

Sunshine Coast University Hospital: Project Agreements Summary

1 Introduction

- 1.1 This report summarises the main agreements for the Sunshine Coast University Hospital (**SCUH**) Project which is being delivered in partnership with the private sector.
- 1.2 It has been prepared by Freehills for Queensland Health (**QH**) in accordance with the public disclosure requirements of the Queensland Government's 2008 guidelines *Public Private Partnerships Guidance Material - Value for Money Framework and Probity and Process Governance* (**Guidelines**), and has been submitted to the Auditor-General for endorsement as a fair account of the Project's agreements, prior to tabling in Parliament.
- 1.3 As required by the Guidelines, this report:
 - (a) details those agreements to which the State of Queensland (through QH) is a party; but
 - (b) does not disclose the private sector parties' cost structure or profit margins, its intellectual property or other matters where disclosure would put them at a commercial disadvantage with competitors.
- 1.4 This report also explains other agreements that the State is not a party to, to the extent necessary to explain the State's exposure.
- 1.5 This report has been prepared for information purposes for Parliament and the public, and is not intended for use as a substitute for the agreements.

The Project

- 1.6 On 18 August 2006, the Queensland Government announced its intention to establish a new tertiary hospital at Kawana on the Sunshine Coast, and the government purchased the site at Kawana in 2007.
- 1.7 The scope of the project includes the following:
 - (a) masterplanning of the entire health campus (excluding the private hospital which is currently being constructed on the site), subject to certain constraints;
 - (b) designing, constructing and commissioning –
 - (i) the **Facility**, comprising the Sunshine Coast University Hospital, a tertiary level public hospital (**SCUH**); the Skills Academic and Research Centre (**SARC**), integrated with the SCUH; car parking, providing a whole of site car parking solution (**Carpark**); a central energy plant (**CEP**), and associated infrastructure for the campus, including internal roads, parkland and utility services;

- (ii) the **Designated Commercial Areas** (or **DCAs**) which include commercial retail developments to support the operation of the Facility; and
 - (iii) the **Kawana Way Duplication**, as returned works, which comprises the duplication of approximately 1.1km of Kawana Way so that Kawana Way will become two lanes in each direction alongside the site;
 - (c) partially financing – the capital funding requirements for the project, net of an \$820 million government contribution (in the form of a capital contribution, not a loan);
 - (d) providing services – provision of help desk and room booking services, building maintenance, utilities, medical gas and laboratory gas management, grounds and garden maintenance, pest control, security and carparking;
 - (e) Carpark operations – assuming demand risk, administration of QH staff, premium and visitor passes and associated revenues, and negotiating third party staff arrangements;
 - (f) commercial retail operations – assuming the development and operations risk for the Designated Commercial Areas within the Facility,
- (the **Project**).
- 1.8 The Facility to be delivered as part of the Project will offer a range of new and expanded services, meaning an estimated 10,000 patients each year will no longer have to travel to Brisbane for complex treatments.
 - 1.9 The Facility will open with about 450 beds in 2016, and will grow to a 738 bed Facility by 2021.
 - 1.10 The Kawana Way Duplication will be completed and adopted by the Department of Transport and Main Roads in late 2013.
 - 1.11 The SCUH will be the centre piece in a network of hospitals which includes Nambour General Hospital, Caloundra Health Service, Gympie Hospital, Maleny Soldiers Memorial Hospital and a comprehensive range of community and primary health services.
 - 1.12 On 18 July 2012, the State entered into the Project Deed with the Exemplar Health (SCUH) Partnership (**Project Co**), to deliver the Project.
 - 1.13 Contract Close was achieved on 18 July 2012 and Financial Close was achieved on 31 July 2012.
 - 1.14 The Project involves two phases:
 - (a) the design and construction phase (**Design and Construction Phase**) which commenced on the date of Financial Close (31 July 2012); and
 - (b) the operating term (**Operating Term**) which will commence upon completion of construction of Stage 1 of the Facility and end on the

25th anniversary of the Date for Commercial Acceptance of Stage 1 (currently 15 November 2016), unless terminated earlier.

- 1.15 The Design and Construction Phase can be further broken into three stages: the Stage 1, Stage 2 and Stage 3 Design and Construction Phases. The Stage 2 and Stage 3 Design and Construction Phase will run concurrently with the Operating Term.
- 1.16 Stage 1 construction is expected to be completed in late 2016, at which time Stage 1 of the Facility will open with about 450 beds. Stage 1 construction will also include the building envelope for Stage 2 and Stage 3 of the Facility. Further fit out works will be undertaken in stages during 2018 and 2021 to complete Stage 2 and Stage 3. Stage 2 and Stage 3 are expected to reach completion on 30 June 2018 and 30 June 2021.
- 1.17 PPP delivery will allow the State to open the hospital sooner than could have been done under a traditional procurement method and will lock in the maintenance funding for the Facility over the course of the 25 year term.
- 1.18 The State will provide a capital contribution in respect of the Project via capital contribution payments (**Government Contribution**) during the Design and Construction Phase for all Stages.
- 1.19 The State will pay Project Co a performance based quarterly service payment during the Operating Term until the end of the contract term (at this time anticipated to be 14 November 2041).

Process in awarding the contract

- 1.20 The evaluation and contract finalisation processes were conducted in accordance the *Queensland Government's Public Private Partnership policy - achieving value for money in public infrastructure and service delivery*.
- 1.21 In April 2011, QH issued an Invitation for Expressions of Interest (EOI) for the Project. Five consortia responded to the EOI and on 13 July 2011, three consortia were short-listed to participate in the Request for Binding Bids stage of the tender process. On 30 August 2011 those three consortia were invited to submit binding bids for the Project. Binding bids were required by 28 February 2012.
- 1.22 The binding bids were subjected to extensive evaluation in accordance with an evaluation plan. All evaluation processes were overseen by the Project's Probity Auditor.
- 1.23 Project Co and the Minister for Health signed the Project Deed on 18 July 2012, and following entry into the Project Deed, the State announced the selection of Exemplar Health (SCUH) Partnership as the successful proponent.
- 1.24 Financial Close occurred on 31 July 2012.

2 Overview of the Project's contract structure, key participants and ownership structure

Project participants

- 2.1 An overview of the Project's contract structure, key participants, and debt and ownership structure are detailed in the diagrams below (*Figures 1, 2 and 3*).

The Minister for Health has entered into the contractual arrangements (**Project Documents**) on behalf of the State acting through QH.

Figure 1 – Contractual Structure (Design and Construction Phase)

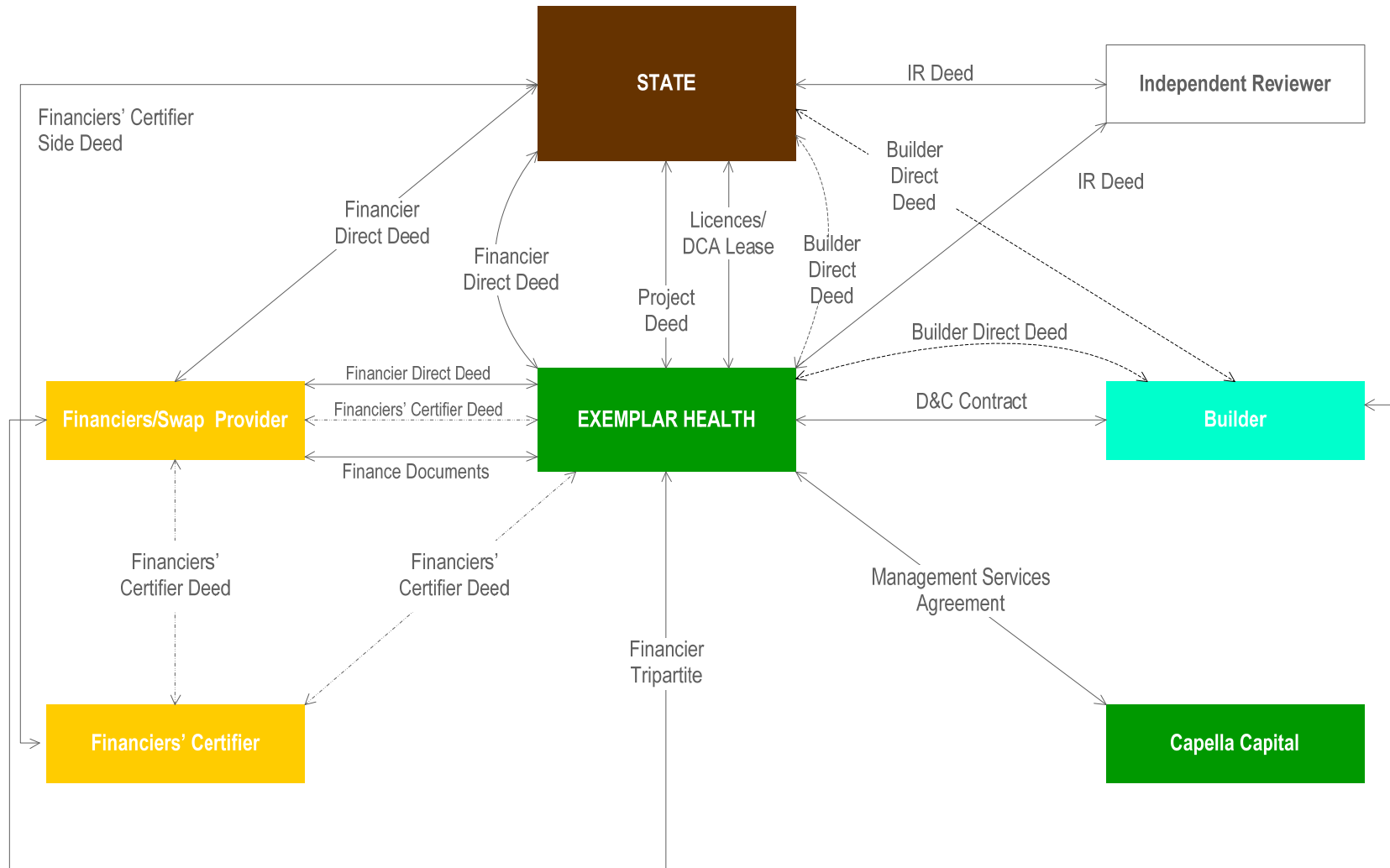


Figure 2 – Contractual Structure (Operating Term)

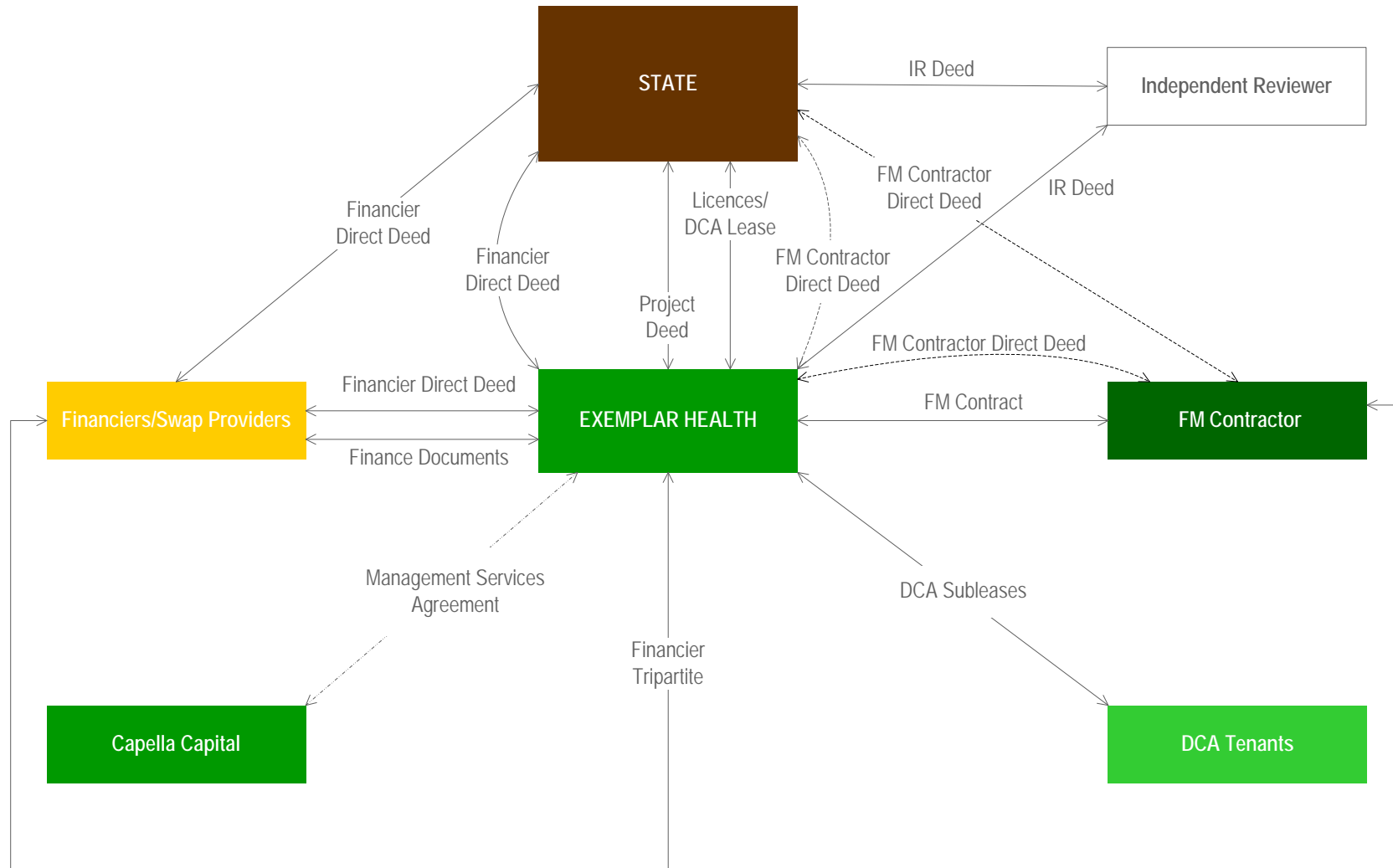
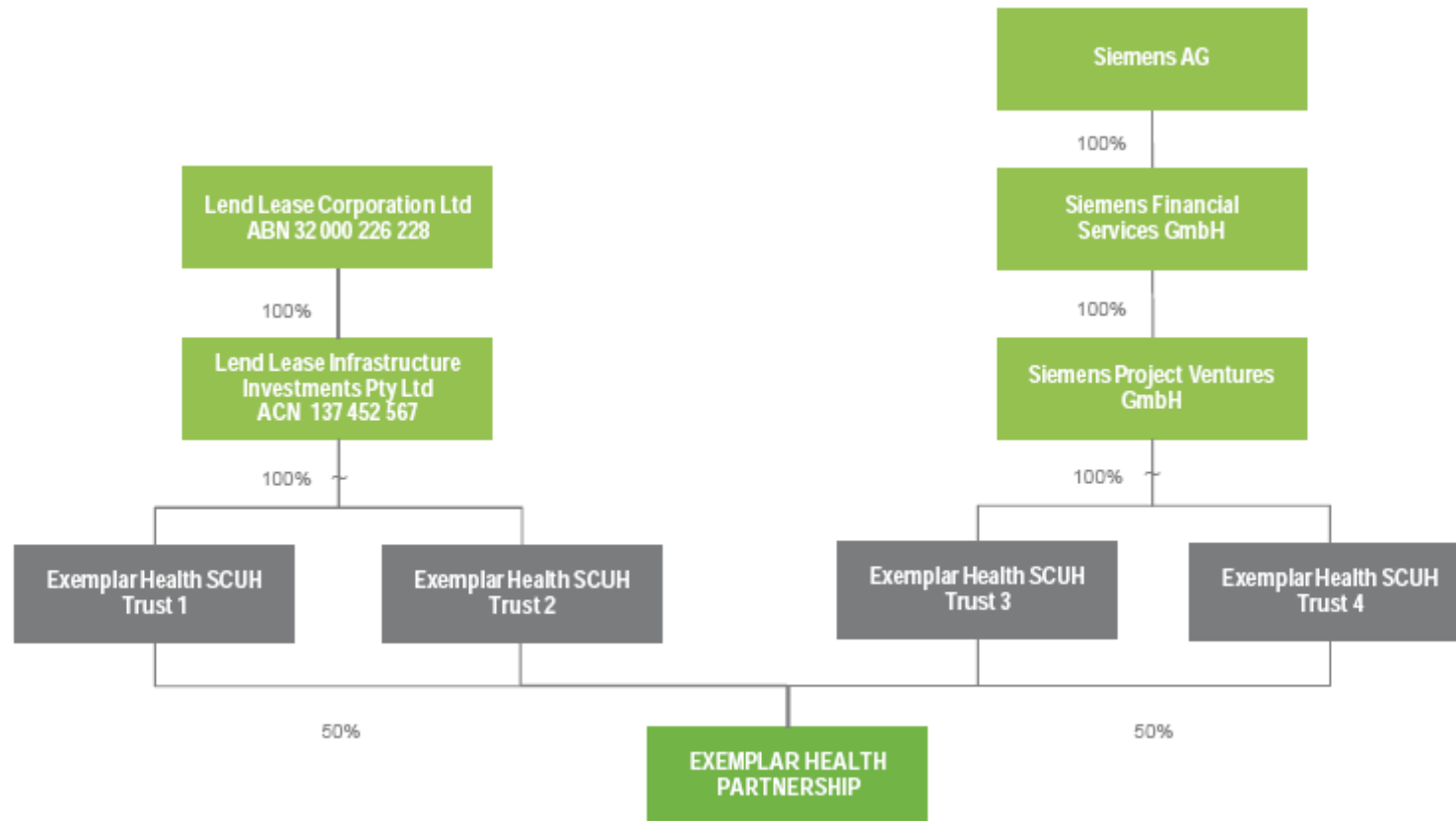


Figure 3 – Ownership Structure



2.2 The primary private sector parties which have contracted with the State are:

- (a) **Exemplar Health (SCUH) Partnership** (Project Co) - a partnership consisting of the EH (SCUH) Partners being:
 - (i) Exemplar Health (SCUH) Trust 1 and Exemplar Health (SCUH) Trust 2, both established by wholly owned subsidiaries of Lend Lease Infrastructure Investments Pty Ltd, which is wholly owned by Lend Lease Corporation Ltd; and
 - (ii) Exemplar Health (SCUH) Trust 3 and Exemplar Health (SCUH) Trust 4, both established by wholly owned subsidiaries of Siemens Project Ventures GmbH, which is wholly owned by Siemens Financial Services GmbH, which in turn is wholly owned by Siemens AG,and organised under the laws of the State of Victoria and an Investors Agreement dated 9 July 2012.
- (b) **Lend Lease Project Management and Construction Pty Ltd** (Builder) – to provide building services under the Construction Contract. The Builder has also agreed to grant to the State certain rights in relation to the Construction Contract under the Builder Direct Deed.
- (c) **Lend Lease Corporation Limited** (Builder Guarantor) – the ultimate holding company of the Builder which guarantees the performance by its subsidiary of its obligations under the Construction Contract. The Builder Guarantor has also agreed to grant to the State certain rights in relation to the Builder Guarantee under the Builder Direct Deed.
- (d) **Spotless Facility Services Pty Ltd** (FM Contractor) – to provide facilities management services under the FM Contract. The FM Contractor has also agreed to grant to the State certain rights in relation to the FM Contract under the FM Contractor Direct Deed.
- (e) **Spotless Group Limited** (FM Contractor Guarantor) – the ultimate holding company of the FM Contractor which guarantees the performance by its subsidiary of its obligations under the FM Contract. The FM Contractor Guarantor has also agreed to grant to the State certain rights in relation to the FM Guarantee under the FM Contractor Direct Deed.
- (f) **Donald Cant Watts Corke (Qld) Pty Ltd** (Independent Reviewer) – to undertake independent reviewer services under the Independent Reviewer Deed relating to the design, construction, installation, and completion and commissioning of the Project.
- (g) **Stella SCUH Finance Pty Ltd** (Finance Co) - the financing vehicle in relation to the Project, which has contracted with the State and Project Co as part of the financing arrangements for the Project. Finance Co was established for, among other things, acquiring, funding and holding securitised assets, and is the borrower under the financing documents with the debt financiers.

- (h) **Aquenta Consulting Pty Ltd** (Financiers' Certifier) – to provide financiers' certifier services under the Financiers Certifier Deed. The Financiers' Certifier has also agreed to grant to the State certain rights under the Financiers' Certifier Side Deed.
- (i) **National Australia Bank Limited** (State's Account Agent) – to act as the State's Account Agent with respect to the operation of the State Payment Account. The State's Account Agent is appointed by the State to authorise the withdrawal or transfer of funds held in the State Payment Account.
- (j) **National Australia Bank Limited** - the Security Trustee and Senior Agent of the debt financiers.

Contractual Structure

- 2.3 The primary contract is the Sunshine Coast University Hospital Project Deed (Project Deed), dated 18 July 2012, between the State and Project Co.
- 2.4 Under the Project Deed, Project Co has agreed to:
 - (a) undertake the design, construction, completion and commissioning of:
 - (i) the Facility;
 - (ii) the Designated Commercial Areas; and
 - (iii) the Kawana Way Duplication,(each as described in paragraph 1.7),
 - (b) provide certain facilities management services in respect of the Facility and operate the Carpark; and
 - (c) partially finance the Project,in return for payment by the State in accordance with the terms of the Project Deed.
- 2.5 The Project Deed sets out the terms under which:
 - (a) Project Co must design, construct, complete and commission the Facility and the Kawana Way Duplication. This will be achieved through contractual arrangements that Project Co has put in place with the Builder.

The performance of the Builder under the Construction Contract with Project Co has been guaranteed to Project Co by the Builder Guarantor under parent company guarantees.

The Independent Reviewer, appointed under the Independent Reviewer Deed, will independently verify the design, construction, completion and commissioning of the Facility and Kawana Way Duplication, and make certain determinations under, and issue certificates as required by, the Project Deed.
 - (b) Project Co must provide services in respect of the Facility for the Operating Term.

This will be achieved through contractual arrangements between Project Co and the FM Contractor.

The performance of the FM Contractor under the FM Contract with Project Co has been guaranteed to Project Co by the FM Contractor Guarantor.

- (c) The State will make:
- (i) progress payments as consideration for Project Co progressively carrying out the works in relation to the Kawana Way Duplication;
 - (ii) Government Contribution payments as consideration for Project Co progressively carrying out the works in respect of the Facility; and
 - (iii) quarterly service payments in accordance with the Payment Schedule of the Project Deed as consideration for Project Co providing services during the Operating Term. An abatement regime is contained in the Payment Schedule of the Project Deed, whereby deductions may be made if performance indicators are not met.
- (d) The State will grant to Project Co a construction licence for the Design and Construction Phase for Stage 1, for the sole purpose of implementing the works (in respect of both the Facility and the Kawana Way Duplication) pursuant to the Project Deed, and exercising Project Co's rights and complying with its obligations under each project document to which the State and Project Co are a party (**Construction Licence**). The Construction Licence commences on the date of Financial Close (31 July 2012) and terminates on Project Co achieving Technical Completion of Stage 1 of the Facility, or if sooner, upon Project Co completing part of the Carpark, in respect of that part of the site on which that part of the Carpark is constructed. (Note that the Project Deed contains a regime for early completion of the Carpark (or part thereof) during the Stage 1 Design and Construction Phase.) Project Co acknowledges that the site is used by other persons and the Construction Licence does not confer exclusive possession on Project Co.
- (e) The State will grant to Project Co on completion of Stage 1 of the Facility, a licence over the site for the Operating Term, to enable Project Co to perform the services (the **Operating Term Licence**). The Operating Term licence will also enable Project Co to perform the works in respect of Stage 2 and Stage 3 of the Facility.
- (f) The State will grant to Project Co on early completion of the Stage 1 Carpark, a licence to enter on and occupy that part of the site as necessary to operate such part of the Carpark which has been completed by Project Co prior to the remainder of Stage 1 of the Facility (Stage 1 Carpark Licence). This licence will only be granted to Project Co if Project Co completes the Stage 1 Carpark prior to

completion of the remainder of Stage 1 of the Facility, and will terminate upon the Operating Term Licence being granted.

- 2.6 Some of the other rights and obligations of the State and Project Co are subject to restrictions or additional process requirements under the:
- (a) Builder Direct Deed;
 - (b) FM Contractor Direct Deed;
 - (c) Financier Direct Deed;
 - (d) Independent Reviewer Deed;
 - (e) Financiers' Certifier Side Deed; and
 - (f) Securitised licence structure documents.
- 2.7 The State has rights to step-in and take over the Project under the Project Deed, the Builder Direct Deed, the FM Contractor Direct Deed and the Financier Direct Deed (refer below for summaries of these documents). Similarly, the debt financiers have step-in rights and security under the debt financing documents.

Financier Direct Deed

- 2.8 The Financier Direct Deed governs the interaction between the State's and the debt financiers' respective rights. Under the Financier Direct Deed:
- (a) the State consents to the granting of the security by the Security Trustee;
 - (b) amendments to the debt financing documents and assignment of the debt financiers' rights are restricted;
 - (c) each party's enforcement or step-in rights are acknowledged and co-ordinated including:
 - (i) minimisation of disruption to the Project by debt financier enforcement; and
 - (ii) the State's right to step-in or terminate if the debt financiers are exercising their enforcement rights.
- 2.9 The Financier Direct Deed also includes intercreditor-type provisions in relation to the State's Government Contribution, including restrictions on the debt financiers' ability to release funds in the construction proceeds account and the application of equity proceeds.

Key Subcontractor Direct Deeds

- 2.10 The Key Subcontractors (Builder and FM Contractor) have entered into direct deeds with the State. Under the Key Subcontractor Direct Deeds:
- (a) the Key Subcontractor and its respective parent company guarantor acknowledge the State's rights under the Project Deed to step-in and exercise all or any of Project Co's powers and obligations under the relevant Key Subcontract and subsequently step-out, and that the State's liability for any loss caused by step-in is limited;

- (b) the State may require a novation of the relevant Key Subcontract (and related agreements) to itself or a third party if the Project Deed is terminated. This permits the State to either assume the role of Project Co itself, or to appoint a replacement Project Co, whilst maintaining all downstream arrangements (for example, if Project Co is insolvent but the State wishes for the Key Subcontractor to continue to perform its obligations); and
- (c) the Key Subcontractor's ability to exercise its rights under the relevant Key Subcontract to suspend or terminate that Key Subcontract is restricted. The Key Subcontractor must give the State prior notice and an opportunity to rectify the underlying cause of the suspension or termination right prior to exercising that right.

Independent Reviewer Deed

- 2.11 The parties to the Independent Reviewer Deed are the State, Project Co and the Independent Reviewer. Under the Independent Reviewer Deed:
- (a) the State and Project Co jointly appoint the Independent Reviewer;
 - (b) the services to be performed by the Independent Reviewer and related requirements (e.g. quality of services, key people, etc) are set out;
 - (c) provisions are included governing the payment of the Independent Reviewer;
 - (d) the minimum insurances (including deductibles) required to be taken out by the Independent Reviewer are prescribed; and
 - (e) the interaction with, and priority over, the other independent certification functions that the Independent Certifier is appointed to carry out with respect to the downstream documents (i.e. under the Sub-Independent Reviewer Deed) are addressed.

Securitised licence structure documents

- 2.12 In accordance with the Project Deed, the Receivables Purchase Deed and the Payment Directions Deed, the parties have entered into a securitised licence structure whereby:
- (a) the State will pay to Project Co the completion price;
 - (b) Finance Co will pay to the State a securitisation payment; and
 - (c) Finance Co is assigned the benefit of the licence payments due to the State under the Operating Term Licence.
- 2.13 The securitised licence structure provides additional value for money for the State and does not result in any increased State risk allocation.

Conditions Precedent

- 2.14 Although the Project Deed was executed on 18 July 2012, most of the terms, conditions and obligations in the Project Deed did not become binding until all the conditions precedent were satisfied or waived. A summary of the conditions precedent is included in Schedule 1 to this document.

- 2.15 Each of the conditions precedent set out in Schedule 1 to this document were satisfied, with the exception of the condition precedent set out in clause 6.3(g) of the Project Deed regarding insurances, which was waived (on certain conditions) on 31 July 2012. Accordingly, on 31 July 2012, following satisfaction or waiver of all the conditions precedent, the Project Deed became unconditional.
- 2.16 The matters relating to the condition precedent contained in clause 6.3(g) of the Project Deed, which were waived by the State on certain conditions, were addressed to the State's satisfaction and the State issued a letter to Project Co confirming the same on 15 August 2012.

3 The Project Deed

General obligations of Project Co and risks accepted

General obligations and objectives

- 3.1 Project Co's general obligations are that it must undertake the:
- (a) partial financing, design, construction, completion, commissioning, operation, maintenance and handback of the Facility and the Designated Commercial Areas in accordance with the Project Deed and other specified project documents; and
 - (b) design, construction, completion and commissioning of the Kawana Way Duplication in accordance with the Project Deed.
- 3.2 In fulfilling its obligations, Project Co must have regard to the agreed objectives contained in the Project Deed. A summary of these agreed objectives is set out in Schedule 2 to this document.

Project Co accepted risks

- 3.3 Project Co has accepted risks associated with the Project including:
- (a) risks associated with the costs of partially financing, designing, constructing, completing and commissioning the Facility;
 - (b) the operation (of some non-clinical functions) and maintenance of the Facility;
 - (c) the handback of the Facility in the condition specified in the Project Deed; and
 - (d) the risk of liability for taxes or duty being greater than estimated by Project Co or its advisers.

State retained risks

- 3.4 The State has retained some risks, which include the Compensable Extension Events and Compensable Intervening Events listed in Schedule 3 to this document. The risks retained by the State include the following risks in respect to the site conditions and change in law.
- 3.5 *Site Conditions*

Project Co warrants that it has examined all documents and other information provided by the State prior to execution of the Project Deed and the State is not liable for any inadequacy, inaccuracy or incompleteness of that information. The State is indemnified against loss suffered by a third party as a result of relying on this information, where it has been disclosed by Project Co.

- 3.6 Project Co accepts the site and its surroundings in their current physical condition, and generally accepts risks associated with site conditions, however the State retains some risk in relation to the following:
- (a) contamination caused by the State or any operator of the Facility;
 - (b) the discovery of artefacts; and
 - (c) native title and cultural heritage claims.

Change in Law

- 3.7 Where a change in law or change in policy meets certain criteria (for example, with respect to the date of effect of the change in law or policy, jurisdiction of the law or policy, and specified monetary thresholds), the State may be required to provide compensation to Project Co in accordance with the principles set out in the Project Deed. Conversely, where a change in law or change in policy leads to a beneficial outcome for Project Co (i.e. a cost saving) the State is entitled to share that cost saving in accordance with the same principles.
- 3.8 Where the change in law has a capital cost effect, Project Co is entitled to claim and the State may be liable to pay compensation to Project Co, only if the change in law came into effect after the date of Commercial Acceptance of Stage 1 of the Facility. That is, Project Co accepts the risk of changes in law which have a capital cost effect for the duration of the Design and Construction Phase for Stage 1, and in respect of the Kawana Way Duplication.
- 3.9 Alternatively, where the change in law has an operational cost effect, or where there is a change in policy, Project Co is entitled to claim and the State may be liable to pay compensation to Project Co, if the change in law came into effect after the date of the Project Deed.
- 3.10 'Law', in this context, includes legislation (including subordinate legislation), court made law and Government policy requirements with which Project Co is legally required to comply.

Site, Access and Interface

- 3.11 As set out in paragraph 2.5 the State will grant to Project Co the Construction Licence for the Design and Construction Phase relating to Stage 1 of the Facility and will grant the Operating Term Licence to Project Co for the Operating Term. In addition, if Project Co completes the Stage 1 Carpark prior to completion of the balance of Stage 1 of the Facility (i.e. prior to the Operating Term Licence being granted), the State will grant to Project Co the Stage 1 Carpark Licence to enable Project Co to operate that part of the Stage 1 Carpark which has been constructed prior to the balance of Stage 1 of the Facility.

- 3.12 Project Co is responsible for gaining access to and from the Project site, and unless otherwise provided in the Project Deed, will not be entitled to make any claim against the State in connection with access, or a failure to gain or delay in gaining access, to and from the Project site.
- 3.13 Project Co has acknowledged that the State, State associates and other contractors may require access to the site, and that it must not, where reasonably possible, interfere with or disrupt such access.
- 3.14 The State is able to terminate or suspend the Construction Licence and/or the Operating Term Licence throughout the term of the Project Deed, subject to certain conditions and in respect of certain areas the subject of that licence, to enable the State or another party to further develop that part of the site.

The Role of Parties, Representatives and Administration

- 3.15 The Project Deed requires that the State ensures that at all times during the Design and Construction Phase for Stage 1, a natural person is appointed as the Project Director, and at all times during the Operating Term, a natural person is appointed as Contract Administrator (in each case a **State Delegate**).
- 3.16 Each State Delegate will act as an agent of the State, and will be able to exercise the power and authority that is conferred upon them by the Project Deed, and such other power and authority that is delegated to them in writing by the State. Each State Delegates may authorise one or more persons to exercise its powers except where it is contrary to law.
- 3.17 Project Co must appoint a Project Co representative who is an agent of Project Co and who has the authority to perform its role under the Project Documents.
- 3.18 An Independent Reviewer has been jointly engaged by the State and Project Co whose role is to independently verify the design, construction, installation, completion and commissioning of the Project works, make certain determinations under the Project Deed and issue certificates as required by the Project Deed.

Design and Construction

- 3.19 Project Co is responsible for designing, constructing, completing and commissioning the Facility and the Kawana Way Duplication in accordance with the Project Deed (including the Output Specification), and as detailed in its Bid Design Documentation.

Output Specification

- 3.20 The Output Specification provides the technical detail of the design, construction, operations and maintenance requirements of the Project. The Output Specification is comprised of the annexures to the Project Deed, namely:
 - (a) Annexure 1 Part 1: Site Provisions;
 - (b) Annexure 2 Part 1: Project Management Provisions;
 - (c) Annexure 3 Part 1: Design Provisions;

- (i) Annexure 3A: Design Development Requirements;
- (ii) Annexure 3B: Functional Design Brief;
- (iii) Annexure 3C: Masterplanning and Architectural Specification;
- (iv) Annexure 3D: Technical Specification;
- (v) Annexure 3E: Design Departures Schedule;
- (d) Annexure 4 Part 1: Equipment Requirements;
- (e) Annexure 5 Part 1: Construction Provisions;
- (f) Annexure 6 Part 1: Completion Requirements; and
- (g) Annexure 7 Part 1: Services Specification.

Design Documentation

- 3.21 Project Co must submit design documentation to the State in accordance with an agreed design development process.
- 3.22 Among other things, the design development process requires Project Co to organise and manage, in consultation with the State, regular meetings with user groups and identified stakeholders to obtain their input into the design development process and the design documentation.
- 3.23 The State may provide comments on or reject the design documentation submitted by Project Co in certain circumstances (for example, where the design documentation does not meet the requirements of the Project Deed), and in such circumstances Project Co must resubmit the design documentation to the State. If the State has no further comments on the design documentation, the State can mark the documentation 'no comment', or on the expiry of the prescribed time period, the State will be deemed to have no comment, and Project Co can proceed with the Project based on that documentation.
- 3.24 Project Co bears full liability and responsibility for the design of the Facility.

Master Works Program

- 3.25 The initial master works program is contained in an annexure to the Project Deed. It contains milestones in relation to the works, completion dates and availability dates with respect to the Facility and the Kawana Way Duplication.
- 3.26 Project Co must periodically update the master works program. If, in the opinion of the State, the updated master works program does not comply with the Project Documents, Project Co must submit a revised master works program.

Operating Term documentation (including Quality Assurance, manuals and reports)

- 3.27 Project Co must develop and keep up to date, Operating Term documentation (including operations manuals and other data related to the services) at all times to a level sufficient to enable the State or a third party to carry out the services. This documentation will be delivered to the State at the end of the term.

- 3.28 Project Co must establish, implement, maintain and comply with a project management plan (including a quality assurance plan) and ensure that all records are made available to the State, the Independent Reviewer and the State's nominees at all times throughout the term.

Timing for completion of the works

- 3.29 Project Co is required to notify the State of any circumstances that have caused or may cause a delay to the progress of the works.
- 3.30 Where the works have or will be delayed by an 'Extension Event' (refer to Schedule 3), as soon as Project Co becomes aware of such delay it must advise the State, and to be entitled to an extension of time Project Co must demonstrate to the Independent Reviewer's reasonable satisfaction that:
- (a) it has actually been delayed or will be delayed in achieving completion of the Facility or the Kawana Way Duplication by the 'Extension Event'; and
 - (b) the 'Extension Event' has caused, or will cause, activities on the critical path (for the works contained and shown in the master works program) to be delayed.
- 3.31 The State will review the information provided by Project Co and will grant an extension of time where Project Co is so entitled under the Project Deed.
- 3.32 If Project Co achieves completion of the Facility or the Kawana Way Duplication earlier than the relevant date for completion, there is no obligation on the State to certify early completion of the Facility or the Kawana Way Duplication, but if it the State does so certify early completion, Project Co must pay the State 50% of any savings made by Project Co as a result of the early completion (e.g. preliminary and supervision costs).

Late completion of the works

- 3.33 Project Co does not receive the quarterly service payments until completion has occurred and the Operating Term has commenced. As the expiry date is 25 years from the date for commercial acceptance of Stage 1 of the Facility (which is only extended due to 'Extension Events' under the Project Deed), if Project Co is late in completing the works (other than due to an 'Extension Event') Project Co will have a reduced timeframe in which it will receive the quarterly service payments.
- 3.34 In addition, if the State suffers loss due to late completion of the works, the State is entitled to recover such losses under the general indemnity contained in the Project Deed. Project Co's liability under the general indemnity for failing to achieve commercial acceptance of a Stage of the Facility by the date for commercial acceptance of that Stage is limited to a pre-determined amount specified in the Project Deed.
- 3.35 Project Co is also subject to 'Sunset Dates' (i.e. prescribed long stop dates, after the dates for commercial acceptance, by which construction must be completed) under the Project Deed. The Sunset Dates are extended where Project Co is delayed in performing the works due to a 'Compensable Extension Event' (refer to Schedule 3). In no other circumstances is the

Sunset Date extended, and in no circumstances is Project Co entitled to an extension of time beyond the Sunset Date.

Operation

Operating obligations

- 3.36 The Project Deed outlines the general operating obligations of Project Co.
- 3.37 For the duration of the Operating Term, Project Co must:
- (a) provide the services, and ensure that the services are provided, in accordance with the service specification and completion requirements contained in the Output Specification (see paragraph 3.20);
 - (b) repair and maintain the Facility so that it remains fit for the intended purpose;
 - (c) provide the services, and ensure that the services are being provided, in accordance with best operational practices and consistent with current policies;
 - (d) ensure that relevant quality standards are being complied with;
 - (e) comply with all other obligations under the services specification; and
 - (f) carry out repairs and refurbishment works using materials and equipment that are of high quality, have design life equal or greater than the items being repaired, and do not materially increase operating or maintenance costs.

Service delivery and performance monitoring

- 3.38 The overriding obligation on Project Co in relation to service delivery is that it complies with all the requirements of the Project Deed (including the services specification).
- 3.39 Project Co must prepare and submit for endorsement, a performance monitoring program demonstrating all the performance monitoring activities that Project Co will undertake to monitor the quality of services that Project Co is achieving (including Project Co's performance against each key performance indicator), and to ensure the services are being carried out to the level and quality required by the Project Deed (including the services specification). Project Co must monitor its own performance in accordance with the endorsed performance monitoring program.
- 3.40 The State may monitor the delivery of the services using any method considered reasonable by the Contract Administrator including:
- (a) review and analysis of information contained in Contract Administrator / Project Co reports and operational records;
 - (b) comparison with agreed policies, procedures, manuals, work plans and benchmarks;
 - (c) Project Co self-monitoring;

- (d) user satisfaction surveys (including of employees, visitors and patients); and
 - (e) State audit (including analysis of complaints, random visits, validation checks of Project Co data and deliberate testing).
- 3.41 Project Co's performance against key performance indicators will determine the abatements that may be made to the quarterly service payments paid by the State to Project Co.

Equipment

- 3.42 Project Co is responsible for, and accepts the risk of all costs associated with the provision of plant and equipment for the Facility and the Kawana Way Duplication except for the categories of equipment referred to below, which are subject to specific arrangements.
- (a) 'Excluded Equipment' comprises 2 categories of equipment required for the Facility (i.e. Group 2B and Group 3B Equipment), being specialised medical equipment/equipment with a high technological value which will be used by the Operator in the provision of the Functions. Given the nature of this equipment, the State has specified these items at Contract Close and has also retained responsibility for (and certain risks in respect of) the ultimate selection of these items during the Design and Construction Phase. Project Co is responsible for the conduct and management of the procurement processes associated with such equipment. A lump sum 'Excluded Equipment Limit' has been allowed for the procurement of these items and will be paid progressively to Project Co during the Design and Construction Phase upon the satisfaction of various conditions.
 - (b) 'Transferred Equipment' comprises equipment which will be transferred from other locations to the Facility. Given the nature of this equipment, this equipment is also subject to a particular regime in the Project Deed.
- 3.43 The State owns all plant and equipment for the Facility during the Operating Term. Project Co must transfer to the State title to the plant and equipment for the Facility:
- (a) at completion, when procured by Project Co during the Design and Construction Phase; and
 - (b) at the time of procurement, when procured by Project Co after completion (i.e. during the Operating Term).
- 3.44 Project Co must maintain, replace and repair all 'Included Equipment' (i.e. equipment other than Excluded Equipment) until the end of the Operating Term in accordance with the 'Asset Management Plan', the services specification and otherwise in accordance with the Project Deed.

Carpark

- 3.45 Project Co is required to operate the Carpark (as part of the provision of the services) and accepts all operating (and revenue) risk associated with the carparking operations during the term, subject only to a limited material

adverse effect regime for key risk events. The regime is triggered where staff numbers at the Facility in any operating year are less than a prescribed percentage of the anticipated staff numbers. Consistent with other material adverse event regimes, this regime does not give rise to an automatic contractual right for Project Co to be compensated by the State, but rather the focus is on Project Co exploring numerous methods of redress.

- 3.46 Project Co will be the exclusive carpark operator on the site (subject to some limited exceptions), will be entitled to collect all revenue, and is responsible for administering staff and visitor pass arrangements in accordance with the requirements of the Project Deed and the Output Specification.
- 3.47 The Project Deed includes the maximum Carpark rates, as bid by Exemplar Health, which can be charged by Project Co. These rates (inclusive of GST as at 1 July 2012) are set out below, and will be indexed by the consumer price index (CPI) in accordance with the Project Deed on an annual basis.

	Maximum Rate
Public half hourly rate	\$2.25
Public daily charge	\$13.50
Fortnightly Staff Pass	\$73.00

- 3.48 The Project Deed contains a regime regarding the staff passes including number of passes, conditions for part time staff, replacement passes and enabling the Private Hospital Operator (Ramsay Health Care) to have access to a similar staff pass regime.
- 3.49 The Project Deed also includes a regime to facilitate development of additional carparking spaces in response to capacity issues that may arise on the site in the future.

Commercial Opportunities

- 3.50 Project Co must pursue, and may engage in, retail opportunities for certain permitted commercial purposes in the designated commercial areas (**DCAs**), whether in its own capacity or through the grant of DCA subleases to DCA tenants in accordance with the Project Deed.
- 3.51 The State must grant to Project Co DCA leases following completion of construction of a Stage and the relevant area will then be subleased to DCA tenants. The DCA leases are to be in the form previously agreed between the State and Project Co.
- 3.52 Project Co must ensure that any DCA tenant complies with the provisions of the Project Deed, and must ensure that:

- (a) carrying out the permitted commercial purpose does not obstruct or detract from undertaking the Facility functions;
 - (b) Project Co, and each DCA tenant, maintains appropriate insurance cover;
 - (c) each DCA tenant's access to the common areas does not cause any material adverse effect or disruption to any Facility user or Facility function (with such access being subject to any terms imposed by the State);
 - (d) each DCA tenant makes good the DCA at the end of the DCA sublease and either removes all fixtures and fittings or surrenders fixtures and fittings at the State's election at the end of the relevant DCA sublease;
 - (e) the DCAs comply with the trading requirements outlined in the Project Deed, are kept clean and tidy and comply with relevant workplace health and safety requirements; and
 - (f) all maintenance and repair work is carried out diligently, in a sound and workmanlike manner, with minimal disruption to the Facility and in compliance with any accreditation requirement of the Facility.
- 3.53 The quarterly services payments paid by the State to Project Co have been determined taking into account an agreed rent for the DCAs.
- 3.54 Project Co must pay to the State at the end of each operating year, a proportion of the aggregate revenue derived by Project Co from the DCAs which is in excess of that projected for that operating year in the financial close financial model.

Utilities, Medical Gases and Laboratory Gases

- 3.55 During the Operating Term Project Co must enter into agreements for the supply of all utilities, medical gases and laboratory gases unless otherwise directed by the State. The State Delegate is entitled to be involved in the negotiations of such agreements, and Project Co must provide the State Delegate with the proposed terms of any such agreement before the agreement is entered into.
- 3.56 The State may at any time require Project Co to terminate any agreement entered into for the supply of utilities, medical gases or laboratory gases, provided the State pays for the costs and expenses of such termination.
- 3.57 Project Co must allow other developments (which are developed on the site) to connect to Project Co infrastructure and must ensure the continuous supply of utilities to those developments.
- 3.58 Project Co is not entitled to make a claim against the State in respect of any costs incurred by Project Co in respect of the supply of utilities, medical gases or laboratory gases other than the cost of the actual supply of the relevant utilities, medical gases or laboratory gases.

Energy Risk Sharing

- 3.59 During the Operating Term, Project Co is responsible for the volume of electricity used at the Facility and must ensure that all energy usage is strictly monitored.
- 3.60 The State and Project Co have agreed on initial maximum targets for electricity usage, which are to be adjusted if, during the design development process, the energy modelling report prepared by Project Co determines the usage to be less than previously agreed.
- 3.61 The Project Deed also provides a regime whereby, during the Operating Term, the target electricity volumes may be reduced.

Modifications

State initiated Modifications

- 3.62 Any modification to the State's requirements may be proposed to Project Co. Project Co must respond and outline, among other things, the information required by the change compensation principles, including, the effects of the proposed modification, the time to implement the modification and if applicable, the time consequences on the overall Project and estimated cost of the modification.
- 3.63 The State has the option to accept or reject Project Co's response or enter into negotiations to reach a mutually acceptable position.
- 3.64 If the State accepts Project Co's response and issues a modification order Project Co is required to amend (where applicable) design documentation, operating manuals and any other relevant documentation to take account of the modification.
- 3.65 If the State directs Project Co to carry out a modification it will be required to compensate Project Co in accordance with the change compensation principles in the Project Deed.

Project Co initiated modifications

- 3.66 Project Co may, at any time, by notice to the State request a modification.
- 3.67 The notice must be prepared in accordance with the change compensation principles, and contain all the information specified in the change compensation principles, including:
 - (a) details of the effects of the proposed modification on the:
 - (i) workmanship, quality, appearance, durability or asset design life of any part of the Facility or Kawana Way Duplication;
 - (ii) the design, construction, commissioning management and maintenance of the Facility and Kawana Way Duplication; and
 - (iii) the provision of the services;
 - (b) details of all estimated costs and savings;
 - (c) details in relation to timing implications, including the time within and the manner in which Project Co proposes to implement the modification; and

(d) such further details as reasonably requested by the State.

Unless otherwise agreed by the State, Project Co must bear all costs and expenses of any Project Co initiated modification.

- 3.68 Where a modification saving arises, the State will share equally in the savings with Project Co.

Payment

- 3.69 The State must make quarterly services payments to Project Co during the Operating Term, which commence on completion of the first Stage of the Facility. The quarterly services payment may be abated if key performance indicators are not met.
- 3.70 The net present cost to the State of the Project is \$1.68 billion. This includes the cost of designing, constructing and financing relevant components of the Facility and Kawana Way Duplication and providing certain facilities management services for the 25 year operating term commencing in 2016 after the initial four year Design and Construction Phase.
- 3.71 For the avoidance of doubt, the net present cost is inclusive of all costs and revenues associated with the provision and operation of the Carpark(s) and Designated Commercial Areas but excludes pass-through capital and operating costs to the State such as the Supply Cost of Excluded Equipment, supply of utilities, medical and laboratory gases and operating term insurances.

Government Contribution

- 3.72 In consideration for progressively carrying out the works, the State agrees to pay the Government Contribution payments. The State will pay Project Co, monthly, an amount no greater than that set out in the Government Contribution schedule. All other monies required to fund the works will be provided by the debt financiers and the equity providers.
- 3.73 The State will only be obliged to make any Government Contribution to Project Co if (among other things):
- (a) 100% of equity has been drawn down or committed and 50% of the debt funding requirements for Stage 1 of the Facility have been drawn down;
 - (b) the Senior Agent has confirmed that all previous Government Contributions paid by the State and drawn down by Project Co under the finance documents have been correctly applied on or before the relevant Government Contribution payment date;
 - (c) Project Co complies with certain restrictions contained in the Financier Direct Deed in respect of the application of the funds;
 - (d) Project Co has submitted a Government Contribution notice containing relevant drawdown notices, withdrawal notices, documentary evidence relating to certified payment claims under the Construction Contract and documentary evidence relating to the satisfaction of cost to complete tests contained in the finance documents;

- (e) Project Co has provided confirmation to the State from the Senior Agent that the debt financiers' construction facility drawing due on the same date has been or will be made available; and
 - (f) the aggregate of the Government Contributions paid by the State (including the amount of the Government Contribution payable for the current month) does not exceed the Government Contribution amount forecast in the Project Deed.
- 3.74 The payment of the Government Contribution to Project Co is a two stage process. Firstly, Government Contribution amounts are deposited by the State into a State account, and upon the satisfaction of further conditions, those funds are withdrawn from the State account and paid into Project Co's proceeds account.
- 3.75 The State has appointed the National Australia Bank (under the State Account Bank Deed) to act as the State's Account Agent for the purposes of operating the State Account.

Insurance, liability and indemnity

Insurance and indemnities

- 3.76 Project Co releases and indemnifies the State from and against any claim or loss suffered by the State and any State Associate in respect of:
- (a) any breach or repudiation of any Project Document by Project Co; or
 - (b) negligent or unlawful acts or omissions or wilful misconduct by Project Co.
- 3.77 Project Co releases and indemnifies the State (and each indemnified person and sub-licensee) from and against any claim or liability suffered (notwithstanding that such claims or liability result from an act Project Co which is authorised to do under a Project Document) in respect of:
- (a) failure of Project Co to satisfy any Conditions Precedent by the Conditions Precedent deadline;
 - (b) the reliance on any information or data prepared by the State and made available to Project Co;
 - (c) a claim by a third party that contract material licensed to the State infringes intellectual property or other third party rights;
 - (d) any contamination which Project Co is required to remediate under the Project Deed, or any injury, loss or damage suffered by any user of the Facility as a result of or in connection with such contamination;
 - (e) any:
 - (i) damage to, loss of, or loss of use of, any third party property; or
 - (ii) death or illness of, or injury to, any person; orto the extent caused or contributed to:

- (iii) by the use or occupation of the Facility, the DCAs, the Kawana Way Duplication or the site by Project Co or any Project Co associate; or
- (iv) by the performance of Project Co's obligations arising from or in connection with any Project Document; and
- (f) any liability or claim which the State or State Associate may incur arising from breach of Workplace Health and Safety legislation to the extent permitted by law,

except to the extent that any such claim or loss above is a direct consequence of circumstances such as:

- (g) fraudulent, negligent or wilful act or omission of the State, a State associate or a sub-licensee;
- (h) a breach by the State of a Project Document to which it is a party; or
- (i) Project Co complying with a direction of the State.

Risk of damage or destruction

3.78 From Financial Close (i.e. 31 July 2012):

- (a) until the end of the term, Project Co will bear the risk of any damage to or destruction of the Facility; and
- (b) until the date of completion of the Kawana Way Duplication, Project Co will bear the risk of any damage to or destruction of the Kawana Way Duplication.

Reinstatement and application of insurance proceeds

3.79 Where such damage or destruction occurs to the Facility or the Kawana Way Duplication, Project Co, unless otherwise determined by the State, must:

- (a) promptly provide the State with notice of any such damage to or destruction of the Facility or the Kawana Way Duplication;
- (b) repair or rebuild the Facility or the Kawana Way Duplication; and
- (c) apply all insurance proceeds received towards the cost of repair or rebuilding.

Liability for indirect or consequential loss

3.80 The State does not have any liability to Project Co for any indirect or consequential loss incurred or sustained by Project Co as a result of an act or omission (whether negligent or otherwise) or as a result of a breach of the Project Documents. The following do not constitute indirect or consequential loss:

- (a) quarterly service payments;
- (b) amounts payable in respect of 'Change Compensation Events';
- (c) liability arising from criminal acts or fraud on the part of the State or State associates;

- (d) liability to the extent which, by law, the parties cannot limit or exclude; and
 - (e) liability in respect of an 'Uninsurable risk' in respect of which the State is required to indemnify Project Co.
- 3.81 Project Co has no liability to the State for any indirect or consequential loss incurred or sustained by the State as a result of an act or omission (whether negligent or otherwise) or as a result of a breach of the Project Documents. The following do not constitute indirect or consequential loss:
- (a) liability arising from death, injury or property damage (other than pure economic loss arising as a result of such damage);
 - (b) liability in respect of claims in connection with the Project Deed by third parties;
 - (c) liability arising from criminal acts or fraud on the part of Project Co or any Project Co associate;
 - (d) liability arising from wilful misconduct or abandonment on the part of Project Co or any Project Co associate;
 - (e) liability to the extent which, by law, the parties cannot limit or exclude;
 - (f) liability in respect of an abatement amount;
 - (g) the cost to the State of procuring an alternative item of plant or equipment arising from a failure of Project Co to procure plant and equipment which complies with the Project Deed;
 - (h) liability incurred by the State (including to a third party) in rectifying a defect for which Project Co is liable under the Project Deed; and
 - (i) moneys owing under the Project Deed.
- 3.82 Indirect or consequential loss means loss of opportunity, profit, anticipated profit, business, business opportunities or revenue or any failure to achieve anticipated savings (including in respect of Project Co's subcontractors) or any penalties under agreements other than the Project Deed.

Insurance policies required

- 3.83 Project Co must effect and maintain the insurance policies set out in Schedule 4.
- 3.84 All insurance policies and certificates of currency must be made available to the State or sufficient evidence provided to the State to assure the State that each insurance policy has been procured and maintained in accordance with the Project Deed.
- 3.85 The State has the right to request Project Co to insure against a risk not specifically provided for in the required insurance policies, or increase the extent of, or change the terms of an existing insurance policy. The State must reimburse Project Co for any additional premium that is incurred.

Notices of potential claims

- 3.86 Project Co must notify the State of any occurrence or incident that might give rise to a claim under any insurance policy and must take all necessary steps to ensure that its rights are fully preserved.
- 3.87 Project Co and the State must inform the other if it becomes aware of any occurrence or incident which might materially reduce Project Co's insurance cover.

Uninsurable risks

- 3.88 Project Co is not required to procure or maintain insurance in respect of a risk which is agreed or determined to be uninsurable, for so long as it remains uninsurable.
- 3.89 If a risk which is required to be insured against under the Project Deed, is or becomes, or is likely to become, uninsurable, Project Co must, within 5 business days after becoming aware that the risk has, or is likely to become, uninsurable, notify the State, and meet with the State to discuss the issue.
- 3.90 If both parties agree that the risk is uninsurable, or it is determined to be so under the Project Deed, the parties must meet to discuss the means by which the risk should be managed, including through self-insurance, paying higher premiums (and passing the premium charges through to the State), or assigning some other allocation or responsibility to the risk.
- 3.91 If a risk is agreed to be uninsurable but after the meeting, agreement cannot be reached as to how to manage the risk then the Project Deed will continue and the State will deduct from the quarterly service payment an amount equal to the premium that was payable by Project Co for that risk.
- 3.92 If an uninsurable risk occurs the State will either:
- (a) indemnify Project Co for the loss or damage suffered or incurred by Project Co up to an amount equal to the insurance proceeds that would have been payable had the relevant insurance coverage continued, or if the insurance had never been available, the amount agreed by the parties to cover that loss or damage; or
 - (b) terminate the Project Deed, in which case, a force majeure event will be deemed to have occurred and the State will pay Project Co an amount equal to the force majeure termination amount (see termination section below).
- 3.93 Project Co must be vigilant in reviewing the insurance market generally, to ascertain whether an uninsurable risk has become insurable, and if upon such review Project Co or the State finds that the relevant risk is no longer uninsurable, Project Co must promptly procure the insurance in respect of that risk in accordance with the provisions of the Project Deed.

Default, Termination, Step-in and Expiry of Term

Default and Termination

- 3.94 The Project Deed contains a number of Project Co default categories being:
- (a) Default;

- (b) Major Default; and
- (c) Default Termination Event;

3.95 The content and consequences of each of the events listed above are described in Schedule 5 to this document.

Step-in, suspension and emergencies

- 3.96 The State may, at any time after the occurrence of a Major Default or a Default Termination Event, step-in and assume partial or total management and control of the works, the Facility, the Kawana Way Duplication or the provision of the services, and take other steps necessary to continue the implementation of the works or services and to minimise the effects of the Major Default or Default Termination Event.
- 3.97 The State may only exercise these rights in respect of a Major Default where Project Co is not complying with its Prevention Plan or Agreed Cure Plan, as the case may be (outlined in greater detail in Schedule 5 to this document).
- 3.98 If any emergency occurs, the State may elect to, but is not obliged to, step-in and assume partial or total management and control of the works, the Facility or the provision of the services, and take other steps necessary or desirable to mitigate the threat or event which caused the emergency. The State may continue to implement the works and services required under the Project Deed. Project Co must grant such access rights as necessary, suspend the works and services as directed, assist the State as requested (including by making available to the State all documentation relating to the Project and all relevant staff) and must not do anything which prejudices or frustrates the State's exercise of these rights.
- 3.99 The State may cease to exercise the above step-in rights at any time, and must cease to exercise those rights as soon as the relevant threat or event which caused the emergency is averted or overcome (or its consequences have been mitigated or otherwise dealt with), or where the Major Default or Default Termination Event has been cured.
- 3.100 Once normal performance can resume, Project Co must immediately recommence performance of its obligations which were suspended during the period in which the State was exercising its step in rights. During the step-in period Project Co must provide assistance to the State in performing the Project, and must meet the costs of the State where it has caused the step-in event.

Process for handback and final refurbishment works

- 3.101 No later than 9 months before 5 years from the expiry date, Project Co and the State must jointly appoint an independent reviewer to inspect the Facility and the site, and provide a written report.
- 3.102 The report will assess whether the Facility, as at the termination date, will be in the condition required to satisfy the warranties and handback condition specified in the Project Deed. It will also determine what final refurbishment work, if any, is required to be undertaken prior to the termination date. Prior to the end of each 12 month period after the report was first delivered, the

independent reviewer must reinspect the Facility and provide an updated written report.

- 3.103 If, at any time after the review dates, the remaining quarterly services payments are equal to or less than 120% of the cost of the remaining final refurbishment works, the State must notify Project Co, and within 5 business days of receipt of such a notice, Project Co must elect to either:
- (a) establish an escrow account for the quarterly services payment to be paid into; or
 - (b) procure and issue to the State a refurbishment bond for the value of 120% of the cost of the remaining final refurbishment works.
- 3.104 The State is required:
- (a) within 20 business days after completion of all final refurbishment works, to pay, if Project Co elected to establish an escrow account, the balance of the escrow account to Project Co; or
 - (b) within 20 business days of each updated written report by the independent review, to release, if Project Co elected to provide a refurbishment bond, the refurbishment bonds to the extent and value of that final refurbishment work has decreased (unless the State requires to draw on the refurbishment bonds).

Rights at the end of the term

- 3.105 At the end of the term, Project Co must:
- (a) ensure that the Facility, and all right, title and interest in the Facility (including all improvements on the site and all plant and equipment but excluding any plant and equipment that is owned by a subcontractor or DCA subcontractor), and the site, to the extent not already vested in the State, will revert or pass to and vest in the State, free of security interests or any claim by any person;
 - (b) deliver to the State originals or certified copies of all books, records, plans, drawings, specifications and documents relating to the Facility, the Kawana Way Duplication and the Project, however recorded, as required in the handover package and, upon delivery the right, title and interest of all the items, is transferred to and vests in the State;
 - (c) if requested by the State, promptly assign, novate or transfer to the State (or its nominee) all or any agreements, contracts and authorisations to which Project Co is a party, and which are material to the execution of the works or the provision of the services, and make necessary adjustments, due to any outstanding debt obligations of Project Co;
 - (d) at the option of the relevant employee, facilitate the transfer to the State or its nominee of all employees of Project Co that the State considers necessary to provide the services and to whom it offers employment (with Project Co to make appropriate adjustments and payment to the State in respect of all accrued entitlements not paid out to the staff at the time of transfer); and

- (e) do all other things necessary to assist the State in ensuring the Facility continues to be capable of enabling the State to undertake the functions and services without interruption.
- 3.106 Project Co irrevocably appoints the State (and its nominees) as its attorney to carry out Project Co's obligations at the end of the term.

General provisions

Subcontracting

- 3.107 Project Co may subcontract any part of the works or the provision of any part of the services in accordance with the provisions set out below. However, in doing so, Project Co is not relieved of any of its liabilities or obligations under the Project Deed and is at all times responsible for the performance of all subcontractors.
- 3.108 Project Co must:
- (a) notify the State in writing if it wishes to replace a Key Subcontractor (the Builder or FM Contractor); and
 - (b) not engage any new subcontractor who would become a Key Subcontractor without the State's prior consent (not to be unreasonably withheld).
- 3.109 It will be reasonable for the State Delegate to withhold its approval of any proposed Key Subcontractor if:
- (a) Project Co has not given the State all the information required by the Project Deed;
 - (b) the proposed replacement Key Subcontractor:
 - (i) is not of at least the same or similar financial capacity and technical capability as the Key Subcontractor it is replacing;
 - (ii) does not have the qualifications, skills and experience required to perform the obligation of the Key Subcontractor it is replacing;
 - (iii) is not solvent and reputable; or
 - (iv) does not have at least the same or similar levels of risk exposure under the proposed subcontract as the Key Subcontractor it is replacing;
 - (c) Project Co has not procured sufficient guarantees in respect of the Key Subcontractor's obligations, a duly executed direct deed, or written consent to a probity investigation if required by the State; or
 - (d) the State Delegate is of the opinion, acting reasonably, that the proposed Key Subcontractor is not capable of performing Project Co's obligations in whole or in any part, has not demonstrated recent experience and good performance in delivery of works and services similar to that required under the Key Subcontract, or does not have sufficient financial capacity to implement the works or perform the services.

Force Majeure

- 3.110 The Project Deed specifies a number of 'Force Majeure Events'.
- 3.111 On the occurrence of a Force Majeure Event during the Design and Construction Phase, provided certain conditions are satisfied and Project Co complies with the provisions of the Project Deed, Project Co's obligations will be suspended to the extent that Force Majeure Event prevents Project Co from performing its obligations, and Project Co will be entitled to an extension of time.
- 3.112 On the occurrence of a Force Majeure Event during the Operating Term, provided certain conditions are satisfied and Project Co complies with the provisions of the Project Deed, Project Co's obligations will be suspended to the extent that Force Majeure Event prevents Project Co from performing its obligations. The quarterly services payment may be abated to the extent that the services are not being provided by Project Co in accordance with the services specification, but Project Co may apply to the State for some payment.
- 3.113 If a Force Majeure Event substantially prevents the performance by Project Co of its material obligations under the Project Deed for a period of 180 consecutive days or more, this will constitute a 'Force Majeure Termination Event' and may lead to termination of the Project Deed.
- 3.114 The specific events giving rise to force majeure and the consequences of those events are detailed in Schedule 6 to this document.

Restrictions on business

- 3.115 Project Co must not, without the prior consent of the State:
- (a) conduct any business other than implementation of the Project; or
 - (b) acquire or hold any property or incur any liabilities other than for the purposes of the Project.

Change in Control

- 3.116 Project Co must not permit a Change in Control of a relevant company (i.e. Project Co, the Builder, the FM Contractor and their respective guarantors), other than those specified as a 'Permitted Change in Control' in the Project Deed, without the prior written consent of the State, which must not be unreasonably withheld.
- 3.117 In relation to changes in control (other than transfers of securities or other interests listed on a stock exchange, or in respect of changes in control arising from acquisitions by related funds), it will only be reasonable for the State to withhold its consent to a proposed change in control if the State is of the reasonable opinion that:
- (a) the new controller is not solvent or reputable;
 - (b) the change in control (where it relates to Project Co) is to take effect prior to the second anniversary of the date of the operational commencement date (i.e. commercial acceptance of Stage 1 of the Facility);

- (c) the new controller has an interest which conflicts in a material way with the interests of the State or is involved in a business or activity which is incompatible or inappropriate in relation to the Project and use of the Facility;
 - (d) the new controller does not have the level of financial, managerial and technical capacity of the person or entity it is replacing or from whom it is taking control or otherwise to deliver the Project; or
 - (e) the proposed change of control is against the public interest, could lead to the occurrence of a probity event, would have a material adverse effect, or would increase the level of risk or liabilities of the State or any State associate.
- 3.118 In relation to changes in control which occur due to the transfer of shares or interests listed on a stock exchange, or in respect of changes in control arising from acquisitions by related funds, it will only be reasonable for the State to withhold its consent to a proposed change in control if the State has not received all information required under the Project Deed, or if the change in control:
- (a) is against the public interest;
 - (b) could lead to the occurrence of a probity event;
 - (c) would have a material adverse effect on the Project; or
 - (d) would materially increase the level or risk or liabilities of the State or any State associate.

Restrictions on dealing and finance documents

- 3.119 Except as expressly permitted under the Project Documents, and except for a permitted security interests created pursuant to the finance documents, Project Co must not sell, transfer, assign, lease, licence, grant a trust over, part with possession or otherwise deal with or dispose of, or create or suffer to exist any security interest over:
- (a) any of its rights under a Project Document; or
 - (b) all or any part of, or any interest in, the site, the Facility or the works, without the prior written approval of the State, which may be given or withheld in the State's sole and absolute discretion.
- 3.120 The State may assign, transfer, assign or otherwise dispose of its interest in the Project documents without Project Co's consent, to another party which is an emanation of, an agent of, and the obligations of which are supported by, the State of Queensland, but otherwise the prior consent of Project Co is required to a transfer, assignment or disposal.
- 3.121 Project Co must not enter into any financing arrangements other than those already agreed to by the State in the finance documents or make any material amendment to the finance documents without the prior consent of the State.
- 3.122 Project Co must not enter into any refinancing arrangement (other than in limited specified circumstances) without the prior consent of the State, which

must not be unreasonably withheld. A breach of this condition is a 'Major Default'.

- 3.123 Where the State consents to a refinancing which results in a refinancing gain, Project Co agrees to pay to the State 50% of any gain.

Dispute Resolution

- 3.124 The Project Deed sets out procedures to be followed when there is a dispute between the State and Project Co.

- 3.125 The dispute resolution procedures are outlined below:

- (a) The relevant State Delegate and the Project Co Representative must meet and attempt in good faith to resolve the dispute within five business days of receiving a notice of dispute;
- (b) If the meeting does not occur or, having occurred, fails to resolve the dispute, then a senior representative of Project Co, together with the Chief Executive Officer of the Sunshine Coast Hospital and Health Services (or his or her nominee) will meet within 10 business days to resolve the dispute or agree that the dispute be referred to an independent expert or arbitration;
- (c) If the meeting does not occur or, having occurred, fails to resolve the dispute, or to agree on whether the dispute should be referred to an independent expert or an arbitrator within 20 business days after notice of the dispute was given then the dispute must be referred to arbitration, unless the dispute is in respect of a claim for payment of an amount equal to or less than:
 - (i) \$5 million in relation to the works; or
 - (ii) \$500,000 in relation to each of the DCA works or the services,in which case the dispute must be referred for resolution by an independent expert in accordance with the accelerated dispute resolution procedures;
- (d) If the dispute is one which is required to be referred to an independent expert, the parties must agree upon the appointment of an independent expert to hear the matter. If agreement is not reached regarding this appointment, then an independent expert will be appointed by the Minister from the appropriate discipline on the accelerated dispute panel (which was agreed by the parties at the date of the Project Deed) or, failing appointment by the Minister within a further 10 business days, the President of the Australian Centre for International Commercial Arbitration;
- (e) To the extent permitted by law, the independent expert's decision will be final and binding on the parties unless:
 - (i) the value of the determination is greater than \$5 million (in the case of a dispute relating to the works) or \$500,000 (in the case of a dispute relating to each of the DCA works or the services); and

- (ii) a party gives written notice to the other party within 15 business days of the determination referring the matter to arbitration;
- (f) The costs of the independent expert must be borne equally by the parties, unless the determination is made against the party who issued the notice of dispute, in which case the independent expert may determine that party will bear all or a greater proportion of the costs;
- (g) Where a dispute goes to arbitration, any determinations made by the arbitrator must include a determination relating to the costs of the reference and the award, including the fees and expenses of the arbitrator;
- (h) Any award of an arbitration tribunal will be final and binding on all parties.

Intellectual Property

3.126 Project Co warrants that:

- (a) neither the provision or performance of the works and services, infringes or will infringe, the rights (including any intellectual property rights or moral rights) of any person;
- (b) it owns or has appropriate licences of all intellectual property rights that are required by it for the purposes of its obligations under the Project Documents;
- (c) it is able to grant the assignments and licences contemplated by the Project Deed;
- (d) the contract material and the exercise of intellectual property rights in the contract material by the State will not infringe the rights of any third party or breach any law (including rights and any law in respect of intellectual property rights and moral rights); and
- (e) the State is not liable to pay any third party any licence or other fee in respect of the use of the contract material, whether by reason of intellectual property rights or moral rights of that third party or otherwise provided that use of the intellectual property is in accordance with the relevant licence

and Project Co releases and indemnifies and keeps indemnified the State and the State associates as described in paragraph 3.77.

- 3.127 Project Co grants to the State a non-exclusive, royalty-free, irrevocable and transferable licence to exercise all intellectual property rights in all contract material for any purpose under, in connection with or contemplated by any Project Document to which the State is a party, and for the Project, the Facility and the Kawana Way Duplication generally and for any purpose arising out of or in connection with the Facility and the Kawana Way Duplication.
- 3.128 To the extent that any item of intellectual property is commercially available third party software, the obligation of Project Co is to licence that item of intellectual property for the State and the State associates (if Project Co is

legally able to do so) at no additional cost to the State, and on the terms granted to Project Co by the third party licensor. Project Co must use reasonable endeavours to procure the consent of the third party licensor to grant that sub-licence to the State and State associates.

- 3.129 If, despite all reasonable endeavours to do so, Project Co is unable to licence any intellectual property from third party licensors, Project Co must consult with the State and do all things reasonably necessary to obtain for the State's benefit the rights or arrangements required by the State for any purpose under or contemplated by a Project Document to which the State is a party, and for the Project, the Facility and the Kawana Way Duplication, and for any purpose arising out of or in connection with the Facility, the Kawana Way Duplication or the functions.
- 3.130 Project Co must maintain and keep updated a copy of the source code for the software and, if requested by the State, deposit that source code with a third party escrow agent on terms acceptable to the State.
- 3.131 For any intellectual property owned by the State which is required by Project Co to undertake the Project, the State grants an irrevocable, royalty free non-exclusive licence to Project Co for the duration of the term, but only to the extent necessary to implement the works and provide the services.

Miscellaneous Provisions

Amendments

- 3.132 No amendment or variation of any Project Document is valid or binding on a party unless made in writing executed by both parties.

Disclosure and confidentiality

- 3.133 Project Co must not (and must ensure that the Builder and FM Contractor do not) make public or disclose any confidential information without the prior written confirmation of the State, subject to the following exceptions:
- (a) Project Co may provide such confidential information as is necessary for the purpose of performing its obligations under the Project Deed or resolving disputes, to its subcontractors or other relevant persons;
 - (b) Project Co may disclose confidential information to:
 - (i) any financier under the finance documents;
 - (ii) any prospective financier where the State has given its consent to the proposed financing arrangements; or
 - (iii) any prospective purchaser of the interests of Project Co in the Project,
- provided that the relevant parties enter into a confidentiality deed with the State agreeing to be bound by the same confidentiality provisions that bind Project Co and, in respect of the prospective purchaser, the State has carried out any probity investigations it requires.
- 3.134 Project Co will use its best endeavours to ensure that each of its employees, agents, advisers and subcontractors or other relevant persons do not make public or disclose any confidential information, and for this purpose the State

may require such persons to enter into a confidentiality deed with the State agreeing to be bound by the same confidentiality provisions that bind Project Co.

- 3.135 The State may publish or disclose confidential information and the contents of any Project documents, and Project Co will use all reasonable endeavours to assist the State to meet its public disclosure obligations, provided that the State must not disclose or publish the financial model, or any other information which the State has previously agreed must not be disclosed on the basis that it is commercially sensitive, without the prior written consent of Project Co, except if required to do so to comply with its public disclosure obligations.

Schedule 1 - Conditions Precedent

The Project Deed is conditional on Project Co delivering to the Project Director all of the conditions precedent in a form and substance reasonably satisfactory to the Project Director. The following is a summary of the conditions precedent under the Project Deed:

- (a) an original duly completed verification certificate in respect of:
 - (i) Project Co;
 - (ii) Finance Co;
 - (iii) the Builder;
 - (iv) the Builder Guarantor;
 - (v) the FM Contractor; and
 - (vi) the FM Contractor Guarantor,(each being a **Relevant Company**);
- (b) an original legal opinion from solicitors acting for each Relevant Company as to the legal capacity and corporate power of the Relevant Company to enter into and perform its obligations under the transaction documents to which it is a party;
- (c) original counterparts of all Project Documents to which the State is a party duly executed by all parties other than the State, and certified copies of each Project Document duly executed by all parties to it;
- (d) an original letter by the financiers confirming that all financing is in place and ready for drawdown, all derivatives are in place, and all conditions precedent to the funding and drawdown of the facilities for the Project have been satisfied or waived;
- (e) certified copies of all finance and equity documents duly executed by all parties to them;
- (f) a certified copy of the audited financial model, varied in accordance with the Project Deed and revised only with the approval of the State in accordance with the financial close adjustment protocols;
- (g) certified copies of relevant insurance policies for the insurances required for the Design and Construction Phase under the Project Deed, and a certificate of currency from an insurance broker for each required policy;
- (h) certified copies of evidence confirming Project Co's receipt of the construction bond;
- (i) Project Co receiving and delivering to the State certified copies of binding tax rulings from the Australian Tax Office in relation to the application of the *Income Tax Assessment Act 1997* (Cth);
- (j) certified copies of evidence in writing confirming Project Co's receipt of the construction bond for the Kawana Way Duplication;

- (k) all probity investigations in respect of Project Co and any associate of Project Co required to be conducted under the Project Deed have been conducted and either found acceptable, or, if unacceptable, Project Co has replaced the person found unacceptable with a person who is found acceptable by the State;
- (l) delivery to the State of a certified copy of the unconditional approval of the Australian Treasurer advising there is no objection under the *Foreign Acquisition and Takeovers Act 1975* (Cth) to the ownership of Project Co and/or its interest in the Project;
- (m) delivery to the State of certified copies of evidence in writing that Project Co holds a contractor's licence of the relevant class under the *Queensland Building Services Authority Act 1991* (Qld); and
- (n) a letter from the State confirming that all conditions precedent have been satisfied.

Schedule 2 - Project Objectives

Set out below is a summary of agreed objectives as contained in the Project Deed:

- (a) to deliver health facilities which:
 - (i) facilitate the provision of outstanding patient care;
 - (ii) assist in the development of new knowledge through research, to contribute to national and international improvements in patient care;
 - (iii) facilitate the education of the next generations of staff;
 - (iv) are accessible and responsive to demand;
 - (v) provide a healing environment integrated with external services, that achieve high levels of wellness in the community;
 - (vi) are efficient and facilitate the delivery of a high quality health service that is efficient, sustainable over the long term and has the flexibility to grow and adapt to meet service demand and changes in the way healthcare services are delivered;
 - (vii) assist in the attraction and retention of a high quality, skilled workforce;
 - (viii) provide a contemporary environment for training and education of the existing and future workforce; and
 - (ix) achieve Ecologically Sustainable Development (ESD) objectives;
- (b) to ensure the Project is delivered in accordance with announced timeframes;
- (c) to deliver health facilities which deliver quantitative value for money to the State;
- (d) to ensure the Facility is based on proven concepts that reflect national and international best practice, is well designed, functional and will be fit for the intended purposes over the term; and
- (e) in light of the significant challenge of successfully delivering a stepchange in both healthcare capacity and capability for the State, to ensure that the Project is deliverable from a workforce perspective.

Schedule 3 - Extension Events and Intervening Events

Extension Events

The following events are risks during the Design and Construction Phase which are retained by the State and will entitle Project Co to an extension of time:

- (a) a Force Majeure Event;
- (b) a Compensable Extension Event;
- (c) fire, flood or explosion (which is not caused by a Force Majeure Event, Project Co or any other Project Co associate);
- (d) failure by a Governmental agency (other than the State under this Deed) to carry out works or provide services necessary for the implementation of the Project, unless that Governmental agency, in failing to carry out the relevant works or services, is acting in accordance with or pursuant to its statutory powers, duties, discretions or obligations;
- (e) blockade or embargo that directly affects the site; or
- (f) any event or occurrence outside the control of either party or their associates, which causes lack of possession at, or access to, the site, other than industrial action or an event or occurrence arising from third party rights to use or access the Site as contemplated by, and subject to, clause 7 (this clause deals with the access rights of third parties).

Compensable Extension Events

The following events are risks during the Design and Construction Phase which are retained by the State and in addition to entitling Project Co to an extension of time, may also enable Project Co to recover compensation:

- (a) **(breach by State)**: breach by the State of any Project Document to which the State is a party which impacts the ability of Project Co to perform its obligations under the Project Documents;
- (b) **(access)**: a failure or delay by the State to provide Project Co access to the site in accordance with the Project Deed;
- (c) **(Project specific industrial action)**: industrial action which occurs in respect of the works which directly affects the Project and which Project Co demonstrates to be the direct result of an act or omission of the State and which is not caused or contributed to by an act or omission of Project Co;
- (d) **(State modification)**: a State modification at any time up to completion (other than a minor modification);
- (e) **(eligible claim)**: suspension, cessation or variation in or of execution of the works as required by law, court order, tribunal decision or direction of the State in respect of an eligible claim (in each case not resulting from a breach by Project Co);

- (f) **(change in mandatory requirements)**: a change in mandatory requirements which is a Project specific change in law which occurs in respect of the works, the financial effect of which Project Co is entitled to be compensated for under the Project Deed;
- (g) **(equipment modification)**: an equipment modification (other than a minor modification) which occurs in respect of the works, at any time up to completion;
- (h) **(contamination)**: the remediation of contamination for which the State is responsible to pay any costs of Project Co under the Project Deed;
- (i) **(emergency)**: any act or omission of the State in respect of the Project or at the Site, taken in an emergency event (other than where a force majeure event or caused by the failure of Project Co to provide services); and
- (j) **(supporting infrastructure)**: the supporting infrastructure is not completed by 30 June 2015.

Intervening Events

The following events are risks during the Operating Term which are retained by the State and will entitle Project Co to relief from performance of its obligations:

- (a) **(Compensable Intervening Event)**: a Compensable Intervening Event;
- (b) **(act or omission)**: an act or omission by the State or any State associate which is not:
 - (i) in undertaking the functions;
 - (ii) a reasonably foreseeable consequence of undertaking the functions; or
 - (iii) an act or omission authorised or permitted under any Project Document and which is done or omitted to be done in any time authorised or permitted under that Project Document,and which prevents, hinders or disrupts Project Co in the implementation of the Project in accordance with the Project Documents;
- (c) **(breach by the State)**: breach by the State of any Project Document to which the State is a party, which impacts the ability of Project Co to perform its obligations under the Project Documents;
- (d) **(third party work or services)**: works or services performed by the State or a third party engaged by the State in accordance with Clauses 33.1(b), 33.2(d)(2), 38.11(a), 38.11(c), 41.6, 42.5 or 51.1 (these clauses of the Project Deed enable the State to perform works or services, or engage a third party to do so, in certain circumstances) which prevent, hinder or disrupt Project Co in the provision of the services in accordance with the Project Documents;
- (e) **(infrastructure works or services)**: works or services performed in relation to external infrastructure or utility infrastructure (other than by, or at the request or due to a breach of, Project Co or any other Project Co associate) where such works or services do not meet the requirements of the Project Deed or, where such works or services are required to be performed, they are not performed;

- (f) **(Failure Event)**: where Project Co is unable to respond to or rectify a failure event due to a specific direction by the contract administrator or the operator's representative, or a person authorised by them under the Project Deed, to delay the response or rectification;
- (g) **(fire, flood or explosion)**: fire, explosion or flood at or transgressing onto the Site (which is not a Force Majeure Event), where Project Co can demonstrate that all reasonable preventative measures were taken (having regard to the nature of the site, the works, the DCA works and the Facility) to minimise the cause and effect of the fire, explosion or flood on the performance of its obligations under the Project Deed;
- (h) **(Governmental Agency)**: failure by a Governmental Agency (other than the State under the Project Deed) to carry out works or provide services necessary for the implementation of the Project, unless that Governmental agency, in failing to carry out the relevant works or services, is acting in accordance with or pursuant to its statutory powers, duties, discretions or obligations; or
- (i) **(Contamination)**: the existence of migrating contamination on the site which prevents, hinders or disrupts Project Co in the provision of the services in accordance with the Project Deed, or the remediation of contamination for which the State is responsible to pay the costs to Project Co under the Project Deed.

Compensable Intervening Events

The following events are risks during the Operating Term which are retained by the State and in addition to entitling Project Co to relief from performance of its obligations, may also enable Project Co to recover compensation:

- (a) **(breach by State)**: breach by the State of any Project Document to which the State is a party which impacts the ability of Project Co to perform its obligations under the Project Documents;
- (b) **(malicious damage)**: a reckless, unlawful or malicious act or omission by the State when acting in respect of this Project, and which is not caused by an act or omission of Project Co;
- (c) **(eligible claim)**: suspension, cessation or variation in or of execution of the works as required by law, court order, tribunal decision or direction of the State in respect of an eligible claim (in each case not resulting from a breach by Project Co); and
- (d) **(Project specific industrial action)**: industrial action which directly affects the Project and which Project Co demonstrates to be the direct result of an act or omission of the State and which is not caused or contributed to by an act or omission of Project Co.

Schedule 4 - Insurance Policies

Design and Construction Phase

Project Co is required to procure or cause to be procured, and thereafter maintained the following insurances during the Design and Construction Phase:

- (a) contract works insurance (material damage): for the full cost of the Facility or the Kawana Way Duplication;
- (b) contract works insurance (public liability): for \$250 million for any one occurrence or series of occurrences and unlimited in the aggregate;
- (c) contractors' pollution liability: for \$50 million per pollution condition and \$50 million aggregate policy limit;
- (d) fixed site (pollution legal) liability: for \$50 million per pollution condition and \$50 million aggregate policy limit;
- (e) contract works insurance (Advance Consequential Loss): for an amount equivalent to an agreed number of quarterly service payments, and with respect to the risks of loss or damage to the works or the Facility incurred under the contract works insurance (material damage) insurance;
- (f) marine transit: for a limit of indemnity not less than the maximum total value of combined works property to be transferred in one shipment, plus a provision for the cost of freight, insurance, taxes and duties as applicable;
- (g) design and construct professional indemnity insurance: for a minimum coverage of \$50 million for any one claim;
- (h) workers compensation insurance: as required by law; and
- (i) motor vehicle insurance: for \$30 million per occurrence.

Operating Term

Project Co is required to effect and maintain the following insurances during the Operating Term:

- (a) industrial special risks / consequential loss insurance: for no less than the aggregate of the following:
 - (i) in relation to the site and the Facility, its full value;
 - (ii) in relation to business interruption, an amount equal to an agreed number of quarterly services payments; and
 - (iii) an amount sufficient to replace Project Co contents of the site and the Facility;
- (b) public and products liability insurance: for \$250 million for any one occurrence with regards to public liability and \$250 million in the annual aggregate for products liability;

- (c) professional indemnity insurance: for a minimum \$10 million for any one claim and in the annual aggregate for all claims, including reinstatement of limits for unrelated claims;
- (d) workers compensation insurance: as required by law; and
- (e) motor vehicle insurance: \$30 million per occurrence.

Schedule 5 - Default, Major Defaults and Default Termination Events

Default

A 'Default' event is the occurrence of any event of default or breach of any obligation (other than a Major Default or Default Termination Event), by Project Co under any Project Document to which the State is a party.

If a Default (other than in respect of a service failure) occurs the relevant State Delegate may give Project Co a notice in writing stating that a Default has occurred, identifying and providing details of the Default and requiring Project Co to cure the Default within 20 business days of receipt of notice.

If that Default is not cured within 20 business days of project Co receiving the Default notice, that Default will constitute a Major Default.

Major Default

A 'Major Default' is any of the following:

- (a) **(insolvency other than Project Co)**: an insolvency event occurs in respect of a Relevant Company other than Project Co;
- (b) **(change in control other than Project Co)**: a change in control of a relevant company other than Project Co occurs without the consent of the State;
- (c) **(Change in Management)**: a change in management which is deemed to be a Major Default under clause 64.6(b), being a change in:
 - (i) the entity which provides management functions to Project Co;
 - (ii) the senior employees of an entity which carries out management functions for Project Co; or
 - (iii) the key personnel;
- (d) **(financial audit report)**: a financial audit report discloses fraudulent, false, misleading or negligent reporting by Project Co;
- (e) **(untrue statements)**: any representation or statement made by Project Co to the State in any project document proves to have been untrue in any material respect which gives rise to circumstances of a material adverse effect;
- (f) **(late completion)**: completion for a Stage of the Facility has not occurred by the due date for that Stage where this is prior to the sunset date;
- (g) **(late Kawana Way completion)**: where Kawana Way completion has not occurred by the due date where this is prior to the Kawana Way sunset date;
- (h) **(cessation of Services)**: there is a cessation of the services (other than as a result of a Force Majeure Event or Intervening Event for which Project Co is entitled to suspension of performance);
- (i) **(commercial opportunities)**: any:

- (i) breach of any of the DCA provisions of the Project Deed which has an adverse effect on the performance of the services and designated commercial purposes; or
 - (ii) carry out of any commercial opportunities outside of the DCAs;
- (j) **(Insurance)**: a failure by Project Co to effect and maintain the insurances required under the Project Deed;
- (k) **(damage and destruction)**: a breach by Project Co of its repair or rebuilding obligations under the Project Deed;
- (l) **(probity event)**: Project Co fails to comply with the Project Deed in relation to a probity event;
- (m) **(finance default)**: any event that would restrict or cancel Project Co's ability to obtain or continue to have all available funding under the finance documents or the equity documents;
- (n) **(Refinancing)**: a failure by Project Co to inform the State of a refinancing or distribute to the State its required share of any refinancing gain;
- (o) **(other default)**: any Default other than a service failure which has not been cured within 20 business days of Project Co receiving notice;
- (p) **(breach of other project documents)**: any breach by Project Co of a Project document (other than the Project Deed or a finance document) which has a material adverse effect;
- (q) **(persistent breach)**: persistent breach as follows:
 - (i) there have been five or more Defaults (other than in respect of service failures) in any 12 month period; or
 - (ii) in the opinion of the State there has been a persistent or repeated failure to comply with the obligations of Project Co under the Project Deed (other than in respect of a service failure) and the State has provided notice of this persistent failure;
- (r) **(Service Failure)**: there are service failures and, under the abatement regime (whether or not Project Co has actually been abated), Project Co accumulates failure abatements greater than certain thresholds specified in the Project Deed; or
- (s) **(vitiation of documents)**: any material part of any transaction document:
 - (i) ceases to have effect, otherwise than in accordance with its terms as at the date of the Project Deed;
 - (ii) to which the State is not a party is terminated otherwise than in accordance with its terms; or
 - (iii) is or becomes void, voidable, illegal, invalid or unenforceable (other than by reason only of a party waiving any of its rights),and if the transaction document is one to which the State is not a party, this would, in the reasonable opinion of the State, have a material adverse effect.

In the event of Major Default, or an event which is likely over time to become a Major Default, Project Co must immediately notify the State and must provide details of the nature of the default, and outlining the time period required for the cure.

Major Default capable of cure

Where the Major Default is capable of a cure, upon receipt of the Major Default notice Project Co must promptly commence and continue to pursue the cure of the Major Default and submit to the State a sufficiently detailed draft cure plan. The State and Project Co must then meet and agree the cure plan within five business days of receipt of this draft. The Project Deed provides a process by which Project Co can request an extension of the time period within which the Major Default must be cured. This consent of the State to this extension application must not be unreasonably refused where Project Co can demonstrate that the extension is warranted and that it is capable of curing the Major Default within the extended time period.

Failure to cure a Major Default by the expiry of the cure period will constitute a Default Termination Event, as outlined below.

Major Default not capable of cure

Where the Major Default is not capable of being cured, Project Co must submit to the State a plan which sets out:

- (a) reasons why the Major Default is incapable of being cured;
- (b) steps to be taken by Project Co which will overcome the consequences of, or compensate the State for, the Major Default;
- (c) how Project Co intends to address the underlying issue that gave rise to the Major Default; and
- (d) a time frame within which Project Co will overcome the consequences of, or compensate the State for the Major Default (**Prevention Plan**).

If the State agrees with the proposed Prevention Plan, Project Co must comply with and diligently pursue the Prevention Plan and comply with the specified timeframes to overcome the consequences of the Major Default. Where the State does not agree with the Prevention Plan, Project Co must comply with any reasonable requirements of the State. If:

- (a) the State forms the view that there are no reasonable requirements that can be met by Project Co to overcome the consequences of, or compensate the State for, the Major Default, or
- (b) Project Co fails to comply with an agreed Prevention Plan,

then a Default Termination Event will be deemed to have occurred.

Where Project Co does not comply with the requirements of the Major Default notice provisions under the Project Deed, or either the Major Default Cure Plan or Prevention Plan (as the case may be), the State may:

- (a) temporarily assume total or partial management and control of the works, the Facility and the provision of the services;
- (b) access those parts of the Site and the Facility to which Project Co has access or is entitled to occupy; and

- (c) take such other steps necessary or desirable to continue the implementation of the works or provision of the services and to minimise the effects of the Major Default or Default Termination Event.

Default Termination Event

A 'Default Termination Event' is the occurrence of any of the following:

- (a) **(Project Co insolvency)**: an insolvency event occurs in respect of Project Co or an EH (SCUH) Partner;
- (b) **(Project Co change in control)**: a change in control of Project Co occurs without the consent of the State;
- (c) **(abandonment)**: Project Co at any time wholly or substantially abandons the works or the services;
- (d) **(service failure)**: following three Major Default service failures in any rolling three year period (whether or not they have been cured), the point at which a further Major Default notice is issued, provided that on one occasion during the term, the Major Default service failures will be deemed to be reset to zero from the date on which the FM Contractor is replaced;
- (e) **(late completion of combined works)**: late completion as follows:
 - (i) completion for a Stage of the Facility has not occurred by the sunset date for that Stage (except where this constitutes a Force Majeure Termination Event); or
 - (ii) Kawana Way Completion has not occurred by the Kawana Way sunset date (except where this constitutes a Force Majeure Termination Event);
- (f) **(assignment)**: Project Co assigns, transfers or otherwise disposes of any of its right, title and interest in or under any project document not in accordance with the assignment provisions of the Project Deed;
- (g) **(curable Major Default)**: a Major Default that is capable of cure has not been cured in accordance with the Project Deed;
- (h) **(Major Default not capable of cure)**: the State forms the view that there are no reasonable actions that can be taken to overcome the consequences of, or compensate the State for, a Major Default; or
- (i) **(damage and destruction)**: damage to or destruction of:
 - (i) the works or the Facility during the term; or
 - (ii) the Kawana Way works during the period from Financial Close to and including the date of Kawana Way completion,

in each case where the damage or destruction is caused by a Default, Major Default or Default Termination Event and the State directs Project Co not to rebuild or repair the works or the Kawana Way works.

In the event of a Default Termination Event, Project Co must immediately notify the State and must provide details of the nature of the default, and outlining the time period required for the cure.

The State may elect to do any one or more of the following:

- (a) terminate this Deed at any time after the occurrence of a Default Termination Event;
- (b) exercise its rights to cure or attempt to cure the Default Termination Event;
- (c) require Project Co to pay any moneys owing, on the election of which Project Co must immediately pay the amount demanded by the State; and
- (d) proceed by an appropriate court action to enforce performance of the applicable provisions of the Project Documents or to recover damages for the breach.

Schedule 6 - Force Majeure

Force Majeure Events

Force Majeure Events are defined in the Project Deed as any of the following:

- (a) lightning, cyclone, earthquake, natural disaster, landslide, tsunami, or mudslide;
- (b) civil riot or rebellion, revolution, terrorism, insurrection commotion and military usurped power, act of sabotage or act of a public enemy and war (declared or undeclared) or other like hostilities;
- (c) ionising radiation, contamination by radioactivity, nuclear, chemical or biological contamination (at levels above those contemplated in the design requirements) which is not caused or contributed to by Project Co;
- (d) each of the following events:
 - (i) fire;
 - (ii) flood at or transgressing onto the Site (or in the immediate vicinity of the Site which prevents, delays or disrupts access to the Site); or
 - (iii) explosion,in each case where such event is caused by any of the events described in paragraphs (a) or (b) (or in the case of flood, caused by other extreme weather events), not caused or contributed to by Project Co, and where Project Co can demonstrate that all reasonable preventative measures were taken to minimise the cause and effect of the event;
- (e) during the Operating Term, utility interruption upstream from a connection point;
- (f) epidemics or pandemics to the extent that Project Co cannot, in compliance with law, enter such part of the site necessary to perform the works or the services; and
- (g) an emergency declared as a disaster under the *Disaster Management Act 2003* (Qld) or a public health emergency declared under the *Public Health Act 2005* (Qld) that occurs during the Operating Term, but only to the extent performance of the services is unlawful,

which directly causes the State or Project Co to be unable to perform its obligations under the Project Deed, where the event or its consequences could not have been prevented by the exercise of a standard of care and diligence consistent with that of a prudent person undertaking the obligations under the Project Deed and where the event or its consequences were not otherwise caused or contributed to by the failure by Project Co to comply with its obligations under the Project Deed.

On the occurrence of a Force Majeure Event, Project Co must notify the State promptly in writing and provide full particulars of all relevant matters specified in the Project Deed (**Force Majeure Notice**).

The parties must meet within 5 business days of service of a Force Majeure Notice to discuss whether the event is actually a force majeure and to discuss and agree the consequences, including:

- (a) whether the Force Majeure Event will delay the achievement of completion and if so by how long and whether a claim for an extension of time is likely to be made;
- (b) how long it is estimated that the Force Majeure Event will continue;
- (c) what obligations (if any) will be affected by the Force Majeure Event; and
- (d) whether the Force Majeure Event is covered by insurance.

Upon the occurrence of a Force Majeure Event at the site, the obligations of the parties affected by the Force Majeure Event will be suspended to the extent that the Force Majeure Event prevents that party from meeting its obligations. The quarterly services payment may be abated to the extent that the services are unable to be provided by reason of the Force Majeure Event.

Project Co may apply for payment by the State of:

- (e) the minimum amount necessary to enable Project Co to pay scheduled principal repayments and interest on its debt; plus
- (f) a portion of the quarterly services payment to the extent services are still being provided; plus
- (g) an amount of the 'scheduled lifecycle component' as part of the next quarterly services payment after the suspension ceases; less
- (h) any abatement amounts for that period; less
- (i) any amount Project Co may recover under contract works insurance; less
- (j) any amount paid by the State to the extent referable to the Force Majeure Event.

Force Majeure Termination Events

'Force Majeure Termination Events' are defined in the Project Deed as any of the following:

- (a) where a Force Majeure Event (other than an event that occurs under clause 51 (Emergency) of the Project Deed), substantially prevents the performance by Project Co of its material obligations under the Project Deed for a continuous period of 180 consecutive days or more;
- (b) an event which is deemed to be a Force Majeure Termination Event under Clause 49.14(d) (i.e. where an uninsurable risk occurs) or Clause 50.3(a) (i.e. where the State directs Project Co not to rebuild or repair the facility after a 'Casualty Occurrence'); or
- (c) where:
 - (i) commercial acceptance for a Stage of the Facility has not been achieved by the applicable sunset date;
 - (ii) completion of the Kawana Way Duplication has not been achieved by the applicable sunset date; or

- (iii) the Independent Reviewer gives a certificate under Clause 28.3(a)(3) (i.e. that the Facility will not achieve commercial acceptance by the applicable sunset date),

and commercial acceptance for that Stage of the Facility or the Kawana Way Duplication would have achieved commercial acceptance or completion by the applicable sunset date, in each case but for the Force Majeure Event.

The State may terminate the Project Deed where a Force Majeure Termination Event has occurred and is subsisting.

Similarly, Project Co may terminate the Project Deed where a Force Majeure Termination Event has occurred and is subsisting, provided that Project Co is not able to recover under either advanced loss of profits insurance policies (applicable to the works) or the consequential loss cover section of the industrial special risks insurance (in respect of the Operating Term) for the Force Majeure Termination Event (other than because Project Co has not complied with its obligations in respect of such insurance policies or made a proper claim).