I. Introduction

Over the last decade, a number of hospitals have been delivered under the PPP model\(^1\) and a number of new hospital PPPs are in the planning/procurement phase.\(^2\) Hospital PPPs have been primarily awarded to a special purpose vehicle who then subcontracts the design and construction of the hospital to a D&C contractor and the facilities management services component to the hard FM contractor and the soft FM contractor. Whilst the project company will be responsible for delivering and maintaining various logistics and IT systems, the ICT systems have been traditionally procured and maintained by the government. The clinical services are generally provided by the government.

Most state health departments have specific ICT strategic plans as part of the patient service requirements and healthcare architecture\(^3\) requiring the upgrading of ICT or new delivery of ICT in support of the clinical processes and health outcomes. One of the current challenges for hospitals is that they have information systems (which are usually based on each hospital’s legacy proprietary systems) that do not necessarily communicate or are incompatible with the other systems. This leads to duplication of data in separate databases resulting in errors, inconsistencies and inefficiencies.

Because healthcare interventions and processes occur in complex situations and evidence based decision support, the new ICT systems are developed with the aim of better integration of diverse data with an emphasis on data quality, seamless support and tracking of patient related data in a...
secure environment, ensuring that the collection, presentation and auditing of data from multiple sources are useful to the decision makers.\(^4\) There needs to be a decent ICT architecture with a well managed ICT organisation.\(^5\)

As part of the overall quality management systems implemented for healthcare management in the 21st century, the aim of the ICT architecture and the integration engine is to allow streamlined healthcare workflows by facilitating timely, reliable and accurate data flow, and having the flexibility to deal with changed conditions when emergency or abnormal conditions occur on the hospital floor. The integration engine must be able to capture the data, store it and present the data in a format to allow the operational decision makers to make complex decisions in an efficient and safe manner. There are a number of global partnerships between IT and software companies providing leading edge integration technology.\(^6\)

The latest New Royal Adelaide Hospital (NRAH) PPP project specifically required the project company to deliver and operate an ICT integration system for that project.\(^7\)

For the NRAH, the ICT network comprises of a virtually separate State Network and the Project Co Network. The State ICT comprises the State Health Information Broker, the State servers and applications, and State ICT devices and any ICT related equipment. The Project Co ICT comprises the integration engine, the cabling, the IP PABX, wireless location tracking system, and other applications and systems required for the facilities management.

The NRAH Model of Care is reliant on a robust ICT system which is fully integrated throughout the hospital and with primary and secondary health providers including E-health records, integrated booking systems, clinical data acquisition and information transfer (including for digital health and hospital technologies, telemedicine, handheld and bedside terminals such as PDAs, IP-phones, etc), bed management, asset tracking and community interface capability (with GPs and other service providers such as facilities management) and allowing use of real-time information.

The integration engine provided by the ICT contractor is intended to bring together the disparate technologies and systems. The integration engine can be described as the “communications exchange” for the clinical and patient support, facilities management and business data to ensure that the information and data passes seamlessly across the different technologies, software applications and databases. To enable that connectivity to occur, the infrastructure and support systems needs to be on one Internet Protocol based network.

For example, the clinical staff can receive timely and prioritised information (such as clinical diagnostic results) for them to provide the critical care required for patients, or an enhanced nurse call system to improve response time.

The integration platform is designed to meet the availability, security and reliability requirements of clinical functions. This means it has to be a high availability (min 99.9 %) network and low latency suitable for critical and real time systems, self healing for redundancy and inbuilt capacity for expansion.

II. Delivery structure and risk allocation\(^8\)

1. Risk transfer to subcontracts

In PPP projects, the usual approach is for project owners to retain very few risks and most risks are transferred “downstream” to the D&C contractor, the FM contractors and in the latest hospital PPP projects, the ICT contractor.

2. Delivery of ICT components

Generally, the ICT contractor will be responsible for delivery of the ICT system in 2 parts, one will be the

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\(^5\) HP Digital Hospital Infrastructure – Integrate hospital systems and information on a unified platform, March 2007, Rhapsody Integration Engine, Orion Health.

\(^6\) Orion Health’s Rhapsody Integration Engine; GE AgileTrac Platform and Cisco Context Aware Software/Unified Wireless Network; HP and Cisco Imatis.


“built” component which involves the physical design, manufacture, installation and commissioning of the ICT system; and secondly, the “run” component which is the provision of the ICT services and the ICT lifecycle services. Unlike the FM contractors who are not responsible for delivery of any physical component of the hospital, the delivery of the built component is an important completion requirement for the project company under the project agreement.

There are 2 approaches that may be taken to deliver the ICT component:
1) package the ICT “built” component as part of the overall D&C package making the D&C contractor responsible for delivery and integrating the ICT component as part of the overall hospital delivery, and engaging the ICT contractor to provide the ICT services for the “run” component as a separate contract package; and
2) package the ICT “built” and “run” components as a single contract package.

Each delivery approach has its risk issues to consider. For ICT contractors, one of the challenges is to understand its business model and appetite for undertaking significantly greater risks than what they usually assume under standard IT outsourced contracts (both hardware and IT services).

III. Key issues

1. Flow-down of risks and due diligence

The project agreement generally sets the stage for risk allocation for the underlying subcontract agreements. Although the ICT subcontractors are not parties to the project agreement, the final project agreement will set out the risk landscape agreed by the D&C contractors, the FM contractors and the ICT contractors, and the underlying subcontracts will reflect that risk landscape as those risks will be flowed-down or step-down into the subcontracts. This is driven by the requirements of the equity investors and the project financiers that the project company retains minimal risk in the project delivery and the operational phase.

By comparison, government IT outsourcing in Australia is generally based on the national procurement contract forms for both hardware and software based on the framework by the Commonwealth Information Technology and Communications (GITC) framework.
2. Service payments and abatement regime – ICT Services

The ICT payment structure generally comprises 3 components:
1) monthly services payment amounts;
2) scheduled lifecycle amounts; and
3) pass through costs to deal with additional tasks required by the State/project company such as additional inspections and testing, dealing with intervening events (such as emergencies, modifications, etc) which may impact on the performance of the ICT services.

The first 2 components generally comprise monthly agreed amounts which will be indexed by the appropriate multiplier to reflect inflation. In Australia, there are a range of CPI multipliers published by the Australian Bureau of Statistics. The common index used is the All Groups Consumer Price Index Weighted Average of Eight Capital Cities which is published quarterly.9 For the labour component of the ICT Services, it is more common to use the Australian Information Industry Association (AIIA) multiplier.10

The payments are then adjusted to reflect any abatement due to different types of failure events. The failure events are generally classified into quality failure, or failure events or area failures.

Quality failures generally cover breaches of the requirements of the services specifications. A quality failure table will generally identify the relevant services requirement, the monitoring methods, the performance monitoring period, the quality failure points and calculation method and what constitutes a repeat quality failure deduction period.

Failure events or area failures are generally categorised into levels of priority (such as emergency, medium priority or low priority) and each failure event will have their own response and rectification times.

In hospitals, the project company is generally required to provide a Helpdesk to facilitate the performance of the FM services and the ICT services and act as a communication hub and capable of receiving, logging and responding to all communications including dealing with service failures.

A failure event abatement will usually be incurred if the ICT contractor does not respond or rectify the failure event prior to expiration of the applicable response or rectification periods or is a repeated failure event. A monetary amount (service credits or abatement amounts) is usually allocated for each level and category of failure events. In addition, there is a time weighting in the calculation depending on the time the ICT contractor takes to respond or rectify the failure event.

The abatement regime will also deal with situations where there is an overlap of different types of service failures or providing relief where there is planned preventative maintenance.

Unlike abatement regimes used on some performance based contracts or relationship based contracts where it is common for the KPIs and the abatement regime to be reviewed annually and for the parties to use their best endeavours to agree on those adjustments, generally, the abatement regime is “locked” in for the initial performance period until the next review where it is adjusted (see section on Reviewable Services).

3. Delivery of ICT systems – Enforceability

Generally, if the delivery structure is for the D&C Contractor to engage the ICT contractor as a subcontractor to deliver the ICT “run” component, the ICT contractor will generally be required to contract under the terms of the D&C Contractor bespoke subcontract form. In addition to the flow down of obligations and risks under the project agreement, the subcontract also usually contains onerous sub-contract conditions. ICT contractors need to carefully consider those obligations including any indemnity or liability for loss or damages that the D&C Contractor may give in favour of the project company arising from a breach or delay.

A key legal issue is to structure the abatement scheme so as not to be construed as a penalty.

For a liquidated damages regime to be enforceable the liquidated damages will need to be a genuine pre-estimate of the losses that the party is likely to suffer. The applicable principles are set out in Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd [1915] AC79. The abatement regime

10 “Same Incumbent Survey on Total Remuneration Cost Average Percent Movement” as published for the year ending March cycle each year by the Australian Information Industry Association.
will need to be carefully structured to calculate the estimated compensation for loss/damage suffered as a result of the failure of the facility/system to meet the contractually stipulated performance requirements. It will depend on the relevant performance warranty (e.g., efficiency, output or availability). This is usually a net present value cost calculation of the revenue foregone over the term of the contract or increased O&M costs.

Another consideration is whether there is an agreed limitation or "cap" to the abatement and whether that cap or abatement regime should be the project company's sole and exclusive remedy for damages in connection with the ICT contractor's failure to meet any of the service standards.

4. Intellectual property

IP issues to be considered include:

a. Ownership of background intellectual property and licences to use

Technology and intellectual property rights (IP) are invariably important elements of ICT projects. The parties may each bring valuable IP to the project, or develop it during the course of the project, or both. It is important to make it clear who owns the IP rights and what rights the other parties have to use those rights both inside and outside the project.

It is usually agreed that each party retains ownership of all IP it brings to the project. This is especially important for parties who wish to retain the competitive edge their IP offers for future engagements. The pre-existing or "background" IP that is in or used in the deliverables is normally licensed on a non-exclusive basis to the D&C Contractor or the FM Contractor (or both) who in turn may sublicense to the project company, but only to the extent necessary to undertake, and for the purposes of, the project.

While this approach may seem more in keeping with a traditional contracting model, the parties are of course free to be innovative in terms of drafting the scope of the licensing arrangements.

If an owner requires access to the background IP of an ICT contractor to operate a building or use a system, a transfer of IP ownership is not usually required if the owner is able to negotiate a broad enough licence for the IP. Of course, this may be repugnant to the owner who is paying vast sums of money for another member to construct the building or the system. However, if the licence is cast broadly enough, the owner's needs can be met and both parties' interests protected.

Normally, it is agreed that any modification or enhancement to background IP reverts to the original owner, as it will often be the only party able to exploit the modification or enhancement (unless it can be used as a stand alone product). Commonly the modification or enhancement will be embedded in or will rely on the original work and it would be impractical for different parties to own "bits" of the IP in the enhanced product.

b. Ownership of foreground intellectual property

New foreground IP developed during the project is often the most difficult to address.

It is tempting to specify that new IP is to be owned jointly by the parties. Although this may seem a neat solution during negotiations, joint IP ownership often gives rise to practical difficulties. For example, a potential invention relating to green technology may be jointly developed based on enhancements to existing technology. If the parties jointly own the IP in this enhancement, a number of questions will need to be worked through by the parties. For example:

a) should the invention be protected by filing patent applications? This can be an expensive exercise and one participant may not be interested in exploiting the technology given the cost of doing so and the uncertainty of whether patents will be granted and, if they are granted, whether they will lead to significant royalties;

b) can they both use the invention outside the scope of the current project? If it is based on an enhancement to existing technology, this is likely to depend on whether the owner of the existing technology agrees. In the end, that party may not agree to that use and the other party may have wasted time and money negotiating joint ownership of something that it cannot exploit; and

c) if the parties do wish to have joint ownership of newly developed IP, what are the terms of use by each party? These issues can, of course, be dealt with in the ICT contract. Alternatively, the
parties may choose to leave them to be resolved outside the bounds of the contract on the basis that the parties will work together in the best interests of the project. If, however, agreement cannot be reached, each party may be frustrated in its ability to exploit the technology outside the ambit of the project as each will potentially be infringing the rights of the other owner where consent is not expressly granted by the other owner.

If the parties are not in a position to agree the terms of royalty payments upfront, then they could agree to vest the newly developed IP in the name of one party but restrict all parties from using it outside the project without the consent of all other parties. Again, this would provide a “roadblock” mechanism for getting the parties together at a future date to discuss, negotiate and resolve these issues because, without that agreement, no party will be able to use the IP outside the project.

The general position is that the government entity may require ownership of, or an irrevocable, perpetual non-exclusive royalty-free licence to use, the intellectual property associated with the ICT infrastructure and any associated equipment during any step-in period or in the event the contract is terminated or after expiration. The D&C contractor will generally require the ICT contractor to provide corresponding rights to the D&C contractor so that it can meet its obligations under the project agreement.

ICT contractors are generally unwilling to assign their IP rights in any software that they have developed or in any modifications made to their existing software. The evolvement of base products through improvements made during projects potentially forms a new revenue stream which can be exploited by the ICT contractor on future projects. This will be quite different from the IP regime that may be agreed by the D&C contractors and the FM contractors under their respective upstream contracts.

c. Off the shelf software

Most ICT contractors are dependent on specialist or commercial off-the-shelf (COTS) software suppliers to provide the necessary software for the various integration, servers and appliances. It is important that there are appropriate contractual frameworks and negotiation processes put in place during the bid phase and post-selection phases to ensure that the risks and obligations are appropriately flowed-down.

However, specialist software suppliers are often from other countries and whose legal systems may be quite different. It is therefore prudent to consider governing law enforcement regimes when negotiating those subcontracts.

Contract negotiations with COTS software suppliers are often based on the suppliers’ standard forms. They are not readily agreeable to modify the contract forms to fit in with the flow-down risks.

d. Escrow

As the originating software contractors have invested heavily in developing the software, it is unlikely to give the project parties access to the source code except in very limited circumstances, and then only after payment of appropriate compensation and restrictions on right of use. In such situations, all interested parties may be required to enter into escrow agreements under which the source code supplier deposits the source code with an escrow agent, who will release that source code only in very limited circumstances, such as the insolvency of the software supplier or termination of contracts for breach by the software supplier.

e. IP warranties

Securing appropriate warranties from the ICT contractor that the software, particularly developed software, will not infringe third party intellectual property rights, together with an undertaking from the ICT contractor to indemnify the project parties on an uncapped basis for any third party IP infringements is an important right for the D&C contractor to secure. Invariably the Project Agreement will require the project company to provide guarantees that use of the software will not infringe IP rights to minimise the risk of any interruption in the project build or implementation through third party claims. The project company will look to pass these obligations through to the D&C contractor. Similarly, all moral rights consents need to be secured from any persons involved in the creation of copyright protected works, which includes source codes.
5. Industry best practice

The project agreement generally requires the project company to operate and maintain the hospital facilities (which will include the ICT) to the standard of “good industry practice” or “industry best practice”. This is generally defined as “that degree of skill, care, diligence, efficiency, prudence and foresight which would be expected from a skilled and experienced person when working on projects of commensurate type, size and value of the Project”.

6. Reviewable Services

Due to the long term nature of the “run” component of the ICT contract, which is similar to the arrangements for FM services, during an agreed interval during the term (which is generally over 5 years) there is a requirement for the ICT services specifications to be updated for changes in law and other mandatory requirements, modifications to the ICT system, and for the repricing of the revised ICT services. If the repriced ICT services are not acceptable to the project company or the State, they may reserve the right to call an open tender seeking competitive prices for the provision of those ICT services. If the ICT contractor is not the successful tenderer, it will be replaced with another subcontractor. The challenge for the ICT contractor will be the methodology in which it has priced its provision of the ICT services and whether the pricing has been based on the bundling of the services; any potential issues in relation to the use of confidential IP and management information relating to the services.

7. Sinking fund

There is generally a requirement to establish a sinking fund for the lifecycle components.

There will be stringent controls by the project financiers over the project company’s debt service reserves and cash including the sinking funds for lifecycle maintenance. It is prudent for the ICT contractors to consider how to secure its rights over the sinking fund cash in the event of insolvency issues with the project company as it will be subject to the financiers’ security over the project company’s assets.

8. Limitation of liability and exclusion of liability

Generally, all the major subcontractors involved in PPP deals have prudent risk governance and management policies in place and would require a limitation of liability clause and an exclusion of liability clause.

a. Limitation of liability

Most FM and ICT subcontracts under PPP projects will have 2 levels of limitation, namely, an overall limitation of liability amount and a secondary limitation of the abatements.

aa. Overall liability

On recent projects, the overall limitation ranges from 100–200% of the forecast average annual amounts during the relevant cap periods plus amounts recovered under insurance policies. In addition, liabilities arising from fraud, wilful default, abandonment of contract, breach of intellectual property warranties, breach of confidentiality and breach of privacy laws are often excluded from the agreed limitation amounts.

Depending on the commercial deal, if the term of the FM or ICT subcontract corresponds to the term under the project agreement, there is normally a review of the overall limitation at the end of each cap period (which is usually 5 years).

In addition, there is usually a requirement to refresh the cap if the aggregate liability of the FM/ICT contractor exceeds a pre-agreed level. A failure to refresh the cap will give rise to a termination event.

bb. Limitation of abatement liability

In recent availability charge based projects, the FM contractors have generally sought a limitation of liability for abatements during each financial year. However, on recent building PPP contracts such as

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11 Definition extracted from the New Royal Adelaide Hospital PPP project deed. On recent NSW hospital PPPs (Royal North Shore Hospital and Orange Hospital PPPs, “Good Industry Practice” was defined as “that degree of skill, care, prudence and foresight and practice which would reasonably and ordinarily be expected from time to time of a skilled and experienced person, engaged in the same type of undertaking as that of the Project Company or Subcontractor, as the case may be, under the same or similar circumstances”.

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hospitals and prisons, financiers are reluctant to agree on these types of caps on abatements.

b. Exclusion of liability

Supply contracts generally contain clauses excluding the parties’ liability for consequential loss.

The basic proposition under contract law is that an innocent party is entitled to damages for breach of contract which places it in the same financial position it would have been in if the contract had been performed. The types of losses which may be recovered are limited by the rule in Hadley v. Baxendale\(^\text{12}\) which states that losses may be recovered under two limbs:

1. Those which arise naturally, in the usual course of things, from the breach itself ("first limb"); and
2. Those which were in the contemplation of both parties at the time of executing the contract, as a probable result of the breach ("second limb").

The term "consequential loss" or "indirect loss" generally refers to those which fall under the second limb. However, there are no clear rules or a settled list of the types of losses which may or may not be recovered as either "direct loss" or "consequential loss".

The Victorian Court of Appeal, in a unanimous decision in Environmental Systems Pty Ltd v. Peerless Holdings Pty Ltd\(^\text{13}\) rejected the approach taken by a line of English and single judge Australian authorities (describing it as "flawed") that had construed the term “consequential loss” when used in contracts as limited to the "second limb". See also Allianz Australia Insurance Ltd v. Waterbrook at Yowie Bay Pty Ltd\(^\text{14}\).

Instead, the Court of Appeal held that, in the context of an exclusion clause, the term "consequential loss" should be given its ordinary and natural meaning, and that the true distinction is between:

- Normal loss, which is loss that every plaintiff in a like situation will suffer; and
- Consequential loss, which is “anything beyond the normal measure, such as profits lost and expenses incurred through breach”.

This decision, unless and until it is overturned or rejected in other jurisdictions in Australia, represents a marked departure from the previous judicial approach to the interpretation of the terms "consequential loss".

Parties should carefully consider the losses for which they wish to exclude their liability when negotiating contracts and what their potential exposure is now likely to be under the terms of any existing contracts where the expression “consequential loss” is used.

If parties wish to exclude a specific type of loss (e.g., loss of profits), they should expressly make it clear that both direct and indirect forms of that type of loss are excluded. It is prudent to define what is and what is not included as "consequential loss".

c. Trigger for termination default event

Generally, if the aggregate liability of the FM/ICT contractor in a liability cap period exceeds a predetermined percentage of the forecast annual amount, this will trigger a termination default event allowing the project company to exercise its rights to terminate the FM/ICT subcontract.

9. Dealing with international companies

Leading IT companies that are able to provide the ICT systems and services are generally multinational companies with their parent companies based outside Australia. Most of the leading software suppliers providing the supporting software to those IT companies are also based overseas. It is therefore prudent to consider the implications of dealing with those companies in particular, the following:

a. Parent company guarantees (PCG)

As the parent company is most likely to be incorporated in another foreign jurisdiction, it is prudent to understand the counterparty risk and the location of incorporation of the parent company. In addition, it is prudent to consider the enforceability of the PCG in Australia or the foreign jurisdiction.

\(^{12}\) (1854) 9 Exch 341.
\(^{13}\) [2008] VSCA 28.
\(^{14}\) [2009] NSWCA 224
b. Global insurance policies

Most global companies have global insurance policies. It is prudent to consider how the ICT contractor will be procuring the insurance policies for the purposes of the ICT contract. If they are not project specific and instead rely on the parent companies’ global insurances, issues relating to naming the beneficiaries, level of excess and deductibles, counterparty risk with insurers, access to policies and confidentiality issues, requirement for contracting out of proportionate liability legislation (which is foreign and not appropriate requirement for global policies) and implications for premiums, incorporation for waiver of subrogation, etc.

15 – The proportionate liability scheme applies to damages for economic loss or damage to property arising from a failure to take reasonable care whether in tort, contract or otherwise, and apportions liability between concurrent wrongdoers according to responsibility for damage, and replaces the common law system of joint and several liability.

There are various aspects to consider in relation to the interface agreement issues:
a) Where there is an interdependency of obligations under their respective subcontracts, each contractor will use its reasonable/best endeavours to manage and co-ordinate their performance so that the other contractor is able to comply with its obligations under its contracts.
b) There is generally an abatement responsibility matrix allocating provisional pre-agreed sharing of abatements in various scenarios. This will be followed up by a root-cause analysis to identify the reasons for the abatement and adjustment of the provisional abatement.
c) In the event of the termination of a contractor, there is an obligation on the project company to procure replacement of the terminated contractor and novation of the interface agreement to the incoming contractor. In the event that the project company fails to do so, then the remaining contractor will not be liable for any abatement or any flow-on effects caused by such failure.
d) Each contractor’s liability in relation to the interface arrangements forms part of its overall liability under its contract, and the same exclusion of liability categories apply.

c. Enforceability of contracts and disputes

If the overseas parent company requires the dispute resolution process to be held in a foreign jurisdiction, the Australian parties will be exposed to managing and running any dispute under the procedural laws of that jurisdiction. For example, US courts have much more wide-ranging powers than Australian courts. It may be commercially and tactically prudent to adopt an appropriate international arbitration regime. It is also prudent to have an express choice of law as this will allow the parties to anticipate the rules which will be applied or interpreted in the event of a dispute.

10. Interface issues

Generally, there will be an interface agreement between the subcontractors to allow the subcontractors to co-ordinate and liaise with each other so that their respective obligations can be carried out efficiently and to discharge their contractual obligations under their respective subcontracts.

In the delivery of the hospital, the D&C contractor is responsible for the design, construction and commissioning of the whole hospital (including the ICT systems). The facilities management subcontractors only provide the FM services and will only facilitate any design and constructability input to the D&C contractor through the interface agreement. They are not responsible for delivery or construction of any hospital infrastructure.

However, the ICT contractor is responsible for not only delivery of the ICT component but also provision of the ICT services. This gives rise to a more complex interface arrangement between the project company, the D&C contractor, the FM contractors and the ICT contractor. This will also be dependent on how the project company packages the delivery of the “built” and “run” components of the ICT.

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d) Each contractor’s liability in relation to the interface arrangements forms part of its overall liability under its contract, and the same exclusion of liability categories apply.

c) Defects – there are three scenarios for consideration for the ICT contractor

(1) Relationship between D&C contractor and ICT contractor;
(2) Relationship between FM contractor and ICT contractor;
(3) Relationship between the project company, D&C contractor and ICT contractor.

15 – The proportionate liability scheme applies to damages for economic loss or damage to property arising from a failure to take reasonable care whether in tort, contract or otherwise, and apportions liability between concurrent wrongdoers according to responsibility for damage, and replaces the common law system of joint and several liability.

The liability of a defendant is limited to the amount reflecting the proportion of loss or damage that a court considers “just” having regard to the extent of the defendant’s responsibility for the loss or damage in a claim arising from a failure to take reasonable care.