

Investing in Infrastructure | International Best Legal Practice in Project and Construction Agreements | January 2016

Damian McNair | Partner, Legal | M: +61 421 899 231 | E: damian.mcnair@au.pwc.com

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs



Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
Security package – Construction Bond – Value	[Redacted]% Contract Price	8% Contract Price	7.5% Contract Price	10% Contract Price	8% Contract Price	8.5% Initial Contract Price
Security package – Construction Bond – Commencement	Prior to Financial Close	Prior to Financial Close	Prior to Financial Close	Prior to Financial Close	Prior to Financial Close	Prior to Financial Close
Security package – Construction Bond – Expiry	[Redacted] months after the Original Date for Commercial Acceptance	3 months after the Original Date for Commercial Acceptance	3 months after the Date for Commercial Acceptance	3 months after the Date for Completion	3 months after the Date for Final Completion	3 months after the Original Date for Commercial Acceptance
Security package – Post-Completion Bond – Value	[Redacted]% Contract Price	2.5% Contract Price	2.5% Contract Price	2.5% Contract Price	2.5% Contract Price	3.75% Initial Contract Price
Security package – Post-Completion Bond – Commencement	Upon the issue of the Certificate of Commercial Acceptance	Prior to Date of Commercial Acceptance	Prior to Date of Commercial Acceptance	Prior to Date of Builder Completion	Prior to Date of Final Completion	Prior to Date of Commercial Acceptance

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
Security package – Post-Completion Bond – Expiry	No earlier than [redacted] months after the Original Date of Commercial Acceptance	12 months after the Date of Commercial Acceptance (Defects Liability Period)	12 months after the Date of Commercial Acceptance (Defects Liability Period)	12 months after the Date of Builder Completion	12 months after the Date for Final Completion	No earlier than 12 months after Date of Commercial Acceptance
Bond – Draw down	<p>Project Co able to draw down without notice where:</p> <ul style="list-style-type: none"> Project Co has a bona fide Claim against the Builder Insolvency Event affects Builder or Parent Guarantor Project Co entitled to terminate due a Builder Default Termination Event Builder has failed to replace any Performance Bond when required 	<p>Project Co able to draw down without notice where:</p> <ul style="list-style-type: none"> Builder fails to achieve Commercial Acceptance by Date for Commercial Acceptance fails to rectify or complete a Technical Completion Outstanding Item or Commercial Acceptance Outstanding Item within the relevant Outstanding Item Completion Period Builder fails to rectify a Defect within the time required by the relevant Defect Notice 	<p>Project Co able to draw down without notice where:</p> <ul style="list-style-type: none"> Project Co has a bona fide Claim against the Builder the Builder is in breach of the D&C Subcontract or any other D&C Project Document an Insolvency Event occurs in respect of the Builder Project Co becomes entitled to exercise a right under the D&C Subcontract or any other D&C Project Document in respect of any failure by the Builder to 	<p>Project Co able to draw down without notice where:</p> <ul style="list-style-type: none"> Project Co has a bona fide Claim against the Builder Builder is Insolvent Project Co entitled to exercise a right under the Construction Contract or any other Construction Document in respect of any failure by the Builder to perform its obligations, including on termination Project Co is given notice by the Facility Manager in accordance with clause 22(d) of the Interface Deed Terms Sheet 	-	<p>Project Co only entitled to have recourse to extent that:</p> <ul style="list-style-type: none"> exercises a right to terminate following Builder Default Termination Event for an amount in good faith considers due and payable or recoverable as loss suffered considers in good faith that Builder is in breach of any payment or other obligations under this Agreement or any other Builder Document in good faith considers due and payable or recoverable as loss suffered as a

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
		<ul style="list-style-type: none"> • Insolvency Event occurs in respect of the Builder or Builder Guarantor • Builder fails to pay an amount which is due and payable under, in respect of, or as a result of, a breach and Project Co has provided written notice • Builder has failed to provide or replace any Construction Bond when required • Builder has failed to pay an amount owing under the Interface Agreement • State requires Project Co to call on the Construction Bond under the Project Agreement due to failure of the Builder 	<p>perform its obligations</p> <ul style="list-style-type: none"> • Builder has failed to provide or replace any Performance Bond when required under the D&C Subcontract • Project Co is given notice by the FM Sub contractor in accordance with clause 20(d) of the Interface Deed <p>directed to do so by the State under the Project Agreement or where the State has a right of recourse to any Performance Bond under the Project Agreement, but only to the extent that the Builder's breach or failure to perform an obligation under the D&C Subcontract</p>	<ul style="list-style-type: none"> • failed to replace any Performance Bond 		<p>result</p> <p>Performance Bond is not replaced when required</p>

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
		<ul style="list-style-type: none"> satisfy any Moneys Owning by the Builder to Project Co Project Co terminates the D&C Subcontract as a result of default by the Builder or an Insolvency Event 				
Liability – Cap	<p>[Redacted]% Contract Price</p> <p>Note there is also a cap in respect of Abatement Amounts (Abatement Cap) of [Redacted]% Contract Price</p>	<p>50% of Contract Price</p> <p>Reduced by:</p> <ul style="list-style-type: none"> amount of any payment made by the Builder to the FM Sub contractor under the Interface Agreement any amount demanded under a Performance Bond any amount paid by the Parent Guarantor under a Parent Company Guarantee <p>Increased by:</p> <ul style="list-style-type: none"> by the amount of 	50% of Contract Price	50% of Contract Price	<p>50% of Contract Price</p> <p>Reduced by:</p> <ul style="list-style-type: none"> amounts paid by the Builder directly to the State or the Security Trustee under the side deeds Amounts paid by Construction Contractor to another Key Sub contractor under Interface Amount demanded under a Performance Bond <p>Increased by:</p> <ul style="list-style-type: none"> Amounts Contractor receives from another Key Sub contractor as comp for amounts paid by Contractor to PPP Co in respect of 	50% of Initial Contract Price

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
		any payment which the Builder receives from the FM Sub contractor as compensation for any amount paid by the Builder to Project Co in respect of a Liability under the D&C Subcontract			liability <ul style="list-style-type: none"> Amounts a Change causes an increase in Contract Price 	
Liability – exclusions	<ul style="list-style-type: none"> fraudulent act or omission, wilful default or wilful misconduct by the Builder or a Builder Associate abandonment of the Builder Works damage to property arising out of the Builder Works third party claims in relation to IP infringement third party claims in relation to death, 	<ul style="list-style-type: none"> fraudulent act or omission or wilful default or criminal conduct of the Builder to extent payments have been received under insurance policies (or should have been received) abandonment of the Builder Works Liability that is a statutory fine arising out of a breach of statutory duty, Liability that 	<ul style="list-style-type: none"> LDs Fraud, criminal acts, wilful default, wilful misconduct, wilful or reckless damage to extent payments have been received under insurance policies (or should have been received) abandonment of works or failure to commence construction personal injury, death, destruction or 	<ul style="list-style-type: none"> LDs fraud, wilful misconduct, theft and wilful or reckless damage, and criminal conduct extent payments have been received under insurance policies (or should have been received) abandonment of works or failure to commence construction personal injury, death, destruction or damage to property 	<ul style="list-style-type: none"> insured liability under an insurance policy required to be maintained under the Construction Contract, in respect of an amount equal to any insurance proceeds recovered under such insurance policy arose from Construction Contractor malfeasance, fraudulence, wilful default, a liability that cannot be limited at law, a statutory fine Construction Contractor liability arises out of abandonment of 	<ul style="list-style-type: none"> wilful default, fraud or gross negligence by the Builder or any Builder Associate any amount for which the Builder receives insurance proceeds breach of Clauses 21.2, 21.3 and 21.4 (re IP)

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
	<p>injury or property damage</p> <ul style="list-style-type: none"> any Liability that cannot be limited or excluded by Law Builder's costs in relation to any Builder Defects during the Defect Liability Period <p>Note cap does not include and will not be eroded to extent of any amount covered (or that would have been recovered) under an insurance policy under the Construction Contract.</p>	cannot be limited by Law	<p>damage to property</p> <ul style="list-style-type: none"> interest payable by Builder under Project Document amounts Builder recovers from an Interface Contractor in respect of the liability Liability that cannot be limited by law. 	<ul style="list-style-type: none"> interest payable by Builder under Project Document amounts Builder recovers from an Interface Contractor in respect of the liability Liability that cannot be limited by law 	Project Works	
Liability – LD cap within general liability cap?	Yes	Yes	No	No	No	No
Liability – LD cap	[Redacted]% Contract Price	12% of Contract Price	10% of Contract Price	Limited to [\$80.2 million]	[15]% of Contract Price – To match Construction Contractor Sunset Date of 12 Months after Date for Final Completion	10% of Initial Contract Price

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
Liability – Consequential loss definition	Meaning given in Project Deed	As per Project Deed	<ul style="list-style-type: none"> • loss of opportunity, profit, anticipated profit, business, business opportunities or revenue, any failure to realise anticipated savings • any penalties payable under contracts other than the D&C Subcontract • consequential, indirect, special or punitive damages 	As per Project Deed	<p>Indirect Loss means any loss that is indirect and any of the following losses (whether direct or indirect):</p> <ul style="list-style-type: none"> • loss of profits • loss of revenue • loss of income • loss of production • loss of business • loss of business opportunity • loss of contract • loss of goodwill • loss of use of property • failure to realise anticipated savings • direct or indirect financing costs; or • penalties payable under agreements other than this deed, 	<ul style="list-style-type: none"> • loss of opportunity, profit, anticipated profit, business, business opportunities revenue or any failure to realise anticipated savings • loss or damage to reputation, loss of goodwill or any business interruption, loss of access to markets, loss of use • loss or damage not arise naturally, or according to the usual course of things, from the relevant event itself <p>or any similar costs, loss, expense or damage, whether or not within the reasonable contemplation of the parties as at the Date of this Agreement</p>

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
						and whether that cost, loss expense or damage is present or future, fixed or unascertained, actual or contingent or liquidated or unliquidated
Liability – Consequential loss exclusion	<ul style="list-style-type: none"> any payment expressly stipulated to be payable by the Builder to Project Co in the Construction Contract and the Interface Agreement costs incurred by Project Co in: rectifying or mitigating the effects of Builder Defects and Damage, making the Works safe loss, damage, costs and expenses incurred by Builder that can be claimed from Project Co and is recoverable by Project Co from 	<p>Re liabilities of Builder to Project Co</p> <ul style="list-style-type: none"> any amounts payable by the Builder in respect of Termination Payments Liability to pay Financing Delay Costs Liability to pay Liquidated Damages Project Co's Liability to pay the FM Sub contractor under the interface Agreement any proceeds or amounts recoverable under any insurance policy <p>Re liabilities of</p>	<ul style="list-style-type: none"> [criminal acts or fraud of Builder or any Builder Associate wilful misconduct under any D&C Project Document by Builder or Builder Associate any loss of or damage to third party property or injury to, disease or death of a person to the extent which, by Law, the parties cannot limit or exclude the direct costs incurred by Project Co in rectifying a Defect Builder is 	<ul style="list-style-type: none"> Loss of or damage to third party property LDs abandonment costs incurred by Project Co in rectifying a Defect any amounts payable by either party under Schedule 8 of the Project Deed (Estimated Cost Effect) or clause 15 of this Terms Sheet Project Co's Liability to the Territory pursuant to the Project Deed the Territory's liability to Project Co pursuant to the 	<ul style="list-style-type: none"> loss in respect of death or personal injury or physical damage to third party property due to acts or omissions of in relation to loss sustained by the Project Company or a Project Company Related Party, the Construction Contractor or Construction Contractor Related Party (and vice versa) loss arising from any criminal acts or fraud on the part of in relation to loss sustained by the Project Company or a Project Company Related Party, the Construction Contractor or Construction 	<ul style="list-style-type: none"> wilful default, fraud or gross negligence by the Builder or any Builder Associate any amount for which the Builder receives insurance proceeds breach of Clauses 21.2, 21.3 and 21.4 (re IP)

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
	<p>the State subject to the Pass Through Principles</p> <ul style="list-style-type: none"> Liability in respect of any Liability for the Liquidated Damages, Extension Event Compensation Amounts, and Abatement Amounts any amount payable by the Builder in respect of a Change Compensation Event deductions by the State from the Quarterly Service Payment pursuant to clause 31.4 of the Project Agreement Termination Payments as expressly stipulated in the Construction Contract 	<p>Project Co to Builder:</p> <ul style="list-style-type: none"> Liability arising from death, injury or property damage (other than pure economic loss arising as a result of such damage) Liability in respect of Claims in connection with the D&C Subcontract by third parties against an Indemnified Person Liability arising from wilful misconduct on the part of Project Co moneys which Project Co at any time is or becomes actually liable to pay the Builder amounts payable by Project Co re Termination Payments 	<p>liable for</p> <ul style="list-style-type: none"> any amounts payable by the Builder under Schedule 4 of the Project Agreement (Change Compensation Principles) or section 16 Project Co's Liability to the State pursuant to the Project Agreement (including Abatement) LDs any amounts recovered from insurances amounts due by Project Co to pay or repay the indebtedness of Project Co under the Financing Documents on the due date any payment expressly stipulated to be payable by the 	<p>Project Deed</p> <ul style="list-style-type: none"> Liability that is a Pass Through Claim any amounts recoverable from insurances any amounts due by Project Co or a Project Company Related Party to pay or repay the indebtedness of Project Co under the Finance Documents on the due date for payment any payment expressly stipulated to be payable by the Builder to Project Co in the Construction Contract or the Interface Deed any increased costs properly incurred by Project Co in providing the Services or operating and maintaining the 	<p>Contractor Related Party (and vice versa)</p> <ul style="list-style-type: none"> loss arising from wilful misconduct on the part of in relation to loss sustained by the Project Company or a Project Company Related Party, the Construction Contractor or Construction Contractor Related Party (and vice versa) loss which is the subject of the indemnities set out in clauses 7.9, 13.6(c) or 15.9(f) (re carbon emissions data, employee obligations and proprietary material) any liability to the extent to which by law, the parties cannot limit or contract out of Liability in respect of Claims in connection with this deed by third parties against the Project Company or a Project Company Related Party to the extent that if any such 	

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
	subject to the proviso that the above exclusions do not in any way limit Liability of Builder to Project Co which is, or would have been, recovered under an insurance policy required to be held in respect of the Contract, but only to the limit of insurance required under the Project Agreement.	<ul style="list-style-type: none"> • Moneys Owning • any proceeds or amounts recoverable under any insurance policy • payments in respect of the Contract Price • amounts payable in respect of Change Compensation Events 	Builder to Project Co in the D&C Project Documents]	Facility	<p>Claims were able to be made directly against the Construction Contractor by the third party, the Liability in respect of those Claims would be direct or otherwise would not fall within the remainder of this definition of 'Indirect Loss'</p> <ul style="list-style-type: none"> • moneys which the Project Company at any time is or becomes actually liable to pay the Construction Contractor under any provision of a D&C Document which is not otherwise for an Indirect Loss • any amounts payable by the Project Company under clause 74.1 (consequences of termination) • Project Company's liability under clause 88 (Construction Interface Agreement) • cost to the Project Company of procuring an alternative item of FF&E arising from a 	

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
					<p>breach of clause 19 by the Construction Contractor</p> <ul style="list-style-type: none"> • Liability incurred by the Project Company (including to a third party) in rectifying a Defect for which the Construction Contractor is liable under this deed • Moneys Owing under an express provision of this deed which is not otherwise for an Indirect Loss) • any amounts payable by the Construction Contractor under Schedule 16; (termination payments) • Liability to pay amounts pursuant to clause 21; (time for delivery – Includes delay damages, delay costs and ACL insurance) • Liability to indemnify the Project Company for Abatement Amounts • the Project Company's 	

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
					Liability to pay a party to the Construction Interface Agreement.	
Acts of prevention	<ul style="list-style-type: none"> any act by Project Co or a Project Co Associate, other than as permitted or required under the Construction Contract any omission by Project Co to do something which it is obligated to do under the Construction Contract, other than as permitted or required under the Construction Contract any breach by Project Co of the Construction Contract any Project Co Modification failure to perform a Wrap Exclusion <p>but does not include</p>		<ul style="list-style-type: none"> any act or omission of Project Co or a Project Co Associate any breach by Project Co of any D&C Project Document which affects the performance by the Builder of its obligations under the D&C Subcontract. <p>other than any act, omission or breach to the extent which it:</p> <ul style="list-style-type: none"> is caused or contributed to by the State or any State Associate under a Project Document is authorised or permitted under any D&C Project Document is caused or contributed to by 	<ul style="list-style-type: none"> any act or omission of Project Co or a Project Company Related Party any breach by Project Co of any Construction Document <p>which affects the performance by the Builder of its obligations under the Construction Contract, other than any act, omission or breach to the extent which:</p> <ul style="list-style-type: none"> is caused or contributed to by the Territory or any Territory Related party under a Project Document is expressly authorised or permitted under any Construction Document is caused or 	<ul style="list-style-type: none"> a breach of this deed or any D&C Document by the Project Company an act or omission by the Project Company or a Project Company Related Party not being an act or omission expressly permitted or allowed for by the D&C Documents except to the extent the act or omission is caused or contributed to by a breach by the Construction Contractor of the D&C Documents or any negligent or unlawful act or omission of the Construction Contractor or a Construction Contractor Related Party, and does not result from the exercise by the State or SHFA of any of its powers and functions pursuant to any Law 	<p>‘Construction Extension Event’ means:</p> <ul style="list-style-type: none"> an act, default or omission of Project Co or a Project Co Associate not caused or materially contributed to by the Builder but which is not Compensable Extension Event or <i>Force Majeure</i> Event or an act or omission of Project Co permitted under this Agreement Project Co Modification a valid suspension of the Works by the Builder

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
	an Extension Event under the Project Agreement, a <i>Force Majeure</i> Event or any act, omission or breach to the extent caused by the State or any State Associate, another Key Sub contractor, Builder's breach of the Construction Contract or negligence or wrongful act or omission of the Builder or any Builder Associate.		the Builder's or any Builder Associate's breach of any D&C Project Document or the negligence or wrongful act or omission of the Builder or any Builder Associate.	contributed to by the Builder or any Builder Related Party's breach of any Construction Document or the negligence or wrongful act or omission of the Builder or any Builder Related Party.	under the Project Deed <ul style="list-style-type: none"> any suspension by the Construction Contractor of its obligations under this deed pursuant to clause 73.5(c)(i) a Change Order issued by the Project Company under clause 56.7 	
Project Co Modification	a modification as initiated by Project Co under the Construction Contract (but does not include State Modifications).	-	a Modification proposed by Project Co and confirmed in a Modification Order or which the D&C Subcontract otherwise expressly provides to be a Project Co Modification and which is not a State Modification (but does not include a Minor Modification)	-	-	a Modification initiated by Project Co, or to which Clause 52.20 applies which is not a Modification or FF&E Modification initiated by the State under the Project Agreement

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
Additional costs (above Contract Price)	<p>Only:</p> <ul style="list-style-type: none"> • Modifications • Compensable Extension Events • other additional amounts passed down from the Project Agreement • interest that accrues in the Construction Delay Account and the Sub Debt LD Account • insurance proceeds paid to Project Co to which the Builder is entitled • other payments to which the Builder is entitled under the Construction Contract 	<p>Only:</p> <ul style="list-style-type: none"> • Construction Extension Events • Amount payable under Termination Payment Provisions • Any other amounts expressly payable 	<p>Only:</p> <ul style="list-style-type: none"> • Delay costs as a result of a Project Co Act of Prevention • Costs in respect of a Project Co Modification • Amount payable under Termination Payment Provisions 		<ul style="list-style-type: none"> • Changes in accordance with clauses 55 and 56 and the ECE Schedules • Minor Changes • remediation costs under clause 9.5; • acceleration costs under clause 21.7; • Prolongation Costs under clause 21.8; • GST under clause 86.2; • the Construction Contractor's costs of preparing and submitting a Change Notice; • insurance premiums under clause 67.5 • interest under clause 68.11 • cost of repair or rebuilding under clause 64.1; and • any other costs which the Construction Contractor is explicitly entitled to payment for under this deed 	

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
Warranties	<p>All warranties in relation to the design, construction and commissioning of New Facility required to be given by Project Co to the State under the Project Agreement will be passed through consistently with the Obligations Flow Down Table, including the Fit for Intended Purposes Warranty.</p> <p>The Fit for Intended Purposes Warranty to be provided by the Builder as at Commercial Acceptance will cover works and activities that are not Builder Works:</p> <ul style="list-style-type: none"> the Builder will warrant that such works and activities fulfil the Fit for Intended Purposes Warranty as at Commercial 	<p>[In addition to Pass through of warranties from Project Deed + Warranty Items] Builder as at the Date of Commercial Acceptance of the Works the New Facility (as constructed) is and will remain at all relevant times during the Term, Fit for the Intended Purposes (subject to the proper performance by Project Co of its obligations under the Project Agreement during the Operating Term) and it has checked and carefully considered and understands (or is deemed to have checked and carefully considered and understood) fully what is meant by 'Fit for the intended Purposes' and how to ensure</p>	<p>[In addition to warranties passed through from the Project Deed] Builder represents that, as at the relevant Date of Completion, the Facility is Fit for Purpose and capable of being Fit for Purpose at all times throughout the Term, by reference to standards as at the Date of Completion.</p>	<p>Pass through of warranties, including the Fit for Intended Purpose warranties related to the D&C Obligations which will be passed through to reflect the principle that, as at the Date of Completion, the Facility will be and will remain at all relevant times during the Term, Fit for Intended Purpose subject only to clause 4.3(c).</p> <p>Exceptions to warranties (other than Warranty Items) provided at clause 4(c) to extent that Claim or Liability caused by:</p> <ul style="list-style-type: none"> fair, wear and tear of the Works, including a Warranty Item any failure to operate, maintain or repair the Works, including any Warranty 	<p>Additional design and construction warranties:</p> <ul style="list-style-type: none"> (Project Brief): it has checked and carefully considered the Project Brief and other requirements of this deed, in respect to design and construction (design): the design of the Facilities and the Public Realm will be completed in accordance with the requirements of this deed and so that the Construction Contractor satisfies the FFP Warranty and the Sustainability Requirements (Project Objectives and Services) the Scheme Design and the design and construction of the Facilities and the Public Realm is consistent with, and facilitates and does not impair the achievement of the Project Objectives 	-

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
	<p>Acceptance</p> <ul style="list-style-type: none"> if after Commercial Acceptance a Defect arises in such works and activities, that Defect will not be a Builder Defect, including where the Defect is a failure to fulfil the Fit for Intended Purposes Warranty (This exclusion does not extend to any design obligations of the Builder). 	<p>the New Facility will meet this requirement.</p> <p>Builder warrants that it will design and construct the Builder DCA Works so that, when completed, they will at the date of the Builder DCA Works Completion be fit for their intended purpose as reasonably inferred from the Design and Construction Documents and comply with the requirements of the D&C Subcontract and of Law.</p>		<p>Item in accordance with the Output Specification or Industry Best Practice</p> <ul style="list-style-type: none"> any failure to operate or maintain the Facility in accordance with the reasonable written operating or maintenance instructions provided by the Builder to the Facility Manager (including any manufacturer/supplier requirements) the Facility Manager performing the Services otherwise than in accordance with the Output Specification or Industry Best Practice damage caused to the Works, including a Warranty Item by 	<ul style="list-style-type: none"> (full liability for design): its obligations under, and the warranties given will remain unaffected and that it will bear full liability and responsibility for the design and construction of the Facilities and the Public Realm notwithstanding Scheme Design and any other design work carried out by Construction Contractor or by others prior to the Date of this deed and incorporated into this deed any review or approval of, comment upon, or failure to comment on such design by the Project Director, the State, the Project Company or anyone on their behalf construction in accordance with the Design Documentation will ensure that Technical Completion will be 	

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
				<p>negligent or unlawful acts or omissions of others (other than the Builder or a Builder Related Party)</p>	<p>achieved by the Date for Technical Completion etc.</p> <ul style="list-style-type: none"> • Project Works, when completed, will be designed and constructed in compliance with all health and safety requirements contained in the WHS Legislation • Construction Contractor has consulted with the Operator prior to preparing the Scheme Design and prior to designing and constructing the Facilities and warrants that the design and construction of the Facilities will be completed in accordance with all requirements of the Operator necessary to enable the Operator to satisfy its obligations under the Operator Agreement 	

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
Relief Events	-	If an Extension Event occurs other than a Compensable Extension Event under the Project Agreement, to the extent that any such Extension Event causes Commercial Acceptance to be delayed the Builder must make good Project Co's Financing Delay Costs and any holding costs payable by Project Co to the FM Sub contractor under the FM Subcontract (including any deductible period under the advanced consequential loss insurance policy taken out by the Builder (ACL Insurance))	-	Relief Events will be passed through to the Builder in accordance with the Pass Through Principles. Subject to clause 12.1(f) of this Terms Sheet (Contract Works Insurance – Advanced Loss of Profit), where the Builder is granted EOT for delay caused by a Relief Event, the Builder will be required to pay an amount equal to the equivalent liquidated damages that would be payable had an extension of time not been granted for the period covered by the Relief Event, to compensate Project Co for its daily financing costs, holding costs and other amounts of a like nature that are not recovered from the Territory under the Project Deed or covered by insurance proceeds under clause 12.1(f).	To extent it delays Final Completion, Construction Contractor must make good PPP Co's debt financing delay costs, for period after Date for Final Completion covered by the Relief Event (including any deductible period under insurance). Payment to other parties if any to be agreed. Above liability limited to lesser of Actual costs incurred by Construction Contractor and Sum of LDs applicable to the Stage for each calendar day from date after original date for Final Completion until last date covered by Relief Event.	-

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
EOT	<p>Builder will be entitled to an extension of time to the relevant Date for Completion where the Builder is delayed by:</p> <ul style="list-style-type: none"> • a Project Co Act of Prevention • an Extension Event under the Project Agreement 	<p>Pass through of Extension Events under Project Deed</p>	<p>In addition to Pass Through, entitled to EOT for:</p> <ul style="list-style-type: none"> • Project Co Act of Prevention • Project Co Modification • delay due to failure of FM Sub contractor to perform FM Completion Obligations (provided certain obligations are met) 	<p>In addition to Pass Through, entitled to EOT for:</p> <ul style="list-style-type: none"> • Project Co Act of Prevention • Modification directed by Project Co • suspension of Builder under clause 14.4 		<p>Pass through of Extension Events under Project Deed</p> <p>If Extension Event is not a Compensable Extension event or Construction Extension Event, only able to claim for period for which insurance proceeds are available to Project Co under the advanced loss of profit component of contract works insurance.</p> <p>Extension Event means:</p> <ul style="list-style-type: none"> • Compensable Extension Event • <i>Force Majeure</i> Event • failure by a Governmental Agency to carry out works or provide services directly necessary for the implementation of the Project • any event, circumstance or

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
						occurrence, not caused or contributed to by either party, any Project Co Associate or any Builder Associate, which prevents access to the Site <ul style="list-style-type: none"> Construction Extension Event
Delay costs	<p>Builder will be entitled to:</p> <ul style="list-style-type: none"> be paid prolongation costs by Project Co if the Builder is granted an extension of time for a Compensable Extension Event under the Project Agreement, consistently with the Pass Through Principles be paid prolongation costs by Project Co if the Builder 	<p>Pass through of Compensable Extension Events under Project Deed</p>	<p>In addition to Pass Through, entitled to delay costs for:</p> <ul style="list-style-type: none"> Project Co Act of Prevention Project Co Modification, <p>calculated in accordance with the Change Compensation Principles in the Project Agreement.</p>	-	-	-

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
	is granted an extension of time for a Project Co Act of Prevention.					
DLP	12 Months	12 Months	None specified (as per Project Deed)	12 Months	12 Months	12 Months
Site/Latent Condition Risk	None specified	None specified (as per Project Deed)	None specified (as per Project Deed)	None specified (as per Project Deed)	None specified (as per Project Deed)	Builder accepts all risks associated with Site Conditions.
Sub-Independent Certifier/Verifier	Project Co will pay the costs of the Sub-Independent Reviewer	Costs of Sub-IV borne equally between Project Co and Builder	Project Co will pay costs of Sub-IV except to extent costs due to dispute or claim raised by Builder that is decided against the Builder, or due to Builder's breach.	Project Co will pay costs of Sub-IC except to extent costs due to dispute or claim raised by Builder that is decided against the Builder, or due to Builder's breach.	Borne equally by the Project Co and the Contractor, unless and to the extent that: <ul style="list-style-type: none"> additional costs are payable to the Sub Independent Verifier and which are incurred as a result of a breach by the Construction Contractor of this deed, a request by the Construction Contractor for the performance of additional services or failure of the Construction Contractor to pass any test, in which case the Construction Contractor will pay for 	[No Sub-IC]

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
					<p>the Project Company's share of such additional costs</p> <ul style="list-style-type: none"> additional costs are payable to the Sub Independent Verifier which are not a result of the circumstances set out above, in which case the Project Company will pay for such costs 	
Events of Default	<p>As listed in Project Agreement plus:</p> <ul style="list-style-type: none"> failure to make payment when due and payable to Project Co under the Construction Contract or Interface Agreement breach of the Builder's obligation to replace a Performance Bond breach by the Builder or any other Builder Associate of a Builder 	<p>Additional Events of Default:</p> <ul style="list-style-type: none"> (payment default) fails to make a payment due and payable failure to comply with the Minimum Safety and Environmental Requirements which is not cured within 20 Business Days Parent Company Guarantee provided under the D&C Subcontract is void or voidable Performance 	<p>Additional Events of Default:</p> <ul style="list-style-type: none"> (payment default) fails to make a payment due and payable within 10 Business Days (insurances): a breach by the Builder of its obligations under clause 39 (Performance Bonds): failure to provide or replace (Change in Control): without Project Co's consent 	<p>Additional Events of Default:</p> <ul style="list-style-type: none"> (payment default) fails to make a payment due and payable within 10 Business Days (insurances): a breach by the Builder of its obligations under clause 24 (Performance Bonds): failure to provide or replace (Sub contractors) breach of clause 30 (Change in Control): without Project Co's 	<p>Additional Events of Default:</p> <ul style="list-style-type: none"> fails to regularly and diligently progress the Development Activities as required Project Co reasonably forms the view that Final Completion will not occur by the Date for Final Completion and the Construction Contractor fails to prepare, submit or comply with a Corrective Action Plan in respect of that delay in accordance with clause 21.6 Sub Independent Verifier on a date which is no more than 	<p>Occurrence of any event of default by the Builder or a Builder Relevant Company or breach of any obligation (other than a Builder Major Default or Builder Default Termination Event) by the Builder under this Agreement, the Parent Guarantee, the Builder Direct Deed or any Financier Builder Direct Deed ordination Agreement or the Financier Certifier Agreement, which event of default or breach the Builder</p>

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
	<p>Document (other than the Construction Contract) which has a Material Adverse Effect</p> <ul style="list-style-type: none"> • a default of the Parent Guarantor under the Parent Guarantee or the Parent Guarantee becomes voidable or unenforceable • there are Service Failures and, under the Abatement Regime (whether or not the Builder has actually been abated), the Builder has accumulated Failure Abatements greater than specified percentages in 1, 2, 5 and 12 month averages or a specified 	<p>Bond has been drawn down in full and at least 60% of the amounts drawn were drawn in circumstances where the Builder failed to pay sums due and payable</p>		<p>consent</p>	<p>21 months prior to the Date for Final Completion issues a certificate and the Construction Contractor failures to prepare, submit or comply with a Corrective Action Plan in respect of that delay</p> <ul style="list-style-type: none"> • representation or warranty given by the Construction Contractor in a D&C Document to which the Project Company is a party proves to be untrue • fraud, collusive, misleading or deceptive conduct on the part of the Construction Contractor or a D&C Sub contractor in the performance of the Project Works • breach by the Construction Contractor of an obligation under this deed or any other D&C Document (other than an Availability Failure or a Service Failure) 	<p>fails to cure within 20 Business Days after Project Co gives the Builder a notice in writing</p>

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
	<p>percentage of Quality Failure Points</p> <ul style="list-style-type: none"> there have been a specified number of Defaults in any specified period 				<ul style="list-style-type: none"> any time during the Development Phase, the Construction Contractor fails to comply with the terms of a Corrective Action Plan ASIC forms opinion that serious contravention of the Corporations Act relating to the Construction Contractor or a D&C Sub contractor 	
Suspension – Builder	<p>Subject to the Builder Direct Deed and the Builder Consent Deed, if:</p> <ul style="list-style-type: none"> a Project Co Major Default occurs Project Co does not pay that amount or remedy the Insolvency Event within [redacted] Business Days after receipt of a written notice (“Notice of Intended 	-	<ul style="list-style-type: none"> if (subject to Project Co’s rights to set off under the D&C Subcontract) Project Co fails to pay a sum to the Builder which has been certified by the Sub-Independent Certifier as due and payable to the Builder under the D&C Subcontract within 10 Business Days after the date Project Co 	<p>If (subject to Project Co’s rights to set-off under the Construction Contract) Project Co fails to pay a sum to the Builder which has been certified by the Independent Certifier as due to the Builder under the Construction Contract and which amount has become due and payable under the Construction Contract within 10 Business Days after the date Project Co</p>	<p>If a Project Company Default occurs and is subsisting, the Construction Contractor may give the Project Company a notice in writing.</p> <p>If the Project Company fails to rectify the Project Company Default within:</p> <ul style="list-style-type: none"> 3 Business Days after the date on which the Project Company receives, Construction Contractor may suspend performance of its obligations 10 Business Days after 	<p>Subject to the Builder Direct Deed and the Financier Builder Direct Deed, where any amount is due and payable under this Agreement by Project Co to the Builder, not the subject of a dispute, remains unpaid for 7 days after notice of non-payment has been given by the Builder to Project Co then the Builder may suspend the Works</p>

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
	Suspension”)		receives notice from the Builder of the intention to suspend for failure to pay (other than monies the subject of a bona fide Dispute)	receives notice	the date on which the Project Company receives the notice, Construction Contractor may terminate	
			<ul style="list-style-type: none"> total amount of time that the Builder will be required to continue work without payment before suspending the Builder Works is 20 Business Days 			
Immediate Termination Events – Builder	<p>Events listed under Project Agreement plus:</p> <ul style="list-style-type: none"> Insolvency Event occurs in respect of the Builder or the Parent Guarantor which is not remedied within specified period Change in Control, other than a Permitted Change of 	<ul style="list-style-type: none"> completion will not occur aggregate Liability of the Builder to Project Co exceeds 75% of the General Liability Cap and Builder does not elect to increase the General Liability Cap up to a maximum of 60% of the Contract Price within 5 Business 	<ul style="list-style-type: none"> fails to diligently pursue a D&C Milestone Cure Plan or to achieve a Cure Milestone in any D&C Milestone Cure Plan by more than 20 Business Days or by the D&C Sunset Date (whichever is earlier) or Sub-IC gives a certificate confirming Builder fails to 	<ul style="list-style-type: none"> Completion has not occurred by the date that is 3 months prior to the Date for Completion and the Sub-IC reasonably forms the view and certifies that the Builder will not achieve by the D&C Sunset Date Builder fails to achieve by the D&C Sunset Date 	<ul style="list-style-type: none"> Abandonment Final Completion not occurred by the Construction Contractor Sunset Date (other than due to <i>force majeure</i>) Probity event; Without PPP Co’s prior consent, assignment or disposal of rights under the Construction Contract, Construction Side Deed, Financiers 	<ul style="list-style-type: none"> Insolvency Event occurs in respect of a Builder Relevant Company Change in Control of a Builder Relevant Company without prior consent Builder wholly or substantially abandons Commercial Acceptance has

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
	<p>Control, occurs in respect of the Builder, not approved by Project Co, and not unwound within insert Business Days</p> <ul style="list-style-type: none"> • assignment in breach of Contract • aggregate Liability of the Builder to Project Co exceeds specified percentage of General Liability Cap or LD Cap, unless parties have agreed to an increase in cap or Builder has opted to increase cap. 	<p>Days of receiving written notice</p> <ul style="list-style-type: none"> • aggregate Liability of the Builder for Liquidated Damages reaches the LDs Cap • default of the parent Guarantor under any PCG occurs and is not remedied within 5 Business Days or a PCG is void or voidable and is not replaced within 5 Business Days • Performance Bond has not been provided or replaced as required • Builder fails to implement a Draft Cure Plan or Agreed Cure Plan • Builder fails to cure a Builder Major Default by the expiry or earlier termination of 	<p>achieve by the Stage 1 D&C Sunset Date</p> <ul style="list-style-type: none"> • aggregate Liability of the Builder to Project Co exceeds 90% of the General Liability Cap and Project Co has provided 15 Business Days' notice to the Builder • aggregate Liability of the Builder for LCs reaches the Cap and the Builder has not agreed to increase the LDs Cap within 10 Business Days of a request by Project Co • default or breach of any parent Guarantor under any PCG occurs or a PCG is void or voidable and is not replaced within 15 Business Days • Insolvency Event 	<ul style="list-style-type: none"> • Builder abandons the Works or displays an intention to permanently abandon • aggregate Liability of the Builder to Project Co exceeds 75% of the General Liability Cap • aggregate Liability of the Builder for liquidated damages reaches the LDs Cap • a default or breach of any parent Guarantor under any PCG occurs or a PCG is void or voidable and is not replaced within 10 Business Days • (Performance Bond exhausted): a Performance Bond provided by the Builder has been exhausted and is not replaced • (Change to Builder joint venture): there is a change 	<p>Tripartite Deed, Independent Verifier Deed, any Material Subcontract (and any guarantee given thereunder), any Collateral Warranty and any performance related security interest granted by the Construction Contractor</p> <ul style="list-style-type: none"> • Without PPP Co's prior consent, assignment or disposal of rights by a sub contractor under any Material Subcontract or any Collateral Warranty, subject to the Construction Contractor's right to cure • Construction Contractor Major Default not cured when cureable, not capable of cure or cure plan not complied with • Damage or destruction of Works or Facility deemed a Construction Contractor Default 	<p>not occurred by the Construction Contract Sunset Date or given a certificate that don't expect to meet</p> <ul style="list-style-type: none"> • assignment • Uncured Builder Major Default • damage or destruction to the Facility in circumstances deemed to be a Builder Default Termination Event • Builder's aggregate liability for Liquidated Damages to Project Co exceeds 90% of their maximum liability for Liquidated Damages

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
		<p>the applicable cure period subject to relief for Extension Events</p> <ul style="list-style-type: none"> • Insolvency Event occurs in respect of the Builder or Builder Guarantor 	<p>occurs in relation to the Parent Guarantor and unable to satisfy Project Co (acting reasonably) within 30 days that the insolvency will not adversely affect the performance under the D&C Project Documents or increase the risks to Project Co;</p> <ul style="list-style-type: none"> • result of a Probity Event, Project Co is required under the Project Agreement to terminate the D&C Subcontract and the Probity Event is not cured to the satisfaction of the State within 10 Business Days of notice 	<p>to the parties comprising the Builder joint venture which has not been approved by Project Co (acting reasonably)</p> <ul style="list-style-type: none"> • (Insolvency Event of Pindan): Parent Guarantor is Insolvent and unable to satisfy Project Co (acting reasonably) within 20 Business Days that the insolvency will not adversely affect the performance under the D&C Project Documents or increase the risks to Project Co • (Illegality Event): an Illegality Event occurs • (Probity Event): as a result of a Probity Event, Project Co is required under the Project Agreement to terminate the D&C Subcontract 	<p>Termination Event</p> <ul style="list-style-type: none"> • Aggregate liability for LDs reaches the LD Cap • Failure to provide or replace performance bonds as required. 	

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
Project Co Termination Event	<p>Project Co Major defaults:</p> <ul style="list-style-type: none"> fails to make a payment to the Builder of an amount when due under the Construction Contract, other than a payment which is subject of a bona fide dispute or subject of a Pass Through Claim which has not been paid by the State; or an Insolvency Event of Project Co. <p>Builder will have right to terminate if it provides Notice of Intended Suspension re the above and Project Co does not rectify within specified time.</p>	<ul style="list-style-type: none"> Project Co fails to give access to the Site as required where the State has given equivalent or greater access to the Site to Project Co under the Project Agreement Project Co fails to make a payment certified by the Sub Independent Reviewer as due and payable to the Builder under the D&C Subcontract within 3 Business Days of it being certified as due and payable (where that amount is not in dispute) in circumstances where the payment is for an amount in excess of \$100,000 if Project Co suffers an Insolvency Event 	<p>Subject to the Builder Side Deed and for the avoidance of doubt the D&C Consent Deed:</p> <ul style="list-style-type: none"> if Project Co suffers an Insolvency Event, Builder may give notice of intention to terminate the D&C Subcontract if not cured within 20 Business Days. if Project Co fails to make a certified payment which is due and payable, Builder may give notice of intention to terminate the D&C Subcontract if not corrected within 20 Business Days 	<p>Subject to the Builder Side Deed and for the avoidance of doubt the D&C Consent Deed:</p> <ul style="list-style-type: none"> if Project Co suffers an Insolvency Event, Builder may give notice of intention to terminate the D&C Subcontract if not cured within 20 Business Days. if Project Co fails to make a certified payment which is due and payable, Builder may give notice of intention to terminate the D&C Subcontract if not corrected within 20 Business Days 	As above.	-

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
		<ul style="list-style-type: none"> breach of a provision of the D&C Subcontract by Project Co, which causes delay to the Works or causes material additional losses, expense or liability to the Builder, provided the breach has a Material Adverse Effect on the Builder and only to the extent that the Builder has not been compensated for that delay, loss or liability 				
Payment for Termination – Convenience	Subject to Pass Through Principles (including Termination Payments under Project Deed) where Contract terminated as a result of a termination of the Project Agreement for convenience by the State, Builder entitled to costs of:	-	<ul style="list-style-type: none"> the certified value of the Builder Works performed up to the date of termination reasonable cost of materials, plant and equipment ordered for the Builder Works amounts incurred by the Builder as a direct result of 	<ul style="list-style-type: none"> the certified value of the Builder Works performed up to the date of termination reasonable cost of materials, plant and equipment ordered for the Builder Works amounts incurred by the Builder as a direct result of 	-	-

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
	<ul style="list-style-type: none"> removing all personnel, plant, equipment, facilities, vehicles and any construction waste, machinery, rubbish and debris from the Site removing temporary works and plant and equipment from the Site and returning them to their intended location preserving the Works, including storage and maintenance costs cancelling any subcontracts or altering supplier arrangements, which arises as a direct result of the termination of this Deed incurred in expectation of completion of 		<p>termination (including demobilisation, sub contractor breakage and redundancy costs)</p> <p>less</p> <ul style="list-style-type: none"> net amount Builder entitled to recover under insurance 	<p>termination (including demobilisation, sub contractor breakage and redundancy costs)</p> <ul style="list-style-type: none"> reasonable sub contractor breakage costs and redundancy costs an amount equal to 4% of the balance of the Contract Price (taking into account all payments made under this clause) in respect of loss of anticipated profits from the Construction Contract to the extent that amount is a Sub contractor Breakage Cost under the Project Deed <p>less</p> <p>net amount Builder entitled to recover under insurance</p>		

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
	<p>the Works</p> <ul style="list-style-type: none"> outstanding and not yet submitted Claims from the Builder (including for work in progress that would have been included in the next progress claim); demobilisation costs and costs incurred due to the termination work carried out up to the date of termination, the amount which would have been certified as payable costs of goods and materials reasonably ordered by the Builder for the Combined Works to the extent that the Builder has used reasonable endeavours to minimise such costs 					

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
	<p>together with:</p> <ul style="list-style-type: none"> • a loss of profit calculated at [redacted %] on the incomplete part of the Works • Liability to third parties directly arising from the termination • amount certified as due to the Builder in any unpaid Payment Certificate 					
Payment for Termination – Event of Default/Immediate Termination Event	<p>Builder is liable for and must indemnify Project Co for all Claims and Liabilities incurred by Project Co in connection with termination, including:</p> <ul style="list-style-type: none"> • any amounts payable to the State or any other person, other than Project Co or a Project Co Associate, under a Project 	<p>If the Project Agreement is terminated must pay:</p> <ul style="list-style-type: none"> • all moneys payable by Project Co to the State under the Project Agreement, and any additional costs incurred by Project Co, as a consequence of the termination • in respect of Financiers, the 	<ul style="list-style-type: none"> • the costs associated with the appointment of a replacement builder to complete the Builder Works in accordance with the D&C Subcontract and to achieve Completion • loss or damage reasonably and properly incurred by Project Co (whether incurred directly 	<ul style="list-style-type: none"> • the costs associated with the appointment of a replacement builder to complete the Builder Works in accordance with the D&C Subcontract and to achieve Completion • in relation to the Financiers – Where the Project Agreement is not terminated, any additional interest 	-	-

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
	<p>Document on termination</p> <ul style="list-style-type: none"> if the Builder is replaced in accordance with the Project Agreement – Costs arising on the appointment of a replacement builder, including tendering costs, and any increase in the cost of performing the remaining Construction Contract in excess of the balance of the Contract Price and any other additional costs, loss or damage incurred by Project Co if the Project Agreement is terminated, an amount equal to the difference between the sum of the amounts payable to the 	<p>difference between the termination payment Project Co receives under the Project Agreement and the aggregate of the principal debt, interest, and break costs payable by Project Co under the Finance Documents (to the extent that such payment received by Project Co is less than such principal debt, interest and break costs)</p> <p>If the Project Agreement is not terminated</p> <ul style="list-style-type: none"> all costs associated with the appointment of a replacement Builder, including the cost of constructing the remaining components of 	<p>or payable to the State in connection with the termination of the Project Agreement)</p> <ul style="list-style-type: none"> any increase in the cost of performing the remaining components of the Builder Works (including financing costs and increased costs in completing those Builder Works) in excess of the balance of the Contract Price in relation to the Financiers – where the Project Agreement is not terminated, any additional interest incurred by Project Co (or the financing vehicles) under the Financing Documents or where the Project Agreement is 	<p>incurred by Project Co under the Financing Documents; or where the Project Agreement is terminated, the difference between the termination payment (referable to debt) received by Project Co under Schedule 10 of the Project Agreement and the principal debt, interest and break costs payable by Project Co under the Financing Documents</p>		

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
	Debt Financiers by Project Co as at termination and arising out of termination, including principal, interest and break costs; plus the capital amount invested by the Equity Financiers AND payment received from the State as a consequence of termination	<p>the Builder Works (to the extent that such costs exceed the unpaid portion of the Contract Price)</p> <ul style="list-style-type: none"> in respect of Financiers, any additional interest incurred by Project Co under the Finance Documents <p>Less amount to cover costs and losses incurred by Project Co if the Builder has not delivered up and vacated the site.</p> <p>Reduced to extent Project Co's acts/omissions contributed to event, amount Project Co receives as insurance proceeds and gain made by Project Co as direct consequence of event of default.</p>	terminated, the difference between the termination payment (referable to debt) received by Project Co under Schedule 10 of the Project Agreement and the principal debt, interest and break costs payable by Project Co (or the financing vehicle) under the Financing Documents			

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
Payment for Termination – Project Co Termination Event	<p>Builder’s rights on termination of the Construction Contract for default by Project Co or termination of the Project Agreement, other than as caused by a breach by the Builder or <i>Force Majeure</i> Termination Event will be those as if the Construction Contract had been terminated for convenience of the State.</p>	<ul style="list-style-type: none"> • Builder Termination Costs • Builder Break Costs • an amount in respect of loss of anticipated profits under the D&C Subcontract of 4% of the unspent Contract Price <p>(Builder Break Costs = reasonable cost of materials, plant and equipment ordered for the Builder Works + actual costs reasonably and properly incurred by the Builder in removing temporary work and construction plant from the Site and other reasonable demobilisation and redundancy costs + actual costs reasonably and properly incurred by the Builder in the expectation of completing the</p>	<ul style="list-style-type: none"> • the certified value of the Builder Works performed by the Builder up to the date of termination • the reasonable cost of materials, plant and equipment ordered for the Builder Works, to the extent the Builder cannot cancel • amounts reasonably and properly incurred by the Builder as a direct result of termination • Liabilities to third parties directly arising from the termination <p>less</p> <ul style="list-style-type: none"> • any gains accrued by the Builder as a result of termination • the net amount the Builder is entitled to 	<p>Rights will be those as if the Construction Contract had been terminated at law.</p>	-	-

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
		<p>whole of the Works) (Builder Termination Costs = amount certified as due to the Builder in any unpaid payment certificate and the amount certified as payable in accordance with the D&C Subcontract and payable by reference to timing constraints set out in the Drawdown Schedule for work carried out up to the date of termination)</p> <p>Less amount to cover costs and losses incurred by Project Co if the Builder has not delivered up and vacated the site.</p> <p>Reduced to extent Builder's acts/omissions contributed to event, amount Project Co receives as insurance proceeds and gain made by Builder as direct consequence of event of default.</p>	recover under insurance			

Comparative analysis of key issues in D&C contracts in recent social infrastructure PPPs

	Hospital project A	Hospital project B	Prison project A	Prison project B	Entertainment centre project	Hospital project C
Payment for Termination – Force Majeure	Builder will be entitled to payment of a termination payment comprising all of the payments set out in respect of termination for Convenience, other than loss of profit	<ul style="list-style-type: none"> • Builder Termination Costs • Builder Break Costs <p>Less amount to cover costs and losses incurred by Project Co if the Builder has not delivered up and vacated the site.</p> <p>Reduced to extent Project Co's acts/omissions contributed to event, amount Project Co receives as insurance proceeds and gain made by Project Co as direct consequence of event of default.</p>	<ul style="list-style-type: none"> • the certified value of the Builder Works performed by the Builder up to the date of termination • reasonable cost of materials, plant and equipment ordered for the Builder Works, to the extent the Builder cannot cancel <p>less</p> <ul style="list-style-type: none"> • net amount the Builder is entitled to recover under insurance 	<ul style="list-style-type: none"> • the certified value of the Builder Works performed by the Builder up to the date of termination • reasonable cost of materials, plant and equipment ordered for the Builder Works, to the extent the Builder cannot cancel • reasonable demobilisation costs incurred by the Builder as a direct result of termination, including sub contractor breakage costs, <p>less</p> <p>net amount the Builder is entitled to recover under insurance</p>	-	-

www.pwc.com.au

© 2016 PricewaterhouseCoopers. All rights reserved.
PwC refers to the Australian member firm, and may sometimes refer to the PwC network.
Each member firm is a separate legal entity. Please see www.pwc.com/structure for further details.

At PwC Australia our purpose is to build trust in society and solve important problems. We're a network of firms in 157 countries with more than 208,000 people who are committed to delivering quality in assurance, advisory and tax services. Find out more and tell us what matters to you by visiting us at www.pwc.com.au

Liability limited by a scheme approved under Professional Standards Legislation.