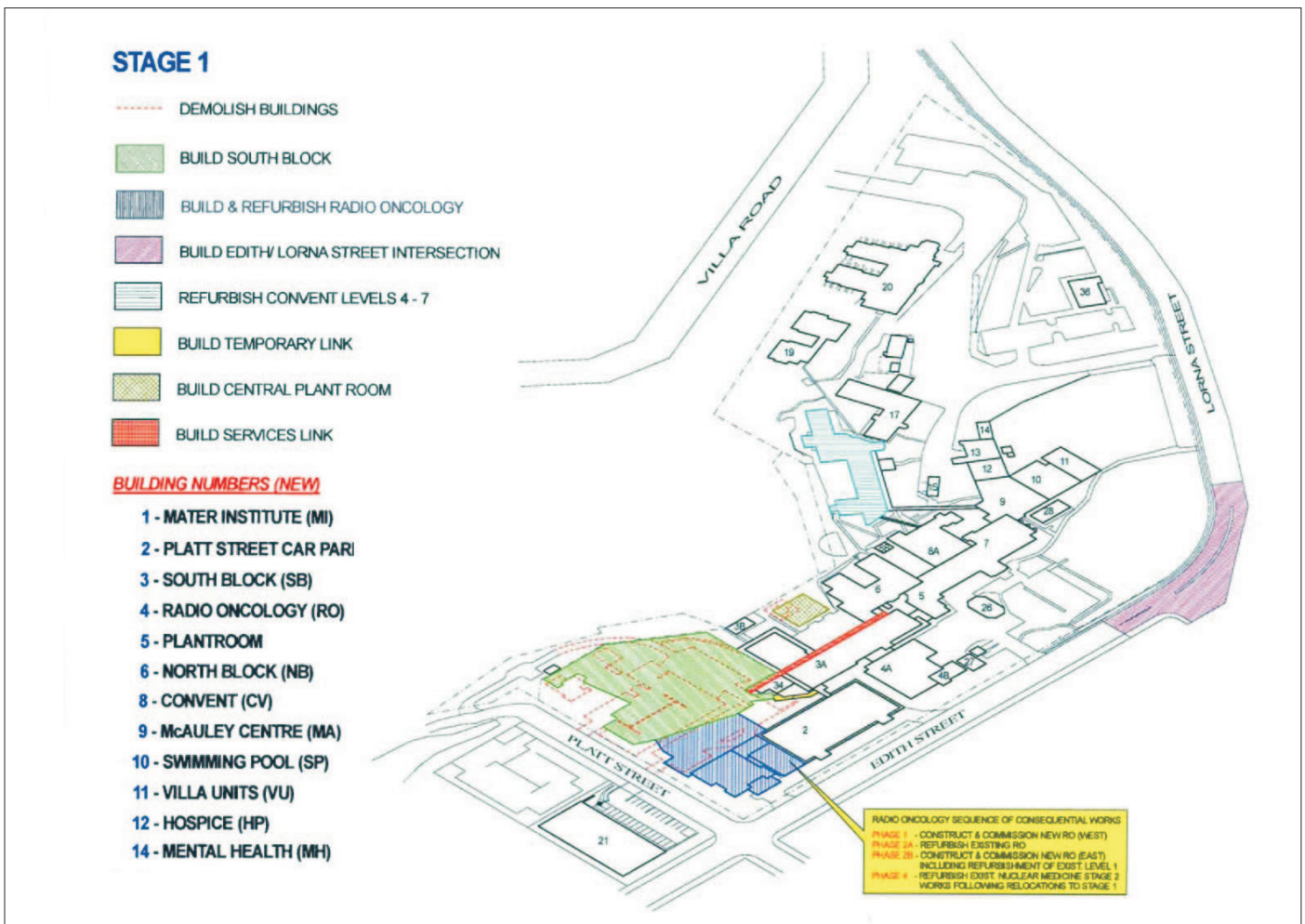
"Stage 3", to be completed by 16 June 2009, will involve completion of the Mental Health building, refurbishment of the X-ray and medical reception ward, construction of a new main entrance, retail facilities, chapel and entrance ramp, refurbishment of level 3 and part of level 4 of the convent and refurbishment of the McAuley Centre (see diagram overleaf).

Changes to the completed detailed designs or scopes of the works may be made by the Project Partnership and ServiceCo only in accordance with the procedures described in section 3.3.15 below.

3.3.2 Planning and other approvals

The Project Partnership and ServiceCo must apply for:

- Any modifications that need to be made to two development approvals, for the Radiation Oncology facilities and the South Block, that have already been granted to

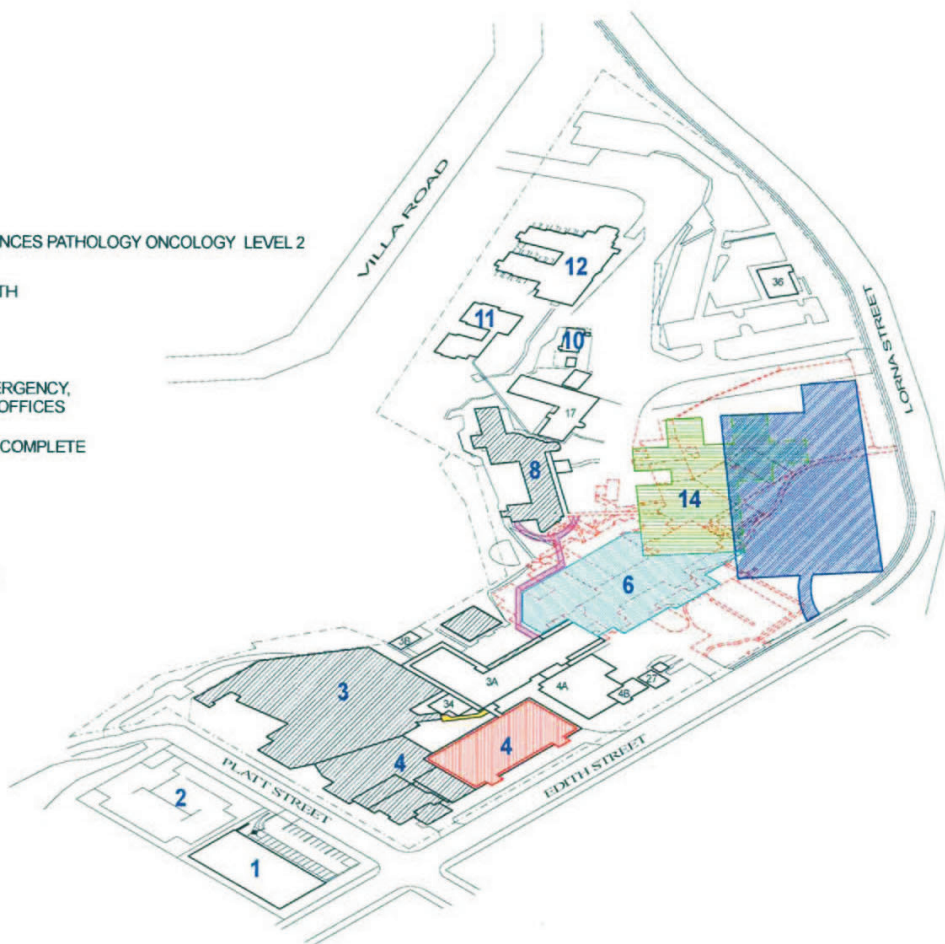


STAGE 2

- - - - - DEMOLISH BUILDINGS
- BUILD SERVICES LINK
- BUILD NORTH CARPARK
- REFURBISH CLINICAL SCIENCES PATHOLOGY ONCOLOGY LEVEL 2
- COMMENCE MENTAL HEALTH
- TEMPORARY LINK
- BUILD NORTH BLOCK - EMERGENCY, ICU, MEDICAL RECORDS & OFFICES
- STAGE 1 - CONSTRUCTION COMPLETE

BUILDING NUMBERS (NEW)

- 1 - MATER INSTITUTE (MI)
- 2 - PLATT STREET CAR PARK
- 3 - SOUTH BLOCK (SB)
- 4 - RADIO ONCOLOGY (RO)
- 5 - PLANTROOM
- 6 - NORTH BLOCK (NB)
- 8 - CONVENT (CV)
- 9 - McAULEY CENTRE (MA)
- 10 - SWIMMING POOL (SP)
- 11 - VILLA UNITS (VU)
- 12 - HOSPICE (HP)
- 14 - MENTAL HEALTH (MH)

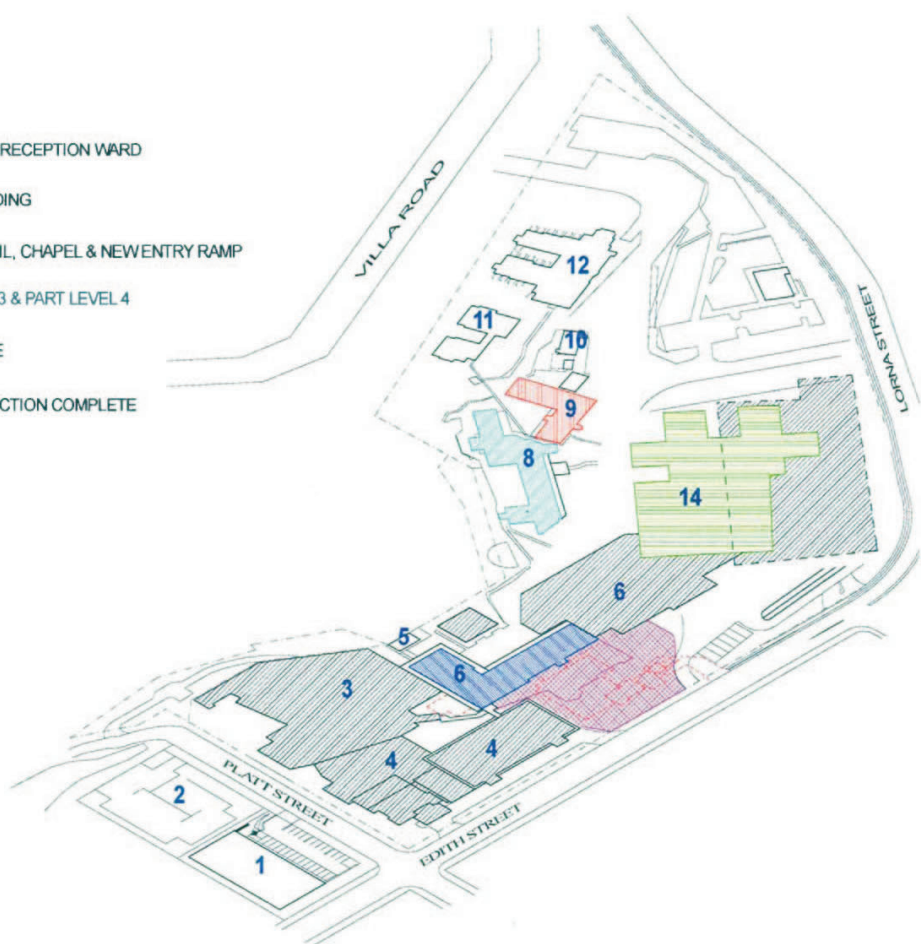


STAGE 3

- - - - - DEMOLISH BUILDINGS
- REFURBISH X RAY / MEDICAL RECEPTION WARD
- FINISH MENTAL HEALTH BUILDING
- BUILD MAIN ENTRANCE, RETAIL, CHAPEL & NEW ENTRY RAMP
- REFURBISH CONVENT LEVEL 3 & PART LEVEL 4
- REFURBISH McAULEY CENTRE
- STAGE 1 & STAGE 2 CONSTRUCTION COMPLETE

BUILDING NUMBERS (NEW)

- 1 - MATER INSTITUTE (MI)
- 2 - PLATT STREET CAR PARK
- 3 - SOUTH BLOCK (SB)
- 4 - RADIO ONCOLOGY (RO)
- 5 - PLANTROOM
- 6 - NORTH BLOCK (NB)
- 8 - CONVENT (CV)
- 9 - McAULEY CENTRE (MA)
- 10 - SWIMMING POOL (SP)
- 11 - VILLA UNITS (VU)
- 12 - HOSPICE (HP)
- 14 - MENTAL HEALTH (MH)



the HAC under the Environmental Planning and Assessment Act, and

- Any additional development approvals for the project that are required under the Environmental Planning and Assessment Act

in order to permit the project to be implemented in accordance with the *Technical Specification*, the *Services Specification* (see section 3.4.1) and the Project Deed.

The HAC must endeavour to secure MHCN's consent, as the owner of the hospital site, to these development approvals, and has agreed that the Project Partnership, ServiceCo and the Construction Contractor may apply for the development approvals on behalf of the HAC.

The Project Partnership and ServiceCo 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 HAC's Project Director copies of all the development approvals and consents they obtain, and
- Comply with the terms of the project's development approvals and consents and ensure the project is carried out without any breaches of these terms.

Development approval for the new Mental Health facility and North Block must be obtained by 28 May 2007.

If this development approval will not be able to be obtained by 10 July 2007 (or within 30 business days after any extended deadline) for any reason other than the direct or indirect effects of any action or inaction by the Project Partnership, ServiceCo or any of their subcontractors or sub-subcontractors, this will constitute a "relief event", entitling the Project Partnership and ServiceCo to an extension of the deadline, or other relief from their obligations under the project contracts, under arrangements described in section 3.5.11 below.

If the deadline for obtaining development approval for the new Mental Health facility and North Block is extended under these arrangements beyond 25 September 2007,

- The "relief event" arrangements will no longer apply.
- The HAC, the Project Partnership and ServiceCo must consult with each other, in good faith, and use all reasonable endeavours to agree on actions to mitigate the effects of the delay and facilitate continued performance of the project contracts.
- If they cannot agree on these actions within ten business days, any of the parties may give the others ten business

days' written notice of the termination of the Project Deed.

- If the Project Partnership or ServiceCo notifies the HAC that it wishes to terminate the Project Deed, the HAC's Project Director will have an option of responding, in writing and within ten business days, with a statement specifying the extent to which the HAC requires the Project Deed to continue. If he or she does so, this will be treated as an HAC-requested variation under arrangements described in section 3.3.15 below.
- If the HAC notifies the Project Partnership and ServiceCo that it wishes to terminate the Project Deed, or if it chooses not to exercise the option described above, the Project Deed will terminate at the end of the notice period and the compensation arrangements described in section 3.6.1 will apply.

If either or both of the development approvals already obtained by the HAC is modified, withdrawn, revoked or replaced, for reasons other than any action or inaction by the Project Partnership or ServiceCo (including any application for an additional or amended development approval), this modification etc will constitute a "compensation event", entitling the Project Partnership and ServiceCo to compensation payments as well as, or as an alternative to, extensions of time or other relief from their obligations under the project contracts, under arrangements described in section 3.5.12 below.

3.3.3 Design obligations and intellectual property

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

- The requirements of the *Technical Specification*
- The timeframes of the *Works Program*
- Good industry practices
- Quality assurance plans that must be developed as specified in the *Technical Specification*
- Consultation and documentation requirements set out in the Project Deed, and
- All applicable approvals, consents and other legal requirements

so that:

- The constructed facilities will be fit for their intended purposes—the provision by the Project Partnership and ServiceCo of non-clinical services in accordance with the *Services Specification* and the provision by the HAC, HNE and/or MHCN of the hospital's "hospital functions" (i.e. its clinical, research, clinical support and non-clinical support administration functions)—but not necessarily for "hospital functions" of types which the

Project Partnership and ServiceCo were not aware of before 30 November 2005 and which could not have reasonably been foreseen by a prudent, competent and experienced hospital and health facility construction and maintenance contractor in their situation, and

- The project's facilities and the services to be provided by the Project Partnership and ServiceCo will be able to meet or exceed the requirements of the *Technical Specification* and *Services Specification*.

The Project Partnership and ServiceCo have expressly acknowledged that they have had an opportunity to correct any design defects in a draft of the *Technical Specification* prior to the execution of the Project Deed, that they have not relied on any HAC information or representations concerning the *Technical Specification* or its accuracy, adequacy or completeness, that the HAC has not made any promises or representations concerning these matters and that the Project Partnership and ServiceCo have assumed all the risks in and full liability for the *Technical Specification*, notwithstanding the fact that it was originally drafted by or on behalf of the HAC.

As part of their development of the detailed designs the Project Partnership and ServiceCo may be directed by the HAC's Project Director to meet and consult with and/or give presentations to "stakeholders" and their consultants and advisers. If they believe 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), the *Works Program* (other than as described in section 3.3.8 below), the project's *Policy and Procedures Manual* (see section 3.3.10 below) or the project's works or services, they must inform the HAC's Project Director and may submit a formal proposal for such a variation only if this is requested by the Project Director.

The Project Partnership and ServiceCo must submit drafts of their detailed designs for review by the HAC's Project Director at times specified in the project's *Works Program* (see section 3.3.8), along with any additional related information he or she reasonably requests.

The Project Director may then (but need not) review the draft designs and make comments, within 20 business days, on whether they comply with the Project Deed. If the Project Director suggests the draft designs do not comply, the Project Partnership and ServiceCo must resubmit amended designs that reflect his or her comments, and may not proceed with any further design development or construct the works set out in the draft designs until they have done so.

If the Project Partnership, ServiceCo and the HAC's Project Director cannot agree on amendments to the draft detailed designs, the dispute resolution procedures described

in section 3.5.9 will apply. If this results in a finding by an independent expert that the original draft detailed designs complied with the Project Deed, or if the HAC's actions constitute a breach of the Project Deed or another project contract and frustrate the ability of the Project Partnership and/or ServiceCo to fulfil any of their obligations or exercise any of their rights under the contracts, the HAC may be liable to compensate the Project Partnership and/or ServiceCo, and/or to provide relief from their contractual obligations, under the "compensation event" arrangements described in section 3.5.12.

Any participation by the Project Director or any other HAC representatives will not make the HAC liable for any errors, omissions, defects or non-compliances in the detailed designs, and the Project Partnership and ServiceCo will remain solely responsible for the project's design and construction.

The Project Partnership and ServiceCo have warranted to the HAC that their 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 make royalty or other payments.

They have also:

- Granted the HAC 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, the hospital or the hospital site (ownership of the intellectual property in the materials will remain with the Project Partnership, ServiceCo and/or the applicable third parties)
- Warranted that they hold all the rights and interests in these licensed materials or have the rights to sub-license rights and interests owned by others, that the only encumbrances over their rights and interests preventing the licensed materials from being used in accordance with the licence are or will be those already agreed to by the HAC in the Financiers Tripartite Deed (see section 4.2), and that they will not deal with their rights and interests in the licensed materials in any way that would conflict with or reduce these rights and interests
- Indemnified the HAC and its employees, agents, contractors and permitted sub-licensees against any claims or losses resulting from a breach of these intellectual property and moral rights warranties, except to the extent of any loss or claim caused by:
 - Any HAC, HNE or MHCN negligence, fraud or breach of the project contracts, or
 - Compliance by the Project Partnership, a Project Partner, ServiceCo, any related corporation, any of

their subcontractors, subsubcontractors, invitees, employees and agents or any HNE or MHCN employee who is being managed and supervised by the Project Partnership or ServiceCo under the Labour Services Agreement with any express directions issued by the HAC or its Project Director in accordance with the Project Deed, and

- Undertaken not to register or patent any intellectual property rights which they develop, discover or first put into practice during the project if this would conflict with or derogate from the licence granted to the HAC.

Similarly, the HAC has warranted to the Project Partnership and ServiceCo that their use of materials made available to them by the HAC 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 has granted the Project Partnership and ServiceCo a non-exclusive licence, for the purposes of the project, to use HAC design drawings made available to them in the draft *Technical Specification* before the Project Deed was executed. Ownership of the intellectual property and moral rights in these drawings will remain with the HAC, but any modifications to or adaptations of the drawings by the Project Partnership and/or ServiceCo will be subject to the same arrangements as those for other materials they develop or use for the project, summarised above.

3.3.4 Construction access and site security

The HAC granted the Project Partnership and ServiceCo access to the construction site for the “Stage 1” works on 30 November 2005, as a condition precedent to the Project Deed’s taking effect (see section 2.3).

The HAC must grant licences to the Project Partnership, ServiceCo and their contractors, agents and employees, the debt financiers’ Security Trustee and any agent, manager, receiver or administrator appointed by the Security Trustee, on terms set out in a schedule to the Project Deed and in accordance with the construction-phase *Works Program* (see section 3.3.8), to enter, occupy and use the construction sites for the other stages of the works and (on a non-exclusive basis) specified access routes to and from these sites and specified areas in which temporary works will be carried out.

If the Project Partnership and/or ServiceCo need access to any other land to carry out the project, this will be their sole responsibility and at their own risk, and the HAC will not be liable for any delays or costs they incur if they cannot obtain unrestricted access to the additional land.

The HAC’s Project Director and his or her representatives may enter any of the constructions sites, at any reasonable time and after giving reasonable notice, to inspect the works, provided they do not cause unreasonable disruption

and comply with reasonable safety and security requirements.

During construction the Project Partnership is fully responsible for the security of the construction sites and the other areas to which access has been granted, and must indemnify the HAC, HNE and MHCN against any loss or claim arising from any security breach, except to the extent of any loss or claim caused by:

- Any HAC, HNE or MHCN negligence, fraud or breach of the project contracts, or
- Compliance by the Project Partnership, a Project Partner, ServiceCo, any related corporation, any of their subcontractors, subsubcontractors, invitees, employees and agents or any HNE or MHCN employee who is being managed and supervised by the Project Partnership or ServiceCo under the Labour Services Agreement with any express directions issued by the HAC or its Project Director in accordance with the Project Deed.

3.3.5 Site conditions and contamination

The Project Partnership and ServiceCo have accepted the construction sites, access and temporary works areas and existing hospital buildings “as is”, in their current state and physical condition, the only exception to this being any structural defects in the existing buildings which were not identified in pre-contractual information given to them by the HAC, the Department of Health, HNE, MHCN, the State of NSW or their agents, contractors, advisers and employees.

This exception is, however, subject to an express acknowledgement by the Project Partnership and ServiceCo that one of these sources of pre-contractual information, a detailed survey of the hospital’s buildings—the “*Meinhardt Report*”, dated 18 October 2004 and annexed to the Project Deed—accurately reflects the condition of these buildings at the time it was conducted (see section 3.2.4). In addition, as also already indicated in section 3.2.4, the Project Partnership and ServiceCo have acknowledged that the HAC, the Department of Health, HNE, MHCN, the State of NSW and their agents, contractors, advisers and employees, other than Meinhardt (NSW) Pty Ltd itself, will not be liable for any inaccuracy in or omission from this report or any failure to make information available to the Project Partnership and ServiceCo.

More specifically, the Project Partnership and ServiceCo have accepted full responsibility for ground conditions on or next to the construction sites, access and temporary works areas, including any existing contamination or artefacts (see section 3.3.14) and the existence, location and availability of water, electricity, gas, communication and other utilities.

The Project Partnership and ServiceCo have also expressly released the HAC, the State of NSW, the Department of Health, HNE, MHCN and their delegates, employees, contractors and agents—to the extent permitted by the law—from any liability or obligations to them for any existing contamination in these areas, even if it were known to and not disclosed by the HAC, *unless* an environmental law direction or order is served on the HAC, MHCN, the Project Partnership or ServiceCo by a court, tribunal or relevant government authority concerning any existing contamination of the existing buildings that was not identified in the *Meinhardt Report* or any other existing contamination of land on the hospital site, including land beneath the existing buildings, in which case the HAC might be liable to pay compensation under the “compensation event” arrangements described in section 3.5.12.

3.3.6 General construction obligations

The Project Partnership and ServiceCo must construct each stage of the project’s works in accordance with:

- The requirements of the *Technical Specification*
- The timeframes of the *Works Program* (see section 3.3.8)
- The detailed designs (see section 3.3.3)
- Construction-phase management plans to be developed by them under arrangements described in section 3.3.10, and
- All applicable laws, including the Building Code of Australia and the building requirements of the Environmental Planning and Assessment Act

and with good workmanship, using good quality new and undamaged materials 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 disrupt the hospital’s “hospital functions” (i.e. its clinical, research, clinical support and non-clinical support administration functions) or damage the hospital or the hospital site in any way not contemplated in the *Works Program*
- The constructed facilities comply with the project’s development approvals, other consents and any other legal requirements
- The constructed facilities will be fit for their intended purposes—the provision by the Project Partnership and ServiceCo of non-clinical services in accordance with the *Services Specification* and the provision by the HAC, HNE and/or MHCN of the hospital’s “hospital functions”—but not necessarily for “hospital functions” of types which the Project Partnership and ServiceCo were not aware of before 30 November 2005 and which could not have reasonably been foreseen by a prudent, competent and experienced hospital and health facility con-

struction and maintenance contractor in their situation, and

- The project’s facilities and the services to be provided by the Project Partnership and ServiceCo will be able to meet or exceed the requirements of the *Technical Specification* and *Services Specification*.

The Project Partnership and ServiceCo must develop and apply quality assurance plans for the works as stipulated in the *Technical Specification* and audit their compliance with these plans at least every three months, in accordance with an audit program that has been agreed to by the HAC’s Project Director. (The quality of the works will also be independently audited, as described in section 3.3.10 below.)

The HAC must specify, provide and install the major medical equipment for the new and refurbished hospital facilities in accordance with the *Technical Specification* and the *Works Program*.

3.3.7 Interfaces with hospital operations

In addition to their general obligations to construct the hospital’s facilities without disrupting its “hospital functions”, the Project Partnership and ServiceCo must consult with the HAC, from time to time, on the best method of integrating the construction works with the “hospital functions”, and the resultant integration requirements must be reflected in a *Policy and Procedures Manual* which they must prepare for the operational phases of the project (see section 3.4.4).

3.3.8 Construction timeframes

The Project Partnership and ServiceCo must complete specified “milestone” components of the works by a series of “target completion dates” set out in a schedule to the Project Deed.

As already indicated, the “Stage 1” works are currently required to be completed by 9 January 2008, the “Stage 2” works” by 3 February 2009 and the “Stage 3” works by 16 June 2009. These deadlines may be extended if there are changes to the *Technical Specification*, the *Services Specification*, the completed detailed designs, the works or the program to carry out these works (other than the program changes discussed immediately below), under arrangements described in section 3.3.15, or if “relief events” or “compensation events” occur, under arrangements described in sections 3.5.11 and 3.5.12.

Within this overall “milestone” framework, the Project Partnership and ServiceCo must comply with a detailed *Works Program*, the requirements for which are set out in the *Technical Specification*.

An initial *Works Program* is annexed to the Project Deed.

The *Works Program* must be updated by the Project Partnership and ServiceCo when they finalise the detailed design of each stage of the works and then, for each stage, on a monthly basis, with the amended *Works Programs* being promptly submitted to the HAC's Project Director, in the latter case by the tenth day each month.

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

- Would be likely to disrupt the hospital's "hospital functions", or
- Would change the obligations of the HAC, the Project Director, any other HAC staff managing the project, any of the hospital's clinical staff, any Department of Health, HNE or MHCN employees, agents or contractors (other than HNE and MHCN employees who are being managed and supervised by the Project Partnership and ServiceCo under the Labour Services Agreement), any patients or any hospital visitors,

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

The HAC's Project Director may also:

- Direct the Project Partnership and ServiceCo to meet and consult with relevant "stakeholders" concerning any of the updated *Work Programs* they have submitted, and may then direct them to make further amendments under the arrangements described above, and
- At any time during the construction phase of the project, direct the Project Partnership and ServiceCo to reschedule any of the works in the *Works Program* if he or she believes, in his or her discretion, that they might or would disrupt the hospital's "hospital functions".

If the Project Partnership or ServiceCo fails to complete a specified "milestone" component of the works by its "target completion date", it must submit a written report to the HAC's 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 timing of the relevant stage of the works and the completion of the works as a whole. It must also provide a copy of this report to the debt financiers' Security Trustee.

More generally, if the HAC's Project Director believes at any time that the Project Partnership or ServiceCo will not complete a stage of the works by its "target completion date", he or she must direct the Project Partnership and ServiceCo, 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 they will pursue in order to meet the "target completion date(s)", including acceleration of the works. The Project Partnership and ServiceCo must send copies of the Project Director's notice and their response to the Security Trustee.

Within ten business days of receiving the draft "corrective action plan" the HAC's Project Director must either approve the plan, in which case the Project Partnership and ServiceCo must diligently pursue the actions set out in the plan, amending the *Works Program* accordingly, or reject the plan and advise them of the reasons for this rejection, in which case the Project Director, the Project Partnership and ServiceCo must meet to discuss and establish an acceptable "corrective action plan". Again, the Project Partnership and ServiceCo must send copies of the Project Director's notification of his or her decision to the Security Trustee.

If the Project Director, the Project Partnership and ServiceCo cannot agree on a "corrective action plan", the dispute resolution procedures summarised in section 3.5.9 will apply.

These arrangements will not relieve the Project Partnership or ServiceCo of any of their other obligations under the Project Deed or any other legal requirement.

3.3.9 The Project Partnership's and ServiceCo's construction workforce and subcontractors

The Project Partnership and ServiceCo must comply with a series of conditions concerning their own employees and the employees of the Construction Contractor, any other "subcontractors" they appoint to carry out the works, under arrangements summarised below, and these subcontractors' "subsubcontractors".

These conditions, set out in a schedule to the Project Deed and in the *Technical Specification*, cover matters such as employees' qualifications, skills, experience and training; pre-employment investigations and the HAC Project Director's rights 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; compliance with Department of Health, HNE and MHCN staff conduct policies; disciplinary actions; the sole responsibilities of the Project Partnership, ServiceCo and their contractors and subcontractors for the employment and conditions of their employees; industrial relations policies; and compliance with employment laws.

In addition to the Project Partnership's Construction Contract with the Construction Contractor, the Project Partnership and ServiceCo may enter into contracts with other

“subcontractors” for the development, construction and/or commissioning of any part of the works.

If they do so,

- They must ensure the subcontractor and any subsubcontractors are reputable and have access to sufficient experience and expertise to perform their obligations to the standards required by the Project Deed
- They must promptly give the HAC’s Project Director a copy of each proposed or executed subcontract or subsubcontract if the total contract sum, or the aggregate value of all the project contracts with the same subcontractor or subsubcontractor and its related corporations, is \$250,000 or more
- The subcontract must include undertakings by the subcontractor, equivalent to those of the Project Partnership and ServiceCo under the Project Deed (see section 3.3.17), to rectify any defects, omissions and defaults at its own cost
- The subcontract must include undertakings by the subcontractor to assign the manufacturers’ warranties for any equipment it supplies to the Project Partnership, ServiceCo or their nominees
- The subcontract must include arrangements which give full effect to the Project Deed’s intellectual property and moral rights provisions described in section 3.3.3
- The subcontract and any subsubcontract must include arrangements for the application of the employment conditions described above
- The Project Partnership and ServiceCo must ensure the subcontractor and any subsubcontractors have specified workers compensation, public liability and, where relevant, professional indemnity insurance (see section 3.5.2.1)
- The Project Partnership and ServiceCo have promised the HAC they will comply with their own obligations under each of their subcontracts and ensure their subcontractors and any subsubcontractors comply with their obligations under the subcontracts and any subsubcontracts
- For each subcontract the Project Partnership and/or ServiceCo, the subcontractor and any guarantors of the subcontractor’s performance must execute a “side deed” in the same form as the Construction Side Deed (see section 3.6.5.4), and
- If a subcontractor or any subsubcontractor is engaged in specific types of work listed in an annexure to the Project Deed, or if the HAC, the Project Partnership and ServiceCo otherwise agree it is necessary, the Project Partnership and ServiceCo must ensure the subcontractor or subsubcontractor also executes a “collateral

warranty deed”, in favour of the HAC, in a form set out in a schedule to the Project Deed. This deed must cover, among other things, the quality of the subcontractor’s or subsubcontractor’s work, materials and equipment, insurance requirements, the provision of information to the HAC, the notification of defaults to the HAC and arrangements following any termination of the Project Deed.

The Project Partnership and ServiceCo must:

- Obtain the written consent of the HAC’s Project Director before they may agree to any variation, amendment, assignment, replacement or termination of the Construction Contract or (if there is likely to be an effect on the HAC’s rights or their ability to meet their Project Deed obligations) any other subcontract for which the total contract sum or the aggregate value of all the project contracts with the same subcontractor and its related corporations is \$250,000 or more (see also sections 3.5.5 and 3.5.6)
- Ensure the Construction Contractor and any other subcontractors impose analogous obligations under any of their subsubcontracts for which the total contract sum or the aggregate value of all the project contracts with the same subsubcontractor and its related corporations is \$250,000 or more
- Obtain the written consent of the HAC’s Project Director before they compromise or waive any claim they may have against the Construction Contractor or any other subcontractor under a subcontract for which the total contract sum or the aggregate value of all the project contracts with the same subcontractor and its related corporations is \$250,000 or more (see also section 3.5.6), and
- Immediately notify the HAC’s Project Director of any material amendment or termination of the Construction Contract or any other subcontract for which the total contract sum or the aggregate value of all the project contracts with the same subcontractor or subsubcontractor and its related corporations is \$250,000 or more.

3.3.10 Construction management plans, reports, inspections and audits

3.3.10.1 Management plans

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

- The requirements of the *Technical Specification*
- The timeframes of the *Works Program*
- Quality assurance plans developed as specified in the *Technical Specification*

- Consultation and documentation requirements set out in the Project Deed, and
- A requirement for an “appropriate” level of professional care

so that the works will comply with the project’s development approvals and all other consents and legal requirements.

The required management plans are an overall *Project Management Plan*, an *Occupational Health and Safety Plan* (see section 3.3.11), an *Environmental Management Plan* (see section 3.3.12), a *Quality Plan*, a *Construction Management Plan*, a *Project Cost Plan*, an *Asset Management Plan* and *Commissioning Plans*, also termed *Commissioning and Finalisation Plans* (see section 3.3.16).

As part of their development of these management plans the Project Partnership and ServiceCo may be directed by the HAC’s Project Director to meet and consult with and/or give presentations to “stakeholders” and their consultants and advisers. If they believe 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), the *Works Program* (other than as described in section 3.3.8), the project’s operations-phase *Policy and Procedures Manual* (see section 3.4.4) or the project’s works or services, they must inform the HAC’s Project Director and may submit a formal proposal for such a variation only if this is requested by the Project Director.

The Project Partnership and ServiceCo must submit drafts of the management plans for review by the HAC’s Project Director at times specified in the project’s *Works Program* (see section 3.3.8), along with any additional related information he or she reasonably requests.

The Project Director may then (but need not) review the draft plans and make comments, within 20 business days, on whether they comply with the Project Deed. If the Project Director suggests the draft management plans do not comply, the Project Partnership and ServiceCo must resubmit amended plans that reflect his or her comments.

If the Project Partnership, ServiceCo and the HAC’s Project Director cannot agree on amendments to the draft management plans, the dispute resolution procedures described in section 3.5.9 will apply.

Any participation by the Project Director or any other HAC representatives will not make the HAC liable for any errors, omissions, defects or non-compliances in the management plans, and the Project Partnership and ServiceCo will remain solely responsible for the project’s design and construction.

3.3.10.2 Construction reports

The Project Partnership and ServiceCo must give the HAC’s Project Director monthly reports on the progress of con-

struction, revisions to the *Works Program* (see section 3.3.8), expenditures and any significant items potentially affecting the *Works Program*, any adjustments to their 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 others on the extension, adjustment or relocation of water, electricity, gas, communication or other utilities.

If requested by the HAC’s Project Director, the Project Partnership must also submit a monthly report on occupational health and safety matters, as described in section 3.3.11 below.

The Project Partnership and ServiceCo must promptly advise the HAC’s Project Director of any material defects or damage to the works if the cost of repairs is more than \$3,000, indexed to the consumer price index from 30 November 2005, informing him or her the actions they are taking to correct the damage or defect and the estimated time the correction will require (see also section 3.5.2). Copies of any such notices must be sent to the debt financiers’ Security Trustee within five business days.

3.3.10.3 Site inspections, site meetings and HAC comments

In addition to the monthly or more frequent meetings of the Project Co-ordination Group (see section 3.2.2),

- The HAC’s Project Director and his or her representatives may, as already indicated in section 3.3.4, enter any of the constructions sites, at any reasonable time and after giving reasonable notice, to inspect the works, provided they do not cause unreasonable disruption and comply with reasonable safety and security requirements
- The Project Partnership and ServiceCo 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 Partnership or ServiceCo written comments and recommendations concerning the compliance of the works with the requirements of the Project Deed
- If he or she does so, the Project Partnership and ServiceCo must meet with the HAC’s Project Director to discuss and establish rectification measures or changes to the works, and if they cannot agree the dispute resolution procedures summarised in section 3.5.9 will apply.

The Project Partnership and ServiceCo have expressly acknowledged that the HAC Project Director’s rights of review, inspection and comment will not make the HAC responsible in any way for ascertaining errors, omissions, defects or non-compliances in the works.

3.3.10.4 Independent and HAC quality audits

In addition to their own quality audits, as referred to in section 3.3.6, the Project Partnership and ServiceCo must have their compliance with their quality assurance plans for the works audited at least every 12 months by an independent auditor acceptable to the HAC's 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 HAC will also have the right to conduct its own quality audits, at its own cost, at any time during the construction phase of the project. Should such an audit reveal any non-compliance with quality assurance plans by the Project Partnership, ServiceCo, the Construction Contractor, any other subcontractor or any subsubcontractor, the Project Partnership and ServiceCo must reimburse the HAC for its auditing costs.

These quality assurance and audit arrangements will not relieve the Project Partnership or ServiceCo of any of their other obligations under the Project Deed.

3.3.11 Occupational Health and Safety

For the purposes of the Occupational Health and Safety Regulation 2001 (NSW), the Project Partnership has been appointed as the "principal contractor" for the project's construction work and may exercise any HAC and MHCN powers 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 Partnership.

If the Project Partnership fails to comply with its duties as a "principal contractor", the HAC may carry out these duties itself, or have them carried out by others, and the Project Partnership must pay the HAC for the costs it incurs, as a debt, upon demand.

The Project Partnership has indemnified the HAC and MHCN against any loss or claim arising from a breach of its obligations as a "principal contractor", except to the extent of any loss or claim caused by:

- Any HAC, HNE or MHCN negligence, fraud or breach of the project contracts, or
- Compliance by the Project Partnership, a Project Partner, ServiceCo, any related corporation, any of their subcontractors, subsubcontractors, invitees, employees and agents or any HNE or MHCN employee who is being managed and supervised by the Project Partnership or ServiceCo under the Labour Services Agreement with any express directions issued by the HAC or its Project Director in accordance with the Project Deed.

If requested by the HAC's Project Director, the Project Partnership must submit a report on occupational health and safety matters as part of its monthly construction report (see section 3.3.10), setting out its *Occupational Health and Safety Plan* (section 3.3.10), the *Safe Work Method Statements* which it, the Construction Contractor and any other construction work subcontractors and subsubcontractors have prepared and all other registers, records and documents which the Project Partnership must prepare and maintain as the "principal contractor".

3.3.12 Environmental requirements

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

- Comply with all environmental laws and all relevant industry standards and codes of practice
- Not contaminate, pollute or bring any waste onto any construction site, access or temporary works area or the hospital site or hospital
- Keep the construction sites and access or temporary works 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
- Adopt good industry practices to ensure the safety of people and protect the environment from harm
- Immediately notify the HAC's 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 HAC, MHCN, the Project Partnership or ServiceCo by any court, tribunal or relevant government authority (this liability will continue after the end of the project in 2033 if it arises because of contamination, pollution or waste disposal during the term of the project), and
- Give the HAC's Project Director a copy of any environmental law direction they receive 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 their compliance with the direction.

The Project Partnership and ServiceCo have released the HAC, the State of NSW, the Department of Health, HNE, MHCN and their delegates, employees, contractors and

agents—to the extent permitted by the law—from any liability or obligation to them, or any person claiming through them, including any subcontractor, for any contamination, pollution or waste disposal on any construction site, access or temporary works area, the hospital site or the hospital, other than in a limited range of circumstances which might amount to a “compensation event” and thus give rise to a potential liability to pay compensation under arrangements described in section 3.5.12.

For a “compensation event” of this type to arise an environmental law direction or order must be served on the HAC, MHCN, the Project Partnership or ServiceCo by a court, tribunal or relevant government authority concerning a matter *other than*:

- A construction site or access or temporary works area during the construction phase
- Any existing contamination of the existing buildings that was identified in the 18 October 2004 *Meinhardt Report*, or
- A breach by the Project Partnership or ServiceCo of their obligations under the Project Deed.

As part of the procedures preceding final completion of the works on each construction site (see section 3.3.16), the Project Partnership and ServiceCo must undertake a final assessment of contamination on the site, undertake any remediation work which this assessment shows is required and subject their assessment and remedial actions to independent review by an accredited site auditor under the Contaminated Land Management Act, jointly appointed by the HAC, the Project Partnership and ServiceCo.

3.3.13 Native title claims

If there is a native title claim over any part of a construction site, access or temporary works area, the hospital site or the hospital the Project Partnership and ServiceCo must continue to perform their obligations under the Project Deed unless they are ordered not to by the HAC’s Project Director, a court, tribunal or other relevant authority or any other legal requirement.

3.3.14 Heritage artefacts and religious items

Any heritage artefacts discovered on or under any of the construction sites, access areas and temporary works areas will (as between the HAC, the Project Partnership and ServiceCo) be the absolute property of the HAC.

The Project Partnership and ServiceCo must:

- Take every precaution to prevent the removal, disturbance, damaging or destruction of any artefacts
- More specifically, protect items of historical and religious significance which are identified in the *Technical Specification*

- Immediately notify the HAC if any artefacts are discovered, and
- Comply with any directions concerning these artefacts from a court, tribunal or other relevant authority.

3.3.15 Variations

If the HAC, the Project Partnership or ServiceCo wishes to make any change to the *Technical Specification*, a completed detailed design, the *Works Program* (other than under the procedures described in section 3.3.8 above) or the works, it may do so only in accordance with a formal and very detailed “change procedure” set out in a schedule to the Project Deed.

This “change procedure” also applies to:

- Changes which any of the parties wishes to make to the *Services Specification*, the services to be provided by the Project Partnership or ServiceCo during the operational phase of the project or an operations-phase *Policy and Procedures Manual* (other than under the procedures described in sections 3.4.1 and 3.4.4 below) (see section 3.4.10)
- Changes identified by the Project Partnership and/or ServiceCo which they *must* propose, even if they do 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 HAC, even if they are in practice requested by the Project Partnership and/or ServiceCo, because they have directly resulted from:
 - A “compensation event”—including “additional work” by a third party at the hospital or hospital site involving capital expenditure on works beyond the current works and any consequential additional services to be provided by the Project Partnership and ServiceCo—under the “compensation event” arrangements described in section 3.5.12
 - An extension of the deadline for obtaining development approval for the new Mental Health facility and North Block beyond 25 September 2007, under the arrangements described in section 3.3.2, followed by a Project Partnership or ServiceCo notice that it wishes to terminate the Project Deed and a response by the HAC stating the extent to which the HAC requires the Project Deed to continue, as also described in section 3.3.2, or
 - A risk for which the Project Deed requires insurance cover has become uninsurable and has subsequently eventuated during the operations phase of the project, affecting only part of the construction sites, the hospital site or the hospital, and the HAC has elected, under arrangements described in

section 3.5.2.3, to request a variation as stipulated in these arrangements.

The only exceptions to the requirement to use the formal “change procedure”, other than those referred to above, are “minor changes” directed by the HAC’s Project Director.

These are changes, *not* arising from a change in any Commonwealth, State Government, Department of Health, HAC, HNE or MHCN policy, guideline, standard, procedure or requirement affecting the provision of services by the Project Partnership or ServiceCo, 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 Consumer Price Index from 30 November 2005. However, if “minor changes” are made without using the “change procedure”, the Project Partnership and ServiceCo will not be entitled to any extension of time or other relief from their obligations concerning the changed matters, and will be entitled to be compensated only for the amounts actually incurred by them in relation to the change, including any costs directly arising from any delay caused by 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 HAC’s operational-phase payments to the Project Partnership and ServiceCo under the arrangements described in section 3.4.8 (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 HAC to terminate the Project Deed during the procedures and pay compensation as if this termination were a “voluntary” termination as described in section 3.6.4 all vary depending on the type of change being contemplated, the party requesting or deemed to be requesting the change, whether the HAC initially and finally accepts or rejects the Project Partnership’s and ServiceCo’s variation proposals (which must be prepared by them even for HAC-initiated changes), the estimated cost effect of the change (as calculated in accordance with another detailed schedule to the Project Deed), whether “additional work” is involved, whether the HAC chooses to have the Project Partnership and ServiceCo carry out part or all of any such “additional work” or call for tenders from third parties, whether the Project Partnership and ServiceCo have taken all reasonably necessary steps to mitigate and minimise the effects of the change and whether the change will necessitate new or amended development approvals and/or other consents.

In broad terms, however,

- Variations requested or deemed to be requested by the HAC and variations compulsorily requested by the Project Partnership and/or ServiceCo because they would result in an “improvement, innovation or time or cost saving” will potentially entitle the Project Partnership and/or ServiceCo to an extension of time, relief from their 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 Partnership and/or ServiceCo will not entitle them to any extensions of time, other relief or compensation, unless otherwise agreed by the HAC.

If the HAC’s Project Director accepts a variation proposal the Project Partnership and ServiceCo must give the Project Director a revised and audited “base case” financial model for the project, and a revised schedule of payments for the operational phase of the project (see section 3.4.8), both of them reflecting the approved change. The HAC may either approve these revisions, in which case the amended versions will replace their equivalents in a schedule and annexure to the original Project Deed, or propose amendments, in which case the Project Partnership, ServiceCo and the HAC 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 3.5.9.

If the HAC engages a party other than the Project Partnership, the Project Partners and ServiceCo to carry out “additional work”,

- The Project Partnership and Service Co must not hinder or delay the HAC and this contractor from undertaking the work
- The HAC may request them 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 Partnership and ServiceCo must comply with all such reasonable requests.

3.3.16 Early occupation arrangements and arrangements for commissioning and completion of the works

3.3.16.1 Commissioning plans

The Project Deed sets out requirements and procedures—very similar to and supplementing the general procedures for

all construction-phase management plans already described in section 3.3.10—for the Project Partnership and ServiceCo to:

- Develop a *Commissioning Plan* for each stage of the works, detailing, in accordance with requirements in the *Technical Specification*, how they will commission and test plant, equipment and other aspects of the works so that the works comply with the *Technical Specification* and *Services Specification*, and
- Update and amend these plans throughout the construction phase of the project, submit each of the amended plans to the HAC's Project Director and the Independent Certifier and further develop, update and amend the plans and/or provide further information if they are directed to do so, with the dispute resolution procedures described in section 3.5.9 applying if they cannot agree with the HAC Project Manager and the Independent Certifier on the necessary amendments.

The Independent Certifier, acting independently, must review and comment on the draft *Commissioning Plans* and must attend commissioning activities and review their results if requested to do so by the HAC's Project Director.

More generally, the HAC's Project Director or the Project Partnership may at any time ask the Independent Certifier, in relation to its obligations concerning the *Commissioning Plans* or its obligations concerning early occupation and commissioning of the works (described below), to inspect the works with them and make representations at these inspections.

These and other obligations of the Independent Certifier under the Independent Certifier Deed, described below, may be amended, added to or deleted by the HAC and the Project Partnership, through joint notices that may be issued at any time under arrangements set out in the Independent Certifier Deed.

3.3.16.2 Early occupation

The Project Deed and the *Works Program* contemplate the possibility of early occupation of parts of the hospital facilities, by the HAC, HNE, MHCN, the HAC's Project Director and other HAC project administrators, clinical staff, other employees of the Department of Health, HNE and MHCN, hospital patients and hospital visitors, prior to formal completion of the relevant stages of the works.

Before any such "early occupation" the Project Partnership and ServiceCo must ensure the Independent Certifier is satisfied all relevant Project Deed requirements for the completion of works in these areas have been satisfied.

The construction-phase licences granted to the Project Partnership and ServiceCo for the construction sites (see section 3.3.4) will be converted to non-exclusive licences for

these "early occupation" areas, with the Project Partnership expressly agreeing to the early occupation of these areas.

The Project Partnership and ServiceCo must bear the costs of any additional insurance required (see section 3.5.2) and provide maintenance, refurbishment and utility services to the occupied areas, at no cost to the HAC, in accordance with the *Services Specification*.

They have also released the HAC, HNE and MHCN, to the extent permitted by law, from any loss or claim arising from the early occupation of these areas, and have indemnified them against any claim concerning any early occupation by themselves, any related corporation, their subcontractors, subsubcontractors, invitees, employees and agents and any HNE and MHCN employees managed and supervised by the Project Partnership or ServiceCo under the Labour Services Agreement.

3.3.16.3 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:

- A final assessment by the Project Partnership and ServiceCo of contamination on the stage's construction site, followed by remediation work if the assessment shows this is required and an independent review of the assessment and the remedial actions by an accredited site auditor under the Contaminated Land Management Act, jointly appointed by the HAC, the Project Partnership and ServiceCo, with copies of the contamination assessment and review reports being given to the HAC's Project Director and the Independent Certifier
- The identification and listing of minor omissions and defects which, in aggregate, will not adversely affect occupation of the works or the provision of "hospital functions"
- Joint inspections and assessments of the works by the HAC's Project Director, the Independent Certifier, the Project Partnership, ServiceCo and the Construction Contractor once the Project Partnership and ServiceCo are satisfied "preliminary completion" of each stage has been achieved, with only specified aspects of the stage's works not having been completed and commissioned
- Certification by the Independent Certifier, acting independently, that "preliminary completion" has in fact been achieved
- Following this, specified consultations and information exchanges, site visits and inspections, testing, training and support, the installation of major medical equipment by specialist contractors appointed by the HAC's Project Director, the verification by the Independent Certifier, acting independently but with the HAC Project Director's assistance, that all HAC-provided

items and equipment have been commissioned and tested (if applicable), and the verification by the Project Partnership and ServiceCo, with the HAC's assistance, that all items equipment provided by them have been commissioned and tested (if applicable) and all the education, training and support specified in the Project Deed's requirements for "completion" have been completed

- Formal notices of completion, in a form specified in the Project Deed, and joint inspections and assessments of the works by the HAC's Project Director, the Independent Certifier, the Project Partnership, ServiceCo and the Construction Contractor once the Project Partnership and ServiceCo are satisfied "completion" of the relevant stage of the works has been achieved
- The rectification by the Project Partnership and ServiceCo 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 have in fact been satisfied
- Within two business days of this certification, the issuing by the HAC's Project Director of a notice:
 - Formally confirming to the Project Partnership and ServiceCo that completion of the stage has occurred, and
 - Specifying a "**commencement date**" for the stage, which must be the later of the date of the notice (the stage's formal "**completion date**") and the "target completion date" for the stage, currently 9 January 2008 for Stage 1, 3 February 2009 for Stage 2 and 16 June 2009 for Stage 3 (see section 3.3.8).

The Project Deed makes it clear that the HAC Project Director's notification of the completion of a stage of the works will not constitute an approval by the HAC of the Project Partnership's and ServiceCo's performance of their obligations or evidence that the stage complies with the *Technical Specification* and the *Services Specification*.

Within 60 days of the "completion date" for a stage the Project Partnership and ServiceCo must give the HAC's Project Director a complete set of "as constructed" drawings of the stage in hard copy and electronic form, and within 180 days of the "completion date" they must give him or her a detailed survey of the completed stage's works by a registered surveyor nominated by the HAC, with the surveyor's certification that the completed works are located in accordance with the relevant detailed designs.

3.3.17 Post-completion correction of defects

The Project Partnership and ServiceCo must rectify the minor omissions and defects identified prior to the "preliminary completion" of a stage of the works (section 3.3.16), to the reasonable satisfaction of the Independent Certifier, acting independently, as soon as practicable after the completion of the stage, and no later than 20 business days after formal "completion date". The Independent Certifier must tell the HAC's Project Director when each of these rectifications is completed and notify him or her if the deadline for all of the minor omissions and defects to be rectified is not met.

More generally, the Project Partnership and ServiceCo must rectify all defects in each stage of the works which are discovered, become apparent or are reasonably apparent during a 12-month "defects liability period" commencing on the stage's formal "completion date".

If they fail to do so, the HAC's Project Director may direct them 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 Partnership and ServiceCo do not comply with this direction, the HAC's Project Director may elect to have the defect rectified by the HAC or a person nominated by the Project Director, in which case the costs incurred will be payable by the Project Partnership to the HAC as a debt.

The defects rectification requirements and procedures described above will apply again if any defects are discovered, become apparent or are reasonably apparent during any of the relevant extended "defects liability periods".

3.3.18 Construction works security bond

In addition to the securities granted to the HAC under the HAC Security (see section 4.1), the Project Partnership and ServiceCo have given the HAC an unconditional bank guarantee of \$2 million in favour of the HAC, to secure their performance of the construction works.

If it is not drawn upon, this bank guarantee is to be reduced to \$1 million 20 business days after the Stage 3 "commencement date" and released entirely 20 business days after the last "defects liability period" has expired.

The Project Partnership and ServiceCo may not take any action to restrain any demands or payments under the bank guarantee or any use by the HAC of any money it receives under the guarantee.

3.4 Operation and maintenance

3.4.1 The general operational phase obligations of the Project Partnership and ServiceCo

The Project Partnership and ServiceCo must provide non-clinical hospital services to the HAC, as specified in a *Services Specification* annexed to the Project Deed, throughout the operations phase of the project, from the Stage 1 “commencement date” (see section 3.3.16.3) until 30 November 2033 or any earlier termination of the project contracts.

The services to be provided are:

- Building and equipment maintenance and refurbishment services, comprising planned preventative and programmed maintenance services, condition surveys, reactive maintenance services, a building maintenance and control system, building engineering services, inspections and testing services, the provision and updating of a *Maintenance Manual* and pest control services
- Grounds and gardens maintenance services, including planned and *ad hoc* horticultural services, the planned and reactive maintenance of external structures and surfaces, including a swimming pool, an emergency call-out service and services to ensure adequate access routes are provided
- Security services, comprising a security risk management program, the provision and maintenance of a *Security Procedures Manual*, security patrols, dedicated security services for the ambulance and emergency area and the mental health facilities under specified circumstances, security escorts, the development and implementation of general security procedures for the hospital, surveillance systems, disaster and emergency responses, access control systems, identification systems, crime prevention plans and responses, lost property systems, specific mental health facility security services, monthly, daily and incident-based security reports, traffic management and other duties as requested
- Utility services, including the procurement, maintenance and continuous supply of electricity, gas (other than medical gases), fuel oil, water, sewerage and surface water, stormwater and in-ground water disposal utilities and associated management, safety, efficiency and environmental services
- Cleaning services, excluding the cleaning of specified types of clinical instruments and equipment and operating theatres and the handling of specified clinical wastes but otherwise including, in compliance with specified minimum cleaning standards and cleaning material and equipment requirements, scheduled, periodic and project cleaning services, reactive cleaning services, regular inspections, pest reporting, linen replacement services, the cleaning of ward patient utensils, waste management, segregation, collection, transportation, storage and disposal services, environmental audits and the provision of a *Cleaning Procedures Manual*
- Catering services, in accordance with specified food procurement, storage and preparation, equipment, food quality, menu development, meal ordering and cleaning requirements and including general and *ad hoc* patient catering and potable water services, services to meet special dietary requirements, daily groceries services, employee and visitor catering services with a restaurant/cafeteria facility, vending machine services, catering waste removal and cleaning services, the development and implementation of a *Catering Services Procedures Manual* and a *Food Safety Program* and external audits of the catering services’ compliance with this *Food Safety Program*
- “Materials management” services for the receipt, safe custody and distribution of materials and services requisitioned by HNE or MHCN, including the use of HNE/MHCN operational support systems, materials receipt and dispatch control services, stock control services, departmental and ward storage services, “top up” services, distribution services, courier and mail services, medical gas services and the maintenance of full audit trails on these activities, and
- “General” services, comprising:
 - Specified management services (general management, the production of and compliance with quality assurance plans, asset management services, infection control policies, procedures and management, occupational health, safety and rehabilitation, disaster and emergency management plans and services, information management services, financial management services, heritage, environmental management and hazardous materials management services, risk management services and the development and maintenance of a *Policy and Procedures Manual* (see section 3.4.4))
 - Performance monitoring, reporting and inspection services, including compliance with the findings of audits (see section 3.4.4)
 - Helpdesk services
 - Employee and employee training services
 - Service materials and workmanship management services
 - Service commissioning and handover management services, and

- The management of any disruptions caused by ongoing construction activities prior to the completion of the Stage 3 works.

Under the Project Deed and the *Services Specification*,

- The Project Partnership will be responsible for the building and equipment maintenance and refurbishment services, the grounds and gardens maintenance services, utility services and specified components of the “general” services, and
- ServiceCo will be responsible for the security services, cleaning services, catering services, materials management services and most of the “general” services.

In providing these services the Project Partnership and ServiceCo must allocate adequate staff and resources and will use both their own employees and subcontractors, in accordance with requirements set out in the Project Deed (see section 3.4.5), and employees of HNE and MHCN, in accordance with the Labour Services Agreement (see section 3.4.6).

All of the services must be provided in accordance with:

- Detailed requirements in the *Services Specification*
- The *Policy and Procedures Manual*, quality assurance plans and all other plans that must be developed under the *Services Specification* (see section 3.4.4)
- Good industry practice
- All applicable approvals, consents and other legal requirements
- The Labour Services Agreement (see section 3.4.6), and
- In the case of services provided prior to the Stage 3 “commencement date”, the construction *Works Program* (see section 3.3.8) and other construction-phase management plans (see section 3.3.10.1).

Consistently with the general commitments to cooperation described in section 3.2.2, the services must also be performed in an “appropriate, effective and efficient, dependable and cooperative” manner.

The Project Partnership and ServiceCo must obtain and maintain all the court, tribunal and statutory approvals, licences and other consents required for the provision of their services, continue to comply (as applicable) with the environmental requirements described in section 3.3.12, provide and/or pay for the telephone and other electronic communication services they need to perform the services, monitor their performance of the services in accordance with procedures set out in the *Services Specification* and have their compliance with the quality assurance plans audited as required by the *Services Specification* (see section 3.4.4).

More generally, the Project Partnership and ServiceCo must ensure, at all times, that the hospital and the hospital site are available, as required in the Project Deed and the

Services Specification, to the HAC, HNE, MHCN, clinical staff, any other persons authorised to carry out “hospital functions”, patients and visitors, the only exceptions to this being any areas where construction works are continuing prior to the “commencement date” for Stage 3 of the works. The Project Partnership and ServiceCo may use the non-construction parts of the hospital and the hospital site *only* for the provision of their services, the facilitation of the hospital’s “hospital functions” or the exercising of any of their other rights and obligations under the project contracts to which the HAC is a party.

The Project Partnership and ServiceCo must consult with the HAC, from time to time, on the best method of integrating their services with the “hospital functions”, and the resultant integration requirements must be reflected in the *Policy and Procedures Manual* (see section 3.4.4).

In addition, they may not modify their work practices or change the way they provide their services in any way that increases the costs of the “hospital functions” or any other aspect of the operation of the hospital to the HAC, HNE or MHCN unless they obtain the prior written consent of the HAC’s Project Director.

All of the hospital chattels and non-fixtures provided by the Project Partnership and ServiceCo will remain their property until 30 November 2033 or any earlier termination of the Project Deed, at which time they will be transferred to the HAC or a replacement contractor under the arrangements described in section 3.4.12.

If any of the parties wishes to change the *Services Specification*, the services to be provided by the Project Partnership or ServiceCo the *Policy and Procedures Manual* (other than under the procedures described in section 3.4.4), they must use the formal “change procedure” already outlined in section 3.3.15, unless the change constitutes a “minor change” as discussed in section 3.3.15 (see section 3.4.10)

However, the HAC’s Project Director may at any time direct the Project Partnership and ServiceCo to reschedule any maintenance or other services in that month’s monthly maintenance program or cleaning schedules, and if he or she does so this will invoke the formal “change procedure” only if:

- The directed amendment will produce a sustained change in the cleaning schedule or the refurbishment component of the monthly maintenance program for the foreseeable future, and
- The cost of the change will exceed \$10,000.

Changes to the services and/or the *Policy and Procedures Manual* may also be made following a “relief event” or a “compensation event”, under arrangements described in sections 3.5.11 and 3.5.12.

3.4.2 Operations-phase leases and licences

As discussed in section 3.1, the HAC has leased the hospital site from MHCN, under the Head Lease, until 2 December 2033.

On the Stage 3 “commencement date” (see section 3.3.16.3), which the Project Deed also terms the “full service commencement date”,

- The HAC must grant and the Project Partnership must accept the SubLease of the hospital's buildings, which must be in a form set out in a schedule to the Project Deed, and
- The Project Partnership must grant and the HAC must accept the SubSubLease, of the same hospital buildings, which must also be in a form set out in a schedule to the Project Deed.

The Project Deed sets out procedures for the preparation, execution, registration and provision of certified copies of these leases. If the HAC were to fail to grant the SubLease as required, the HAC and the Project Partnership would nonetheless be bound as if the SubLease and SubSubLease had been executed and granted.

The SubLease will apply until 30 November 2033 and the SubSubLease until 29 November 2033, unless there is an earlier termination of the Project Deed.

The rent to be paid to the HAC by the Project Partnership under the SubLease will be \$1 per year, payable on demand. The rent to be paid to the Project Partnership by the HAC under the SubSubLease will be \$1 per year *plus* any portions of the monthly payments it must make to the Project Partnership and ServiceCo, under the arrangements described in section 3.4.8 below, that the Project Partnership has not directed it to pay instead to the Nominee Company. (In practice, the Project Partnership and ServiceCo have both irrevocably directed the HAC to pay all amounts payable to them, including the monthly payments, directly to the Nominee Company.)

In addition to these arrangements,

- The HAC may lease any areas of the hospital, expressly including the Mental Health facility, to MHCN, under an MHCN Sublease in the case of areas not subleased to the Project Partnership and under a Subsubsublease in the case of areas it has subleased to the Project Partnership under the SubLease and leased back under the SubSubLease, provided it first obtains the written consent of the Project Partnership and ServiceCo, acting reasonably, for any Subsubsublease of any area and for any MHCN lease of the Mental Health facility
- The Project Partnership may grant ServiceCo a ServiceCo Licence to access areas of the hospital it is subleasing

from the HAC, provided it first obtains the written consent of the HAC, acting reasonably

- The HAC must grant non-exclusive licences to the Project Partnership, ServiceCo and their contractors, agents and employees, the debt financiers' Security Trustee and any agent, manager, receiver or administrator appointed by the Security Trustee, on terms set out in a schedule to the Project Deed, to enter, occupy and use any parts of the hospital site which are not subject to the SubLease as necessary for the performance of the Project Partnership's and ServiceCo's services or otherwise necessary for their exercising of their rights or obligations under the project contracts to which the HAC is a party, and
- If the Project Partnership and/or ServiceCo need access to any other land to perform their services, this will be their sole responsibility and at their own risk, and the HAC will not be liable for any delays or costs they incur if they cannot obtain unrestricted access to the additional land.

The HAC has promised the Project Partnership and ServiceCo that it will continue to perform its obligations to MHCN under the Head Lease, other than those which the Project Partnership will have to perform under the SubLease, and that any MHCN Sublease or Subsubsublease will include acknowledgements that they are subject to the interests of the Project Partnership, ServiceCo and the debt financiers' Security Trustee under the project's contracts.

The HAC, the Project Partnership and ServiceCo have also made a series of undertakings variously promising that they will not amend, create any interest in and/or deal with any of their rights under the Head Lease, the Subsubsublease and/or the ServiceCo Licence without each others' prior written consent.

3.4.3 Building conditions on the Stage 1 'commencement date'

Prior to the “commencement date” for the Stage 1 works (see section 3.3.16.3) the Independent Certifier, acting independently, must procure Meinhardt (NSW) Pty Ltd, the surveyor which conducted the pre-contractual survey of existing buildings annexed to the Project Deed (the “*Meinhardt Report*”, dated 18 October 2004), or another surveyor acceptable to both the HAC and the Project Partnership, to carry out a new survey of the same existing buildings, in order to identify any deterioration or damage, beyond fair wear and tear, between the initial survey and the Stage 1 “commencement date”.

The costs of this second survey will be shared 50:50 by the HAC and the Project Partnership, and the Independent Certifier must ensure its results are promptly made available to both.

If the second survey indicates there has been deterioration or damage, beyond fair wear and tear and not caused by the Project Partnership, ServiceCo, the Project Partners, any related corporation, their subcontractors, subsubcontractors, invitees, employees or agents, the HAC's Project Director must, in his or her absolute discretion, either:

- Instruct the Project Partnership and ServiceCo to rectify the deterioration
- Instruct them to accelerate any construction-phase refurbishment works so as to overcome the effects of the deterioration, or
- Grant the Project Partnership and ServiceCo appropriate relief from "key performance indicators" in the *Services Specification* (see section 3.4.8), for a period of time that is appropriate in the light of the construction phase's refurbishment works.

If the Project Director chooses the first of these options, the HAC, the Project Partnership and ServiceCo must first agree on a reasonable period within which the deterioration must be rectified and the additional costs the Project Partnership and ServiceCo will incur. The HAC must pay these agreed additional costs, either as a lump sum or, if the provisions of the "estimated cost effect" schedule to the Project Deed permit, through an adjustment to the HAC's monthly payments to the Project Partnership and ServiceCo under the arrangements described in section 3.4.8.1.

If the HAC's Project Director chooses the second of these options, the Project Partnership and ServiceCo must use their best endeavours to accelerate any refurbishment works which are both reasonable and necessary to overcome the deterioration, the HAC must pay them the extra costs they reasonably and directly incur, and the Project Partnership and ServiceCo will not be able to make any additional claims against the HAC concerning the acceleration direction.

3.4.4 Operations phase plans, manuals, reports, inspections and audits

3.4.4.1 Management plans and the Policy and Procedures Manual

As already indicated in section 3.4.1, the Project Partnership and ServiceCo 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, they must develop, complete, comply with and from time to time amend and update a *Policy and Procedures Manual*, detailing how they intend to comply with their services obligations, in accordance with the *Services Specification* and their quality assurance plans. Among other things, this *Policy and Procedures Manual* must include all the plans, programs, protocols and manuals stipulated in the

Services Specification for each of the services listed in section 3.4.1.

The Project Partnership and ServiceCo must submit drafts of the initial *Policy and Procedures Manual* for review by the HAC's Project Director before the operations phase of the project, at times specified in the *Services Specification*, along with any additional related information he or she reasonably requests.

The Project Director may then (but need not) review the draft *Policy and Procedures Manual* and make comments, within 20 business days, on whether it complies with the Project Deed. If the Project Director suggests the draft *Manual* does not comply, the Project Partnership and ServiceCo must resubmit an amended draft *Manual* that reflects his or her comments.

During the course of the operations phase of the project the initial *Policy and Procedures Manual* must be updated by the Project Partnership and ServiceCo to take account of any changes in law (see section 3.5.8), any changes in the project's approvals, licences and other consents, any changes in the manner in which any part of the hospital is being used, any changes in the hospital's "hospital functions" (other than "unforeseeable hospital functions", of types which the Project Partnership and ServiceCo were not aware of before 30 November 2005 and which could not have reasonably been foreseen by a prudent, competent and experienced hospital and health facility construction and maintenance contractor in their situation), any changes in good industry practice and, more generally, as required by the *Services Specification* and, in any event, at least once every 12 months.

Each updated *Policy and Procedures Manual* must be promptly submitted to the HAC's Project Director. If he or she reasonably believes:

- Operations complying with an updated *Policy and Procedures Manual* would no longer comply with the Project Deed, or would disrupt the hospital's "hospital functions" (other than any "unforeseeable hospital functions" introduced since the last update or otherwise not previously reflected in the *Manual*), or
- The Project Partnership and ServiceCo have failed to update the *Policy and Procedures Manual* as required,

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

The HAC's Project Director may also:

- Direct the Project Partnership and ServiceCo to meet and consult with and/or give presentations to him/herself

and other nominated persons concerning any iterations of the *Policy and Procedures Manual*, and

- Make clinical staff and others aware of relevant provisions of the *Policy and Procedures Manual*.

If the Project Partnership, ServiceCo and the HAC's Project Director cannot agree on amendments to the *Policy and Procedures Manual*, the dispute resolution procedures described in section 3.5.9 will apply.

Any participation by the Project Director or any other HAC representatives in the *Policy and Procedures Manual* development process will not make the HAC liable for any errors, omissions, defects or non-compliances in the *Manual*. The Project Partnership and ServiceCo will remain solely responsible for the compliance of the *Manual* and their services with the requirements of the Project Deed and the *Services Specification*.

3.4.4.2 Monthly reports on subcontractors

The Project Partnership and ServiceCo must give the HAC's Project Director monthly reports on their payments to their subcontractors (see section 3.4.5) and any disputes with these subcontractors.

The *Services Specification* also specifies many requirements for regular or event-triggered reporting to the Project Director on specific aspects of the services, too numerous and detailed for inclusion in this summary of the contracts.

Financial reporting and audits are also required, as described in section 3.5.4 below.

If requested by the HAC's Project Director, the Project Partnership must submit a report on occupational health and safety matters when it gives the HAC its monthly invoice under the payment arrangements described in section 3.4.8, setting out its *Occupational Health and Safety Plan* for the hospital site, the *Safe Work Method Statements* which it, the ServiceCo, the Hard Services Contractor, the Soft Services Contractor and any other operations-phase subcontractors and subsubcontractors (see section 3.4.5) have prepared, and all other registers, records and documents which the Project Partnership must prepare and maintain as the "principal contractor" under the Occupational Health and Safety Regulation.

3.4.4.3 Monitoring, inspections and audits

The Project Company and ServiceCo must monitor their performance of their services in accordance with detailed requirements in the *Services Specification*, and among other things have their compliance with their quality assurance plans audited as set out in the *Services Specification*.

The HAC's Project Director and his or her representatives, including MHCN and HNE representatives, may carry out inspections of the hospital, the hospital site, and any systems, registers, manuals, records, plans and programs

relating to the hospital to assess whether the Project Partnership and ServiceCo are complying with their obligations under the Project Deed.

Unless there are circumstances potentially leading to termination of the Project Deed under the arrangements described in sections 3.6.5 and 3.6.6, these inspections may be carried out at any individual part of the hospital or the hospital site no more than twice each calendar year.

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

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

If an inspection reveals a breach of the Project Deed's requirements, the HAC's Project Director must notify the Project Partnership or ServiceCo, as applicable, providing details and specifying a reasonable period for the breach to be remedied. The Project Partnership or ServiceCo must comply with this notice and remedy the breach, and the Project Director may carry out a further inspection to check whether they have.

The HAC will bear the costs of its inspections unless such a breach is discovered, in which case the Project Partnership or ServiceCo (as applicable) 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 3.6.5 and 3.6.6.

In addition to these general inspection powers, the HAC's Project Director may at any time audit the Project Partnership's and ServiceCo's compliance with the *Policy and Procedures Manual*, giving them at least 20 business days' notice.

3.4.5 The Project Partnership's and ServiceCo's operational workforces and subcontractors

The Project Partnership and ServiceCo must comply with a series of conditions concerning their own employees and the employees of the Hard Services Contractor, the Soft Services Contractor, any other "subcontractors" they appoint to perform operational phase services, under arrangements summarised below, and these subcontractors' "subsubcontractors".

These conditions, set out in a Schedule to the Project Deed and in the *Services Specification*, are essentially the

same as those already described for construction-phase employees in section 3.3.9.

They will *not* apply to:

- HNE and MHCN “Health employees” managed and supervised by the Project Partnership or ServiceCo under the Labour Services Agreement, whose employment conditions will be protected under the arrangements described in section 3.4.6 below, or
- Any Department of Health, HNE or MHCN employees providing the hospital’s “hospital services”, for whom the Project Partnership and ServiceCo will have no employment or employment condition responsibilities.

In addition to the Project Partnership’s Hard Facilities Management Deed with the Hard Services Contractor and ServiceCo’s Soft Facilities Management Deed with the Soft Services Contractor, the Project Partnership and ServiceCo may enter into contracts with other “subcontractors” for the performance of any part of their services.

If they do so,

- They must ensure the subcontractor and any sub-subcontractors are reputable and has access to sufficient experience and expertise to perform their obligations to the standards required by the Project Deed
- They must promptly give the HAC’s Project Director a copy of each proposed or executed subcontract or subsubcontract if the total contract sum, or the aggregate value of all the project contracts with the same subcontractor or subsubcontractor and its related corporations, is \$250,000 or more
- The subcontract must include undertakings by the subcontractor, equivalent to those of the Project Partnership and ServiceCo under the Project Deed (see section 3.3.17), to rectify any defects, omissions and defaults at its own cost
- The subcontract must include undertakings by the subcontractor to assign the manufacturers’ warranties for any equipment it supplies to the Project Partnership, ServiceCo or their nominees
- The subcontract must include arrangements which give full effect to the Project Deed’s intellectual property and moral rights provisions described in section 3.3.3
- The subcontract and any subsubcontract must include arrangements for the application of the employment conditions described above
- The Project Partnership and ServiceCo must ensure the subcontractor and any subsubcontractors have specified workers compensation, public liability and, where relevant, professional indemnity insurance (see section 3.5.2.1)

- The Project Partnership and ServiceCo have promised the HAC they will comply with their own obligations under their subcontracts and ensure their subcontractors and any subsubcontractors comply with their obligations under the subcontracts and any subsubcontracts
- The Project Partnership and/or ServiceCo, the subcontractor and any guarantors of the subcontractor’s performance must execute a “side deed” in the same form as the Hard Services Contractor Side Deed and the Soft Services Contractor Side Deed (see section 3.6.5.5), and
- If the subcontractor or any subsubcontractor is engaged in providing specific types of services listed in an annexure to the Project Deed under a contract valued at \$20,000 or more, or if the HAC, the Project Partnership and ServiceCo otherwise agree it is necessary, the Project Partnership and ServiceCo must ensure the subcontractor or subsubcontractor also executes a “collateral warranty deed”, in favour of the HAC, in a form set out in a schedule to the Project Deed. This deed must cover, among other things, the quality of the subcontractor’s or subsubcontractor’s work, materials and equipment, insurance requirements, the provision of information to the HAC, the notification of defaults to the HAC and arrangements following any termination of the Project Deed.

The Project Partnership and ServiceCo must:

- Obtain the written consent of the HAC’s Project Director before they may agree to any variation, amendment, assignment, replacement or termination of the Hard Facilities Management Deed, the Soft Facilities Management Deed or (if there is likely to be an effect on the HAC’s rights or their ability to meet their Project Deed obligations) any other subcontract for which the total contract sum or the aggregate value of all the project contracts with the same subcontractor and its related corporations is \$250,000 or more (see also sections 3.5.5 and 3.5.6)
- Ensure the Hard Services Contractor, the Soft Services Contractor and any other subcontractors impose analogous obligations under any of their subsubcontracts for which the total contract sum or the aggregate value of all the project contracts with the same subsubcontractor and its related corporations is \$250,000 or more
- Obtain the written consent of the HAC’s Project Director before they compromise or waive any claim they may have against the Hard Services Contractor, the Soft Services Contractor or any other subcontractor under a subcontract for which the total contract sum or the aggregate value of all the project contracts with the same subcontractor and its related corporations is \$250,000 or more (see also section 3.5.6), and

- Immediately notify the HAC's Project Director of any material amendment or termination of the Hard Facilities Management Deed, the Soft Facilities Management Deed or any other subcontract or subsubcontract for which the total contract sum or the aggregate value of all the project contracts with the same subcontractor or subsubcontractor and its related corporations is \$250,000 or more.

Requirements for the Project Partnership and ServiceCo to notify the HAC's Project Director of health and safety risks affecting their employees and subcontractors, any accidents and other incidents and any industrial relations actions affecting or potentially affecting their services are summarised in section 3.4.7 below.

3.4.6 The Labour Services Agreement

The Labour Services Agreement sets out the terms under which selected HNE and MHCN employees, termed "Health employees" in the project's contracts, will provide non-clinical services at the hospital and the hospital site under the management and supervision of the Project Partnership and ServiceCo and, through them, the Hard Services Contractor, the Soft Services Contractor and any other operations-phase subcontractors and subsubcontractors.

This agreement is intended to give formal effect to general principles ("the Mater Model") announced by the then Minister for Health, Mr Morris Lemma, on 16 March 2004.

HNE and MHCN "Health employees" will work on all the Project Partnership and ServiceCo services listed in section 3.4.1 other than the Project Partnership's utility services and the "general" services.

They will continue to be employed by HNE or MHCN, as applicable, 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 specified Department of Health, HAC, HNE and MHCN workplace policies, as detailed below. The HAC, HNE and MHCN have promised the Project Partnership and ServiceCo that they will continue to comply with their legal obligations to the "Health employees", including workers compensation and occupational health and safety laws, except to the extent that the Labour Services Agreement requires the Project Partnership or ServiceCo to take over these obligations.

The Project Partnership and ServiceCo may employ their own employees, subject to the conditions discussed in section 3.4.5, as necessary to manage the services, including the management and supervision of the HNE and MHCN "Health employees". "Health employees" may apply for these positions, but if they are successful they will become employees of the Project Partnership or ServiceCo.

3.4.6.1 Initial selection of HNE and MHCN 'Health employees'

The Project Partnership and ServiceCo may select the "Health employees" they require from the existing non-clinical HNE workforce at Newcastle's James Fletcher Hospital and the existing non-clinical MHCN workforce at the Mater Hospital.

HNE and MHCN will then be obliged to make each of the selected "Health employees" available to the Project Partnership or ServiceCo, as applicable.

HNE and MHCN employees who are not selected must be redeployed by HNE and MHCN in accordance with Department of Health, HAC, HNE and MHCN workplace policies listed in a schedule to the Labour Services Agreement, as amended, added to or replaced from time to time.

Before the Project Partnership's and ServiceCo's services start on the Stage 1 "commencement date" (see sections 3.3.16.3 and 3.4.1) the Project Partnership and ServiceCo must assist HNE and MHCN with their restructuring of their operations, and thereby assist them with their re-deployments of non-selected employees.

3.4.6.2 Redeployment of surplus 'Health employees'

The Project Partnership and ServiceCo may restructure the ways their services are provided after the Stage 1 "commencement date", provided this is done in accordance with relevant NSW awards and industrial agreements and the specified Department of Health, HAC, HNE and MHCN workplace policies and provided they liaise and consult with HNE and MHCN before taking this action.

If such a restructuring reduces the number of "Health employees" required, the surplus "Health employees" must be redeployed by HNE or MHCN in accordance with the specified workplace policies.

3.4.6.3 Replacement and additional 'Health employees'

If the Project Partnership or ServiceCo needs a permanent replacement for a 'Health employee' for any reason at any time after the Stage 1 "commencement date", it will be responsible for recruiting the replacement on behalf of HNE, in accordance with the specified workplace policies, and the replacement will become an HNE employee (and a "Health employee" for the purposes of the Labour Services Agreement).

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

If the Project Partnership or ServiceCo needs temporary personnel in order to provide its services, it may hire them,

provided they satisfy the specified workplace policies, and they will become temporary HNE employees (if they are not already HNE employees) and be covered by relevant NSW awards and industrial agreements. If it is not reasonably practicable in the circumstances for the temporary personnel to comply with the specified workplace policies, the Project Partnership or ServiceCo may still hire them but in these cases it will be responsible for all the costs of doing so.

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

3.4.6.4 Management of ‘Health employees’

The Project Partnership and ServiceCo will be responsible for their “Health employees” from the Stage 1 “commencement date”, including their training and development, their rostering and working arrangements and ensuring they have access to uniforms, protective clothing, vehicles, equipment, materials and any other things they need to perform their work.

The “Health employees” will be subject to the day-to-day direction and control of the Project Partnership or ServiceCo, as applicable, including their direction and control on management, discipline and performance issues.

Except for a situation where HNE or MHCN reasonably believes there is an immediate risk to safety, the HAC, HNE and MHCN may not direct or control any “Health employee” without first obtaining the Project Partnership’s or ServiceCo’s approval (as applicable), which may not be unreasonably withheld.

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

3.4.6.5 Employment conditions for ‘Health employees’

As continuing employees of HNE or MHCN the terms and conditions of “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 Department of Health, HAC, HNE and MHCN workplace policies, as amended, replaced or added to from time to time.

In their dealings with their “Health employees” the Project Partnership and ServiceCo are expressly required to comply with these specified workplace policies.

They may ask the HAC or HNE to review any workplace policy if they can demonstrate or provide evidence that it has an adverse effect on their ability to effectively or efficiently

provide their services. The HAC or HNE must then review the policy, but is not obliged to make any amendments as a result of the review.

“Health employees” will continue to be paid by HNE and MHCN, which must maintain a “Health employees” payroll system at their own cost.

The Project Partnership and ServiceCo may not pay or give their “Health employees” any benefits beyond those provided in their industrial awards and agreements and the specified workplace policies without the HAC’s prior written consent.

The Project Partnership and ServiceCo must maintain personnel records for their “Health employees” on behalf of HNE and MHCN and do everything legally possible to obtain and maintain the information needed for HNE and MHCN to comply with their obligations to pay the “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 “Health employees”, including requirements for the development of and consultations on occupational health and safety management systems and the notification of incidents (see also section 3.4.7) and provisions permitting the HNE and MHCN to intervene directly if either of them 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 “Health employees”.

The Project Partnership and ServiceCo must make fortnightly payments to the HAC, under arrangements described in section 3.4.8.2, to cover the salary, fringe benefits, workers compensation and related costs, to HNE and MHCN, of employing their “Health employees”.

3.4.6.6 Industrial relations

The Project Partnership and ServiceCo have undertaken:

- To comply with all awards and industrial agreements applying to their “Health employees”, and
- Not to commence any proceedings against a union or a “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 HAC, HNE and MHCN have appointed the Project Partnership and ServiceCo as their authorised nominees and agents for the purpose of resolving issues with “Health employees” under any grievance, disciplinary or dispute resolution procedures in any applicable award or industrial agreement or any of the specified workplace policies. They

have also agreed that the Project Partnership and ServiceCo may, in turn, appoint the Hard Services Contractor, the Soft Services Contractor and/or any other operations-phase subcontractor or subsubcontractor as their nominees and agents for this purpose.

HNE, MHCN, the Project Partnership and ServiceCo 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 “Health employees”.

HNE and MHCN must consult with the Project Partnership and/or ServiceCo, as applicable, before applying to any court or industrial relations tribunal on any matter, award or industrial agreement concerning any “Health employee”.

From the Stage 1 “commencement date” the Project Partnership and ServiceCo will be responsible for managing any industrial disputes arising solely from the performance of services by “Health employees” and/or their management of their “Health employees”.

The HAC, HNE and MHCN have appointed them as their authorised nominees and agents for this purpose and have agreed that they, in turn, may appoint the Hard Services Contractor, the Soft Services Contractor and/or any other operations-phase subcontractor or subsubcontractor as their nominees and agents.

In managing any such “site issue” disputes the Project Partnership and ServiceCo must first comply with any dispute resolution procedures in relevant awards or industrial agreements. If this fails to resolve the dispute, they may then notify the dispute to the relevant industrial tribunal. If the industrial tribunal fails to resolve the dispute, they may commence proceedings in a court concerning any actual or threatened industrial action only if a relevant union or the “Health employees” have not complied with the tribunal’s recommendations and/or directions. At each stage of these processes the Project Partnership and ServiceCo must notify HNE and MHCN and give them any information they reasonably require about the dispute and the steps they propose to take. (These requirements are in addition to more generally applicable requirements for the notification of industrial disputes, described in section 3.4.7.)

The Project Partnership and ServiceCo must meet all the costs associated with their management of any “site issue” disputes, including costs incurred by the HAC, HNE and MHCN and any litigation costs, although the HAC, HNE and MHCN must reasonably endeavour to mitigate these costs.

Notwithstanding the arrangements discussed above, the HAC, HNE or MHCN 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 Partnership and ServiceCo. If they do so, the HAC, HNE, MHCN, the Project Partnership and ServiceCo must meet their own costs associated with the “site issue” and its management, including any litigation costs. In managing the industrial action the HAC, HNE and MHCN must have reasonable regard to the interests, rights and obligations of the Project Partnership and ServiceCo and must reasonably endeavour to mitigate the costs they incur.

HNE and MHCN will be responsible for managing any industrial actions by “Health employees” on any other issues. In these cases, the HAC, HNE, MHCN, the Project Partnership and ServiceCo must meet their own costs associated with these issues and their management.

3.4.6.7 Dismissal of ‘Health employees’

As the employers of the “Health employees” HNE and MHCN will retain their absolute rights to dismiss any of their “Health employees” in accordance with the law.

They must keep the Project Partnership and ServiceCo (as applicable) informed of any proposals or steps to dismiss any of their “Health employees”.

The Project Partnership or ServiceCo may recommend to HNE or MHCN at any time that the services of any of its “Health employees” should be terminated on the grounds of misconduct or unsatisfactory performance or for disciplinary reasons, provided the Project Partnership or ServiceCo, as applicable, 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 “Health employee” under an industrial award or agreement or the Department of Health, HAC, HNE and MHCN workplace policies specified under the Labour Services Agreement.

The HNE and MHCN may not unreasonably reject such a recommendation.

If they do decide not to dismiss the “Health employee”, for reasons other than non-compliance by the Project Partnership or ServiceCo with the required procedures, HNE or MHCN, as applicable, must redeploy the employee at its own cost and in accordance with the specified workplace policies.

If they decide to dismiss the “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 Partnership or ServiceCo, as applicable, must re-engage the “Health employee” on the terms of the order or application and each of the parties will be responsible for its own costs.

3.4.7 Notification of safety and industrial relations issues, emergencies, defects and damage

Throughout the operations phase of the project the Project Partnership and ServiceCo must:

- Identify and inquire into any activity performed as part of their services which might give rise to health and safety risks for their own employees, their agents and consultants, their subcontractors and subsubcontractors and their employees, agents and consultants—or for the HNE and MHCN “Health employees” managed and supervised by the Project Partnership or ServiceCo under the Labour Services Agreement (see section 3.4.6)—and notify the HAC’s Project Director as soon as reasonably practicable if any are identified
- Identify and inquire into any accidents or other incidents involving any loss, injury or damage to persons or property (including any deaths), or the risks of such a loss etc, in connection with the services, and again give the HAC’s Project Director a detailed written report as soon as reasonably practicable
- Keep the Project Director regularly informed of any industrial action known to them, the Construction Contractor, the Hard Services Contractor or the Soft Services Contractor which might affect the provision of their services
- Promptly inform the Project Director of any industrial action that leads to a suspension or cessation of their services and the actions they are taking, or propose to take, to minimise the effects (as discussed in section 3.4.6.6, the HAC, HNE and MHCN share responsibilities with the Project Partnership and ServiceCo for industrial relations matters concerning “Health employees” under the Labour Services Agreement)
- Promptly inform the Project Director of any industrial action affecting them, their subcontractors or subsubcontractors or any of their employees which might impede the provision of “hospital functions”
- Promptly inform the Project Director of any emergency which:
 - In their opinion, threatens or has caused material damage or disruption to personal health and safety, the environment, property or the safe and secure operation of the hospital or will require the provision of materially greater services, and
 - Has led to a suspension or cessation of their services or might impede the provision of “hospital functions”,and provide information on the actions they are taking, or propose to take, to minimise the effects, and

- Promptly advise the Project Director of any material defects or damage to the works, the hospital or the hospital site of which they are aware (if the cost of repairs is more than \$3,000, indexed to the consumer price index from 30 November 2005), the actions they are taking to correct the damage or defect and the estimated time the correction will require (see also section 3.5.2). Copies of any such notices must also be sent to the debt financiers’ Security Trustee within five business days.

3.4.8 Payments

3.4.8.1 Monthly payments by the HAC to the Project Partnership and ServiceCo

The HAC must make payments to the Project Partnership and ServiceCo for the period between the Stage 1 “commencement date” and the start of the next calendar month, and then for each successive calendar month until 30 November 2033 or any earlier termination of the Project Deed.

Each of these payments will comprise:

- A performance-based “monthly payment” calculated in accordance with a “service fees” schedule to the Project Deed, and
- Adjustments to reflect any amounts owing to the HAC by the Project Partnership and ServiceCo under other provisions of the Project Deed, if the HAC chooses to exercise its rights of set-off, and/or any GST.

Under the “service fees” schedule to the Project Deed,* the starting bases for calculating each month’s “monthly payment”, in all cases prior to any performance-based adjustments, are:

- “Quarterly payments”, as calculated from tables in a separate “payments” schedule to the Project Deed. The amounts shown in these tables are to be adjusted by applying an indexation formula which is also set out in that schedule, with some payment amounts increasing in line with the consumer price index, others increasing in line with increases in wage rates for “Health employees”, as determined from relevant awards and industrial agreements, and others remaining unchanged. The resultant “quarterly payments” are then to be converted to payments for each particular month on the basis of the number of days in the month (or, where relevant, the shorter payment period).
- “Lifecycle refurbishment” components of the quarterly payments, as identified in the tables in the “payments” schedule to the Project Deed and indexed in line with

* The formulae set out in this schedule (Schedule 5) and the associated “payments” schedule (Schedule 6) may be downloaded, with all other non-confidential components of the Project Deed and its schedules and the Labour Services Agreement, from <https://tenders.nsw.gov.au/health>.

the consumer price index. These components are also to be converted to amounts for each particular month on the basis of the number of days in the month.

- “Incremental monthly payments”, applying only for the period between the Stage 1 and Stage 3 “commencement dates”, while construction works are still underway, as specified in a table in the “payments” schedule to the Project Deed and as adjusted by applying another indexation formula in this schedule and taking account of the number of days in the month for which the payment is being made.
- A “volume adjustment” for the month, depending on the numbers of different categories of patient meals delivered as part of the catering services and the mass of clinical waste disposed of as part of the cleaning services. This adjustment is to be calculated using prices specified in the “payments” schedule and formulae specified in the “service fees” schedule.
- A quarterly gas and electricity “energy payment”, payable only for the third month of each quarter, similarly calculated using prices specified in the “payments” schedule and a formula specified in the “service fees” schedule.
- An “additional payment” for:
 - Groceries provided as part of the catering services and dedicated security guards requested by the HAC as part of the security services, calculated using prices specified (respectively) in an imprest stock system and the “payments” schedule and formulae specified in the “service fees” schedule
 - Any additional costs incurred by the Project Partnership, ServiceCo, the Hard Services Contractor, the Soft Services Contractor or any other subcontractor or subsubcontractor in providing additional services in response to an emergency, as directed by the HAC under arrangements described in section 3.5.10 below, and
 - Any costs incurred by them as a result of a backdating of changes to an award or industrial agreement governing any of their “Health employees” in accordance with a Department of Health *Information Bulletin*.
- A quarterly “interest payment adjustment”, payable only for the first month of each quarter, reflecting differences between actual interest rates and the interest rates for nominal bonds assumed in the private sector parties’ “base case” financial model for the project and calculated using a formula specified in the “service fees” schedule.

The actual monthly payment to be made by the HAC is then calculated, in accordance with a formula in the “service fees” schedule, by:

- Adding:
 - The month’s share of the relevant “quarterly payment” less the month’s share of the “lifecycle refurbishment” component of this “quarterly payment”
 - The month’s “incremental monthly payment”, if any
 - The month’s “volume adjustment”, if any, and
 - The month’s “energy payment”, if any
- Reducing this sum to reflect any “quality failures” for the month, as described below
- Adding to the resultant amount:
 - The month’s share of the “lifecycle refurbishment” component of the “quarterly payment”
 - The month’s “additional payment”, if any, and
 - The month’s “interest payment adjustment”, if any, and
- Subtracting, from the resultant amount, deductions, described below, for:
 - Any “unit failures” for the month, as defined in the *Services Specification*
 - Any multiple repetitions of “unit failures” within the last three months (“repeated failures”), and
 - Any failures to accurately report earlier “quality failures” or “unit failures” (“reporting failures”).

“Quality failures” are failures to comply with quality-related “key performance indicators” specified in the *Services Specification* for all the security, catering, “materials management” and “general” services, all but one of the cleaning services and specified building and equipment maintenance and refurbishment services, grounds and gardens maintenance services and utility services.

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

Under one of these formula, the reductions for different types of quality failures are to be lessened for any failures during the first two weeks of operations (i.e. immediately following the Stage 1 “commencement date”), through the application of progressively less generous “bedding-in factors” that are specified in the “service fees” schedule.

The relief provided by the “bedding-in” factors for security, cleaning, catering and materials management services will be made more generous than is currently specified if the HAC and MHCN terminate the Interim Services Agreement for convenience prior to the Stage 1 “commencement

date”, with the replacement “bedding-in factors” being as listed in that agreement.

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

The reduction in 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 a “functional area table” annexed to the Project Deed and in the “service fees” schedule, and
- A formula for applying these weightings which is also specified in the “service fees” schedule.

The weightings and the formula 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”
- 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”
- 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 fees” schedule, and
- A time weighting, applied if there was 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, temporary fixes and the provision of temporary accommodation, as set out in the “service fees” schedule.

The deductions for unit failures are also subject to the “bedding-in factors” described above, ameliorating the deductions for failures during the first two weeks of operations after the Stage 1 “commencement date”.

Regardless of any deductions that would otherwise be made under the other weighting factors, if a unit failure is responded to and rectified within the specified timeframes the deduction for this failure will be zero.

The weightings may be jointly reviewed at any time at the request of HAC, the Project Partnership or ServiceCo, but

not more than once in each financial year, and any agreed changes will take effect at the start of the next financial year.

“Repeated failure” deductions from the payments to the Project Partnership and ServiceCo will be applied, in accordance with a formula in the “service fee” 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 over two in 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 failure was rectified before the HAC made its payment. Again, the deductions to be applied are specified in the “service fees” schedule.

It is possible, at least in theory, for the application of all of the deductions described above to reduce a performance-based monthly payment by the HAC to the Project Partnership and ServiceCo to zero, but not to less than zero.

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 Partnership and ServiceCo must submit to the HAC’s Project Director before the eighth day of each operating month
- The Project Partnership and ServiceCo must submit an invoice in a form specified in the Project Deed, and
- The HAC must pay them within 20 business days of receiving both the *Performance and Payment Report* and this invoice, unless the invoice shows a net amount is owed to the HAC (as a result of the combined effects of the adjustments and deductions), in which case the Project Partnership and ServiceCo must pay the HAC within 20 business days unless the HAC’s Project Director permits them to carry the amount over to the following month, offsetting the HAC’s future liabilities. Any late payments will attract daily interest at 3% pa above the BBSY bank bill rate.

If the HAC’s Project Director disputes any amount set out in a monthly invoice, the HAC may withhold its payment of this amount while the issue is resolved under the dispute resolution procedures described in section 3.5.9, but it will be liable to pay the Project Partnership and ServiceCo daily interest (at 3% pa above the BBSY bank bill rate) if it is determined the Project Partnership and ServiceCo were entitled to the disputed amount. Conversely, if it is determined that the Project Partnership or ServiceCo has been overpaid they must pay interest at this rate on the overpaid amount, on top of their repayment to the HAC.

The Project Deed sets out arrangements for the splitting of the HAC's monthly payments between the Project Partnership and ServiceCo. In practice, however, and as already indicated, the Project Partnership and ServiceCo have both irrevocably directed the HAC to pay all amounts payable to them, including the monthly payments, directly to the Nominee Company.

3.4.8.2 Fortnightly payments by the Project Partnership and ServiceCo to the HAC

The Project Partnership and ServiceCo must make fortnightly payments to the HAC to cover the salary, fringe benefits, workers compensation and related costs, to HNE and MHCN, of employing the "Health employees" who will be managed and supervised by the Project Partnership and ServiceCo under the arrangements described in section 3.4.6.

The costs to be reimbursed are specified in a formula in the "payments" schedule to the Project Deed.

Initial estimates of these costs for the "Health employees" to be managed and supervised by each of the Project Partnership and ServiceCo, 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 "Health employee" employment costs every six months.

The HAC must submit its invoices for these payments at least five business days before the end of each fortnightly period following the Stage 1 "commencement date" and the payments must be made by the end of the same fortnight. Any late payments will attract daily interest at 3% pa above the BBSY bank bill rate.

If the Project Partnership or ServiceCo disputes any amount set out in a fortnightly invoice, it may withhold its payment of the this amount while the issue is resolved under the dispute resolution procedures described in section 3.5.9, but it will be liable to pay the HAC interest (at 3% pa above the BBSY bank bill rate) if it is determined the HAC was entitled to the disputed amount.

If the HAC is overpaid because of an error in a fortnightly "Health employee costs" invoice caused by the provision of incorrect information by the Project Partnership or ServiceCo, the HAC must ensure HNE and MHCN recover the overpayment from the relevant "Health employee(s)", with the Project Partnership or ServiceCo, as applicable, meeting any costs associated with their doing so.

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

3.4.9 Benchmarking and market testing of services

ServiceCo may—and, if so directed by the HAC's Project Director, must—conduct a "benchmarking" exercise, to determine the relative quality and competitiveness of its security, cleaning, catering, materials management and "general" services, during any or all of the years preceding 30 November 2013, 30 November 2018, 30 November 2023 and 30 November 2028.

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. If the HAC and ServiceCo cannot agree on the actions to be taken, the dispute must be referred for independent expert determination under the dispute resolution procedures summarised in section 3.5.9.

Under these procedures the differences (if any) between ServiceCo's costs for each of the benchmarked services and the costs of an "efficient alternative service provider" are to be agreed between the HAC's Project Director and ServiceCo. 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, ServiceCo may itself require competitive market testing, provided it has reasonably endeavoured to comply with the benchmarking and costing procedures, and if it does not take this course either party may refer the matter for determination by an independent expert under the dispute resolution procedures summarised in section 3.5.9.

Competitive market testing will also be required if the cost difference for any service 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 the "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 ServiceCo as providing the best value for money—are set out in the same schedule to the Project Deed. The successful tender(s) will replace ServiceCo's previous subcontractor(s) or subsubcontractor(s) in providing the relevant services.

If a benchmarking exercise (or any subsequent market testing exercise) shows ServiceCo'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 reflecting this difference, using procedures set out in the schedule to the Project Deed, to:

- The "quarterly payments" that are used in calculating the HAC's monthly payments to the Project Partnership and ServiceCo (see section 3.4.8), and

- The specified prices of patient meals, clinical wastes, dedicated security services and gas and electricity that are used to calculate the “volume adjustment”, “energy payment” and “additional payment” components of the HAC’s monthly payments to the Project Partnership and ServiceCo (see section 3.4.8).

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 ServiceCo’s costs and the market costs is 5% or less, no adjustment will be made.

3.4.10 Changes to the services

If the HAC, the Project Partnership or ServiceCo wishes to make any change to the *Services Specification*, the services to be provided by the Project Partnership or ServiceCo or the *Policy and Procedures Manual* (other than under the procedures described in section 3.4.1 and 3.4.4) 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 3.3.15.

As indicated in section 3.3.15, the only exceptions to the requirement to use the “change procedure”, other than those referred to above, are “minor changes” directed by the HAC’s Project Director. These are changes, *not* arising from a change in any Commonwealth, State Government, Department of Health, HAC, HNE or MHCN policy, guideline, standard, procedure or requirement affecting the provision of services by the Project Partnership or ServiceCo, with an estimated cost effect—as determined in accordance with the “estimated cost effect” 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 Consumer Price Index from 30 November 2005.

3.4.11 Special arrangements for the last four years of operations

Approximately four years before the termination of the Project Deed on 30 November 2033, and again approximately one year before this date, the HAC’s Project Director may procure an audit of the hospital and the hospital site to:

- Assess whether the hospital and the hospital site, 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 30 November 2033—beyond any components of the HAC’s monthly

payments that are to be paid for scheduled maintenance or lifecycle replacements—in order to:

- Ensure the hospital and hospital site will be in the condition they should be in if the Project Partnership and ServiceCo comply with their obligations under the Project Deed, the *Technical Specification* and the *Services Specification*
- More particularly, ensure there will be no life cycle failure or expiry, prior to 30 November 2039, of any part of the hospital’s buildings, plant or equipment with a normal life cycle of 15 years or more, and
- Rectify any breaches of the Project Partnership’s and ServiceCo’s obligations.

The HAC’s Project Director must give the Project Partnership and ServiceCo at least ten business days’ notice of the date on which it 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 HAC, the Project Partnership and ServiceCo or, if they cannot agree within two business days of a nomination by the HAC, the President of the Australian Institute of Quantity Surveyors. The HAC must meet half of the audit’s costs and the Project Partnership and ServiceCo must pay for the balance.

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

Within 20 days of receiving the audit report the Project Partnership must give the HAC’s Project Director an unconditional bank guarantee in favour of the HAC, from an Australian bank with specified minimum credit ratings, in a form specified in a schedule to the Project Deed and expiring no earlier than 30 November 2033, 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 Partnership is unable to obtain such a bank guarantee, the HAC may establish a “retention fund” by deducting, from each of its monthly payments to the Project Partnership, 120% of the total amount assessed as being required divided by the number of months remaining until 30 November 2033.

If the termination audit reveals rectification work is required, the HAC’s Project Director must notify the Project Partnership and ServiceCo of the required work, specifying a reasonable period within which it must be completed, and

they must carry out this work within the specified period and at their own cost.

If the Project Partnership and ServiceCo comply 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 Partnership and ServiceCo will have their costs reimbursed from the fund or, if it is insufficient at the time, by reductions in the deductions from their monthly payments still to be paid into the fund, and
- If there is still insufficient money in the fund on 30 November 2033 to fully reimburse them, they will bear the balance of the costs themselves.

Any money remaining in the fund on 30 November 2033 must be paid to the Project Partnership or ServiceCo, as directed by them, as soon as practicable.

If the Project Partnership or ServiceCo (as applicable) 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 HAC may carry out the works itself, or procure others to do so. The Project Partnership or ServiceCo, as applicable, will be liable to pay the costs incurred as a debt to the HAC. The HAC may deduct or set off this amount against any amount payable to the Project Partnership or ServiceCo, including the retention fund if there is one, or take enforcement action, including action under the bank guarantee, if the debt is not paid.

The Project Partnership and ServiceCo must, by no later than 30 November 2033 or any earlier termination of the Project Deed, ensure—to the extent permitted by the law—that all documents and computer records containing information on hospital patients or clinical staff which are in their possession, custody or control, or the possession, custody or control of any of their subcontractors, are delivered to the HAC's Project Director.

3.4.12 Transition to the HAC, HNE, MHCN or another contractor

During the three months ending on 30 November 2033, or during the period after any notice by the HAC that it is terminating the Project Deed for a breach by the Project Partnership or ServiceCo under the arrangements described in section 3.6.6, and then for the following 12 months, the Project Partnership and ServiceCo must fully cooperate with the transfer of any or all of their services to the HAC, HNE,

MHCN and/or any new contractor providing the same or similar services.

Among other things, they must:

- Transfer all their title to and interests and rights in the works, the hospital and the hospital site to the HAC or the new contractor, free of any encumbrances
- Liaise with the HAC's 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 hospital at reasonable times and on reasonable notice, provided this does not interfere with their services
- Give the Project Director and/or the new contractor all the information about the hospital, the hospital site 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.

3.5 Miscellaneous general provisions of the HAC's project contracts

3.5.1 Tax rulings and liabilities for taxes, rates, charges and stamp duty

3.5.1.1 Tax ruling

The Project Partnership and ServiceCo must obtain a binding ruling from the Australian Taxation Office (ATO), by no later than 30 May 2006, on whether section 51AD of the Income Tax Assessment Act (Cth) will apply to the project as currently structured.

If it fails to do so, or if the ruling states that section 51AD will apply, the Project Partnership and ServiceCo must take steps to ensure section 51AD will not apply, and must obtain a binding tax ruling from the ATO to this effect by no later than 30 May 2007.

If they fail to obtain this second ruling the HAC may terminate the Project Deed, in its sole discretion. If it does so, the Project Partnership and ServiceCo will not be entitled to any compensation (see section 3.6.6.1).

3.5.1.2 Liabilities to pay taxes, rates, charges and stamp duty

As between the HAC, the Project Partnership and ServiceCo, the HAC will be liable to pay:

- All rates, land taxes and other amounts levied by reference to the hospital site, other than headworks costs and other contributions and charges levied by reference to the Project Partnership's and ServiceCo's works and services, and

- All usage charges for water, stormwater, sewerage and drainage services to the hospital and the hospital site.

Throughout the operations phase of the project, starting on the Stage 1 “commencement date” (see section 3.3.16.3), the Project Partnership will be liable to pay all usage charges for electricity, fuel oil and gas services to the hospital and the hospital site, excluding medical gases, but it will be reimbursed for these payments by the HAC under the “energy payment” component of the monthly payment arrangements described in section 3.4.8.

The HAC must pay any NSW stamp duty on the Project Deed, the HAC Security, the SubLease, the SubSubLease, its licences, any security it grants over its interests under the project’s contracts and any transfer of its interests to another NSW statutory body (see section 3.5.5), and must also pay any NSW mortgage duty on the project’s financing agreements, but will not be liable for any fines or penalties for late lodgment etc.

The Project Partnership and ServiceCo will be liable for all other taxes, except for rates and land taxes etc and income tax, arising from the negotiation, preparation, execution, stamping and registration of the project’s contracts, the transactions contemplated in the contracts and any amendments to or consents, approvals, waivers, releases or discharges of or under the contracts.

3.5.2 Insurance and loss or damage

3.5.2.1 Insurance

The Project Partnership and ServiceCo must take out and maintain the following insurance policies, as specified in a schedule to the Project Deed:

- Contracts works all risks insurance for the full reinstatement value of the construction works (until the end of the last defects liability period)
- 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 (until the Stage 1 “commencement date”)
- Public and products liability insurance for at least \$100 million per occurrence until the Stage 1 “commencement date” and \$200 million per occurrence, or a higher amount directed by the HAC’s Project Director under arrangements described below, after that date, throughout the operations phase of the project
- Compulsory third party motor vehicle insurance (throughout the project)
- Third party property damage plant and motor vehicle insurance for at least \$20 million per occurrence until the Stage 1 “commencement date” and \$20 million per

occurrence, or a higher amount directed by the HAC’s Project Director, after that date, throughout the operations phase of the project

- Workers’ compensation insurance (throughout the project)
- Professional indemnity insurance for at least \$20 million per claim and \$40 million in total (until seven years after the Stage 3 “commencement date”)
- All risks property insurance, for the full reinstatement value of the completed works and all their plant and equipment and also for lost revenue and increased costs of working during the Stage 1 construction period and subsequently during a business disruption period of two years (until the Stage 1 “completion date”), and
- Industrial special risks insurance, for the full reinstatement value of the hospital and all their plant and equipment and for lost revenue and increased costs of working during a business disruption period of two years (throughout the operations phase of the project).

The terms of these insurance policies must comply with requirements set out in the schedule to the Project Deed, including requirements for their coverage of the HAC, HNE and MHCN.

The operations-phase insurance must also be obtained using procedures which will closely involve the HAC, as set out in the Project Deed, and the resultant premiums will be used to determine and periodically update an “insurance component” of the “quarterly payments” specified in the “payments” schedule to the Project Deed (see section 3.4.8.1). Disputes arising during these procedures must be referred for independent expert determination under the dispute resolution procedures summarised in section 3.5.9.

The HAC’s Project Director may increase the required insurance cover for the operations-phase public and products liability insurance, plant and motor vehicle third party property damage insurance and/or workers’ compensation 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.

3.5.2.2 Loss or damage

With the exception of damage arising from a structural defect in an existing building which was not identified in pre-contractual information given to them by the HAC, the Department of Health, HNE, MHCN, the State of NSW or their agents, contractors, advisers and employees (see section 3.3.5), the Project Partnership and ServiceCo bear the risks of loss or damage to the works, existing structures in or on which the works are carried out, the hospital and the hospital site.

They are responsible for, and must indemnify the HAC, HNE, MHCN and their employees, agents and contractors against, any claim or loss for death, personal injury or property loss or damage arising out of their design, construction, operation or maintenance activities, but they are *not* liable for any claim or loss caused by:

- Malicious damage by the HAC, its Project Director, any other HAC project administrators, any clinical staff, any employee, agent, contractor or invitee of the Department of Health, HNE or MHCN (other than a “Health employees” being managed and supervised under the Labour Services Agreement) or any hospital patient
- A breach of any of the project contracts by the HAC, HNE or MHCN
- Their following an express direction by the HAC or its Project Director, made in accordance with the Project Deed, or
- Any fraudulent or negligent act or omission of the HAC, HNE, MHCN or any of their employees, agents and contractors.

The HAC has also released the Project Partnership and ServiceCo—to the extent permitted by the law—from any liability for consequential or economic loss suffered by the HAC that is connected in any way with their works and services or any breach of the project’s major contracts.

As indicated in section 3.4.7, the Project Partnership and Service Co must promptly advise the Project Director of any material defects or damage to the works, the hospital or the hospital site of which they are aware (if the cost of repairs is more than \$3,000, indexed to the consumer price index from 30 November 2005), the actions they are 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.

They must promptly repair any loss or damage to any part of the works, the hospital or the hospital site so that, to the greatest possible extent, they can continue to comply with their obligations under the project’s contracts.

However, if the loss or damage arises from an unrevealed structural defect in an existing building,

- The Project Partnership’s and ServiceCo’s obligations to repair or replace the affected works or parts of the hospital will be limited to remedying what the *Services Specification* terms “Level D” and “Level E” “unit failures”, the former being failures in a room or space that do not and are unlikely to disrupt, hinder, impede, deter or otherwise materially affect the hospital’s clinical, research, clinical support and non-clinical support administration “hospital functions” and the

latter being failures that only breach the *Services Specification*’s minimum aesthetic standards

- The HAC will not be entitled to make any deductions from its monthly payments to the Project Partnership and ServiceCo, under the arrangements described in section 3.4.8.1, for:
 - Any more serious “unit failures” caused by the unrevealed structural defect (i.e. any “Level A”, “Level B” or “Level C” “unit failures” under the *Services Specification*)
 - Any “quality failure” resulting from an inability of the Project Partnership or ServiceCo to safely access any part of the hospital or the hospital site because of damage caused by the structural defect, or
 - Any “repeated failures” of either type, and
- The Project Partnership and ServiceCo must pay the HAC any cost savings they make because service(s) cannot be provided as a result of the structural defect.

In carrying out their repairs and replacements following an event causing loss or damage the Project Partnership and ServiceCo must minimise the impacts on their works, the hospital, the hospital site and the “hospital functions” and keep the HAC’s Project Director informed of their progress.

All insurance proceeds received for loss or damage to any part of the project’s works, the hospital or the hospital site must be applied by the Project Partnership and ServiceCo to repair, reinstate and/or replace the relevant works or the affected parts of the hospital and hospital site. The project debt financiers’ Security Trustee has promised the HAC 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 a claim is made under an industrial special risks insurance policy for any wilful or malicious damage during the project’s operations phase—other than damage caused by the Project Partners, the Project Partnership, ServiceCo, a related corporation, any of their subcontractors or subcontractors, a “Health employee” or their agents, contractors, advisers, employees or invitees—and the total cost to the Project Partnership and ServiceCo of rectifying wilful or malicious damage in any calendar year, other than any deductions made to their monthly payments (section 3.4.8), exceeds \$20,000, indexed to the Consumer Price Index, HAC must pay the Project Partnership and ServiceCo their rectification costs beyond this \$20,000 threshold.

If an event causing loss or damage to the works, the hospital or the hospital site 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” (see section 3.3.8) or is adversely affecting the ability of the Project Partnership or ServiceCo to perform its obligations and exercise its rights under the project’s contracts, the Project Partnership or ServiceCo, as applicable, may seek relief from its contractual obligations under the “relief event” arrangements described in section 3.5.11. In more extreme circumstances, the *force majeure* provisions described in section 3.5.13 may apply.

3.5.2.3 Uninsurable risks

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

- The types of insurance otherwise required under the Project Deed are not generally available, in the recognised international insurance market, for that risk, or
- The insurance premium for the risk would be so high that the risk is generally not being insured against, in the recognised international insurance market, by prudent, competent and experienced Australian providers of services similar to those of the Project Partnership and ServiceCo.

If a risk that would otherwise have to be covered by an operations-phase insurance policy becomes uninsurable, the Project Partnership and ServiceCo must notify the HAC’s Project Director within five business days.

If the HAC agrees the risk is uninsurable, or if this is the conclusion of dispute resolution procedures as summarised in section 3.5.9, and the “uninsurability” has not been caused by the Project Partners, the Project Partnership, ServiceCo, a related corporation, any of their subcontractors or subcontractors, a “Health employee” or their agents, contractors, advisers, employees or invitees, the HAC, the Project Partnership and ServiceCo 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, third party motor vehicle, plant and motor vehicle third party property or industrial special risks insurance policy then eventuates, but the HAC, the Project Partnership and ServiceCo cannot agree on how to manage it,

- The Project Deed will continue
- The monthly payments to the Project Partnership and ServiceCo (section 3.4.8.1) must be adjusted to deduct an amount equal to the premium payable for the risk immediately before it became uninsurable, and
- The HAC’s Project Director must, at his or her option, either:

- Pay the Project Partnership and/or ServiceCo, as applicable, an amount equal to the insurance proceeds they would have received had the insurance continued to be available, in which case the Project Partnership and ServiceCo must apply this payment to repair, reinstate and/or replace the affected works or parts of the hospital and hospital site, *or*
- If only part of the construction sites, the hospital or the hospital site are affected, request a contract variation under the “change procedures” discussed in sections 3.3.15 and 3.4.10, *or*
- If the hospital “as a whole” is affected, terminate the Project Deed and pay the Project Partnership and ServiceCo an amount specified in a “termination payments” schedule to the Project Deed and described in section 3.6.2.

If the second of these courses is selected,

- The “quarterly payment” used in calculating the monthly payments by the HAC to the Project Partnership and ServiceCo under the arrangements described in section 3.4.8.1 must be the same as it would have been, at the same time, had the uninsurable risk not eventuated, apart from a reduction accounting for any costs avoided as a result of the variation, and
- Any failure by the Project Partnership and ServiceCo to comply with the provisions of the project’s contracts as a result of the occurrence of the uninsurable risk will not be regarded as a breach of any of the contracts to which the HAC is a party, will not result in any “failure” deductions from their monthly payments under the arrangements described in section 3.4.8.1 and will not entitle the HAC to terminate the Project Deed for a Project Partnership or ServiceCo default under the arrangements described in sections 3.6.5.6 and 3.6.6.

3.5.3 Additional commercial developments

If the Project Partnership or ServiceCo wishes to pursue an additional commercial development on an area it has identified on the hospital site, and believes this development would benefit the HAC and the hospital but not disrupt the provision of the hospital’s “hospital functions” or the Project Partnership’s and ServiceCo’s services, it may submit a proposal for the development to the HAC’s Project Director under the formal “change procedure” processes discussed in sections 3.3.15 and 3.4.10.

The Project Partnership and ServiceCo may be directed by the Project Director to meet and consult with and/or give presentations on the proposed development to the HAC, the Project Director, other “stakeholders” and their consultants and advisers.

They have expressly acknowledged that the HAC's Project Director is under no obligation to agree to any such proposal, and that if he or she does agree to it he or she may impose terms and conditions in his or her absolute discretion.

These arrangements in no way limit the HAC's right to undertake additional development of the hospital or the hospital site, including building extensions and new buildings.

3.5.4 Financial reporting and audits

The Project Deed sets out requirements for the Project Partnership and Service Co to:

- Maintain accounts and other financial and financial planning records and have them audited annually
- Make them available to the HAC's Project Director for inspection, on five business days' notice, as described in section 3.4.4
- Submit annual business plans and budgets for each financial year during the operations phase, both for themselves and for the Hard and Soft Services Contractors and any other operational subcontractors, to the HAC's Project Director by no later than the preceding 30 March
- Provide unaudited financial statements to the HAC's Project Director every six months
- Provide annual audited financial statements to the Project Director, for themselves, for the Construction Contractor and any other construction subcontractors during the construction phase and for the Hard and Soft Services Contractors and any other operational subcontractors during the operations phase, within two business days of the deadlines for these statements to be prepared under the Corporations Act, and
- Promptly give the Project Director copies of any material notices and updated financial models they provide to the project's financiers.

The HAC's Project Director may arrange an independent financial audit of the Project Partnership's and ServiceCo's financial statements and other financial information, giving them notice of this audit at any time until 30 May 2034, unless there is an earlier termination of the Project Deed.

The auditor will be appointed by the Project Director and the audit will be carried out at the HAC's cost. If it uncovers inaccuracies or incompleteness in the accounts or records, the Project Partnership and ServiceCo, as applicable, must fix these deficiencies, appropriate adjustments must be made to the HAC's monthly payments (section 3.4.8.1) if the deficiencies have affected past payments and the Project Partnership and ServiceCo, as applicable, must reimburse the HAC for the costs of the audit.

3.5.5 Substitutions, changes of ownership or control, assignments, encumbrances and refinancing

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.

If there are any changes in the identities of the Project Partners (i.e. through the admission of a new partner to or retirement of an existing partner from the Novacare Solutions Partnership) that are consented to by the HAC (as discussed below), any retiring partner will be released from its obligations to the HAC and the other parties under the project contracts to which the HAC is a party and any new partner will assume all the rights and obligations of the Project Partnership under these contracts. The HAC is not obliged to consent to the retirement of a partner if their retirement would result in a dissolution of the Project Partnership.

The HAC's prior written consent is required before there may be any change in the ownership of ServiceCo, any addition of a new Project Partner to the Project Partnership, any change in the ownership of units in the Novacare Solutions Trust, Novacare Health Solutions Trust, Novacare Solutions No 1 Trust or Novacare Health Solutions No 1 Trust or any change in the ownership structure of the Project Partners, the Project Partnership and ServiceCo (see section 2.1.2), *other than* a change in the ownership of listed equity interests, a change in the identity of the trustee of the Novacare Solutions Trust or the Novacare Health Solutions Trust, a transfer of equity interests to a related corporation or a change in equity interests arising from a transfer or disposal of interests into, from or between Westpac companies, trusts, superannuation funds and/or managed investment schemes *or* a change in ownership that is contemplated in the Financiers Tripartite Deed (see section 3.5.6).

If an entity ultimately controlling a Project Partner, the Project Partnership or ServiceCo (such as Westpac Banking Corporation at present) is listed on a prescribed financial market, and there is a change in the control of the Project Partnership or ServiceCo as a result of a change in the ownership of this listed entity—other than a change arising from a transfer or disposal of interests into, from or between Westpac companies, trusts, superannuation funds and/or managed investment schemes—the Project Partnership or ServiceCo, as applicable, must promptly notify the HAC's Project Director, providing full details and any other inform-

ation reasonably needed by the HAC for it to decide whether to consent to the change.

The HAC will then have ten business days to notify its acceptance or rejection of the change in control. If it rejects the change, the HAC and the Project Partnership or ServiceCo, as applicable, must discuss ways of overcoming the effects of the change in control or ways by which the Project Partnership or ServiceCo, as applicable, might procure a cessation of relevant voting or control powers or an end to the equity holdings 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 HAC. The Project Partnership or ServiceCo, as applicable, must then take the necessary steps to overcome the change or its effects within 90 days of the HAC's notice of rejection.

Similarly, if there is a change in the control of the Hard Services Contractor, the Soft Services Contractor or any other operations-phase subcontractor, for any reason, the Project Partnership and ServiceCo must promptly notify the HAC providing full details and any other information reasonably needed by the HAC for it to decide whether to consent to the change. If the HAC rejects the change—after taking account of, among other things, the solvency of the Project Partnership and ServiceCo—the Project Partnership and ServiceCo must, at their own cost, terminate the relevant operations subcontract and appoint a replacement operations subcontractor to carry out the same services, in accordance with the subcontracting arrangements described in section 3.4.5.

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 HAC's Project Director and the Project Partnership must, unless they agree otherwise, appoint an appropriately qualified, experienced and independent 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.

The HAC, the Project Partnership and ServiceCo may not deal separately with their interests under the Project Deed, the SubLease or the SubSubLease, 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 HAC may not grant any security interest or encumbrance over or otherwise dispose of any or all of its rights, obligations or interests under the project's contracts, or its

interests in land that is the subject of any of these contracts, unless:

- The Project Partnership, ServiceCo and the debt financiers' Security Trustee have been given full written details, the proposed transferee is a NSW statutory body with the powers, authority and approval to enter into and comply with the HAC's obligations and has agreed to be bound by all the project contracts to which the HAC is a party, and the transferee's obligations will be guaranteed by the State of NSW on terms that are no less favourable than those of the PAFA Act Guarantee (see section 5) and are otherwise reasonably acceptable to the Project Partnership, ServiceCo and the Security Trustee, *or*
- The Project Partnership, ServiceCo and the Security Trustee have otherwise consented to the transfer in writing. (They may not unreasonably withhold or delay their consent.)

Similarly, the Project Partnership and ServiceCo 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's contracts, or their interests in land that is the subject of any of these contracts, unless:

- The transfer is expressly permitted or required under the Project Deed and/or the Financiers' Tripartite Deed (among other things, they may grant security interests in accordance with the project's financing agreements or if it the grant is necessary for their being able to comply with their obligations under the Project Deed), *or*
- The HAC has otherwise given its written consent.

The Security Trustee may not transfer or dispose of any property that is subject to the project financiers' securities except in accordance with the Financiers Tripartite Deed or otherwise with the HAC's prior consent. The HAC may not unreasonably withhold its consent, and in considering whether to give its consent the HAC must take account of the relative priorities of its own securities, under the HAC Security, and those of the financiers (see section 4.2). If the transfer proceeds, other than through a transfer of ownership of the Project Partnership and ServiceCo, the HAC must release the HAC Security, provided the transferee enters into new securities in favour of the HAC on substantially the same terms.

The Security Trustee and the project's financiers may, however, transfer their rights and obligations under the project's financing agreements (and, in the case of the Security Trustee, the Financiers Tripartite Deed and the PAFA Act Guarantee), but only if the proposed transferee is a financial institution satisfying criteria set out in the Financiers Tripartite Deed or the HAC otherwise gives its written

consent. If the Security Trustee makes such a transfer, the HAC must, if requested, promptly execute a deed, with the incoming security trustee, the Project Partnership and ServiceCo, in the same form as the Financiers Tripartite Deed.

In addition to the restrictions described above, there are also restrictions, under the Project Deed, on the assignment or replacement of the Construction Contract, the Hard Facilities Management Deed, the Soft Facilities Management Deed or (if there is likely to be an effect on the HAC's rights or the ability of the Project Partnership and ServiceCo to meet their Project Deed obligations) any other subcontract for which the total contract sum or the aggregate value of all the project contracts with the same contractor and its related corporations is \$250,000 or more. These restrictions, and requirements for analogous restrictions on the transfer or replacement of substantial subsubcontracts, have already been described in sections 3.3.9 and 3.4.5.

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

The HAC has already agreed, in the Financiers Tripartite Deed, that the project's debt financiers and their Security Trustee may grant waivers under the financing agreements during the construction phase and may exercise a series of other rights concerning the financing agreements as specified in that deed.

The Project Director's consent is also required before the Project Partnership and ServiceCo may enter into any new financing agreements other than leases, hire purchase agreements and similar obligations incurred in the ordinary course of business.

More specifically, the Project Partnership and ServiceCo may not refinance the project without the Project Director's consent, except in ways already contemplated in the financing agreements and the Project Deed, if this would:

- Produce a financial gain for the project's equity investors, after deducting the direct costs of the refinancing to the HAC, the Project Partnership and ServiceCo and making other adjustments specified in the Project Deed, or
- Increase or adversely affect the HAC's liabilities under the project's contracts.

If such a refinancing is proposed, the Project Partnership and ServiceCo must submit a "refinancing report" to the HAC's Project Director, explaining the proposal and its impacts on the HAC's liabilities 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 HAC consents to the refinancing, it will be entitled to receive 50% of the estimated refinancing gain. It may elect to take this as a lump sum payment when the refinancing occurs, through reductions in its monthly payments to the Project Partnership and ServiceCo under the arrangements described in section 3.4.8.1 or through a combination of both of these approaches.

3.5.6 Amendments to and waivers of the HAC's project contracts

The terms of the Project Deed may be amended only by a document signed by or on behalf of the HAC, the Project Partnership and ServiceCo. Analogous provisions are included in most of the other HAC project contracts.

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 HAC actions or inaction, some of which have already been cited.

The Project Deed makes it clear that the HAC's Project Director has no authority to orally waive any of the obligations of the Project Partnership and ServiceCo or release them from these obligations, and that any HAC waiver or release must be expressly identified as such, in writing, and signed personally by the Project Director and not 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 Hard Facilities Management Deed, the Soft Facilities Management Deed or (if there is likely to be an effect on the HAC's rights or the ability of the Project Partnership and ServiceCo to meet their Project Deed obligations) any other subcontract for which the total contract sum or the aggregate value of all the project contracts with the same contractor and its related corporations is \$250,000 or more. These restrictions, and requirements for analogous restrictions on amendments to substantial subsubcontracts, have already been described in sections 3.3.9 and 3.4.5.

3.5.7 Confidentiality

The Project Deed, the Construction Side Deed, the Independent Certifier Deed, the Hard Services Contractor Side Deed, the Soft Services Contractor Side Deed and the Financiers Tripartite Deed all contain confidentiality restrictions applying to specified contents of the contracts to which the HAC is a party, other than the PAFA Act Guarantee, and in some cases also to all the contents of the project's financing

agreements and all the other major project contracts to which the HAC is not a party.

The matters specified as having to be kept confidential are the project's "base case" financial model, that model's "base case" equity returns, equity margin and weighted IRR, the amounts payable to the Independent Certifier, all the numbers in tables in the Project Deed's "payments" schedule that are used to help calculate the monthly payments to the Project Partnership and ServiceCo (section 3.4.8.1), other than the total "quarterly payments", the financing agreements and all their associated documents, all the other project contracts to which the HAC is not a party, and any internal project plans, method statements and procedures of the Project Partnership, ServiceCo, the Construction Contractor, the Hard Services Contractor, the Soft Services Contractor and any other subcontractor which have not entered the public domain.

These confidentiality restrictions are, however, subject to a series of specified exemptions, including disclosures required by law, disclosures by the HAC's Project Director to HNE, MHCN or any State Government department or agency, disclosures to prospective investors and disclosures to the Auditor-General in accordance with the Public Finance and Audit Act.

3.5.8 Changes in law

The Project Deed's definition of "change in law" encompasses changes resulting from legislation (including subordinate legislation and legally enforceable guidelines), changes in the interpretation or application of legislation as a result of court decisions that are not or are no longer subject to appeal, new rules, guidelines, regulations, policies, standards, procedures and requirements by the Commonwealth or NSW Governments, the Department of Health, the HAC, HNE or MHCN that affect the provision of the project's services, and new industrial awards or industrial agreements applying to the "Health employees" who are being managed and supervised by the Project Partnership or ServiceCo.

The Project Partnership and ServiceCo are not generally entitled to any compensation, extension of time or other relief from their obligations under the Project Deed as a result of any such "change in law".

However,

- The HAC must use all reasonable endeavours to give the Project Partnership and ServiceCo access to any relief, implementation arrangements or programs that are extended to HNE hospitals in general in response to a "change in law"
- If a "change in law" is the result of a new rule, guideline, regulation, policy, standard, procedure or requirement by the Commonwealth or NSW Governments, the

Department of Health, the HAC, HNE or MHCN, the HAC's Project Director may issue a written notice requiring the Project Partnership and ServiceCo not to comply with the "change in law"

- The Project Partnership and ServiceCo will also be relieved from having to comply with a "change in law" of this type if the HAC or its Project Director decides not to proceed with a proposed contract variation resulting from the "change in law"
- If a "change in law" is a "**discriminatory change in law**"—applying to this project but not to other similar projects procured by the NSW Government, applying to the Project Partners, the Project Partnership and/or ServiceCo but not to others, applying to any or all of this project's construction sites or facilities but not to other similarly situated land or facilities, or applying to privately financed projects such as this project but not to other projects—the Project Partnership and/or ServiceCo may be entitled to apply for relief from their obligations, and/or claim compensation, under the "compensation event" arrangements described in section 3.5.12, and
- The Project Partnership and/or ServiceCo may also be entitled to apply for relief from their 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 Partnership or ServiceCo to incur capital expenditure during the operations phase of the project or additional operating expenditure.

If division 16D or section 51AD of the Income Tax Assessment Act (Cth) are amended or repealed and this produces a cost saving for the project, or if a cost saving arises as a result of a new rule, guideline, regulation, policy, standard, procedure or requirement by the Commonwealth or NSW Governments, the Department of Health, the HAC, HNE or MHCN, the HAC's monthly payments to the Project Partnership and ServiceCo (section 3.4.8.1) must be reduced in accordance with the Project Deed's "estimated cost effect" schedule as if there had been a contract variation requested by the HAC under the "change procedure" arrangements discussed in sections 3.3.15 and 3.4.10.

3.5.9 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 HAC, the Project Partnership and/or ServiceCo, other than:

- Disputes concerning the Independent Certifier Deed, which must be settled under different dispute resolution

procedures set out in the Independent Certifier Deed, and

- Disputes about workers' compensation and occupational health and safety issues under the Labour Services Agreement.

The Project Deed's dispute resolution procedures essentially involve three sequential stages, with the procedures starting in most cases at either the first or second stages. In some cases, however, the Project Deed stipulates that a dispute must be resolved through an independent expert determination, which is one of two initial alternatives for the third stage, so in these cases the first two stages must be bypassed.

The parties also have the option of proceeding straight to expert determination if they agree to do so or if the Project Deed expressly stipulates that a party may choose to do so (as it does, for example, if there is a dispute about the differences in costs between ServiceCo and "benchmarked" services and at two stages of the "change procedure" for contract variations).

The "normal" sequence of stages is:

- (1) Any dispute between HAC, the Project Partnership and/or ServiceCo arising out of the Project Deed or otherwise concerning the works or the services, other than a dispute for which expert determination is stipulated, may be referred by any of the parties for resolution by the Project Co-ordination Group, whose other roles are described in section 3.2.2, 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 must then meet to resolve the dispute. It may do so only through unanimous decisions.

- (2) If the Project Co-ordination Group fails to resolve a dispute referred to it within ten business days, the dispute must be referred for determination by the chief executive officers of the HAC, the Project Partners and ServiceCo.

In addition, a dispute that has not been referred to the Project Co-ordination Group may be referred directly to the chief executive officers by any of the parties, again by giving the other parties a notice to this effect, providing reasonable details about the nature of the dispute.

In either event, the chief executive officers or their delegates must meet to resolve the dispute. If they do so, 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 ten business days of its referral to them, or a further period agreed to by the

parties in writing, or if they do not meet within this period (as extended), any of the parties may notify the other parties that it requires the dispute to be referred for independent expert determination or referred to arbitration.

As indicated above, some disputes (about revisions to the "base case" financial model, insurance policies, service benchmarking procedures, a determination by the Independent Certifier on whether a stage of the works will not be completed by a date one year after its "target completion date" and the quantum of payments to be made following a termination of the Project Deed for a Project Partnership or ServiceCo default) *must* be referred directly for independent expert determination, bypassing the first two stages of the process and ruling out arbitration without a prior expert determination, while others *may* be referred directly for independent expert determination.

The independent expert or arbitrator must be selected by the parties in accordance with procedures set out in the Project Deed. If there are no common nominees by the parties for the independent expert, or if they cannot agree on an arbitrator within five business days, the expert or arbitrator will be selected by the President of The Institute of Arbitrators and Mediators Australia.

The processes for independent expert determinations and arbitrations are set out in the Project Deed. Arbitrations must be conducted in accordance with The Institute of Arbitrators and Mediators Australia Rules for the Conduct of Commercial Arbitrations.

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

The HAC, the Project Partnership and ServiceCo must continue to perform their obligations under the Project Deed, notwithstanding the dispute, throughout all these dispute resolution processes.

If a "formal" dispute arises under the Construction Contract, the Hard Facilities Management Deed, the Soft Facilities Management Deed or any other subcontract or subsubcontract, the Project Partnership and ServiceCo must immediately inform the HAC of the dispute and its effects, if any, on the operation of the Project Deed. If the HAC consents, the Project Contractor, ServiceCo and the relevant subcontractor or subsubcontractor may use the dispute resolution procedures set out in the Project Deed, provided the subcontractor or subsubcontractor 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 either party 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 so, 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.

3.5.10 Emergencies

As already indicated in section 3.4.7, throughout the operations phase of the project the Project Partnership and ServiceCo must promptly inform the Project Director of any emergency which:

- In their opinion, threatens or has caused material damage or disruption to personal health and safety, the environment, property or the safe and secure operation of the hospital or will require the provision of materially greater services, and
 - Has led to a suspension or cessation of their services or might impede the provision of “hospital functions”,
- and provide information on the actions they are taking, or propose to take, to minimise the effects.

Similarly, if there is an emergency which, in the HAC Project Director’s opinion, threatens or has caused material damage or disruption to personal health and safety, the environment, property or the safe and secure operation of the hospital or will require the provision of materially greater services, the Project Director may instruct the Project Partnership or ServiceCo, as applicable, to:

- Immediately perform any of their services for which they are not fulfilling their obligations, and/or
- Do everything they can to 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 facility, the hospital and the hospital site resumes as soon as reasonably practicable.

The Project Partnership or ServiceCo, as applicable, must give the Security Trustee a copy of any such direction.

If the emergency was caused, directly or indirectly, by any negligence or wilful misconduct by the Project Partnership, a Project Partner, ServiceCo, any related corporation, any of their subcontractors, subsubcontractors, invitees, employees and agents or any HNE and MHCN “Health employees” managed and supervised by the Project Partnership or ServiceCo under the Labour Services Agreement, or if it was

caused, directly or indirectly, by any breach of the Project Partnership’s or ServiceCo’s obligations under the Project Deed, the Project Partnership and ServiceCo must bear the costs of any additional or alternative services they are directed to provide.

Otherwise, however, the HAC must pay for any additional third party costs incurred by the Project Partnership, ServiceCo or their subcontractors and subsubcontractors in providing any additional or alternative services as directed.

If the HAC’s Project Director:

- Reasonably believes action must be taken to respond to an emergency of the types described above, but the Project Partnership or ServiceCo, as applicable, 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 HAC must “step in” to discharge a legislative, public or constitutional duty,
- he or she may exercise specific emergency HAC “step in” rights that are set out in a schedule to the Project Deed.

These rights are in addition to general HAC “step in” powers described in section 3.6.5.2, the rights of HNE and MHCN to “step in” if either of them reasonably believes there is an immediate risk to the safety of any “Health employee”, by taking action to control or eliminate the risk and/or by ordering the temporary withdrawal of “Health employees” (see section 3.4.6.5), 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 section 3.6.5.6.

If the HAC Project Director decides to exercise the HAC’s emergency “step in” rights, he or she must notify the Project Partnership and ServiceCo of the action the HAC wishes to take, the reasons for and likely timeframes of this action and, if practicable, the effects of the proposed action on them and their obligations to provide their services. The Project Partnership and ServiceCo, as applicable, must give the Security Trustee a copy of this notice.

The HAC may then take the notified action and any additional, consequential action it reasonably believes to be necessary, and the Project Partnership and ServiceCo must provide all reasonable assistance.

If the action taken by the HAC prevents the Project Partnership or ServiceCo from providing any part of their services, they will be relieved of these particular obligations during the period they cannot be performed and their monthly payments from the HAC (section 3.4.8.1) will not be affected, unless the HAC’s action is being taken because of a breach of the Project Deed by either of them, in which

case the costs incurred by the HAC in taking the action will be deducted.

In addition, the Project Partnership and ServiceCo may be entitled to apply for compensation and/or other relief from their obligations under the “compensation event” arrangements described in section 3.5.12, unless the HAC’s action is being taken because of a breach, by either of them, of the Project Deed or any other project contract to which the HAC is a party.

The HAC must reasonably endeavour to complete its emergency “step in” action promptly, again except in the case of an action that is being taken because of a breach of the Project Deed by either of the Project Partnership or ServiceCo. The HAC’s Project Director must give the Project Partnership or ServiceCo reasonable notice of the completion or cessation of the action, they must give a copy of this notice to the Security Trustee and the HAC must complete or end its action in accordance with the notice, after which the Project Partnership and ServiceCo must immediately resume any services they had been prevented from carrying out.

3.5.11 ‘Relief events’

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

- Fire, explosion, storm, lightning, flood, mudslide, ionising radiation, nuclear contamination, earthquake, drought declared as state of emergency, war, terrorism, riot or protest
- Failure by an authority to carry out works or provide services—including a failure that results in the unavailability of water, electricity, gas, fuel oil, drainage, sewerage, stormwater or communication utility services, in accordance with normal community standards and in the quantities required by the Project Partnership and ServiceCo—*unless* the Project Partnership or ServiceCo has failed to provide a back-up of the relevant utility in accordance with any requirements to do so in the *Technical Specification* or the *Services Specification*
- Shortage of or inability to acquire water, electricity, gas, fuel oil, drainage, sewerage, stormwater or communication utility services, transport or medical gases, for any reason, again unless the Project Partnership or ServiceCo has failed to provide a back-up in accordance with any requirements to do so in the *Technical Specification* or the *Services Specification*
- Event causing loss or damage to the works, the hospital or the hospital site
- Supersonic shock waves
- Infectious disease outbreak which substantially frustrates or makes it impossible for the Project Partnership or ServiceCo to perform its Project Deed obligations

- Blockade or embargo
- Official or unofficial strike, lockout or other industrial dispute or industrial action affecting the construction industry, the facilities management industry or significant sectors of these industries in general, but *not* any industrial dispute or action affecting only the project’s construction site(s), the hospital, the Construction Contractor or any other construction subcontractor or sub-subcontractor
- Breach of the Project Deed or any other project contract by the HAC or the HAC’s Project Director
- Event beyond the control of the HAC, the Project Partnership and ServiceCo which prevents possession of or access to a construction site
- An inability to obtain a development approval for the new Mental Health facility and North Block by 10 July 2007, or within 30 business days after any extended deadline that is not later than 25 September 2007, or
- Structural defect in an existing building which was not identified in pre-contractual information given to them by the HAC, the Department of Health, HNE, MHCN, the State of NSW or their agents, contractors, advisers and employees (see section 3.3.5)

other than any such event directly or indirectly caused by:

- Any action by the Project Partnership, a Project Partner, ServiceCo, any related corporation, any of their subcontractors, subsubcontractors, invitees, employees and agents or any HNE and MHCN “Health employee” who is being managed and supervised by the Project Partnership or ServiceCo under the Labour Services Agreement, or
- Any inaction by these parties amounting to a failure to act in accordance with good industry practice.

If any of these “relief events” occurs, and it:

- Causes, or is likely to cause,
 - An inability to obtain a development approval for the new Mental Health facility and North Block by 10 July 2007, or within 30 business days after any extended deadline that is not later than 25 September 2007 (see section 3.3.2)
 - An inability to achieve completion of a construction “milestone” or stage by its “target completion date” (see section 3.3.8), or
 - More specifically, an inability to achieve the Stage 3 “commencement date” (see section 3.3.16.3) by its target date, and/or
- Affects the ability of the Project Partnership or ServiceCo to comply with any of its obligations or exercise any

of its rights under the Project Deed or the other major project contracts, the Project Partnership and/or ServiceCo, as applicable, may, without prejudicing any rights they might have if the HAC has breached any of the project's contracts, apply for relief from their obligations under the project contracts to which the HAC is a party, 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 Partnership and/or ServiceCo as soon as practicable and by no later than ten business days after they first became aware of the "relief event" or its effects. Full details must then be provided to the HAC's Project Director within five business days of this claim, or within five business days of the end of the "relief event" if it has continued.

Provided these notification requirements are met, the Project Director must grant reasonable extensions to the relevant "target" dates (sections 3.3.2 and 3.3.8) and provide other reasonable relief under the project contracts, inasmuch as the contracts permit the HAC to do so, but only to the extent that would be required if the Project Partnership and ServiceCo were taking reasonable steps to mitigate the effects of the "relief event", even if they are not doing so. The Project Partnership and ServiceCo will not be entitled to any compensation for increased costs or lost revenue, and the HAC's monthly payments (section 3.4.8)—which may continue to include deductions—may be changed only for those obligations for which relief is granted and only in accordance with specifications set out in the "relief event" schedule to the Project Deed.

If the Project Partnership and/or ServiceCo are more than five business days late in notifying the Project Director of the "relief event" or providing full details, they will not be entitled to any relief for the period of the delay.

If the Project Partnership and/or ServiceCo become aware of any new information about the "relief event", mitigation measures or rectification programs, they must notify the HAC's Project Director and the parties must meet to agree on any necessary amendments to the relief granted. If the HAC is still considering the initial request for relief, it must grant "reasonable and timely" interim relief on the basis of the original and new information it has received, provided this will not materially delay the granting of relief in response to the original request.

If the HAC has granted an extension to the "target completion date" of any stage of the works but a corresponding change has not been made under the Construction Contract, the Project Partnership and ServiceCo may ask the HAC to bring the "target completion date" forward, in accordance with procedural and other requirements set out in the "relief event" schedule to the Project Deed.

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, any of them may refer the matter for resolution under the dispute resolution procedures summarised in section 3.5.9.

If a "relief event" or its effects continue or can reasonably be expected to continue for a continuous period of more than 180 days, causing the HAC, the Project Partnership or ServiceCo to be unable to comply with all or a material part of their obligations under the Project Deed, the *force majeure* provision described in section 3.5.13 will apply.

3.5.12 'Compensation events'

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

- HAC, HNE or MHCN breach of the Project Deed or any other project contract which substantially frustrates or makes it impossible for the Project Partnership or ServiceCo to perform their obligations or exercise their rights under the project's contracts
- "Discriminatory change in law" (see section 3.5.8)
- "Qualifying change in law" (see section 3.5.8)
- Exercise by the HAC of its emergency "step in" rights, as described in section 3.5.10, provided the HAC's action is not being taken because of a breach, by the Project Partnership and/or ServiceCo, of the Project Deed or any other project contract to which the HAC is a party
- Additional work by a third party at the hospital or hospital site, involving capital expenditure on works beyond the current project's works, provided the Project Partnership, the Project Partners and ServiceCo are complying with any consequential obligations to the HAC, such as the provision of additional services
- Native title claim or consequential direction to the Project Partnership or ServiceCo, by the HAC, the HAC's Project Director, a court, tribunal or other relevant authority or any other legal requirement, to suspend the performance of its obligations under the Project Deed or any subcontract (see section 3.3.13)
- Legal requirement or direction by the HAC, the HAC's Project Director, a court, tribunal or other relevant authority concerning a heritage artefact, if this causes the Project Partnership or ServiceCo to suspend the performance of its obligations under the Project Deed or any subcontract for more than two weeks
- Modification, withdrawal, revocation or replacement of either or both of the development approvals for the project already obtained by the HAC, for reasons other than any action or inaction by the Project Partnership or ServiceCo (including any application for an additional or amended development approval)

- Failure to complete a stage of the works in accordance with the Project Deed as a result of a failure by the HAC to provide major medical equipment, or other items it has undertaken to provide, in accordance with the Project Deed and the *Works Program*, unless the HAC's failure has been caused, directly or indirectly, by any action by the Project Partnership, ServiceCo or a subcontractor or subcontractor or by any omission by them amounting to a failure to act in accordance with good industry practice
 - Rescheduling of works set out in the *Works Program*, at the direction of the HAC's Project Director, if he or she believes, in his or her discretion, that if the works were carried out at their scheduled time they might or would disrupt the hospital's "hospital functions", provided the Project Partnership and ServiceCo have complied with a *Partnering Protocol*, as annexed to the Project Deed, in relation to the rescheduling (any other rescheduling of works or amendments to the *Works Program* under the arrangements described in section 3.3.8 will not be a "compensation event")
 - Environmental law direction or order served on the HAC, MHCN, the Project Partnership or ServiceCo by a court, tribunal or relevant government authority concerning a matter *other than*:
 - A construction site or access or temporary works area during the construction phase
 - Any existing contamination of the existing buildings that was identified in the 18 October 2004 *Meinhardt Report*, or
 - A breach by the Project Partnership or ServiceCo of their obligations under the Project Deed
 - Comments, recommendations and representations by the HAC's Project Director suggesting a draft detailed design for a stage of the works does not comply with the requirements of the Project Deed, *provided*:
 - The Project Partnership or ServiceCo disputes these comments etc, and this means it cannot proceed to the next stage of design development in accordance with the *Works Program*, and
 - An independent expert decides, under the dispute resolution procedures summarised in section 3.5.9, that the original detailed design does comply with the Project Deed
 - Official or unofficial strike, lockout or other industrial dispute or industrial action by HNE or MHCN "Health employees" (section 3.4.6.6) as a result of matters wholly unrelated to any action or inaction by the Project Partnership, ServiceCo or any of their subcontractors and subsubcontractors
 - Official or unofficial strike, lockout or other industrial dispute or industrial action by HNE or MHCN "Health employees" which:
 - Is related to the restructuring by HNE and MHCN of their operations directly related to the Project Partnership's and ServiceCo's services, and
 - Does *not* arise from a failure, by the Project Partnership, a Project Partner, ServiceCo, any related corporation, any of their subcontractors, subsubcontractors, invitees, employees or agents or any "Health employee", to comply with Department of Health, HAC, HNE and MHCN workplace policies as specified in the Labour Services Agreement or a failure by them to comply with any of their other obligations under the project's contracts, or
 - Official or unofficial strike, lockout or other industrial dispute or industrial action by Department of Health, HNE or MHCN staff *other than* "Health employees", unless it is caused, directly or indirectly, by any action by the Project Partnership, ServiceCo or a subcontractor or subcontractor or by any omission by them amounting to a failure to act in accordance with good industry practice.
- If any of these "compensation events" occurs, and it:
- Causes, or is likely to cause,
 - An inability to obtain a development approval for the new Mental Health facility and North Block by 10 July 2007, or within 30 business days after any extended deadline that is not later than 25 September 2007 (see section 3.3.2)
 - An inability to achieve completion of a construction "milestone" or stage by its "target completion date" (see section 3.3.8), or
 - More specifically, an inability to achieve the Stage 3 "commencement date" (see section 3.3.16.3) by its "target" date, and/or
 - Affects the ability of the Project Partnership or ServiceCo to comply with any of its obligations or exercise any of its rights under the Project Deed or the other major project contracts, and/or
 - Causes the Project Partnership or ServiceCo to incur costs or lose revenue associated with the project,
- the Project Partnership and/or ServiceCo, as applicable, may, again without prejudicing any rights they might have if the HAC has breached any of the project's contracts, apply for relief from their obligations under the project contracts to which the HAC is a party, 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 in these circumstances must be lodged by the Project Partnership and/or ServiceCo as soon as practicable and by no later than 15 business days after they first became aware of the “relief event” or 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 HAC’s 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” dates (sections 3.3.2 and 3.3.8), other reasonable relief under the project contracts, inasmuch as the contracts permit the HAC to do so, and pay the Project Partnership and/or ServiceCo, as applicable, 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 Partnership and ServiceCo were taking reasonable steps to mitigate the effects of the “compensation event”, even if they are not doing so.

If the Project Partnership and/or ServiceCo are more than five business days late in notifying the Project Director of the “compensation event” or providing full details, they will not be entitled to any relief or compensation for the period of the delay.

If the Project Partnership and/or ServiceCo become aware of any new information about the “compensation event” and its effects, they must notify the HAC’s Project Director and the parties must meet to agree on any necessary amendments to the relief and compensation granted, in accordance with the “estimated cost effect” schedule to the Project Deed and with repayments to the HAC if the revised compensation is less than the amount already paid. If the HAC is still considering the initial request for relief and compensation, it must grant “reasonable and timely” interim relief and compensation on the basis of all the information it has received, provided this will not materially delay the granting of relief and compensation in response to the original request.

If the HAC has granted an extension to the “target completion date” of any stage of the works but a corresponding change has not been made under the Construction Contract, the Project Partnership and ServiceCo may ask the HAC to bring the “target completion date” forward, in accordance with procedural and other requirements set out in the “compensation event” schedule to the Project Deed.

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 Partnership and/or ServiceCo have been prevented from performing their other obligations under the project contracts, the impact on costs or revenue or the extent of the relief and compensation sought, any of them may refer the matter for resolution under the dispute resolution procedures summarised in section 3.5.9.

3.5.13 Force majeure

A “relief event” (section 3.5.11) 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, causing the HAC, the Project Partnership or ServiceCo to be unable to comply with all or a material part of their 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 Partnership and/or ServiceCo are the affected parties, they must also provide evidence that the event has occurred, that they are unable to comply with their 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 they are using their best endeavours to perform their 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 HAC, the Project Partnership and ServiceCo must at all times use reasonable endeavours to prevent and mitigate the effects of any delay and the Project Partnership and ServiceCo must do everything required under good industry practice to overcome or minimise the effects of the event.

If the Project Partnership and/or ServiceCo are the parties unable to perform their obligations, and have given the HAC’s Project Director the evidence described above, the HAC must grant them “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 Partnership and/or ServiceCo are entitled, the matter must be referred

for resolution under the dispute resolution procedures described in section 3.5.9.

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 affected parties’ being unable to perform the affected obligations.

The deductions the HAC may make from its monthly payments to the Project Partnership and ServiceCo under the arrangements described in section 3.4.8.1 must be reduced:

- For all “unit failures” and “repeated failures” directly arising from the fact that an obligation is rendered impossible by a “*force majeure* event”—other than a continuation or expected continuation of a “relief event” causing loss or damage to the works, the hospital or the hospital site—in accordance with specifications set out in the Project Deed, and
- For all “quality failures” resulting from any type of “*force majeure* event” or its effects, again in accordance with specifications set out in the Project Deed.

The Project Partnership and/or ServiceCo, as applicable, must notify the HAC’s Project Director if they become 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 the Project Director previously granted must be amended accordingly.

If a “*force majeure* event” ends or it 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”.

If the HAC, the Project Partnership and ServiceCo 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 may give the others 20 business days’ notice that it intends to terminate the Project Deed for *force majeure*.

The Project Partnership and ServiceCo 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 Partnership and/or ServiceCo, the HAC’s Project Director must either:

- Accept the notice, in which case the arrangements described in section 3.6.3 will apply, or
- Issue a notice, in response, specifying that the whole of the Project Deed must continue.

If he or she chooses the latter course,

- The Project Partnership and ServiceCo must give the Security Trustee a copy of the notice
- The HAC’s monthly payments to the Project Partnership and/or ServiceCo after the Stage 3 “commencement date” (section 3.4.8.1) must be calculated, from the day after the date on which the Project Deed would have terminated had the Project Director accepted their notice of termination, as if the Project Partnership and/or ServiceCo, as applicable, were satisfying all of obligations under the Project Deed and the *Services Specification*, with the only permitted reductions in these payments being for any costs they do not incur and any insurance proceeds they receive under construction-phase advance consequential loss insurance or operations-phase industrial special risks insurance (section 3.5.2) and are entitled to retain under the Project Deed, and
- The Project Deed will otherwise continue to apply unless the HAC decides to terminate it, giving the Project Partnership and ServiceCo at least 30 business days’ notice. If it does so, the Project Partnership and ServiceCo must give a copy of the notice to the Security Trustee and the arrangements described in section 3.6.3 will apply.

3.6 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 extended development approval delays (section 3.3.2), the occurrence of an uninsurable risk affecting the whole hospital (section 3.5.2.3) or *force majeure* (section 3.5.13)
- “Voluntary” termination of the project’s contracts by the HAC
- The handling of breaches of the contracts, and
- Termination of the project’s contracts for various types of serious defaults.

3.6.1 Termination for Development Approval delays

As discussed in section 3.3.2, if the Project Partnership and ServiceCo are delayed in being able to obtain development

approval for the hospital's new Mental Health facility and North Block, and the current 28 May 2007 deadline for obtaining this development approval is extended, under the "relief event" arrangements described in section 3.5.11, beyond 25 September 2007,

- The "relief event" arrangements will no longer apply
- The HAC, the Project Partnership and ServiceCo must consult with each other, in good faith, and use all reasonable endeavours to agree on actions to mitigate the effects of the delay and facilitate continued performance of the project contracts, and
- If they cannot agree on these actions within ten business days, any of the parties may give the others ten business days' written notice of the termination of the Project Deed.

If the Project Partnership or ServiceCo notifies the HAC that it wishes to terminate the Project Deed, the HAC's Project Director will have an option of responding, in writing and within ten business days, with a statement specifying the extent to which the HAC requires the Project Deed to continue (by means of an HAC-requested variation under the arrangements described in section 3.3.15).

If the HAC notifies the Project Partnership and ServiceCo that it wishes to terminate the Project Deed, or if it chooses not to exercise the option described above,

- The Project Deed—and, if they have commenced, the SubLease and SubSubLease—will terminate at the end of the notice period
- The Project Partnership and ServiceCo will be entitled to compensation, as prescribed in a "termination payments" schedule to the Project Deed and described in section 3.6.1.1 below
- The HAC may defer the acceleration of bonds and the closing out of a swap under the project's private sector debt financing arrangements until after this compensation is paid
- The HAC's Project Director may require the Project Partnership and ServiceCo, at no cost to the HAC beyond this compensation, to:
 - Transfer their title, interests and rights in any of their works, the hospital and the hospital site
 - Transfer the Construction Contract, and/or any other construction subcontract, in accordance with the Construction Side Deed or the equivalent side deed required for each other construction subcontract (see section 3.3.9), as described in section 3.6.1.2 below, and/or
 - Transfer the Hard Facilities Management Deed, the Soft Facilities Management Deed and/or any other operations subcontract, in accordance with

the Hard Services Contractor Side Deed, the Soft Services Contractor Side Deed or the equivalent side deed required for each other operations subcontract (see section 3.4.5), again as described in section 3.6.1.2 below, and

- The Project Partnership and ServiceCo must facilitate a smooth transfer of responsibility for the services they were to have provided to a new project company or the HAC and take no action at any time, before or after the termination of the Project Deed, to prejudice or frustrate such a transfer.

3.6.1.1 Compensation

If the project has *not* become subject to the recently enacted Part 3A "major infrastructure projects" provisions of the Environmental Planning and Assessment Act, *or* (even if it has) the powers of the Director-General of the Department of Planning concerning Part 3A environmental assessments and public consultation have been delegated to Newcastle City Council, the Project Partnership and ServiceCo will be entitled to receive, as a full and final settlement of all their claims and rights against the HAC,

- An amount sufficient to pay out the outstanding debt under the project's debt financing agreements, calculated in accordance with the "termination payments" schedule to the Project Deed, *plus*
- Half of the par value of the share capital of Novacare Solutions No 1 Pty Limited, Novacare Health Solutions No 1 Pty Limited and ServiceCo, the units held in the Novacare Solutions No 1 Trust and the Novacare Health Solutions No 1 Trust and any shareholder loans to these entities, the Project Partners or the Project Partnership, as shown on their balance sheets on the termination date, *plus*
- Any unpaid amounts that were due and payable to them by the HAC, HNE and/or MHCN under the project's contracts on the termination date, *less*
- Any amounts they owed to the HAC, HNE and/or MHCN under the project's contracts on the termination date, *less*
- Any insurance proceeds which they have received or will receive (or would have received had they complied with their obligations under the Project Deed), which they are entitled to retain and which they have not applied, and are not obliged to apply, to satisfy their reinstatement obligations, and *less*
- Any gains they have made or will make as a result of the termination other than this compensation payment itself

and any gains from the termination of the financing agreements, with adjustments, if necessary, to avoid any “double counting”.

If the project *has* become subject to the Part 3A “major infrastructure projects” provisions of the Environmental Planning and Assessment Act, *and* the powers of the Director-General of the Department of Planning concerning Part 3A environmental assessments and public consultation have *not* been delegated to Newcastle City Council, the Project Partnership and ServiceCo will be entitled to receive, as a full and final settlement of all their claims and rights against the HAC,

- An amount sufficient to pay out the outstanding debt under the project’s debt financing agreements, calculated in accordance with the “termination payments” schedule to the Project Deed, *plus*
- An amount which, in combination with any dividend, interest, principal or other payments made by them to the project’s equity investors prior to the termination of the Project Deed, will give these investors a real rate of return equal to the return forecast in the project’s “base case” financial model, *plus*
- Any costs incurred by or payable by them as a result of the termination of the project contracts (excluding the financing agreements), such as redundancy payments and demobilisation costs, provided they reasonably endeavour to minimise these costs, *plus*
- Any unpaid amounts that were due and payable to them by the HAC, HNE and/or MHCN under the project’s contracts on the termination date, *less*
- Any amounts they owed to the HAC, HNE and/or MHCN under the project’s contracts on the termination date, and *less*
- Any gains they have made or will make as a result of the termination other than this compensation payment itself and any gains from the termination of the financing agreements,

again with adjustments, if necessary, to avoid any “double counting”.

In either event the compensation must be paid as soon as practicable, and in any event by no later than 120 business days after the termination of the Project Deed. Interest will accrue on unpaid amounts from the termination date, at the weighted average interest rate for the project’s senior debt at the time.

3.6.1.2 Post-termination transfers of subcontracts

The HAC may, within 90 days of the termination of the Project Deed,

- Require the Construction Contractor and the Construction Contractor Guarantors to enter into a new con-

struction subcontract, construction contractor guarantee and/or interface deed, essentially on the same terms as the Construction Contract, the Construction Contractor Guarantee and the Interface Deed, with a company nominated by the HAC and approved by the Construction Contractor as a substitute for the Project Partnership, in accordance with procedures, timeframes and criteria specified in the Construction Side Deed

- Require the Hard Services Contractor and the Hard Services Contractor Guarantor to enter into a new hard services subcontract, hard services contractor guarantee and/or interface deed, essentially on the same terms as the Hard Facilities Management Deed, the Hard Services Contractor Guarantee and the Interface Deed, with a company nominated by the HAC and approved by the Hard Services Contractor as a substitute for the Project Partnership, in accordance with procedures, timeframes and criteria specified in the Hard Services Contractor Side Deed
- Require the Soft Services Contractor and the Soft Services Contractor Guarantor to enter into a new hard services subcontract, hard services contractor guarantee and/or interface deed, essentially on the same terms as the Soft Facilities Management Deed, the Soft Services Contractor Guarantee and the Interface Deed, with a company nominated by the HAC and approved by the Soft Services Contractor as a substitute for ServiceCo, in accordance with procedures, timeframes and criteria specified in the Soft Services Contractor Side Deed, and/or
- Impose similar requirements on any other subcontractors under the equivalent side deeds required for each other construction or operations subcontract and/or (if relevant) their Collateral Warranty Deeds (see sections 3.3.9 and 3.4.5).

If the HAC takes this action during the construction phase of the project, the substitute project company will automatically replace the Project Partnership in a new contract in the same form as the Independent Certifier Deed.

The debt financiers’ Security Trustee has undertaken to facilitate these novation arrangements, in particular by releasing relevant securities under the project’s financing agreements if this is required.

3.6.2 Termination for an uninsurable risk affecting the whole hospital

Under the “uninsurable risk” arrangements described in section 3.5.2.3, the HAC’s Project Director may terminate the Project Deed, at his or her option, if:

- An uninsurable risk that would otherwise have to be insured under an operations-phase public and products

liability, third party motor vehicle, plant and motor vehicle third party property or industrial special risks insurance policy eventuates and affects the hospital “as a whole”, and

- Procedures specified in the Project Deed have been followed but the HAC, the Project Partnership and ServiceCo cannot agree on how to manage the risk.

If he or she does so,

- The SubLease and SubSubLease will also terminate (if they have commenced)
- The Project Partnership and ServiceCo will be entitled to compensation, as prescribed in the “termination payments” schedule to the Project Deed and described below
- The HAC may defer the acceleration of bonds and the closing out of a swap under the project’s private sector debt financing arrangements until after this compensation is paid
- The HAC’s Project Director may require the Project Partnership and ServiceCo, at no cost to the HAC beyond this compensation, to:
 - Transfer their title, interests and rights in any of their works, the hospital and the hospital site, and
 - Transfer the Construction Contract, the Hard Facilities Management Deed, the Soft Facilities Management Deed and/or any other subcontracts, in accordance with the Construction Side Deed, the Hard Services Contractor Side Deed, the Soft Services Contractor Side Deed, the equivalent side deed required for each other subcontract and/or the subcontractor’s Collateral Warranty Deed (sections 3.3.9 and 3.4.5), as described in section 3.6.1.2 above, and

- The Project Partnership and ServiceCo must facilitate a smooth transfer of responsibility for the services they were to have provided to a new project company or the HAC and take no action at any time, before or after the termination of the Project Deed, to prejudice or frustrate such a transfer.

The Project Partnership and ServiceCo will be entitled to receive compensation, as a full and final settlement of all their claims and rights against the HAC, equal to:

- An amount sufficient to pay out the outstanding debt under the project’s debt financing agreements, calculated in accordance with the “termination payments” schedule to the Project Deed, *plus*
- Half of the par value of the share capital of Novacare Solutions No 1 Pty Limited, Novacare Health Solutions No 1 Pty Limited and ServiceCo, the units held in the Novacare Solutions No 1 Trust and the Novacare Health

Solutions No 1 Trust and any shareholder loans to these entities, the Project Partners or the Project Partnership, as shown on their balance sheets on the termination date, *plus*

- Any unpaid amounts that were due and payable to them by the HAC, HNE and/or MHCN under the project’s contracts on the termination date, *less*
- Any amounts they owed to the HAC, HNE and/or MHCN under the project’s contracts on the termination date, *less*
- Any insurance proceeds which they have received or will receive (or would have received had they complied with their obligations under the Project Deed), which they are entitled to retain and which they have not applied, and are not obliged to apply, to satisfy their reinstatement obligations, and *less*
- Any gains they have made or will make as a result of the termination other than this compensation payment itself and any gains from the termination of the financing agreements,

with adjustments, if necessary, to avoid any “double counting”.

This compensation must be paid as soon as practicable, and in any event by no later than 120 business days after the termination of the Project Deed, and interest will accrue on unpaid amounts from the termination date, at the weighted average interest rate for the project’s senior debt at the time.

3.6.3 Termination for *force majeure*

If the Project Deed is terminated for *force majeure* under the arrangements described in section 3.5.13,

- The SubLease and SubSubLease will also terminate (if they have commenced)
- The Project Partnership and ServiceCo will be entitled to compensation, as prescribed in the “termination payments” schedule to the Project Deed, that must be calculated on exactly the same basis as compensation payable following a termination of the Project Deed for an unisurable risk, as described in section 3.6.2
- The HAC may defer the acceleration of bonds and the closing out of a swap under the project’s private sector debt financing arrangements until after this compensation is paid
- The HAC’s Project Director may require the Project Partnership and ServiceCo, at no cost to the HAC beyond this compensation, to:
 - Transfer their title, interests and rights in any of their works, the hospital and the hospital site
 - Transfer the Construction Contract, the Hard Facilities Management Deed, the Soft Facilities Man-

agement Deed and/or any other subcontracts, in accordance with the Construction Side Deed, the Hard Services Contractor Side Deed, the Soft Services Contractor Side Deed, the equivalent side deed required for each other subcontract and/or the subcontractor's Collateral Warranty Deed, as described in section 3.6.1.2, and

- The Project Partnership and ServiceCo must facilitate a smooth transfer of responsibility for the services they were to have provided to a new project company or the HAC and take no action at any time, before or after the termination of the Project Deed, to prejudice or frustrate such a transfer.

3.6.4 'Voluntary' termination by the HAC

The HAC may terminate the Project Deed at any time—even if there have been no defaults by the Project Partnership or ServiceCo, no delays in obtaining development approvals, no uninsurable risk events and no *force majeure* events—by giving the Project Partnership and ServiceCo at least 120 business days' written notice.

If the HAC issues such a "voluntary termination" notice, the Project Partnership and ServiceCo must give the Security Trustee a copy of the notice and:

- The Project Deed—and, if they have commenced, the SubLease and SubSubLease—will terminate at the end of the notice period
- The Project Partnership and ServiceCo will then be entitled to compensation, as prescribed in the "termination payments" schedule to the Project Deed and described below
- The HAC may defer the acceleration of bonds and the closing out of a swap under the project's private sector debt financing arrangements until after this compensation is paid
- The HAC's Project Director may require the Project Partnership and ServiceCo, at no cost to the HAC beyond this compensation, to:
 - Transfer their title, interests and rights in any of their works, the hospital and the hospital site, and
 - Transfer the Construction Contract, the Hard Facilities Management Deed, the Soft Facilities Management Deed and/or any other subcontracts, in accordance with the Construction Side Deed, the Hard Services Contractor Side Deed, the Soft Services Contractor Side Deed, the equivalent side deed required for each other subcontract and/or the subcontractor's Collateral Warranty Deed, as described in section 3.6.1.2, and
- The Project Partnership and ServiceCo must facilitate a smooth transfer of responsibility for the services they

were to have provided to a new project company or the HAC and take no action at any time, before or after the termination of the Project Deed, to prejudice or frustrate such a transfer.

The Project Partnership and ServiceCo will be entitled to receive compensation, as a full and final settlement of all their claims and rights against the HAC, equal to:

- An amount sufficient to pay out the outstanding debt under the project's debt financing agreements, calculated in accordance with the "termination payments" schedule to the Project Deed, *plus*
- An amount which, in combination with any dividend, interest, principal or other payments made by them to the project's equity investors prior to the termination of the Project Deed, will give these investors a real rate of return equal to the return forecast in the project's "base case" financial model, *plus*
- Any costs incurred by or payable by them as a result of the termination of the project contracts (excluding the financing agreements), such as redundancy payments and demobilisation costs, provided they reasonably endeavour to minimise these costs, *plus*
- Any unpaid amounts that were due and payable to them by the HAC, HNE and/or MHCN under the project's contracts on the termination date, *less*
- Any amounts they owed to the HAC, HNE and/or MHCN under the project's contracts on the termination date, and *less*
- Any gains they have made or will make as a result of the termination other than this compensation payment itself and any gains from the termination of the financing agreements,

again with adjustments, if necessary, to avoid any "double counting".

Again, the compensation must be paid as soon as practicable, and in any event by no later than 120 business days after the termination of the Project Deed, and interest will accrue on unpaid amounts from the termination date, at the weighted average interest rate for the project's senior debt at the time.

3.6.5 Actions to remedy Project Partnership and ServiceCo contract 'breaches' and 'defaults'

3.6.5.1 General indemnity

The Project Partnership and ServiceCo must indemnify the HAC, HNE and MHCN against any claim or loss they incur that arises out of, or is in any way associated with, any breach of the Project Deed by the Project Partnership or ServiceCo, except to the extent of any loss or claim caused by:

- Any HAC, HNE or MHCN negligence, fraud or breach of the project contracts, or
- Compliance by the Project Partnership, a Project Partner, ServiceCo, any related corporation, any of their subcontractors, subsubcontractors, invitees, employees and agents or any HNE or MHCN “Health employee” with any express directions issued by the HAC or its Project Director in accordance with the Project Deed.

3.6.5.2 *The HAC’s general power to perform the Project Partnership’s and ServiceCo’s obligations if they breach these obligations*

If the Project Partnership or ServiceCo fails to perform or comply with any of its obligations under the Project Deed or any other project contract to which the HAC is a party,

- The HAC may (but need not) itself perform or secure the performance of these obligations, and
- The costs it incurs in doing so must be paid by the Project Partnership or ServiceCo, as applicable, on demand.

The HAC’s Project Director must give the Project Partnership and ServiceCo as much notice as practicable if it intends to take this action. If advance notice is not practicable, the Project Partnership and ServiceCo must be promptly advised after the action is taken. In either event, they must give copies of the HAC’s notices to the debt financiers’ Security Trustee.

These general provisions are supplemented by much more detailed provisions allowing the HAC and/or the Security Trustee to “step in” in particular circumstances, as already discussed for emergencies (section 3.5.10) and as detailed in the rest of this section 3.6.5.

3.6.5.3 *Procedures following contractual and other defined ‘breaches’ by the Project Partnership or ServiceCo*

The Project Deed specifies that a series of defined situations, in addition to failures by the Project Partnership or ServiceCo to comply with their obligations under the project contracts to which the HAC is a party, will constitute “breaches” for the purposes of the Project Deed.

Under these provisions, a “breach” will occur if:

- The Project Partnership or ServiceCo breaches any of its obligations to the HAC under the Project Deed or any other contract to which the HAC is a party, *other than*:
 - A failure to complete a “milestone” *within* a stage of the works by its “target completion date” (see section 3.3.8)
 - 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 HAC to terminate the Project Deed, as set out in the Project Deed’s definition of “project company termination event” and listed in section 3.6.5.6 below
- Any representation or warranty given to the HAC by the Project Partnership or ServiceCo in any of the contracts to which the HAC is a party proves to be untrue
- Any matter relating to the Project Partnership, ServiceCo, the Construction Contractor, the Hard Services Contractor, the Soft Services Contractor or any other subcontractor is or will be subject to an investigation by the Australian Securities and Investments Commission
- The Project Partnership, ServiceCo, the Construction Contractor, the Hard Services Contractor, the Soft Services Contractor or any other subcontractor engages in fraud or misleading and deceptive conduct in performing any part of the project
- A subsubcontractor engages in fraud or misleading and deceptive conduct in performing any part of the project and this has a material adverse effect on part or all of the project
- The Project Partnership or ServiceCo fails to comply with a “corrective action plan” produced in response to a failure to complete a stage of the works by its “target commencement date” (section 3.3.8)
- The Project Partnership or ServiceCo breaches its releases and indemnities in favour of the HAC, HNE and MHCN for any claim or loss arising from any early occupation of parts of the hospital facilities prior to their formal completion (section 3.3.16.2)
- An obligation to provide debt financing for the project is terminated, withdrawn or cancelled before the Stage 3 “commencement date”
- The Project Partnership and ServiceCo incur, between them, deductions from their monthly payments (section 3.4.8.1), in two of any three consecutive months, that are:
 - In total, more than 5% of the sum of these months’ portions of the relevant pre-deduction “quarterly payment” and their pre-deduction “incremental monthly payments”, if any, as set out in the Project Deed’s “payments schedule”
 - For “quality failure” deductions, more than 3% of this sum, or
 - For “unit failure” deductions, more than 3% of this sum, or
- The Project Partnership and ServiceCo incur deductions from their monthly payments as a result of more than

four “unit failures” or eight “quality failures” preventing or causing the suspension of “hospital functions” in any three consecutive months

If any of these “breaches” occurs, the HAC’s Project Director may issue a formal “breach notice” to the Project Partnership and ServiceCo, with a copy being sent to the debt financiers’ Security Trustee, giving reasonable details of the breach.

If the “breach” can reasonably be remedied within five business days of this notice, the Project Partnership and ServiceCo must do so.

If the “breach” can be remedied, but not reasonably within five business days, the Project Partnership and ServiceCo must submit a detailed *Cure Plan* to the HAC’s Project Director within ten business days of the HAC’s notice, setting out the steps they will take to remedy the breach and mitigate its effects. This *Cure Plan* must be acceptable to the Project Director and must be diligently implemented in accordance with its terms.

If the “breach” cannot be remedied, the Project Partnership and ServiceCo must submit a detailed *Prevention Plan*, again within ten business days of the HAC’s notice, setting out the steps they will take to prevent any recurrence of the breach. This *Prevention Plan* must be acceptable to the Project Director and must be diligently implemented in accordance with its terms.

The HAC may grant a single extension of up to 40 business days to the period allowed for remedying the “breach” or the periods specified in a *Cure Plan* or *Prevention Plan* for implementing these plans, provided the Project Partnership and ServiceCo provide evidence they are diligently pursuing the remedy or implementing the *Plan*.

If the Project Partnership and ServiceCo fail to remedy the “breach” or provide or implement a *Cure Plan* or *Prevention Plan*, as relevant, the HAC 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 section 3.6.6.

In addition to the HAC’s rights to take action itself following a Project Partnership or ServiceCo breach, as described above, the HAC has expressly acknowledged and consented to the debt financiers’ Security Trustee’s rights, under the debt financing agreements, to remedy, procure the remedy of or prevent any breach of the project’s contracts by the Project Partnership and/or ServiceCo.

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 Partnership and/or ServiceCo under the project’s contracts, in the specific circumstances described in sections 3.6.5.6 and 3.6.5.7 and under arrangements described in those sections.

3.6.5.4 *The HAC’s remedy and ‘step in’ rights under the Construction Side Deed during the construction phase*

Under the Construction Side Deed, if the Project Partnership breaches the Construction Contract the Construction Contractor may not terminate that contract, or give the Project Partnership a notice of termination under the terms of the Construction Contract, without giving the HAC 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 Partnership.

The Construction Contractor must then give the HAC at least weekly updates on whether the Project Partnership’s default has been remedied.

If the Project Partnership fails to remedy its breach, the HAC may, in its sole discretion and at any time during the 60 days following the Construction Contractor’s initial notification, elect to make its own arrangements to remedy the breach, short of a full assumption by the HAC of the Project Partnership’s rights and obligations under the Construction Contract in accordance with other Construction Side Deed provisions described below.

If the HAC makes this election, it must notify the Construction Contractor, the Project Partnership and the Security Trustee as soon as reasonably practicable, and the Construction Contractor must then use its best endeavours to reach an agreement with the HAC 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 Partnership’s breach, unless:

- Such an agreement with the HAC is not reached within 90 days of the original notice to the HAC, and
- The HAC has not “stepped in” and taken over all the rights of the Project Partnership under the Construction Contract and the Construction Contractor Guarantee, under provisions described below, or exercised its powers under the HAC Security (see section 4.1)—subject to priorities set out in the Financiers Tripartite Deed (see section 4.2)—to appoint an agent, manager, receiver, receiver/manager or administrator to do likewise.

Under the Construction Side Deed the HAC or an agent, manager, receiver, receiver/manager or administrator appointed under the HAC’ Security may, but need not, “step in” and assume the rights of the Project Partnership under the Construction Contract, the Interface Deed and the Construction Contractor Guarantee if:

- The HAC is already exercising its “step in” rights following an emergency, as described in section 3.5.10, and decides that this course of action is justified, or

- The Construction Contractor has notified the HAC of Project Partnership breach of the Construction Contract and the 60-day period following this notice has not expired

and the Security Trustee has not exercised its own “step in” rights under the Financiers Tripartite Deed arrangements described in section 3.6.5.6 or section 3.6.5.7 below.

If the HAC decides to take this action, it must give the Construction Contractor, the Construction Contractor Guarantor and the Security Trustee at least two days’ written notice, including details of the background events.

During any “step in” by the HAC or its agent, manager, receiver, etc under the Construction Contract, the Interface Deed or the Construction Contractor Guarantee,

- The Construction Contractor must continue to perform all its obligations under the Construction Contract
- The HAC may enforce any of the Project Partnership’s rights under these contract(s), and
- The Construction Contractor may terminate the Construction Contract and/or the Interface Deed 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 HAC of the Project Partnership’s breach (as independently certified to the reasonable satisfaction of the HAC and any HAC 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 HAC of the Project Partnership’s breach, or any other previously unknown amount which becomes payable to it after this original notification, within 30 days of notifying the HAC of this liability (again as independently certified to the reasonable satisfaction of the HAC and any HAC agent/manager/receiver etc), or
 - Grounds for termination of the Construction Contract and/or the Interface Deed under their own terms arise after the “step in”.

If the HAC has “stepped in” but the Security Trustee then exercises its own “step in” rights under the Financiers Tripartite Deed arrangements described in section 3.6.5.6 or section 3.6.5.7, the HAC must “step out” for the duration of the Security Trustee’s “step in” period.

The HAC may terminate the “step in” at any time by giving the Construction Contractor and the Construction Contractor Guarantors at least 30 days’ written notice, and it must do so as soon as the reasons for the “step in” end or its proposed action is completed.

3.6.5.5 The HAC’s remedy and ‘step in’ rights under the Hard and Soft Services Contractor Side Deeds during the operations phase

The HAC’s rights and procedures for the remedying of:

- Operations-phase Project Partnership breaches of its Hard Facilities Management Deed with the Hard Services Contractor, under the provisions of the Hard Services Contractor Side Deed, and
- ServiceCo breaches of its Soft Facilities Management Deed with the Soft Services Contractor, under the provisions of the Soft Services Contractor Side Deed,

are precisely analogous to its rights and procedures just described for the remedying of construction-phase Project Partnership breaches of its Construction Contract with the Construction Contractor, under the provisions of the Construction Side Deed.

Among other things, the HAC’s rights and procedures for “stepping in” and assuming the rights of the Project Partnership under the Hard Facilities Management Deed, the Interface Deed and the Hard Services Contractor Guarantee, and/or the rights of ServiceCo under the Soft Facilities Management Deed, the Interface Deed and the Soft Services Contractor Guarantee, are precisely analogous to those described above and again include a right to “step in” not only in response to breaches of the subcontracts but also in situations where the HAC is already exercising its “step in” rights following an emergency, as described in section 3.5.10, and decides that this course of action is justified.

3.6.5.6 The HAC’s remedy 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 if

- The Project Partnership does not commence the works by a “drop dead date” of 30 January 2006 (or a later date as decided by the HAC’s project director in his or her absolute discretion or determined in response to a “relief event” or “compensation event” under the arrangements described in sections 3.5.11 and 3.5.12)
- A stage of the works is not completed within 12 months after its “target completion date” (section 3.3.8)
- The Independent Certifier finds, in accordance with procedures set out in the Project Deed, that a stage of the works will not be completed within 12 months after its “target completion date” (in this case, the “project company termination event” will be deemed to occur ten business days after the Independent Certifier issues a certificate to this effect, but if the finding is disputed by the Project Partnership or ServiceCo, under the dispute resolution procedures summarised in section

3.5.9, it will be the date, if any, on which an independent expert comes to the same conclusion)

- The Project Partnership and ServiceCo collectively abandon the project or display an intention to permanently abandon their provision of the works or a material part of their services, unless this is the direct result of a “relief event” (section 3.5.11) or a Project Partnership or ServiceCo “insolvency event”, as defined in the Project Deed
- There is a Project Partnership or ServiceCo “insolvency event”
- There is an “insolvency event” related to the Construction Contractor, any other construction subcontractor, either or both of the Construction Contractor Guarantors, the Hard Services Contractor, the Soft Services Contractor, any other operations subcontractor, the Hard Services Contractor Guarantor or the Soft Services Contractor Guarantor, *and* the relevant organisation is not replaced, within 90 days of the Project Partnership’s or ServiceCo’s becoming aware of this “insolvency event”, by a reputable and solvent subcontractor or guarantor that has the resources and experience to perform the relevant obligations, complies with the Project Deed’s requirements for subcontractors etc (sections 3.3.9 and 3.4.5) and is otherwise acceptable to the HAC
- There is a breach of the law by the Project Partnership, ServiceCo, the Construction Contractor, any other construction subcontractor, the Hard Services Contractor, the Soft Services Contractor or any other operations subcontractor, including any failure to continue to hold all approvals and licences required for the project, *and* the HAC’s Project Director believes this breach is likely to have a material adverse effect on the performance of the Project Partnership’s or ServiceCo’s obligations under the Project Deed, *and* the breach is not remedied within 30 days of the Project Director’s notifying Project Partnership or ServiceCo of the breach or any earlier awareness by them of the breach
- The Project Deed or any of the other major project contracts is revoked, repudiated or terminated, ceases to be legal, valid, binding or ceases to be enforceable against the Project Partnership, ServiceCo or any other party apart from the HAC, HNE or MHCN, *except* as contemplated by the project contracts, *and* this situation is not remedied within 45 days of the Project Partnership’s or ServiceCo’s becoming aware of it
- The Project Partnership or ServiceCo fails to pay to the HAC any of the “Health employee” costs that are due to the HAC under the fortnightly payment arrangements described in section 3.4.8.2, and this payment is still not

made within five business days of a notice from the HAC requiring it to do so, *and* the HAC has no amounts due and payable to the Project Partnership or ServiceCo in that month or the following month, under the monthly payment arrangements described in section 3.4.8.1, against which the HAC could set off the amount owed to it by the Project Partnership or ServiceCo

- There is a “**persistent breach**” of the Project Deed by the Project Partnership and ServiceCo, 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”—as defined in section 3.6.5.3 above, apart from an express exclusion of breaches of the Project Partnership’s and ServiceCo’s cross-guarantees of each other’s performance (section 3.2.1)—more than once, *followed by* the service of a formal warning notice by the HAC (with a copy being sent 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 HAC (again with a copy being sent 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, significantly impair the ability of the HAC, HNE or MHCN to provide “hospital functions” or otherwise have a material adverse effect on the HAC’s interests under the Project Deed or indicate the Project Partnership or ServiceCo does not regard itself as being bound by the Project Deed, *followed by* the service of a formal warning notice by the HAC (with a copy being sent to the Security Trustee), *followed by* continued frequent breaches during any period of three months or more starting 30 days or more after this notice, *followed by* a final warning notice by the HAC (again with a copy being sent to the Security Trustee), *followed by* further frequent breaches within the next six months, *or*
- The Project Partnership or ServiceCo fails to remedy a “breach” (as defined in section 3.6.5.3) or provide or implement a *Cure Plan* or *Prevention Plan*, as relevant, under the arrangements described in section 3.6.5.3.

The Project Partnership and ServiceCo must immediately notify the HAC if either of them becomes aware of a “project company termination event” or anything likely to

become a “project company termination event”, and they must give a copy of this notification to the Security Trustee within five business days.

Action by the HAC to overcome the effects of a ‘project company termination event’

The HAC may take any action it considers appropriate or necessary to overcome the effects of a subsisting “project company termination event” or preserve the project, with the costs it incurs in doing so being payable by the Project Partnership and/or ServiceCo on demand.

‘Stepping in’ by the Security Trustee

Under the Project Deed the HAC may also terminate the Project Deed for a subsisting “project company termination event” simply by giving the Project Partnership and ServiceCo at least 20 business days’ written notice (see section 3.6.6).

Under the Financiers Tripartite Deed, however, the HAC has:

- Expressly acknowledged and consented to the Security Trustee’s rights, under the debt financing agreements, to remedy, procure the remedy of or prevent any “project company termination event”, including “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 Partnership and/or ServiceCo under the project’s contracts
- Promised not to issue a termination notice for a subsisting “project company default event” without first giving the Security Trustee at least ten business days’ written notice of its intention to do so, specifying the proposed date for the termination notice and providing details of the “project company termination event”, and
- Promised not to terminate the Project Deed, in response to a “project company termination event”, in any other way.

At any time after receiving an HAC notice that it intends to terminate the Project Deed for a “project company default event”, but no later than one business day before the proposed date for the HAC’s issuing of the termination notice, the Security Trustee may—but need not—notify the HAC 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 HAC may issue a termination notice under the Project Deed and the arrangements described in section 3.6.6 will apply.

However, if the Security Trustee does issue a notice that it intends to “step in”, the HAC may not terminate the Project Deed prior to the day after the proposed “step in” date, the Security Trustee must give the HAC details about its proposed agent, manager, receiver, receiver/manager or administrator and the HAC and the Security Trustee must consult with each other, as soon as practicable, to:

- Determine the content of a *Step-In Report* which they must jointly produce, at the Project Partnership and ServiceCo’s cost, setting out:
 - The Project Partnership and ServiceCo’s outstanding obligations to the HAC under the Project Deed
 - A program to remedy breaches of the Project Deed (and/or prevent the recurrence of breaches not able to be remedied) and remedy the “project company termination event”
 - Details on the proposed performance of the Project Partnership and ServiceCo’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 HAC chooses to have an auditor and/or technical adviser verify any of the information in the *Step-In Report*.

Any “stepping in” agent, receiver, receiver/ manager, administrator or other representative appointed by the Security Trustee must (in the HAC Project Director’s reasonable opinion) be suitable and appropriate for carrying out the project or have access to such persons, and must satisfy the Project Director that they will be able to carry out the obligations of the Project Partnership and ServiceCo during the “step in” period.

HAC and Security Trustee rights and obligations during the Security Trustee’s ‘step in’ period

During the Security Trustee’s “step in” period,

- The HAC’s rights and obligations under the project’s contracts 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 Partnership and ServiceCo under the contracts, in accordance with details set out in the Financiers Tripartite Deed
- The Security Trustee and its representative must minimise any disturbance to the delivery of the services that would otherwise have to be provided by the Project Partnership and ServiceCo and minimise any disturbance to the hospital’s “hospital functions”, except to the extent contemplated in the *Step-In Report*

- The Security Trustee must give the HAC's Project Director detailed reports, at least monthly, on the implementation of the *Step-In Report*, and if requested by the HAC, at its discretion, the Security Trustee must update the *Step-In Report* to reflect any matters not contemplated in the original *Step-In Report*
- The Security Trustee must nominate a substitute representative if the HAC's Project Director notifies it that the original representative has not satisfied him or her that it is carrying out the obligations of the Project Partnership and ServiceCo under the Project Deed, and if the substitute is not judged satisfactory within ten business days the Security Trustee's "stepping in" notice will be deemed to have been withdrawn
- The HAC may terminate the Project Deed, by written notice to the Project Partnership, ServiceCo, the Security Trustee and the Security Trustee's representative, only if:
 - The "stepping in" notice is deemed to have been withdrawn
 - The Security Trustee or its representative notifies the HAC 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, the Project Partnership and ServiceCo are not, in the HAC Project Director's reasonable opinion, using all reasonable endeavours to remedy a notified and continuing breach that would otherwise entitle the HAC to terminate the Project Deed
 - After the preparation of the *Step-In Report*, the Security Trustee's representative is not curing the material breaches in accordance with the *Step-In Report*, or
 - A new "project company termination event" occurs as a result of matters not identified in and being addressed under the *Step-In Report*. (The HAC may not, however, terminate the Project Deed in these circumstances if the new "project company termination event" is a "persistent breach" caused by a continuation or recurrences of a *type or class* of breach and this "persistent breach" does not have a material adverse effect on the hospital's "hospital functions" or the HAC's interests. In this case, the new breach or breaches producing the "persistent breach" must be instead be addressed under an updated *Step-In Report*.)

Extensions and termination of the Security Trustee's 'step in' period

The Security Trustee may seek an extension of its "step in" period, giving the HAC's Project Director an updated *Step-In*

Report with a detailed description of the steps being taken and proposed by the Security Trustee. The Project Director may grant or reject an extension in his or her absolute discretion.

The Security Trustee's representative may at any time terminate the "step in" by giving the HAC ten days' written notice.

If the "project company termination event" which led to the "step in" is still continuing when the "step in" ends, the HAC will become entitled to terminate the Project Deed, by giving the Project Partnership and ServiceCo at least 20 business days' written notice, and the arrangements described in section 3.6.6 will apply.

Replacement of subcontractors

Provided the HAC grants its prior consent, the Security Trustee, the Project Partnership and/or ServiceCo may, at any time during the "step in" period,

- Novate the Construction Contract, the Hard Facilities Management Deed, the Soft Facilities Management Deed, the Interface Deed or any other construction or operations subcontract to a replacement subcontractor, or
- Terminate any of these subcontracts and appoint a replacement subcontractor.

The HAC may not withhold its consent if:

- It has been provided with details about the proposed replacement contractor and the proposed novation or appointment
- The proposed replacement contractor is a reputable corporation and, in the HAC's reasonable opinion, has sufficient expertise, ability and financial and commercial standing to carry out the relevant obligations
- The terms of the novation or appointment are reasonably acceptable to the HAC
- The proposed replacement contractor agrees to be bound by the contracts proposed for novation or other terms agreed to by the HAC, acting reasonably, and
- The HAC bears none of the associated costs.

Replacement or sale of contractors

Similarly, at any time during the "step in" period the Security Trustee may procure:

- The transfer of the Project Partnership's and ServiceCo's rights and responsibilities under the Project Deed and the other major project contracts, by assignment or novation, to a substitute contractor nominated by the Security Trustee and approved by the HAC, or
- The sale or other transfer of all of the capital, equity or units on the Project Partnership and ServiceCo to a

substitute contractor nominated by the Security Trustee and approved by the HAC.

The Security Trustee must give the HAC at least 60 days' written notice of any such transfer, and the HAC must notify it whether the proposed transferee is acceptable within 30 days of receiving all the information it needs to make this decision.

The HAC may not withhold or delay its decision if:

- It is reasonably satisfied the proposed substitute contractor:
 - Has the necessary legal capacity, power or authority
 - Has the necessary technical competence and financial standing or resources, and
 - Is not an unsuitable or inappropriate organisation to have an interest in the hospital, its facilities or the hospital site
- The proposed substitute contractor is not a related corporation of the Project Partnership, ServiceCo, the Construction Contractor, the Hard Services Contractor, the Soft Services Contractor or any other Project Partnership or ServiceCo subcontractor, and
- The terms of the transfer are satisfactory to the HAC.

Once the HAC has granted its consent, the parties must use their best endeavours to execute the necessary legal documents, including property transfers and assignments or novations of the Labour Services Agreement and the PAFA Act Guarantee or, if the Labour Services Agreement is not able to be transferred, its replacement by equivalent arrangements under the project's contracts so that the substitute contractor is no worse off.

Once the transfer becomes effective,

- Any existing grounds for the HAC to terminate the Project Deed will cease to have any effect, provided the substitute contractor remedies any continuing breaches or "project company termination event" within the times specified in the *Step-In Report* or, in the case of breaches or events that cannot be remedied, has implemented a program acceptable to the HAC to prevent a recurrence and/or overcome or mitigate the effects
- Any accrued warning notices about breaches (as part of the processes potentially leading to a "persistent breach") will be cancelled
- Any monthly payment deductions or "unit failures" will be disregarded for the purpose of determining whether there has been a "breach", as defined in section 3.6.5.3, provided a breach notice has not already been issued
- If the transfer involved novation or assignments of the contracts, the substitute contractor will effectively take

over from the Project Partnership and ServiceCo under the project contracts, and

- The HAC, the substitute contractor and its new financiers, or their agent or security trustee, must enter into a tripartite deed on substantially the same terms as the Financiers Tripartite Deed.

3.6.5.7 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 above.

The Security Trustee must notify the HAC within two business days if it becomes aware of any finance default, providing reasonable details and indicating whether, when and how it intend to exercise its rights under the financing agreements. The Security Trustee must also promptly notify the HAC if its intentions change or it is instructed to take action to enforce the debt financiers' securities.

From that point on, the rights and obligations of the parties under the Financiers Tripartite Deed's arrangements are the same as those described in section 3.6.5.6 above, except that the Security Trustee may procure a transfer to a suitable substitute contractor not only during any "step in" period but also following any enforcement of the debt financiers' securities.

3.6.6 Termination by the HAC for Project Partnership and ServiceCo defaults

3.6.6.1 Termination for a failure to obtain a satisfactory tax ruling

If the Project Partnership and ServiceCo fail to obtain a binding tax ruling from the Australian Taxation Office by 30 May 2007 to the effect that section 51AD of the Income Tax Assessment Act will not apply to the project, the HAC may terminate the Project Deed, in its sole discretion.

If the HAC does so,

- The Project Partnership and ServiceCo will not be entitled to any compensation
- The HAC's Project Director may require the Project Partnership and ServiceCo, at no cost to the HAC, to:
 - Transfer their title, interests and rights in any of their works, the hospital and the hospital site, and
 - Transfer the Construction Contract, the Hard Facilities Management Deed, the Soft Facilities Management Deed and/or any other subcontracts, in accordance with the Construction Side Deed, the Hard Services Contractor Side Deed, the Soft Services Contractor Side Deed, the equivalent side deed required for each other subcontract and/or

the subcontractor's Collateral Warranty Deed (sections 3.3.9 and 3.4.5), as described in section 3.6.1.2, and

- The Project Partnership and ServiceCo must facilitate a smooth transfer of responsibility for the services they were to have provided to a new project company or the HAC and take no action at any time, before or after the termination of the Project Deed, to prejudice or frustrate such a transfer.

3.6.6.2 Termination for a 'project company termination event'

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 3.6.5.6), the HAC may issue a termination notice to the Project Partnership and ServiceCo, giving them at least 20 business days' notice, and at the end of this notice period:

- The Project Deed will terminate
- The SubLease and SubSubLease will also terminate (if they have commenced)
- The HAC 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 3.6.6.3 below
- The Project Partnership and ServiceCo will be entitled to compensation, as prescribed in the "termination payments" schedule to the Project Deed and as determined under the arrangements discussed in sections 3.6.6.3 to 3.6.6.5 below, and
- The HAC's Project Director may require the Project Partnership and ServiceCo, at no cost to the HAC beyond this compensation, to:
 - Transfer their title, interests and rights in any of their works, the hospital and the hospital site, and
 - Transfer the Construction Contract, the Hard Facilities Management Deed, the Soft Facilities Management Deed and/or any other subcontracts, in accordance with the Construction Side Deed, the Hard Services Contractor Side Deed, the Soft Services Contractor Side Deed, the equivalent side deed required for each other subcontract and/or the subcontractor's Collateral Warranty Deed (sections 3.3.9 and 3.4.5), as described in section 3.6.1.2.

In addition, as already discussed in section 3.4.12, during the notice period and then for the following 12 months, the Project Partnership and ServiceCo must fully cooperate with the transfer of any or all of their services to the HAC, HNE, MHCN and/or any new contractor providing the same or similar services.

Among other things, they must:

- Transfer all their title to and interests and rights in the works, the hospital and the hospital site to the HAC or the new contractor, free of any encumbrances
- Liaise with the HAC's 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 hospital at reasonable times and on reasonable notice, provided this does not interfere with their services
- Give the Project Director and/or the new contractor all the information about the hospital, the hospital site 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.

3.6.6.3 The HAC's right to elect to call new tenders following a termination for a 'project company termination event'

If the HAC terminates the Project Deed for a "project company termination event" it 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 compensation payable to the Project Partnership and ServiceCo, if any, as set out in the same schedule.

The option to call new tenders is available only if:

- The HAC notifies the Project Partnership and ServiceCo that it intends 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 3.6.5.6, for the "project company termination event" which now entitles the HAC to terminate the Project Deed, *and*
- The "project company termination event" entitling the HAC to terminate the Project Deed did *not* occur while the Security Trustee had "stepped in" to remedy another, unrelated "project company termination event" under the Financiers Tripartite Deed arrangements described in sections 3.6.5.6, *and*
- There is a "liquid" market immediately before the time of tendering, with sufficient willing bidders for "public private partnership" or similar contracts, at the price likely to be achieved, to provide a reliable indicator of the "fair value" of the relevant works and/or services.

3.6.6.4 Procedures and compensation if the HAC calls new tenders

If the HAC elects to call new tenders,

- The HAC’s Project Director, the Project Partnership and ServiceCo must follow procedures set out in the “termination payments” schedule to the Project Deed.
- Within 20 business days of receiving a capital sum from the successful tenderer, the HAC must pay the Project Partnership and ServiceCo, as a full and final settlement of all their claims and rights against the HAC, an amount equal to:
 - The highest capital sum offered by any tenderer complying with the tender’s qualification criteria, *plus*
 - Any unpaid amounts due and payable to the Project Partnership or ServiceCo by the HAC, HNE or MHCN under the project contracts on the termination date, to the extent these amounts are not otherwise taken into account, *plus*
 - All credit balances in bank accounts held by or on behalf of the Project Partnership and/or ServiceCo on the date the successful tender was received, to the extent these amounts are not otherwise taken into account, *plus*
 - Any insurance proceeds and other amounts which are owed to the Project Partnership and ServiceCo and which they are entitled to retain, to the extent these amounts are not otherwise taken into account, *less*
 - The reasonable costs of the tender process to the HAC, and *less*
 - Any amounts the HAC is entitled to set off or deduct under the Project Deed, including all its reasonable costs associated with the “project company termination event”.

If this final payment amount is negative, the HAC need not make any final payments to the Project Partnership or ServiceCo, the Project Partnership must pay the HAC this amount and the HAC will be released from all its liabilities to the Project Partnership and ServiceCo for breaches and/or termination of the Project Deed or any other project contract.

- In the interim period between the termination of the Project Deed and date on which the payment described above is paid by the HAC—or, if has been calculated that no such payment will need to be made, any earlier commencement of a new contract with the successful tenderer—the HAC must make monthly payments to the Project Partnership and ServiceCo, again calculated in

accordance with the “termination payments” schedule to the Project Deed, equal to:

- One-third of the relevant “quarterly payment” that would have been used to calculate their monthly payment under the arrangements described in section 3.4.8.1, *other than* the ServiceCo “general services”, security services, catering services, cleaning services, materials management services, building and equipment maintenance services, grounds and gardens maintenance services, life cycle refurbishment, utility services and insurance components of this “quarterly payment”, *less*
- Any rectification costs reasonably incurred by the HAC in remedying their defaults during the relevant month, except to the extent that these costs are incurred in providing the above types of services and the costs actually incurred are less than the component amounts deducted above.

If this is a negative amount, it must be carried forward and set off against any future monthly amounts payable to the Project Partnership and ServiceCo.

3.6.6.5 Procedures and compensation if new tenders are not called

If the HAC elects to require expert determination, or has no option but to use expert determination,

- The Project Partnership and ServiceCo will be entitled to receive interim monthly payments, as described above, until their final payment, described below.
- The independent expert, appointed in accordance with the procedures applying for the appointment of independent experts for dispute resolution purposes (section 3.5.9), must apply a formula set out in the “termination payments” schedule to the Project Deed to calculate an “estimated fair value” of a contract on the same terms as the Project Deed, apart from specified exceptions.

Two such formulae are presented in the “termination payments” schedule. The first, for a termination prior to the completion of the Stage 1 works, focuses on construction costs, while the other, for a termination after the Stage 1 works are completed, focuses primarily on forecasts of future monthly payments and costs.

The independent expert’s determination of the “estimated fair value” will bind the HAC, the Project Partnership and ServiceCo.

- If the “estimated fair value” is a negative amount, the HAC need not make any final payments to the Project Partnership or ServiceCo, the Project Partnership must pay the HAC this amount and the HAC will be released from all its liabilities to the Project Partnership and

ServiceCo for breaches and/or termination of the Project Deed or any other project contract.

- Otherwise, the HAC must, within ten business days of the expert's determination, pay the Project Partnership and ServiceCo, as a full and final settlement of all their claims and rights against the HAC, an amount equal to:
 - The "estimated fair value", *plus*
 - All credit balances in bank accounts held by or on behalf of the Project Partnership and/or ServiceCo on the date the successful tender was received, to the extent these amounts are not otherwise taken into account, *plus*
 - Any insurance proceeds and other amounts which are owed to the Project Partnership and ServiceCo and which they are entitled to retain, to the extent these amounts are not otherwise taken into account, *less*
 - The reasonable costs of the tender process to the HAC, and *less*
 - Any amounts the HAC is entitled to set off or deduct under the Project Deed, including all its reasonable costs associated with the "project company termination event", to the extent these amounts were not already taken into account in the expert's determination of the "estimated fair value".

Interest will accrue on unpaid amounts from the date ten business days after the expert's determination, at the weighted average interest rate for the project's senior debt at the time.

3.6.7 Termination by the Project Partnership or ServiceCo for an HAC default

If:

- Any breach of the Project Deed or any other project contract by the HAC substantially frustrates or makes it impossible for the Project Partnership or ServiceCo to perform their obligations or exercise their rights under the project's contracts for a continuous period of two months or more
- There is an expropriation or requisition of a material part of the assets of the Project Partnership, the Project Partners or ServiceCo, and/or any of their shares or units, by a NSW court or tribunal or a local, State or Commonwealth government, minister, department or authority in NSW, or

- The HAC fails to pay the Project Partnership or ServiceCo any undisputed amount specified in their monthly invoices (section 3.4.8.1)—or any other amount of money, totalling more than \$100,000 (indexed to the CPI from 30 November 2005), that is due to them under the Project Deed—within 20 business days of a formal demand by the Project Partnership or ServiceCo, the Project Partnership and/or ServiceCo may issue a termination notice to the HAC, giving it 40 business days' notice that they intend to terminate the Project Deed for the default, as specified in the notice. A copy of this notice must be sent to the Security Trustee.

If the HAC fails to rectify or overcome the effect of the default within the notice period, at the end of this period:

- The Project Deed—and, if they have commenced, the SubLease and SubSubLease—will terminate
- The Project Partnership and ServiceCo will then be entitled to compensation, as prescribed in the "termination payments" schedule to the Project Deed, that must be calculated on exactly the same basis as compensation payable following a "voluntary" termination of the Project Deed by the HAC, as described in section 3.6.4
- The HAC may defer the acceleration of bonds and the closing out of a swap under the project's private sector debt financing arrangements until after this compensation is paid
- The HAC's Project Director may require the Project Partnership and ServiceCo, at no cost to the HAC beyond this compensation, to:
 - Transfer their title, interests and rights in any of their works, the hospital and the hospital site
 - Transfer the Construction Contract, the Hard Facilities Management Deed, the Soft Facilities Management Deed and/or any other subcontracts, in accordance with the Construction Side Deed, the Hard Services Contractor Side Deed, the Soft Services Contractor Side Deed, the equivalent side deed required for each other subcontract and/or the subcontractor's Collateral Warranty Deed, as described in section 3.6.1.2, and
- The Project Partnership and ServiceCo must facilitate a smooth transfer of responsibility for the services they were to have provided to a new project company or the HAC and take no action at any time, before or after the termination of the Project Deed, to prejudice or frustrate such a transfer.

4 The HAC Security and interactions between the HAC's securities and the debt financiers' securities

4.1 The HAC Security

Under the Newcastle Mater Hospital Fixed and Floating Charge (“the HAC Security”) the Project Partnership and ServiceCo have granted the HAC fixed and floating charges over all their present and future real and personal property interests, including their interests under the project’s contracts, as security for:

- The prompt payment by the Project Partnership and ServiceCo of all amounts owing to the HAC under the Project Deed or other project contracts, and
- The performance by the Project Partnership and ServiceCo of all their other obligations to the HAC under the Project Deed and the other project contracts.

The Security Trustee, the Construction Contractor, the Construction Contractor Guarantors, the Hard Services Contractor, the Hard Services Contractor Guarantor, the Soft Services Contractor and the Soft Services Contractor Guarantor have expressly acknowledged and consented to the creation of the charges.

The Project Partnership, ServiceCo and the Project Partners have 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 and other project contracts, any liens and other rights arising in the ordinary course of business and any encumbrances specifically approved by the HAC.

The Project Partnership and ServiceCo have also promised not to dispose of, permit the creation of an interest in or part with possession of any of its property subject to the fixed charges, other than as agreed to by the HAC.

The relative priorities of the charges created by the HAC Security and the debt financier’s securities are governed by the Financiers Tripartite Deed, as discussed in section 4.2 below. Under these arrangements, the charges created by the HAC Security rank behind the debt financier’s securities but ahead of all other securities affecting the Project Partnership’s and ServiceCo’s property.

To ensure the HAC’s charges will have priority over any subsequently registered charges, unless the HAC agrees

otherwise, the maximum prospective liability secured by the HAC’s charges has been set, for the purpose of determining priorities between the charges under Part 2K.3 of the Corporations Act 2001 and *only* for this purpose, at \$250 million, a figure much higher than the value of all of the Project Partnership’s and ServiceCo’s interests in the project. The HAC Security makes it clear that notwithstanding this provision, the HAC’s 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 HAC Security may be immediately enforced by the HAC, without notice, if:

- The HAC has issued a termination notice for a “project company termination event” (section 3.6.6.2), or
- The Project Deed has been terminated for any reason other than an HAC default (section 3.6.7).

In these circumstances, and again subject to the Financiers Tripartite Deed, the HAC may appoint receiver(s) and/or receiver(s)/manager(s) of the charged property, exercising powers set out in the HAC Security, and the HAC and its authorised representatives may exercise specified powers of attorney granted by the Project Partnership and ServiceCo.

4.2 Consents to and priorities between the HAC and debt financiers' securities

The Financiers Tripartite Deed formally records:

- The HAC’s consent to the debt financier’s securities under the project’s private sector debt financing agreements, and
- As already indicated in section 4.1, the Security Trustee’s consent to the charges created by the HAC Security.

With the exception of what are termed “HAC priority amounts”—any amounts the Project Partnership and/or ServiceCo owe to the HAC because the HAC has taken action, in accordance with the terms of the project contracts, to remedy a default by the Project Partnership and/or ServiceCo—each of the debt financier’s securities has priority over any HAC security, up to the aggregate of the

project's senior debt, all interest on this senior debt and all financing agreement enforcement costs. Beyond this limit, the financiers' securities and the HAC's charges will have equal priority.

Accordingly, any money received in enforcing the debt financiers' securities or the HAC's charges must be applied:

- First, to pay any "HAC 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 HAC's charges.

Until all the amounts secured by the debt financiers' securities have been paid:

- The HAC may not take any action to enforce its charges or apply for insolvency action concerning the Project

Partnership, ServiceCo or the Project Partners unless the Security Trustee agrees, the only exceptions to this being:

- ◻ HAC actions in response to an emergency (see section 3.5.10), and
- ◻ HAC actions to overcome the effects of a "project company termination event" or preserve the project after such an event (see section 3.6.5.6), and
- Notwithstanding the terms of the HAC Security, the HAC's charges will operate only as floating charges unless the Security Trustee agrees otherwise, the only exceptions to this being charges which are expressed to be fixed in the HAC Security and which operate over an asset that is also subject to a fixed charge under the financiers' securities.

5 The NSW Government's guarantee of the HAC's performance

Under the PAFA Act Guarantee of 30 November 2005, between the Minister for Health (on behalf of the State of NSW), the HAC, the Project Partnership, ServiceCo and the Security Trustee, the State of NSW has unconditionally and irrevocably guaranteed the HAC's performance of all its obligations to the Project Partnership, ServiceCo and the Security Trustee under the Project Deed, the Independent Certifier Deed, the Labour Services Agreement, the SubLease, the SubSubLease, the HAC Security, the Construction Side Deed, the Hard Services Contractor Side Deed, the Soft Services Contractor Side Deed, the Financiers Tripartite Deed and any other documents approved 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 30 June 2034 or seven months after any earlier termination of the contracts), even if the HAC is discharged from any or all of its guaranteed obligations under the contracts for any reason whatsoever.

The State must satisfy its obligations under its guarantee, within 21 days of a demand made on it by the Project Partnership, ServiceCo 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 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 Mater Hospital PPP 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 in December 2005, and is based on the Mater Hospital PPP contracts as at 30 December 2005. Subsequent amendments or additions to these contracts, if any, are not reflected in this summary.

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

The Project Deed (with its schedules) and the Labour Services Agreement, other than portions of these documents subject to confidentiality restrictions, were publicly released in January 2006, and may be downloaded from <https://tenders.nsw.gov.au/health>.