

CLAYTON UTZ

## Royal North Shore Hospital and Community Health Services

### PPP Project Deed

Health Administration Corporation  
NSW Health

InfraShore Pty Ltd  
Project Company

The Clayton Utz contact for this document is  
**John Shirbin/Stuart Cosgriff on +61 2 9353 4000**

Clayton Utz  
Lawyers  
Levels 19-35 No. 1 O'Connell Street Sydney NSW 2000 Australia  
PO Box H3 Australia Square Sydney NSW 1215  
T +61 2 9353 4000 F +61 2 8220 6700

[www.claytonutz.com](http://www.claytonutz.com)

Our reference 117/2652/80046668

Legal\107161654.8

## Contents

<b>PART A – PROJECT PARAMETERS AND INTERPRETATION.....</b>	<b>1</b>
<b>1. Interpretation and General Matters.....</b>	<b>1</b>
1.1 Definitions.....	1
1.2 Rules for interpreting this deed.....	44
1.3 No joint venture.....	46
1.4 Business Days.....	46
1.5 Multiple parties.....	46
1.6 Contra proferentum.....	46
1.7 Approvals and consents.....	46
1.8 Discontinuance of bodies or associations.....	47
1.9 Exercise of functions.....	47
1.10 Priority of Interpretation.....	48
<b>2. Project Parameters.....</b>	<b>48</b>
2.1 Objectives.....	48
2.2 Interface with Health Functions.....	49
2.3 Adherence to Objectives.....	50
2.4 Project Company Acknowledgments.....	50
2.5 Appointment of Project Company.....	53
2.6 Compliance with Law.....	53
2.7 Exclusion of <i>Civil Liability Act 2002 (NSW)</i> .....	54
2.8 Car Parking and Retail.....	54
<b>PART B – PRELIMINARY MATTERS.....</b>	<b>55</b>
<b>3. Conditions, Representations, Warranties and Undertakings.....</b>	<b>55</b>
3.1 Conditions Precedent.....	55
3.2 Representation and warranties.....	55
3.3 Project Company General Undertakings.....	57
3.4 Status of Obligations.....	58
<b>4. Project Management.....</b>	<b>58</b>
4.1 Appointment of Project Director.....	58
4.2 Notification of details of Project Director.....	58
4.3 Delegation by Project Director.....	59
4.4 Management of Project Documents.....	59
4.5 Project Company Representative.....	59
4.6 Project Co-ordination Group.....	60
<b>5. Construction Sites.....</b>	<b>61</b>
5.1 Site Licences.....	61
5.2 Site Condition.....	66
5.3 Security.....	66
5.4 Environmental obligations.....	66
5.5 Artefacts.....	68
5.6 Native Title Application.....	69
5.7 Utilities and Rates.....	69
5.8 Ownership of Certain Property.....	70
<b>6. Approvals and Consents.....</b>	<b>70</b>

6.1	Development Approvals.....	70
6.2	Other Consents.....	73
6.3	Copies of Approvals and Consents .....	73
6.4	Conditions and Costs of Consents.....	73
6.5	NSW Health Development Approval Health Facilities Modification.....	74
<b>7.</b>	<b>Subcontracts.....</b>	<b>75</b>
7.1	Subcontracting.....	75
7.2	Subcontract Requirements .....	75
7.3	Subcontracting Obligations.....	76
7.4	Ability to Perform Obligations .....	77
7.5	Insurance .....	77
7.6	Agreed Form.....	77
7.7	Amendment and Termination .....	77
<b>8.</b>	<b>Workforce.....</b>	<b>77</b>
8.1	Employee Requirements .....	77
8.2	NSW Health Checks .....	78
8.3	Conduct of Staff.....	79
8.4	Project Company's and Subcontractor's Employees .....	79
8.5	Labour Relations.....	79
8.6	Independent Contractors and Subcontractors .....	79
8.7	Occupational health and safety obligations .....	80
8.8	Principal contractor under OH&S Regulation.....	80
<b>9.</b>	<b>Financing.....</b>	<b>81</b>
9.1	Financing Agreements.....	81
9.2	Copies of Financing Agreements.....	81
9.3	Refinancing.....	81
9.4	Payment to NSW Health of Refinancing Gain .....	83
<b>PART C – DESIGN AND CONSTRUCTION OBLIGATIONS .....</b>		<b>84</b>
<b>10.</b>	<b>Design and Works Programs .....</b>	<b>84</b>
10.1	The Project Company's Detailed Design obligations .....	84
10.2	The Project Company's Works Program obligations .....	85
10.3	The Project Company's Management Plans obligations .....	86
10.4	Preparation of Design and Works Documentation.....	86
10.5	Proprietary Materials.....	88
10.6	Car Parking and Retail Fit Out.....	91
<b>11.</b>	<b>Health Facilities Construction.....</b>	<b>91</b>
11.1	R&E Facility .....	91
11.2	The Project Company's obligation to construct.....	93
11.3	Works Program Amendments.....	94
11.4	Commissioning and Decanting Plan.....	95
11.5	Construction reports .....	98
11.6	The Project Director's right to enter and inspect.....	99
11.7	The Project Director's right to comment.....	99
11.8	Failure to meet Milestones.....	100
11.9	Quality Assurance (Works) Plan.....	101
11.10	Group 1 Equipment.....	102

11.11	Group 1TA Equipment .....	103
11.12	Other Transferable Equipment .....	104
11.13	Group 1TB Equipment .....	105
11.14	Group 2 Equipment.....	106
11.15	Group 2TB Equipment .....	107
11.16	Group 3 Equipment.....	109
11.17	Group 4 Equipment.....	109
11.18	Equipment general provisions .....	111
<b>12.</b>	<b>Variations .....</b>	<b>111</b>
<b>13.</b>	<b>Completion and Commissioning .....</b>	<b>111</b>
13.1	Due Dates.....	111
13.2	Completion.....	111
13.3	Commissioning of other facilities .....	113
13.4	Commencement .....	113
13.5	Commencement Date .....	114
13.6	Environmental Audit.....	114
13.7	Drawings and Survey.....	115
<b>14.</b>	<b>Independent Certifier .....</b>	<b>116</b>
14.1	Nominations and Qualifications .....	116
14.2	Appointment.....	116
14.3	Costs and Expenses of the Independent Certifier .....	116
14.4	Replacement.....	116
<b>14A.</b>	<b>Construction Payment and Operations Variation.....</b>	<b>117</b>
<b>14A.1</b>	<b>Construction Payment .....</b>	<b>117</b>
<b>14A.2</b>	<b>Operations Variation Payment .....</b>	<b>118</b>
<b>PART D – OPERATION OBLIGATIONS.....</b>		<b>119</b>
<b>15.</b>	<b>Services.....</b>	<b>119</b>
15.1	Interim Services Phase.....	119
15.2	Provision of Services .....	120
15.3	Operations Manual .....	121
15.4	Planned Maintenance .....	125
15.5	Defects.....	125
<b>16.</b>	<b>Alterations, Additions and Modifications.....</b>	<b>128</b>
<b>17.</b>	<b>Additional Commercial Development.....</b>	<b>128</b>
<b>18.</b>	<b>Information, Monitoring and Audit.....</b>	<b>128</b>
18.1	Notification of Safety Issues .....	128
18.2	Notification of Industrial Issues .....	129
18.3	Notification of Emergency Events .....	129
18.4	Notification of damage or defect.....	130
18.5	Monitoring and Records.....	130
18.6	Plans, Procedures, Standards Audit .....	130
18.7	Financial Reporting .....	131

18.8	NSW Health Inspection.....	132
18.9	NSW Health Financial Audit .....	133
<b>PART E – ADVERSE EVENTS AND CHANGE .....</b>		<b>134</b>
<b>19.</b>	<b>Emergencies and NSW Health Step in.....</b>	<b>134</b>
19.1	Project Director may instruct.....	134
19.2	Payment for additional or alternative services .....	134
19.3	NSW Health Step-In .....	134
<b>20.</b>	<b>Compensation Events .....</b>	<b>135</b>
<b>21.</b>	<b>Relief Events .....</b>	<b>135</b>
<b>22.</b>	<b>Change Procedure.....</b>	<b>136</b>
22.1	Proposal of Changes in Services.....	136
22.2	Project Company Changes .....	136
22.3	NSW Health Change .....	136
22.4	Deemed NSW Health Variation Requests .....	136
22.5	No Other Change.....	137
22.6	Additional Work.....	137
22.7	Minor Changes .....	139
22.8	Third Party Facilities .....	139
22.9	Cogeneration .....	140
<b>23.</b>	<b>Force Majeure .....</b>	<b>140</b>
23.1	Ability to make Deductions .....	140
23.2	Notify.....	141
23.3	Consultation and Relief.....	141
23.4	Relief.....	141
23.5	Unable to Agree.....	142
23.6	Notice to Continue .....	142
23.7	Mitigation .....	142
23.8	Event Ceases .....	143
23.9	Not all Health Facilities affected .....	143
<b>24.</b>	<b>Change in Law .....</b>	<b>143</b>
24.1	Requirement to comply .....	143
24.2	Implementation Relief .....	143
24.3	Beneficial Change in Law .....	144
<b>PART F – LOSS, DAMAGE AND INSURANCE .....</b>		<b>144</b>
<b>25.</b>	<b>Loss and Damage.....</b>	<b>144</b>
25.1	Risk of loss or damage .....	144
25.2	Project Company's indemnity .....	144
25.3	Project Company not obliged to indemnify and limitation on liability .....	145
25.4	Damage by NSW Health or NSW Health Related Parties .....	146
25.5	Responsibility for Related Parties .....	146
25.6	Claims Procedure .....	146
25.7	Costs of claims .....	146
25.8	Residual, Divested and Vacated Facilities.....	146

<b>26.</b>	<b>Insurance</b> .....	<b>147</b>
26.1	Project Company's Requirement to Maintain.....	147
26.2	Limit of Liability .....	147
26.3	Insurance proceeds .....	147
<b>27.</b>	<b>Reinstatement</b> .....	<b>147</b>
27.1	Project Company's Obligation to Reinstate .....	147
27.2	Direction Not to Replace or Reinstate.....	148
27.3	NSW Health May Repair or Reinstate .....	148
<b>28.</b>	<b>Uninsurable Risks</b> .....	<b>149</b>
28.1	Obligation.....	149
28.2	Risks Become Uninsurable .....	149
28.3	Consequences .....	149
28.4	Obligation to Monitor.....	150
<b>PART G – PAYMENT PROVISIONS</b> .....		<b>151</b>
<b>29.</b>	<b>Payment Provisions</b> .....	<b>151</b>
29.1	Payments .....	151
29.2	Invoices.....	151
29.3	Payment of Invoices .....	152
29.4	Disputed Amounts .....	152
29.5	Determination of Dispute .....	152
29.6	Monthly Reconciliations .....	153
29.7	Late Payments.....	153
29.8	Rights of Set-Off .....	153
29.9	Set-Off and Disputed Amounts .....	153
29.10	Base Case and Service Payment Adjustments .....	153
29.11	Payment of Health Staff Member Costs.....	156
<b>30.</b>	<b>Benchmarking</b> .....	<b>156</b>
30.1	Benchmarking Exercise .....	156
30.2	Purpose of Benchmarking .....	156
30.3	Market Testing .....	156
30.4	Benchmarked Service Rates .....	156
30.5	Benchmarking of Insurance Component of Service Payment .....	157
<b>PART H – TERMINATION</b> .....		<b>157</b>
<b>31.</b>	<b>Financiers Tripartite Deed</b> .....	<b>157</b>
<b>32.</b>	<b>Non-Performance of Obligations</b> .....	<b>157</b>
<b>33.</b>	<b>Project Default and Persistent Breach</b> .....	<b>158</b>
33.1	Project Default .....	158
33.2	Persistent Breach .....	160
<b>34.</b>	<b>Termination of this Deed</b> .....	<b>161</b>
34.1	Project Company Default Termination .....	161
34.2	Termination by NSW Health .....	162
34.3	Project Company Notice of Project Company Termination Event .....	163

34.4	NSW Health Action Following Project Company Termination Event.....	163
34.5	NSW Health Default Termination.....	163
34.6	Voluntary Termination.....	163
<b>35.</b>	<b>Consequences of Termination .....</b>	<b>164</b>
35.1	Consequences of Termination .....	164
35.2	Compensation Provisions .....	164
35.3	Accrued Rights .....	164
<b>36.</b>	<b>Audit on Expiry and Handover Security .....</b>	<b>164</b>
36.1	Handover Audit.....	164
36.2	Security .....	165
36.3	Notification of Handover Audit .....	166
36.4	Minimise Disruption .....	166
36.5	Results of Handover Audit.....	166
36.6	Rectification Work.....	166
36.7	Reduction of the Relevant Amount .....	167
36.8	Failure to Carry Out Work.....	167
<b>37.</b>	<b>Transition to State or Another Project Company .....</b>	<b>168</b>
37.1	Duty to Co-operate.....	168
37.2	Handover of documents on Termination Date .....	168
37.3	Transfer of Responsibility .....	169
<b>PART I – ADMINISTRATION OF PROJECT .....</b>		<b>169</b>
<b>38.</b>	<b>Information and Confidentiality .....</b>	<b>169</b>
38.1	Keep Confidential .....	169
38.2	Permitted Disclosure.....	169
38.3	Obligations Preserved .....	170
38.4	Auditor-General .....	170
38.5	Exploitation of Information .....	170
38.6	Expiry.....	170
<b>39.</b>	<b>Assignment or Change of Control .....</b>	<b>170</b>
39.1	Assignment.....	170
39.2	Change of Ownership .....	171
39.3	Change in Ownership of Material Subcontractors .....	172
<b>40.</b>	<b>Dispute Resolution .....</b>	<b>173</b>
40.1	Dispute Resolution Procedure .....	173
40.2	Expert Determination .....	175
40.3	Arbitration .....	176
40.4	Continued Performance of Obligations Pending Resolution of Dispute.....	176
40.5	Related disputes .....	177
40.6	Dispute under Independent Certifier Deed .....	177
<b>41.</b>	<b>Notices.....</b>	<b>177</b>
41.1	How to give a notice .....	177
41.2	When a notice is given.....	177
41.3	Address for notices .....	178

<b>42.</b>	<b>General .....</b>	<b>178</b>
42.1	Governing Law and Submission to Jurisdiction .....	178
42.2	Liability for Taxes .....	179
42.3	GST gross up and GST on claims .....	179
42.4	Liability for Expenses .....	181
42.5	Cost of Obligations .....	182
42.6	Giving effect to this deed .....	182
42.7	Operation of this deed .....	182
42.8	Severance.....	182
42.9	Amendment and waivers in writing .....	182
42.10	Consequential Loss .....	182
42.11	Operation of indemnities .....	184
42.12	Exercise of Remedies .....	184
42.13	Counterparts .....	185
42.14	Attorneys.....	185

## **SCHEDULES**

**Schedule 1 - Conditions Precedent**

**Schedule 2 - Project Company Ownership Structure**

**Schedule 3 - Timelines**

**Schedule 4 - NSW Health Tenants**

**Schedule 5 - Service Payment Calculation**

**Schedule 6 - Side Deed**

**Schedule 7 - Financiers Tripartite Deed**

**Schedule 8 - Project Security**

**Schedule 9 - Independent Certifier Deed**

**Schedule 10 - Collateral Warranty Deed**

**Schedule 11 - Base Retail Fit Out**

**Schedule 12 - Development Programs**

**Schedule 13 - Forms of Notices and Certifications**

**Schedule 14 - Insurances**

**Schedule 15 - Step in Procedure**

**Schedule 16 - Change Procedure**

**Schedule 17 - Compensation Event Procedure**

**Schedule 18 - Relief Event Procedure**



**Schedule 19 - Estimated Cost Effect**

**Schedule 20 - Benchmarking and Market Testing**

**Schedule 21 - Termination Payments**

**Schedule 22 - R&E Facility Construction Contract**

**Schedule 23 - Labour Services Agreement**

**Schedule 24 - Handover Condition**

**Schedule 25 - Handover Condition Security**

**Schedule 26 - Separate Contractor Access Deed**

**ANNEXURES**

**Annexure A - Site Access Schedule**

**Annexure B - Facility Specification**

**Annexure C - Support Services Specifications**

**Annexure D - Partnering Protocol**

**Annexure E - Financial Close Protocol**

**Annexure F - Initial Works Program**

**Annexure G - Commissioning and Decanting Plan**

**Annexure H - Project Company Proposals**

**Annexure I - R&E Facility Interface Protocol**

**Annexure J - EA Works Interface Protocol**

**Annexure K - Private Hospital Interface Protocol**

**Annexure L - Draft Planning Approval Materials**

**Annexure M - Application Resources Schedule**

**Annexure N - RNSH PPP Footprint Plans**

**PPP Project Deed made at** \_\_\_\_\_ **on** \_\_\_\_\_ **2008**

**Parties**                    **Health Administration Corporation**, a corporation sole constituted under section 9 of the *Health Administration Act 1982 (NSW)* ("**NSW Health**")

**InfraShore Pty Ltd ACN 124 557 008** of Level 22, ABN AMRO Tower, 88 Phillip Street, Sydney, NSW 2000 ("**Project Company**")

## **Background**

- A. NSW Health invited proposals from the private sector for the Project and, based on the proposals submitted in response to that invitation, selected the proposal of the Project Company.
- B. NSW Health and the Project Company have agreed on the terms and conditions pursuant to which the Project Company will finance, design and construct the Works in consideration of the Construction Payment and manage, maintain and provide certain other support services in connection with certain health facilities in consideration of the Service Payment, in accordance with the terms and conditions of this deed.
- C. ISAM Trust and FinCo have agreed to provide finance raised under the Financing Agreements and ISAM Trust has agreed to enter into the Securitisation Agreement with NSW Health.

## **Operative provisions**

### **PART A – PROJECT PARAMETERS AND INTERPRETATION**

#### **1. Interpretation and General Matters**

##### **1.1 Definitions**

The following definitions apply in this deed.

**"Accreditation"** means each accreditation in respect of each Stage (including any Health Facility included in that Stage) which is required in accordance with applicable Law to carry out the Health Functions, including, if required, accreditation with the Australian Council on Healthcare Standards.

**"Additional Commercial Development"** means a development on the RNSH PPP Footprint (other than the Works) carried out or to be carried out by the Project Company.

**"Additional Residual Building Equipment"** means all FF&FE:

- (a) is of a type equivalent to that listed as Group 1 and "Classification A" or "Class A" in Appendix A to Volume 2.2 of the Facility Specification or any other types of FF&FE in the R&E Facility or Retained Facilities which the Project Company is required to maintain as part of the Support Services;
- (b) located in Building 1 or Building 2 on or prior to the Commencement Date for Stage 2; and
- (c) which is not Residual Building Equipment.

**"Additional Work"** means any work (other than the Support Services) requiring Capital Expenditure to be carried out on the RNSH PPP Footprint involving a change in or addition to the Hospital, but excluding:

- (a) works in relation to the Third Party Facilities;
- (b) life cycle maintenance and refurbishment contemplated by or required for performance of the Support Services; and
- (c) the Works or any Contract Variation in respect of the Works.

**"Additional Work Contractor"** means any person (other than the Project Company or a Project Company Related Party) engaged by NSW Health to undertake Additional Work.

**"Additional Work Request"** has the meaning given to that term in clause 22.6(a).

**"Adjoining Property"** means any land or property adjoining or in close proximity to or the vicinity of a Construction Site and each and every part of such land or property, including improvements on the land such as walls, fencing, buildings and infrastructure on, under or within such land or property including (without limitation) the Private Hospital.

**"Adverse Rights"** means all (if any) interests, rights, affectations and encumbrances easements and covenants (including any rights, and easements and other affectations or encumbrances in respect of conduits) and other restrictions on use (excluding rights of light and air):

- (a) affecting or impacting the Hospital and granted, or to be granted, in favour of any NSW Health Tenant; or
- (b) otherwise affecting or impacting the Hospital Campus,

noted on the titles to the Hospital Campus or otherwise of which the Project Company has actual knowledge as at the date of this deed.

**"Agreement for Retail Services"** means the agreement so entitled to be entered into by NSW Health and the Retail Head Lessee on the date of this deed.

**"Annual Maintenance Program"** has the meaning given to that term in the Support Services Specifications.

**"Applicable Workplace Policy"** has the meaning given to that term in the Labour Services Agreement.

**"Applications Resources Schedule"** means the document titled "RNS Hospital Project Application and Resources Schedule" and dated 17 October 2008 which is Exhibit M.

**"Approval Delay Event"** means an event or circumstance occurs so that a Project Company Development Approval (but not including any Early Works Development Approval) is not available by the relevant Target DA Approval Date, other than where it is caused, directly or indirectly, by the action or inaction, as the case may be, of the Project Company or any Project Company Related Party, including any contest carried out in accordance with clause 6.4(c).

**"Arbitration Law"** means the *Commercial Arbitration Act 1984* (NSW).

**"Area Failure"** has the meaning given to that term in schedule 5.

**"Artefacts"** means any fossils, bones, artefacts, coins, articles of antiquity, structures, objects or other remains or things of scientific, geological, historical, archaeological or aboriginal interest or things otherwise of value.

**"Associated Infrastructure"** in respect of a Health Facility or a Car Park Facility includes:

- (a) all Utilities, buildings, infrastructure, improvements, roads (except public roads under the *Roads Act 1993* (NSW)), paths, grounds and gardens shown on the RNSH PPP Footprint Plan as relating to that Health Facility or Car Park Facility (as applicable); and
- (b) all equipment, furniture, fittings and fixtures in or relating to that Health Facility or Car Park Facility (as applicable), but excludes:
  - (i) any equipment owned by any Project Company Related Party;
  - (ii) NSW Health Provided Items, medical equipment or NSW Health Tenant or Retail Head Lessee fit out; and
  - (iii) in respect of the Car Park Facilities, Operational Equipment and other equipment to be operated and maintained under the Car Park Licence Agreement.

**"Assumed Refinancing"** means a Refinancing which does not result in the Senior Debt exceeding the Maximum Debt Profile at any time.

**"Auditor General"** means the New South Wales Auditor General, appointed pursuant to the *Public Finance and Audit Act 1983* (NSW).

**"Backlog Maintenance and Refurbishment"** has the meaning given in the Support Services Specifications.

**"Bank Bill"** means a bill of exchange (as defined in the *Bills of Exchange Act 1909* (Cth)) that has been accepted by a bank authorised under a law of the Commonwealth of Australia or any state to carry on banking business.

**"Bank Bill Rate"**, for a period, means the rate, expressed as a yield per cent per annum (rounded up (if necessary) to 4 decimal places) that is quoted as the average bid rate on the Reuters monitor system page "BBSY" (or any page that replaces that page) at about 10.10 am (Sydney time) on the first day of the relevant period for which the rate is sought, for Bank Bills that have a tenor in months which is closest to the period, provided that if there is a manifest error in the calculation of that average bid rate or if no average bid rate is so published for Bank Bills of that tenor by about 10.30 am then the Bank Bill Rate shall be the bid rate specified by the non-defaulting party reasonably, acting in good faith, having regard to the rates otherwise bid for Bank Bills having a tenor as described above at or around that time.

**"Base Case"** means the base case financial model in the agreed form as amended from time to time in accordance with this deed.

**"Base Case Equity Return"** means the nominal blended internal rate of return to Equity Investors (before Equity Investor tax, but after Project Company tax), expressed as a percentage, as stated in the Base Case.

**"Base Retail Fit Out"** means the fit out works described in Schedule 11.

**"Benchmark Date"** means, for each of the Support Services or groups of Support Services set out in schedule 20, the date specified as the benchmark date for those Support Services.

**"Benchmarked Insurances"** means those insurances set out in paragraphs 7, 8(a)(ii) and 9 of schedule 14.

**"Benchmarking Exercise"** has the meaning given to that term in clause 30.1.

**"Beneficial Change in Law"** means a Change in Law which results or would, if implemented, result in a Variation Saving.

**"Building Code"** means the Building Code of Australia as adopted by Law and any other requirements of the EPA Act and associated regulations of that legislation in relation to buildings.

**"Business Day"** means a day that is not a Saturday, Sunday or public holiday in the city of Sydney, New South Wales.

**"Capital Expenditure"** means, at any time, expenditure which would be classified as capital expenditure in accordance with the then current Australian accounting standards issued by the Australian Accounting Research Foundation, or any successor or replacement of such body, on behalf of the professional accounting bodies.

**"Car Park Documents"** means:

- (a) the Car Park Operating Agreement;
- (b) the Car Park Licence Agreement;
- (c) the Car Park Promissory Notes;
- (d) the Car Park Securitisation Agreement;
- (e) the Car Park Payment Directions Deed; and
- (f) the Car Park Financier's Tripartite Deed.

**"Car Park Facilities"** means the car park facilities that are the subject of the Car Park Licence Agreement.

**"Car Park Licence Agreement"** means the agreement under which NSW Health grants InfraShore Parking the right to operate the Car Park Facilities.

**"Car Park Licence Plan"** has the meaning given in the Car Park Licence Agreement.

**"Car Park Operating Agreement"** means the document entitled "Royal North Shore and Community Health Services Car Park Operating Agreement" between InfraShore Parking and the Car Park Operator.

**"Car Park Operator"** has the meaning given in the Car Park Licence Agreement.

**"Car Park Payment Directions Deed"** means the document titled "Royal North Shore Hospital and Community Health Services - Car Park Payment Directions Deed" between InfraShore Parking, ISAM Trust and NSW Health.

**"Car Park Promissory Note"** means each payment instrument issued by InfraShore Parking to NSW Health under the Car Park Licence Agreement which are assigned under the Car Park Securitisation Agreement.

**"Car Park Securitisation Agreement"** means the agreement titled "Royal North Shore Hospital and Community Health Services - Car Park Securitisation Agreement" between InfraShore Parking, ISAM Trust and NSW Health.

**"Car Park Spaces"** means each space from time to time in the Car Park Facilities which is designated by NSW Health (under the Car Park Licence Agreement) as appropriate for the parking of motor vehicles and motor cycles in accordance with the requirements of any Government Agency.

**"Change in Control"** means, in respect of an entity, any event occurs such that a change occurs in the Control of that entity.

**"Change in Law"** means a change to or the coming into effect or implementation after the date of this deed of:

- (a) Legislation; or
- (b) any applicable judgement of a relevant court of law which changes a binding precedent; or
- (c) a Policy; or
- (d) an Industrial Instrument applying to Health Staff Members,

other than any Legislation, Policy or Industrial Instrument applying to Health Staff Members which, on the date of this deed, has been published or of which public notice has been given (provided that the Legislation, Policy or Industrial Instrument applying to Health Staff Members is in substantially the same form as published or notified) or any Legislation, Policy or Industrial Instrument applying to Health Staff Members that a party experienced and competent in the delivery of works and/or services similar to the Works and Support Services would have reasonably foreseen or anticipated.

**"Change Procedure"** means the procedure set out in schedule 16.

**"Claim"** includes any suit, claim, action, demand, proceeding, penalty or fine (except to the extent contrary to public policy or law), order or adverse judgement (at common law or in equity or under statute) under, arising out of, or in any way in connection with, this deed or the Project.

**"CLM Act"** means the *Contaminated Land Management Act 1997*.

**"Collateral Warranty"** means a collateral warranty in favour of NSW Health by a Material Subcontractor (other than a Key Subcontractor) on terms not materially different to the terms set out in schedule 10.

**"Commencement Certificate"** means a certificate issued by the Project Director in accordance with clause 13.4 in the form contained in Part B of schedule 13.

**"Commencement Date"** means:

- (a) for each Stage and Associated Infrastructure (or Health Facility comprised in a Stage) the subject of the Works, the date stated in the Commencement Certificate for that Stage or Health Facility issued in accordance with clause 13.4(a) with respect to the Support Services;
- (b) for the R&E Facility, the Retained Facilities and the Vacated Facilities, the Hard FM Start Date with respect to the Hard FM Services;
- (c) for the R&E Facility Basement Extension from Completion of the R&E Facility Basement Extension, with respect to the Hard FM Services;
- (d) for the R&E Facility, the R&E Facility Basement Extension, the Retained Facilities, Residual Facilities, Vacated Facilities and the Divested Facilities, the Soft FM Start Date with respect to the Soft FM Services; and
- (e) for the Project Company Services, the Hard FM Start Date.

**"Commercially Sensitive Information"** means, subject to the terms of the Guidelines, any information relating to the Financing Facilities, ISAM Trust or the Project Company's cost structure or profit margins, any of ISAM Trust or the Project Company's Proprietary Material, any other information which is commercially sensitive, in that it provides a competitive advantage or has a unique characteristic to ISAM Trust or the Project Company or their shareholders or unitholders, their financiers or their Subcontractors.

**"Commissioning"** means, in relation to a Stage:

- (a) any installation, commissioning, testing or running in of plant, equipment, machinery or facilities required to ascertain the ability of the Works, or any part of it, to comply with the Specifications;
- (b) hospital operational commissioning has occurred in accordance with the Facilities Specification;
- (c) any training, education, familiarisation and support required by the Specifications;
- (d) all decanting and recanting of FF&FE and other equipment in accordance with the Specifications, the Works Program, and the Commissioning and Decanting Plan; and
- (e) any installations of NSW Health Provided Items required in accordance with the Specifications to occur prior to the Commencement Date,

for that Stage.

**"Commissioning and Decanting Plan"** means the plan or procedures for the Commissioning Works developed in accordance with clause 11.4 based on the plan which is Annexure G.

**"Commissioning Works"** means the process of carrying out the Commissioning of a Stage.

**"Common Terms Deed"** means the document entitled "Royal North Shore Hospital and Community Health Services - Common Terms Deed" dated on or around the date of this deed between the Project Company, Infrashore Parking and others.

**"Community Health Car Park Facility"** means the car park facility located at the Community Health Facility as referred to in the Car Park Licence Agreement.

**"Community Health Facility"** has the meaning given to that term in the Facility Specification and includes all Associated Infrastructure.

**"Compensation Event"** means each of:

- (a) a breach by NSW Health or the Director-General of the NSW Department of Health of its obligations under this deed or any other Project Document which substantially frustrates or renders it impossible for the Project Company to perform any of its obligations or exercise any of its rights under the Project Documents;
- (b) a Discriminatory Change in Law;
- (c) a Qualifying Change in Law;
- (d) the exercise by NSW Health of its Emergency Step In Rights;
- (e) the implementation of Additional Work other than work carried out or managed by the Project Company, including any defects arising in respect of such Additional Work carried out other than by the Project Company, except to the extent dealt with in accordance with the Change Procedure;
- (f) a Native Title Application;
- (g) a direction by NSW Health, the Project Director or a Relevant Authority in respect of the discovery of an Artefact causes the Project Company to suspend or cease to provide all or any part of the Works or Support Services for more than two weeks or incur additional costs, except where the direction results from a breach by the Project Company of its obligations under this deed and the Specifications in dealing with the Artefact;
- (h) any legal proceedings challenging the validity of the NSW Health Development Approval or the modification, withdrawal, revocation, suspension or replacement of the NSW Health Development Approval, in each case other than due to an application for a Project Company Development Approval, any Project Company Variation Proposal, or any other action or inaction, as the case may be, of the Project Company or any Project Company Related Party;
- (i) a defect or deficiency in a NSW Health Provided Item, or in a Group 1B Equipment Item after novation of the relevant Group 1B Equipment Item Supply Agreement to NSW Health, not reasonably discoverable by the inspection and testing required by this deed, including defects and deficiencies due to inadequate maintenance, in each case other than where that circumstance is caused, directly or indirectly, by the action or inaction, as the case may be, of the Project Company or a Project Company Related Party;
- (j) an official or unofficial strike, lockout, go slow or other dispute by the Health Staff Members where such an action is as a consequence of matters wholly unrelated to:
  - (i) the performance of the Support Services;
  - (ii) the failure of the Project Company or a Project Company Related Party to manage the implementation of the automated guided vehicles in the Health Facilities in accordance with Good Industry Practice;



- (iii) the non-performance to specification of the automated guided vehicles in the Health Facilities; or
  - (iv) the management of the Health Staff Members by the Project Company or a Project Company Related Party;
- (k) an official or unofficial strike, lockout, go slow or other dispute by the Health Staff Members where such action is related to the restructuring activities contemplated in clause 2(d) of the Labour Services Agreement and which does not arise as a result of:
- (i) the failure of the Project Company or a Project Company Related Party to manage the implementation of the automated guided vehicles in the Health Facilities in accordance with Good Industry Practice; or
  - (ii) the non performance to specification of the automated guided vehicles in the Health Facilities; or
  - (iii) a failure by the Project Company or a Project Company Related Party to comply with any Applicable Workplace Policy and their obligations under the Project Documents;
- (l) an official or unofficial strike, lockout, go slow or other dispute by staff employed by NSW Health or the Director-General of the NSW Department of Health (excluding Health Staff Members) ("**Non Health Staff Member Action**"), other than where it is caused directly or indirectly, by the action or inaction, as the case may be, of the Project Company or a Project Company Related Party provided that:
- (i) in the case of any Non Health Staff Member Action occurring at a place other than the Hospital, where that Non Health Staff Member Action is caused by or related to the operation or implementation of automated guided vehicles, this cause is deemed not to be an action or inaction by the Project Company or the Project Company Related Party; and
  - (ii) in the case of any Non Health Staff Member Action related to the automated guided vehicles by those persons at the Hospital, no action or inaction by the Project Company or a Project Company Related Party will be, or will be deemed to be a cause of that Non Health Staff Member Action unless the Non Health Staff Member Action arises as a result of:
    - A. a failure by the Project Company or a Project Company Related Party to manage the implementation of the automated guided vehicles in the Health Facilities in accordance with Good Industry Practice; or
    - B. the non performance to specification of the automated guided vehicles in the Health Facilities.
- (m) where the Project Company has complied with the Partnering Protocol in relation to the relevant re-scheduling, a re-scheduling of Works set out in the Works Program or a Site Access Date set out in the Site Access Schedule under clause 11.3(g) other than where the Project Director or NSW Health reschedules the Works or amends

- the Works Program and Site Access Schedule pursuant to any other right under clause 11.3;
- (n) any part of the Commissioning being delayed, not being able to be provided or carried out, or being interfered with, as a result of:
- (i) a NSW Health Provided Item not being made available, in accordance with the Project Deed, at a time consistent with the Works Program; or
  - (ii) delays to the NSW Health Decanting Process, other than as a result of rescheduling in accordance with the Commissioning and Decanting Plan,
- in each case other than where that circumstance is caused, directly or indirectly, by the action or inaction, as the case may be, of the Project Company or a Project Company Related Party;
- (o) an Environmental Notice is served on the Project Company, a Project Company Related Party or NSW Health in respect of Unidentified Pre-existing Contamination;
- (p) any:
- (i) defect in the condition of subsurface Existing Infrastructure comprising Utilities; or
  - (ii) latent defect in the structural condition of an Existing Health Facility (other than the R&E Facility) which is discovered during the carrying out of the Works or Support Services and which was not identified in the Condition Survey Report.
- (q) comments made by the Project Director under clause 6.1(e) in relation to the Project Company Development Approval, where:
- (i) the Project Company disputes the comments; and
  - (ii) the Project Company is unable to submit any Project Company Development Approval; and
  - (iii) the dispute resolution process under this deed results in a final and binding determination that the relevant documentation did comply with the requirements of this deed;
- (r) where, despite the Project Company complying with the relevant Interface Protocol, the carrying out of R&E Facility Works or Third Party Facility Works substantially prevents or interferes with the performance of the Works or the Support Services by the Project Company;
- (s) the Project Director requires that a condition to a Consent be contested in accordance with clause 6.4(d);
- (t) the presence of friable asbestos in an Existing Health Facility that is required by Law to be removed or remediated other than as part of the Works or Support Services;
- (u) an amendment to the R&E Facility Construction Contract after the date of this deed;

- (v) any inconsistency between the R&E Facility Basement Extension (as completed) and that which is required to be constructed under the R&E Facility Construction Contract (excluding a Defect to which clause 15.5(b) applies), which prevents or interferes with the performance of the Works by the Project Company; and
- (w) the Project Company Development Approval (not including any Early Works Development Approval):
- (i) has not been issued by the Target DA Approval Date (but without limiting paragraph (ii) below) other than in the following circumstances:
- A. the Project Director, NSW Health, the Department of Planning or the Minister for Planning (respectively) and their respective employees, agents, delegates or officers have completed each task allocated to them within the period of time allowed for the completion of that task in the Works Program; or
- B. by:
- 1) any contest carried out in accordance with clause 6.4(d) of this deed other than a contest in respect of a Fundamental Adverse Condition;
  - 2) the Director General of the Department of Planning reasonably forming the view for the purposes of section 75H(2) of the EP&A Act that an environmental assessment submitted by Project Company or a Project Company Related Party in connection with a Project Company Development Approval does not adequately address any requirements in respect of application number "MP 08\_0172" notified by the Director-General of Planning pursuant to section 75F(3) of the EP&A Act to the extent that inadequacy relates to a matter allocated to the Project Company in the Applications Resources Schedule;
  - 3) the failure of the Project Company, a Key Subcontractor or a Subcontractor after the date of this deed to use Good Industry Practice in preparing, or managing the application process for, the application for the Project Company Development Approval; or
  - 4) any other action or inaction, as the case may be, of the Project Company or the Construction Contractor after the date of this deed.
- (ii) being granted subject to a condition which is a Fundamental Adverse Condition,
- (iii) has not been issued by the Target DA Approval Date because:

- A. of a legal requirement for a NSW Health Development Approval Health Facilities Modification or that a NSW Health Development Approval Health Facilities Modification Approval must be obtained; or
- B. following the commencement of the *Environmental Planning and Assessment Amendment Act 2008* (NSW) the Minister for Planning (whether as a consequence of a legal obligation or an election) refers the determination of the application for a Project Company Development Approval to the "Planning Assessment Commission" constituted under the EP&A Act as a result of that Amendment Act.

**"Completion"** means:

- (a) in respect of a Stage, subject to paragraph (b), the stage of construction or refurbishment (as applicable) where:
  - (i) the Stage is complete in accordance with the terms of this deed, save only for any minor omissions or defects which, individually or in aggregate, do not have an adverse effect on the occupation of the Stage and/or do not have an adverse effect on NSW Health, the State or the NSW Health Staff's ability to provide the Health Functions, or the Project Company's ability to provide the Support Services in accordance with this deed, and can be rectified within 20 Business Days and, in each case, where the process of rectification of such defects, agreed in accordance with clause 13.2, will not have any such adverse effect;
  - (ii) building commissioning of the relevant Stage including any Health Facility comprised in that Stage, including all plant and equipment, has been carried out in accordance with the Facility Specification;
  - (iii) all Consents:
    - A. then necessary for the occupation of the relevant Stage including any Health Facility comprised in that Stage for Health Functions; and
    - B. then necessary for the use of the relevant Stage including any Health Facility comprised in that Stage for its intended purpose; and
    - C. required by the Specifications,
 have been issued, and the conditions of those Consents have been satisfied;
  - (iv) any work required under clause 13.6 has been carried out, including the Final Contamination Assessment and the Final Site Audit Statement where relevant;
  - (v) removal of rubbish, construction machinery, equipment, materials and Temporary Works used in connection with the Stage and any other work required for the occupation of the relevant Stage, including any Health

Facility comprised in that Stage, for Health Functions and its use for its intended purpose has been completed;

- (vi) Utilities infrastructure has been provided and Utilities connection verified in accordance with the Specifications;
  - (vii) the Operations Manual as it applies to the relevant Stage, including any Health Facility comprised in that Stage, has been completed or updated in accordance with this deed and the Specifications and NSW Health has been provided with all other material documents and information in relation to the relevant Stage; and
  - (viii) in respect of the relevant Stage, including any Health Facility comprised in that Stage, the insurances referred to, and to be taken out and maintained as detailed, in part B of schedule 14 are in full force and effect; and
- (b) following the completion of the matters referred to in paragraph (a) in respect of a Stage, the balance of the Commissioning Works have been carried out in respect of the Stage; and
  - (c) in respect of a Milestone, when the Milestone is completed in accordance with the terms of the requirements of this deed.

**"Condition Survey Report"** means in respect of the buildings identified on the Site Plan as "Building 1", "Building 2" and Building 53", the report prepared by Sinclair Knight Mertz dated 20 March 2007 entitled "Royal North Shore Hospital PPP Project Existing Buildings 1, 2 and 53 Condition Report".

**"Conditions Precedent"** means the conditions set out in schedule 1.

**"Consents"** means all permits, authorisations, approvals, licences, exemptions, clearances, consents, permissions, notifications, applications, filings, registrations, lodgements, deeds, certificates, directions, declarations or exemptions, or similar decisions of any kind which are required from, by or with a Relevant Authority for the performance of the Project or any part of it, including each Development Approval.

**"Consequential Loss"** means Loss or Claim suffered or incurred by any person (including under an indemnity) whether arising in contract, tort (including for negligence), under statute or on any other basis in law or equity which is indirect or consequential including, without limitation and without being limited by the meaning of "indirect or consequential", the following:

- (a) loss of profits;
- (b) loss of revenue;
- (c) loss of production;
- (d) loss of goodwill;
- (e) loss of use;
- (f) loss of business opportunity

or any similar loss, but does not include:

- (g) loss arising from death or personal injury;
- (h) loss arising from any criminal acts or fraud on the part of the Project Company or its employees, contractors and agents (or any of their employees, contractors and agents);
- (i) loss arising from wilful misconduct on the part of the Project Company or its employees, contractors and agents (or any of their employees, contractors and agents);
- (j) loss which is the subject of the indemnities set out in clause 10.5(f) (but subject to clauses 10.5(i) and 10.5(j)), clause 27.3 and paragraph 7 of Schedule 15; and
- (k) any liability to the extent to which by law, the parties cannot limit or contract out of.

For the avoidance of doubt, "Consequential Loss" does not include any liability that the Project Company has under this deed for a Deduction.

**"Construction Contract"** means each design and construction contract, in the agreed form, between the Project Company and a Construction Contractor relating to the Works or any part of the Works.

**"Construction Contractor"** means Thiess Pty Ltd or such other replacement contractor or contractors as the Project Company may, subject to clause 7, appoint to carry out the Works or any part of the Works.

**"Construction Contractor Guarantor"** means Leighton Holdings Limited or such other party as may be substituted for the Construction Contractor Guarantor in accordance with the Project Documents.

**"Construction Payment"** means the payment by NSW Health to the Project Company of an amount equal to the "Purchase Price" (as defined in the Securitisation Agreement) payable by ISAM Trust to NSW Health under the Securitisation Agreement in respect of the Works for a Stage.

**"Construction Payment Date"** means each date upon which ISAM Trust pays the Purchase Price under the Securitisation Agreement.

**"Construction Phase"** means, in respect of a Construction Site and a Stage, the period commencing on the date when the Project Company is granted access to the relevant Construction Site under the Site Access Schedule and ending on Completion of the Stage.

**"Construction Report"** means each report provided in accordance with clause 11.5.

**"Construction Side Deed"** means the side deed, substantially in the form set out in schedule 6, between NSW Health, the Project Company, the Construction Contractor and the Construction Contractor Guarantor as the context may require, or any replacement of such document entered into in accordance with the Project Documents.

**"Construction Site"** means during the Construction Phase for a Stage, each area within the construction site identified on the Site Access Plans but does not include any part of the area so identified prior to the date on which access is granted to the Project Company, nor any part of

the area from the date on which it is returned to the control of NSW Health or a NSW Health Related Party in accordance with the Works Program and Decanting and Commissioning Plan and always excluding any area which ceases to be part of the Construction Site in accordance with clause 5.1(c).

**"Contamination"** has the same meaning as in section 5 of the Contaminated Land Management Act 1997 (NSW).

**"Contract Variation"** means any variation to the Specifications, the Project Company's Proposals, the Detailed Design (other than changes to the Detailed Design which may be made in accordance with clause 10.4) the Works Program (other than changes to the Works Program which may be made in accordance with clauses 10.4 and 11.3), the Works, the Operations Manual (other than changes to the Operations Manual which may be made in accordance with clause 15.3), a Health Facility (including its use) or the Support Services, and, as the context may require, any consequential amendments to this deed or any other Project Document as a result of such a variation.

**"Contract Year"** means each period of 12 months during the Term commencing on 1 January, provided that:

- (a) the first Contract Year shall be the period commencing on the date of this deed and ending on the immediately following 31 December; and
- (b) the final Contract Year shall be the period commencing on 1 January immediately preceding the last day of the Term and ending on the Termination Date.

**"Control"** means, with respect to an entity, the ability or capacity to determine the outcome of decisions about that entity's financial and operating policies.

**"Cooperation and Interface Deed"** means the document entitled "Royal North Shore Hospital and Community Health Services - Cooperation and Interface Deed" entered into between the Project Company, the Construction Contractor, the Facilities Managers and others.

**"Corporations Act"** means the *Corporations Act 2001* (Cth).

**"Counterparties"** has the meaning given in clause 2.8.

**"CPI"** means the "Weighted Average of Eight Capital Cities: All Groups Consumer Price Index" as maintained and published quarterly by the Australia Bureau of Statistics ("**ABS**") provided that:

- (a) if for any reason the CPI is not published for any quarter, or if publication is delayed until after the relevant date under the Project Documents or other date in respect of which a determination is to be made, the interim number determined by the Reserve Bank of Australia for application in regard to Commonwealth of Australia Treasury Indexed Bonds will be used for the purposes for which the actual CPI figure would have been applied. If no such interim number is determined by the Reserve Bank of Australia then the CPI published for the previous quarter will apply in the interim. In the event of subsequent publication of the actual CPI figure for that quarter by the ABS, adjustment to the payment will be made;
- (b) if the ABS ceases to publish the CPI and publishes another index which is stated to be in replacement of the CPI, then that will be used for the relevant determination;

- (c) if the ABS ceases to publish the CPI without publishing a replacement index, or if any change is made to the coverage, periodicity, or basic calculation of the CPI which, in the opinion of the Treasurer of the Commonwealth of Australia, constitutes a change in the CPI which is materially detrimental to the interests of Commonwealth of Australia Treasury Indexed Bond holders then, in such circumstances, the index to be announced by the Treasurer of the Commonwealth of Australia for use with Commonwealth of Australia Treasury Indexed Bonds will be substituted for the CPI. In the event of no such index being established, the President of the Institute of Actuaries of Australia or his/her nominee acting as an independent arbitrator will be called upon to calculate an index which he/she determines to be appropriate as a general indication of the rate of price change for consumer goods and services in the capital cities of Australia; and
- (d) if the reference base of the CPI is changed, the index which will be used will be the CPI numbers expressed on the new base as published by the ABS.

**"Dangerous Good"** has the same meaning as in the latest edition of the Australian Code for the Transport of Dangerous Goods by Road and Rail.

**"Deduction"** has the meaning given to that term in schedule 5.

**"Defect"** means any latent or patent defect in any of the Health Facilities, or any part of them, attributable to:

- (a) defective design;
- (b) defective workmanship or defective materials, plant or machinery used in the carrying out of the Works or construction of Health Facilities, or any part of them;
- (c) defective installation of anything in or on the Health Facilities, or any part of them or in or on a Construction Site, having regard to Good Industry Practice and to applicable standards and codes of practice current at the date of such installation;
- (d) defective preparation of a Construction Site, or
- (e) any failure to comply with the Facility Specification or with any obligation under this deed in relation to design and construction of the Works.

**"Design Data"** means all material calculations, designs, design information, specifications, plans, programs (other than computer programs), drawings, graphs, sketches, models, samples, test results, engineering and other forms of material data in whatever medium prepared or to be prepared by or on behalf of the Project Company for the implementation of the Works.

**"Detailed Design"** means, for a Stage, the complete design development documentation, including detailed specifications, reports and schedules of accommodation developed and finalised in accordance with clause 10.4.

**"Detailed Design Program"** means, the program for development of the Detailed Design for a Stage to be prepared by the Project Company by the date set out in part A of schedule 12 (as updated in accordance with the Works Program) and in accordance with the Specifications.

**"Development Approval"** means each development consent, project approval or other approval and assessments required under the EPA Act and the EPBC Act in relation to the Project, including the NSW Health Development Approval.



**"Discriminatory Change in Law"** means a Change in Law, other than a Change in Law with respect to a Commonwealth of Australia Tax, the terms of which apply to:

- (a) the Project and not to similar projects procured by NSW Health; or
- (b) the Project Company and not to any other person; or
- (c) a Construction Site, the Hospital Campus, the RNSH PPP Footprint, the Works or a Health Facility and not to other similarly situated land, facilities or works; or
- (d) projects procured or established under the Guidelines or other NSW Government policies in respect of privately financed projects and not to other projects.

**"Disposables"** means rubbish, Waste, waste products and refuse, and surplus materials created or separated by virtue of the Works.

**"Disputed Amount"** has the meaning given to that term in clause 29.4.

**"Distribution"** means any distribution by the Project Company to its shareholders or related bodies corporate or by ISAM Trust to its ordinary unitholders, whether by way of dividend, return of capital, redemption, purchase, buy back, cancellation, payment, repayment or otherwise, in respect of the share capital of the Project Company or the subordinated debt (which is, in substance, equivalent to ordinary equity) of the Project Company or the ordinary units of ISAM Trust, or any payment, loan or financial accommodation by the Project Company or ISAM Trust to a related body corporate, other than on arm's length terms.

**"Divested Facility"** means, for the period until such building or facility is vacated by NSW Health and all NSW Health Related Parties, a building or facility (excluding Residual Facilities and their Associated Infrastructure) which the Project Company is required to decommission and secure in accordance with the Commissioning and Decanting Plan and includes Associated Infrastructure.

**"EA Works"** means the zone substation to be constructed by EnergyAustralia on or adjacent to the Hospital Campus.

**"Early Works Development Approval"** means an approval which the Project Company may apply for to permit removal of trees and ancillary works as referred to in the Works Program.

**"Emergency Event"** means a situation relating to the Project, which:

- (a) prevents provision of the Support Services or continuation of the Works under normal circumstances;
- (b) poses a serious threat to, or causes or will cause material damage or material disruption to:
  - (i) the health or safety of persons;
  - (ii) the Environment;
  - (iii) private or public property; or
  - (iv) the safe and secure performance of the Works or provision of the Support Services or operation of the Hospital; or

- (c) will require the provision of the Support Services or alternate services materially greater than that required in the Support Services Specifications,

whether caused by a breach by the Project Company of any of its obligations under any Project Document or not.

**"Emergency Step In Rights"** means the exercise by NSW Health of its Step In Rights, where such exercise is not as a result of any negligence, wilful misconduct or a breach or default of the Project Company or Project Company Related Party of their respective obligations under any Project Document.

**"Environment"** means all components of the earth, including:

- (a) land, air and water;
- (b) any layer of the atmosphere;
- (c) flora and fauna;
- (d) any organic or inorganic matter and any living organism including humans;
- (e) human made or modified structures and areas;
- (f) the aesthetic characteristics of the components of the earth, including appearance, sound, odour, taste and texture; and
- (g) ecosystems with any combinations of the above.

**"Environmental Assessment"** means:

- (a) the environmental site assessment report(s) in relation to the Project entitled:
  - (i) "Stage 2 Environmental Site Assessment, Royal North Shore Hospital Redevelopment Proposed Divestment Site" dated 20 March 2007 (Draft); and
  - (ii) "Stage 2 Environmental Site Assessment, Royal North Shore Hospital Redevelopment, Proposed Hospital Site" dated 16 March 2007 (Draft);
 prepared by Coffey Environments Pty Ltd; and
- (b) the report entitled "Site Radiological Survey of the Royal North Shore Hospital" dated 20 February 2007 prepared by ANSTO.

**"Environmental Law"** means any Law:

- (a) relating to the storage, handling or transportation of Waste, Dangerous Goods or Hazardous Material;
- (b) relating to occupational health and safety; or
- (c) which has as one of its purposes or effects the protection of the Environment.

**"Environmental Notice"** means any direction, order, demand or other requirement to take any action or refrain from taking any action in respect of a Construction Site, the Works, the RNSH PPP Footprint or a Health Facility or its use:

- (a) from any Relevant Authority;
- (b) whether written or otherwise; and
- (c) in connection with any Environmental Law.

"EPA" means the New South Wales Environment Protection Authority, and any successor to such authority.

"EPA Act" means the *Environmental Planning and Assessment Act 1979* (NSW).

"EPBC Act" means the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

"Equity Investor" means a person who holds an ordinary equity interest in the Project Company or ISAM Trust and/or a provider of subordinated debt, which is, in substance, equivalent to ordinary equity, to the Project Company and/or ISAM Trust.

"Estimated Cost Effect" means the cost effect of an event or variation calculated in accordance with schedule 19.

"Existing Car Park Facilities" means the car park facilities the subject of the Car Park Licence Agreement existing as at the date of this deed and Associated Infrastructure.

"Existing Health Facilities" means the Health Facilities existing at the date of this deed excluding the Works.

"Existing Infrastructure" means, as at the date of this deed, those buildings, fixtures, infrastructure, supporting structures and media for Utilities and other structures within or adjacent to a Construction Site or the RNSH PPP Footprint.

"Expiration Date" means the date falling on the 28th anniversary of the date of this deed.

"Extended Multi-Deck Car Park Facility" has the meaning given to that term in the Car Park Licence Agreement.

"Facilities Management Contract" means each facilities management contract, in the agreed form, between a Facilities Manager and the Project Company relating to the Support Services or any part of the Support Services.

"Facilities Manager" means each of Thiess Services Pty Ltd and ISS Health Services Pty Ltd or such other replacement contractors as the Project Company may, subject to clause 7, appoint to perform the facilities management services or any part of them.

"Facilities Manager Guarantor" means each of Leighton Holdings Limited (in the case of Thiess Services Pty Ltd) and ISS Global A/S and ISS Facility Services Australia Limited (in the case of ISS Health Services Pty Ltd) or such other parties as may be substituted for a Facilities Manager Guarantor in accordance with the Project Documents.

"Facilities Management Side Deed" means each side deed, substantially in the form set out in schedule 6 between NSW Health, the Project Company, the Facilities Manager and the Facilities Manager Guarantor (but not ISS Global A/S in the case of ISS Health Services Pty Ltd), or, as the context may require, any replacement of such document entered into in accordance with the Project Documents.

**"Facilities Removal Contract Variation"** means a Contract Variation which is required as a result of a notice given under clause 23.9, clause 27.2, clause 28.3(b)(ii) or any NSW Health Variation Request which in each case results in a Health Facility or any part of a Health Facility ceasing to be subject to this deed.

**"Facility Specification"** means Annexure B.

**"FF & FE"** has the meaning given to that term in the Facility Specification.

**"Final Contamination Assessment"** means an assessment of the nature and extent of Contamination of a Construction Site on completion of the Works on that Construction Site.

**"Final Site Audit Statement"** means a Site Audit Statement issued by the Site Auditor which reports on the findings of an independent review of the Final Contamination Assessment and any remediation work undertaken following the Final Contamination Assessment.

**"Finance Security"** means each Security defined in the Common Terms Deed.

**"Financial Close"** means the date on which the Project Director gives notice of satisfaction of the Conditions Precedent under clause 3.1 or the date on which satisfaction of the conditions precedent is deemed to have occurred in accordance with clause 3.1.

**"Financial Close Protocol"** means the financial close protocol in the agreed form and contained in Annexure E.

**"Financiers"** means each provider of Financing Facilities from time to time and may, where the context permits, include any agent, custodian, manager or trustee of such Financiers.

**"Financiers Construction Contract Tripartite Deed"** means the document to be entered into between a Construction Contractor, the Construction Contractor Guarantor, the Security Trustee and the Project Company.

**"Financiers Facilities Management Tripartite Deed"** means the document to be entered into between, the Project Company, the Facilities Manager, the Facilities Manager Guarantor (but not ISS Global A/S in the case of ISS Health Services Pty Ltd) and the Security Trustee.

**"Financiers Tripartite Deed"** means the document to be entered into between NSW Health, the Project Company and the Financiers substantially in the form set out in schedule 7, or, as the context may require, any replacement of such document entered into in accordance with the Project Documents.

**"Financing Agreements"** means each of the documents in the agreed form defined as such in the Common Terms Deed (other than the Equity Documents as defined in the Common Terms Deed), and any additions to or replacements of such agreements, in accordance with clause 9.1.

**"Financing Facilities"** means the facilities, financial arrangements or accommodation provided, or to be provided in accordance with the Financing Agreements, to the Project Company, ISAM Trust and FinCo for the purpose of carrying out the Project.

**"FinCo"** means InfraShore Finance Pty Limited.

**"Fit for Intended Purpose"** means:

- (a) for the Works, being fit for the purpose of the provision of the Support Services and the Health Functions; and
- (b) for the R&E Facility or a Retained Facility, meeting the requirements of the Support Services Specifications in respect of that Health Facility.

**"Force Majeure Event"** means the occurrence of a Relief Event which exists or occurs or the impacts of which exist or occur, or can reasonably be expected to exist or occur, for a continuous period exceeding 180 days, and that directly causes either party to be unable to comply with a material part of its obligations under this deed.

**"Frequent Breach Notice"** has the meaning given to that term in clause 33.2(b).

**"Fundamental Adverse Condition"** means a condition that:

- (a) requires a NSW Health Development Approval Health Facilities Modification or that a NSW Health Development Approval Health Facilities Modification Approval to be obtained; or
- (b) will adversely impact on the operational capability or efficiency of the PPP As Built Health Facilities by altering the geometry of a floor or any part of a floor of the PPP As Built Health Facility.

**"Funded Completion Date"** has the meaning given in Schedule 3.

**"General Change in Law"** means a Change in Law which is not a Discriminatory Change in Law.

**"Good Industry Practice"** means 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.

**"Government Agency"** means a government, semi-government, municipal, statutory or other public entity or authority.

**"Gross Monthly Service Payment"** means the Monthly Service Payment for the applicable Operating Month plus the aggregate amount of any Deductions for that Operating Month.

**"Group 1 Equipment"** means the equipment described as "Group 1" in the Facility Specification and includes Group 1A Equipment, Group 1B Equipment as described in Appendix A to Annexure B to Volume 2.2 of the Facility Specification and Group 1TA Equipment and Group 1TB Equipment as described in Appendix C to Annexure B to Volume 2.2 of the Facility Specification.

**"Group 1A Equipment"** means Group 1 Equipment which is of a type described as "Classification A" or "Class A" in Appendix A to Volume 2.2 of the Facility Specification.

**"Group 1B Equipment"** means the Group 1 Equipment which is listed and described as "Classification B" or "Class B" in Appendix A to Volume 2.2 of the Facility Specification.

**"Group 1T Equipment"** means the equipment described as "Group 1T" in Appendix C to Volume 2.2 of the Facility Specification.

**"Group 1TA Chapel Equipment"** means equipment which is located in the Chapel Building at the date of this deed and is of the type described as "Group 1A" on the Douglas Building and Chapel FF & FE List prepared in accordance with clause 11.12(a).

**"Group 1TA Douglas Building Equipment"** means equipment which is located in the Douglas Building at the date of this deed and is of the type described as "Group 1A" on the Douglas Building and Chapel FF & FE List prepared in accordance with clause 11.12(a).

**"Group 1TA Equipment"** means the Group 1T Equipment which is listed and described as "Classification A" or "Class A" in Appendix C to Volume 2.2 of the Facility Specification.

**"Group 1TA R&E Equipment"** means equipment which is located in the R&E Facility at the date of this deed and is of the type described as "Group 1A" in Appendix A to Volume 2.2 of the Facility Specification.

**"Group 1TB Equipment"** means Group 1T Equipment which is listed and described as "Classification B" or "Class B" in Appendix C to Volume 2.2. of the Facility Specification.

**"Group 2 Equipment"** means the equipment described as "Group 2" in Appendix A to Volume 2.2 of the Facility Specification and includes Group 2A Equipment, Group 2B Equipment and, as described in Appendix C to Volume 2.2 of the Facility Specification, Group 2TB Equipment.

**"Group 2A Equipment"** means Group 2 Equipment which is listed and described as "Classification A" or "Class A" in Appendix A to Volume 2.2 of the Facility Specification.

**"Group 2B Equipment"** means Group 2 Equipment which is listed and described as "Classification B" or "Class B" in Appendix A to Volume 2.2 of the Facility Specification.

**"Group 2TB Equipment"** means the equipment listed and described as "Group 2T" and as "Class B" or "Classification B" in Appendix C to Volume 2.2 of the Facility Specification.

**"Group 3 Equipment"** means the equipment described as "Group 3" in Appendix A to Volume 2.2 of the Facility Specification for Group 3B Equipment and as described in Appendix C of Volume 2.2 of the Facility Specification for Group 3TB Equipment.

**"Group 3B Equipment"** means the Group 3 Equipment listed and described as "Classification B" or "Class B" in Appendix C to Volume 2.2 of the Facility Specification.

**"Group 3TB Equipment"** means the equipment listed and described as "Group 3T" and as "Classification B" or "Class B" in Appendix A to Volume 2.2 of the Facility Specification.

**"Group 4 Equipment"** means any:

- (a) Residual Building Equipment and Additional Residual Building Equipment; and
- (b) any FF&FE of a type equivalent to that listed as Group 1 and "Classification A" or "Class A" in Appendix A to Volume 2.2 of the Facility Specification which is located in Building 1 or 2 on or immediately prior to the Commencement Date of Stage 2,

and which has not been utilised by the Project Company pursuant to clause 11.11(b)(iii).

**"GST"** means:

- (a) the same as in the GST Law; and
- (b) any other goods and services tax, or any Tax applying to this transaction in a similar way.

"**GST Law**" has the meaning given in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

"**Guidelines**" means, as the context requires, the New South Wales government memorandum 2000-11 (Disclosure of Government Contracts) and New South Wales guidelines for privately financed projects dated May 2007, each as amended, augmented or replaced from time to time.

"**Handover Audit**" has the meaning given to that term in clause 36.1.

"**Handover Condition**" means the required condition of the Hospital and the RNSH PPP Footprint as at the Expiration Date as set out in schedule 24.

"**Hard FM Services**" has the meaning given to that term in the Support Services Specifications.

"**Hard FM Start Date**" has the meaning given in schedule 5.

"**Hazardous Material**" means material which, because it is toxic, corrosive, flammable, explosive or infectious or possesses some other dangerous characteristic, is potentially dangerous to the Environment:

- (a) when stored or handled; or
- (b) when any part of the Environment is exposed to it.

"**Health Facility**" means:

- (a) each PPP As Built Health Facility;
- (b) each Retained Facility;
- (c) each Residual Facility;
- (d) each Divested Facility;
- (e) the R&E Facility; and
- (f) from Completion of the R&E Facility Basement Extension, the R&E Facility Basement Extension,

from time to time (and, for the avoidance of doubt, excludes the Vacated Facilities, any equipment owned by any Project Company Related Party, NSW Health Provided Items, medical equipment or NSW Health Tenant or Retail Head Lessee fit out and Operational Equipment and other equipment to be operated and maintained under the Car Park Licence Agreement).

"**Health Functions**" means all clinical, clinical support, non-clinical support and administration functions (other than the Support Services) to be undertaken at each Health Facility, including all activities and services that would reasonably be expected, as at the date of this deed, to be undertaken in connection with or which are incidental or ancillary to such

functions and activities, or which are incidental to the care, treatment, and rehabilitation of Patients, health education, training and research, accommodation of Patients and visitors, and health-related fundraising and charitable activities, but excluding Unforeseeable Health Functions. In the context of the availability of a Health Facility, **Health Functions** includes access required by NSW Health Staff in order to discharge their respective responsibilities and obligations in the course of their employment, and access required by patients and other members of the community to receive the benefit of the Health Functions.

**"Health Functions Disruption"** means a material interference with or increase in the costs or requirements for the provision of Health Functions.

**"Health Staff Member"** means an employee of the NSW Health Service who is managed under the Labour Services Agreement.

**"Health Staff Member Costs"** has the meaning given to it in Part D of schedule 5.

**"Health Staff Member Invoice"** has the meaning given to that term in clause 29.11.

**"Hospital"** means all Health Facilities, buildings and other infrastructure, improvements, roads (except public roads under the *Roads Act 1983* (NSW)), paths, grounds and gardens within the RNSH PPP Footprint from time to time.

**"Hospital Campus"** means:

- (a) the land in Lot 21 in Deposited Plan 863329 and Lot 102 in Deposited Plan 1075748; and
- (b) from the date notified by NSW Health to the Project Company, that part of Westbourne Street (as identified in the notice) which is:
  - (i) generally located between the Private Hospital and the building known as "Building 2"; and
  - (ii) not a public road.

**"Illegality Event"** means the occurrence of any of the following events:

- (a) the Project Company or a Key Subcontractor ceasing to hold a Consent or breaching applicable Law, and such failure or breach is, in the opinion of the Project Director, material to the performance of the Project Company's obligations under this deed and is not remedied within 30 days of the earlier of:
  - (i) the date on which the Project Director notifies the Project Company of the breach; or
  - (ii) the date on which the Project Company becomes aware of the breach;
- (b) any Project Document being revoked, repudiated or terminated or ceasing to be legal, valid and binding and enforceable against the Project Company or any other person (other than NSW Health and the Director-General of the New South Wales Department of Health), other than as contemplated by or permitted in accordance with the Project Documents, or a Project Document becomes invalid, void or voidable in any material respect, and, the event is not remedied within 30 days of the relevant event occurring.



**"Independent Assessor"** has the meaning given to that term in clause 36.1(a).

**"Independent Certifier"** means the person appointed from time to time under the Independent Certifier Deed.

**"Independent Certifier Deed"** means the deed to be entered into by the Independent Certifier, NSW Health and the Project Company, substantially in the form set out in schedule 9.

**"Industrial Instrument"** means any award or certified agreement or enterprise agreement, as defined in the *Industrial Relations Act 1996* (NSW).

**"Industrial Law"** has the meaning given to that term in the Labour Services Agreement.

**"Information Document"** means:

- (a) any information, data or Material provided to the Project Company or any Project Company Related Party by or on behalf of NSW Health prior to the date of this deed; and
- (b) any other information, data or Material which is referred to or incorporated by reference in information or a document referred to in paragraph (a), unless such information or document is otherwise expressly stated to form part of this deed,

other than:

- (c) information provided in respect of the Health Staff Members, which NSW Health agrees does not constitute an Information Document for the purposes of this definition.

**"InfraShore Parking"** means the party named as such in the Car Park Licence Agreement.

**"Insolvency Event"** means, in relation to a party, the occurrence of any of the following events:

- (a) if an application is made (other than for a frivolous or vexatious reason) for the winding up or deregistration of a party and, where an application has been made for the dismissal or withdrawal of the application for winding up within 10 Business Days, the application is not dismissed or withdrawn within 30 Business Days;
- (b) an order is made for the winding up of a party, except for the purpose of a reconstruction, amalgamation, merger or consolidation on terms approved by the Project Director before that order is made where the reconstruction, amalgamation, merger or consolidation is implemented in accordance with the terms of the approval;
- (c) if a party passes a resolution for its winding up or deregistration, except for the purpose of a reconstruction, amalgamation, merger or consolidation on terms approved by the Project Director before that resolution is passed where the reconstruction, amalgamation, merger or consolidation is implemented in accordance with the terms of that approval;
- (d) if a receiver, receiver and manager, liquidator provisional liquidator, compulsory manager trustee for creditors or in bankruptcy or analogous person is appointed to,

- or the holder of a Security Interest takes (or appoints an agent to take) possession of, any property of a party or otherwise enforces its Security Interest;
- (e) if a party or any other person appoints an administrator to the party, or takes any step to do so;
  - (f) if a party:
    - (i) suspends payment of its debts (other than as the result of a failure to pay a debt or claim which is the subject of a good faith dispute);
    - (ii) ceases or threatens to cease to carry on all or a material part of its business;
    - (iii) is or states that it is unable to pay its debts; or
    - (iv) is deemed insolvent by virtue of its failure to comply with a statutory demand; or
  - (g) if a party enters into a readjustment or rescheduling of its indebtedness or makes a general assignment for the benefit of or a composition with its creditors, without the prior consent of NSW Health; or
  - (h) any act is done or event occurs which has an analogous or similar effect to any of the events in paragraphs (a) to (g).

**"Insurance Benchmark Date"** means the date:

- (a) which occurs three years after the date of Financial Close and each third, or multiple thereof, anniversary of the date of Financial Close; and
- (b) falling three months after the date on which the Project Company receives written notification from the Project Director in accordance with paragraph 12 of schedule 14 that the insurance limits of indemnity required for the Benchmarked Insurances will be increased.

**"Insurance Component"** means the component of the Monthly Service Payment payable in respect of the relevant Benchmarked Insurances.

**"Intellectual Property Rights"** means all present and future rights throughout the world conferred by Law in or in relation to copyright, trade marks, designs, patents, circuit layouts, plant varieties, business and domain names, inventions and other results in the industrial, commercial, scientific, literary or artistic fields, whether or not registrable, registered or patentable, including:

- (a) all rights in all applications to register these rights;
- (b) all renewals and extensions of these rights; and
- (c) all rights in the nature of these rights,

but excluding Moral Rights.

**"Interface Protocol"** means:

- (a) in respect of the R&E Facility Works, Annexure I;
- (b) in respect of the EA Works, Annexure J;
- (c) in respect of the impact of the Works on the Private Hospital, Annexure K; and
- (d) in respect of any other Third Party Facility Works, an interface protocol developed by the Project Company pursuant to clause 22.8,

in each case being a protocol relating to interface and co-ordination issues, including:

- (e) design, construction, maintenance, services and operation management, co-ordination and compatibility;
- (f) timing and programming of works, services and other activities;
- (g) access arrangements to relevant Construction Sites;
- (h) connections to and use of Utilities infrastructure and other facilities;
- (i) processes and procedures for managing and minimising impacts and interface issues; and
- (j) exchange of information and dispute resolution.

**"Interim Hard FM Services"** has the meaning given to that term in the Support Services Specifications.

**"Interim Hard FM Start Date"** has the meaning given in schedule 5.

**"Interim R&E Hard FM Services"** has the meaning given in the Support Services Specifications.

**"Interim Services"** means:

- (a) the Interim Hard FM Services;
- (b) the Interim R&E Hard FM Services;
- (c) the Interim Soft FM Services; and
- (d) Backlog Maintenance and Refurbishment.

**"Interim Services Phase"** means any period during which the Project Company is required to provide Interim Services pursuant to clause 15.1(a).

**"Interim Soft FM Services"** has the meaning given to that term in the Support Services Specifications.

**"Interim Soft FM Start Date"** has the meaning given in schedule 5.

**"ISAM Trust"** means InfraShore Asset Management Pty Limited in its capacity as trustee for the InfraShore Asset Management Trust.

**"Key Subcontract"** means each of the Construction Contract and the Facilities Management Contract.

**"Key Subcontractor"** means each Construction Contractor and Facilities Management Contractor.

**"Key Subcontractor Guarantor"** means each Construction Contractor Guarantor and each Facilities Manager Guarantor.

**"KPI"** has the meaning given to it in Schedule 5.

**"Labour Services Agreement"** means an agreement between NSW Health, the Director-General of NSW Health and the Project Company in the form set out in schedule 23.

**"Land Tax"** means land tax payable in accordance with the provisions of the Land Tax Legislation.

**"Land Tax Legislation"** means each of the Land Tax Act 1956 (NSW) and the Land Tax Management Act 1956 (NSW).

**"Law"** means:

- (a) Legislation;
- (b) common law or principles of equity; and
- (c) requirements and Consents of Relevant Authorities (including conditions in respect of those Consents).

**"Legislation"** means, in relation to New South Wales or the Commonwealth of Australia:

- (a) any act of parliament or statute;
- (b) any subordinate legislation, rules, regulations or by-laws;
- (c) any Policy, guidelines and codes of practice of NSW Health, NSCCAHS or local councils and authorities with which the Project Company is required to comply as a matter of law (other than the law of contract).

**"Level A"** has the meaning given to that term in schedule 5.

**"Licence"** means the licence granted under clause 5.1.

**"Licence Payment Amount"** means the licence fee set out in the Model Outputs Schedule, as adjusted in accordance with the Master Licence Agreement from time to time.

**"Longstop Date"** means:

- (a) in respect of Stage 1, the date which is 24 months after the Target Completion Date for Stage 1;
- (b) in respect of Stage 2, the date which is 18 months after the Target Completion Date for Stage 2;
- (c) in respect of Stage 3, the date which is 12 months after the Target Completion Date for Stage 3; and
- (d) in respect of Stage 4, the date which is 12 months after the Target Completion Date for Stage 4.

"**Loss**" includes any cost, expense (including legal expense on an indemnity basis), loss, charge, fee, payment, damage or liability whether direct, indirect or consequential (including pure economic loss), present or future, fixed or unascertained, actual or contingent.

"**Management Period**" has the meaning given to that term in the Labour Services Agreement.

"**Management Plans**" mean, in respect of the Works to be carried out at each Construction Site, the management plans required pursuant to the Facility Specification, as prepared and provided in accordance with clause 10.3.

"**Market Tested Services**" has the meaning given to that term in schedule 20.

"**Market Testing Exercise**" has the meaning given to that term in schedule 20.

"**Master Licence Agreement**" means the document entitled "Royal North Shore Hospital and Community Health Services - Master Licence Agreement" between the Project Company and NSW Health.

"**Material**" means any document, article or other thing in tangible form, in whatever medium, including documented methodologies, processes, instructions, business rules, specifications, plans, drawings, maps, requirements, manuals, guides and reports.

"**Material Risk**" means during the Operations Phase for each Health Facility, those risks required to be insured under paragraphs 7(a) and 9 of schedule 14.

"**Material Subcontract**" means a Subcontract:

- (a) the term of which exceeds seven years; or
- (b) relating to the Works or the Support Services which are nominated by the Project Director as being critical works or services; or
- (c) if relating to the Works, in respect of which the total amount payable to the relevant Subcontractor and its related bodies corporate, under that Subcontract and other Subcontracts in respect of the Works exceeds \$5,000,000 (as indexed by reference to the CPI); or
- (d) if relating to Support Services, in respect of which the total amount payable to the relevant Subcontractor, and its related bodies corporate, under that Subcontract and other Subcontracts in respect of the Support Services exceeds \$500,000 per annum (as indexed by reference to the CPI).

"**Material Subcontractor**" means each Key Subcontractor and each other Subcontractor who is a party to a Material Subcontract.

"**Maximum Debt Profile**" means an amount equal to 100% (or such other percentage as may be approved by NSW Health) of the Senior Debt as shown in the Base Case at the point in time of the relevant Assumed Refinancing.

"**Milestone**" means each milestone or critical path activity within a Stage nominated in schedule 3.

"**Minimum Briefed Retail Fit Out**" has the meaning given to that term in Schedule 11.

**"Minor Change"** means any variation or addition to the Works or the Support Services which, together with related variations or additions, which in aggregate, in substance, constitute one variation or addition, the Estimated Cost Effect of which does not exceed \$10,000 (indexed by reference to the CPI).

**"Mobilisation Activities"** means the activities carried out during the Interim Services Phase and described as mobilisation activities in section 4 of the Support Services Specifications, or required to be provided to satisfy that part of the Support Services Specifications.

**"Mobilisation Activities and Interim Services Plan"** has the meaning given to that term in the Support Services Specifications.

**"Model Outputs Schedule"** means the schedule produced in accordance with the Financial Close Protocol, a pro forma of which appears as schedule 2 to the Financial Close Protocol, as updated and initialled by the Parties from time to time.

**"Monthly Interim Services Payment"** has the meaning given to that term in schedule 5.

**"Monthly Invoice"** has the meaning given to that term in clause 29.2.

**"Monthly Maintenance Plan"** has the meaning given to that term in the Support Services Specifications.

**"Monthly Payment"** has the meaning given to that term in schedule 5.

**"Monthly Performance Report"** has the meaning given to that term in clause 29.6.

**"Monthly Service Payment"** has the meaning given to that term in schedule 5.

**"Moral Rights"** means rights of integrity of authorship, rights of attribution of authorship, rights not to have authorship falsely attributed, and rights of a similar nature conferred by statute that exist, or may come to exist, anywhere in the world.

**"Native Title Application"** means any claim or application under any Law relating to native title, including any application under section 61 of the Native Title Act 1993 (Cth).

**"New Multi-Deck Car Park Facility"** means the car park facility and Associated Infrastructure to be constructed by the Project Company in accordance with the requirements in the Facility Specification.

**"Notice of Completion"** means a duly completed certificate in the form of Part A of schedule 13, certifying each of the requirements set out in the notice and listed in Annexure A of the notice.

**"NSCCAHS"** means Northern Sydney and Central Coast Area Health Service .

**"NSW Health Decanting Process"** means the decanting and recanting which NSW Health is required to carry out as expressly set out in the Commissioning and Decanting Plan.

**"NSW Health Default"** means each of the following events:

- (a) an expropriation, sequestration or requisition of a material part of the assets and/or equity of the Project Company and/or ISAM Trust by the State;
- (b) a failure by NSW Health to make payment to the Project Company of:

- (i) any amount specified in a Monthly Invoice or any part thereof; or
- (ii) any other amount of money exceeding, in aggregate, \$100,000 (indexed by reference to the CPI) that is due and payable by NSW Health under this deed, (excluding for the avoidance of doubt, payment by NSW Health to the Project Company of the Construction Payment or an Operations Variation Payment in circumstances where NSW Health has not received payment from ISAM Trust of the corresponding Securitisation Payment),

in each case, within 20 Business Days of service of a formal written demand by the Project Company (for the avoidance of doubt, an amount disputed under clause 29.4 is not to be taken into account for the purposes of this paragraph (b)); and

- (c) a breach by NSW Health of its obligations under this deed which substantially frustrates or renders it impossible for the Project Company to perform its obligations or exercise its rights under this deed for a continuous period of two months.

**"NSW Health Development Approval"** means the concept plan No. 06\_0051 approved under Part 3A of the EPA Act on 13 April 2007 as modified:

- (a) on 31 January 2008;
- (b) on 8 April 2008; and
- (c) by any Early Works Development Approval.

**"NSW Health Development Approval Health Facilities Modification"** means any change to or modification of the NSW Health Development Approval in connection with any Health Facility (including the design, location, construction or operation of a Health Facility) that is necessary or required by a Relevant Authority.

**"NSW Health Development Approval Health Facilities Modification Approval"** means each approval in accordance with Part 3A of the EP&A Act necessary or required by a Relevant Authority of a NSW Health Development Approval Health Facilities Modification to enable a Consent to be obtained or any work in connection with a Health Facility to be carried out or to otherwise enable any Works to be carried out.

**"NSW Health Provided Items"** means Group 1TB Equipment, Group 2A Equipment, Group 2B Equipment, Group 2TB Equipment, Group 3B Equipment and Group 3TB Equipment.

**"NSW Health Refinancing Share"** means 50% of any Refinancing Gain.

**"NSW Health Related Party"** means:

- (a) the Project Director and any other person responsible for the administration or management or implementation of the Project, or any aspect of the Project, for and on behalf of NSW Health;
- (b) NSCCAHS and any NSW Health Staff acting in the course of his or her employment;

- (c) in relation to any Health Facility, any Patient of that Health Facility, or any person (including any Volunteer) visiting that Health Facility at the invitation (whether express or implied) of NSW Health;
- (d) any NSW Health Tenant; and
- (e) the Director-General of the NSW Department of Health,

but excluding in each case the Project Company and any Project Company Related Party.

**"NSW Health Staff"** means employees, agents, contractors, subcontractors, consultants and authorised officers of NSW Health, NSCCAHS and NSW Health Tenants involved in the provision of the Health Functions (but excluding Health Staff Members).

**"NSW Health Surveyor"** means a person who is a registered surveyor and who is nominated by the Project Director and appointed by the Project Company to be the NSW Health Surveyor for the purposes of this deed.

**"NSW Health Tenant"** means each person identified as a "NSW Health Tenant" in Schedule 4.

**"NSW Health Variation Request"** means a notice issued pursuant to paragraph 2 of schedule 16 or, where the context requires, a proposal deemed to take effect as a NSW Health Variation Request.

**"Operating Hours"** has the meaning given to that term in schedule 5.

**"Operating Month"** means each calendar month from the first Commencement Date until the end of the Term, provided that if the first Commencement Date falls part way through a calendar month, the first Operating Month begins on the Commencement Date and ends at the end of that calendar month, and the last Operating Month will begin on the first day of the calendar month in which the Termination Date falls and end on the Termination Date. Each other Operating Month will begin on the first day of each calendar month and end on the last day of that calendar month.

**"Operational Equipment"** means the equipment referred to as "Operational Equipment" in the Car Park Licence Agreement required to be installed by the Construction Contractor as part of the Works.

**"Operations Manual"** means a manual which is developed, maintained and updated in accordance with clause 15.3 and the Support Services Specifications.

**"Operations Phase"** means, in respect of a Health Facility, the period from and including a Commencement Date for that Health Facility until the end of the Term.

**"Operations Variation Payment"** means an amount payable by NSW Health to the Project Company in relation to a Contract Variation or implementation of works in relation to a Compensation Event where the Project Company has agreed to pay additional Licence Payment Amounts payable under the Master Licence Agreement, as determined in accordance with the Master Licence Agreement, in relation to that Contract Variation or Compensation Event, in each case as determined in accordance with schedule 19.

**"PAFA Act"** means the *Public Authorities (Financial Arrangements) Act 1987* (NSW).



**"PAFA Act Guarantee"** means a guarantee made on or prior to the date of Financial Close pursuant to section 22B of the PAFA Act in respect of NSW Health's obligations under the Project Documents and Car Park Documents.

**"Partnering Protocol"** means Annexure D as updated from time to time in accordance with clause 10.4.

**"Patient"** means a patient being treated or to be treated at the Hospital.

**"Payment Directions Deed"** means the document entitled "Royal North Shore Hospital and Community Health Services - Payment Directions Deed" between NSW Health, ISAM Trust and the Project Company.

**"Permitted Hazardous Substances"** means paints, solvents, lubricants, cleaning fluids, diesel fuel and any other substance required to be used in the performance of the Works or the Support Services which is approved in writing by the Project Director.

**"Persistent Breach"** has the meaning given to that term in clause 33.2.

**"Policy"** means any rule, guideline, regulation, policy, standard, procedures, directives, circulars or requirement relating to the execution of any part of the Works or the provision of a service included in the Support Services as may be and published by the Commonwealth of Australia or the State (including NSCCAHS, the NSW Department of Health, the Director-General of the NSW Department of Health or NSW Health) from time to time.

**"Pollution"** has the same meaning as in the *Protection of the Environment Operations Act 1997* (NSW).

**"PPP As Built Health Facility"** means:

- (a) from the Commencement Date for Stage 1, the Community Health Facility;
- (b) from the Commencement Date for Stage 2, the acute hospital facility;
- (c) from the Commencement Date for Stage 3, the Refurbished Facility;
- (d) from the Commencement Date for Stage 4, the New Multi-Deck Car Park Facility;

and Associated Infrastructure which the Project Company is required to design and construct as part of the Works.

**"Private Hospital"** means the North Shore Private Hospital, operated by North Shore Private Hospital Pty Limited and located on Lot 22 in Deposited Plan 863329.

**"Pre-refinancing Equity Return"** means the internal rate of return of Equity Investors over the Term, taking into account the actual Distributions to date and forecast Distributions over the remainder of the Term in the relevant pre-refinancing financial model.

**"Prescribed Rate"** for a period, means 3% per cent per annum above the Bank Bill Rate for that period.

**"Pro Forma Invoice"** means the form of invoice set out in Part E of schedule 5, which must meet the requirements from time to time of a tax invoice.

**"Programmed Maintenance Plan"** has the meaning given to that term in the Support Services Specifications.

**"Project"** means:

- (a) the financing, design, construction and commissioning of the Works;
- (b) the provision of the Support Services; and
- (c) handover of the facilities on the Termination Date,

each in accordance with this deed.

**"Project Company Decanting Process"** has the meaning given in the Commissioning and Decanting Plan.

**"Project Company Development Approvals"** means all Development Approvals, other than the NSW Health Development Approval, required in order to implement the Project Company Proposals and satisfy the Specifications including any modification to, or replacement of, the NSW Health Development Approval.

**"Project Company Group"** means the Project Company and any related body corporate identified as a member of the Project Company Group in schedule 2, and any related body corporate which becomes a member of the Project Company Group pursuant to a consent given in accordance with clause 39.3.

**"Project Company Proposals"** means those parts of the Project Company's proposal set out in Annexure H.

**"Project Company Related Party"** means:

- (a) an officer, employee (acting in the course of his or her employment) or agent of the Project Company or any related body corporate of the Project Company and any officer, employee (acting in the course of his or her employment) or agent of such a person;
- (b) any Subcontractor and any of their respective officers, employees (acting in the course of their employment) or agents in its capacity as a Subcontractor, including Health Staff Members (acting in the course of their employment); and
- (c) any person on or at any of the Construction Sites, the Works or the Health Facilities at the express or implied invitation of the Project Company or any Subcontractor (other than NSW Health Related Party), including parties involved in any Additional Commercial Development.

**"Project Company Representative"** means the person from time to time appointed in accordance with clause 4.5.

**"Project Company Services"** means the management, insurance, consultancy and other services provided by the Project Company during the Operations Phase.

**"Project Company Termination Event"** means any of the events set out in clause 34.1.

**"Project Company Variation Proposal"** has the meaning given to that term in paragraph 1 of schedule 16.

**"Project Company Variation Request"** has the meaning given to that term in paragraph 1 of schedule 16.

**"Project Co-ordination Group"** means the committee established in accordance with clause 4.6.

**"Project Default"** has the meaning given to that term in clause 33.1.

**"Project Director"** means the person from time to time appointed in accordance with clause 4.2.

**"Project Documents"** means:

- (a) this deed;
- (b) the Construction Contract;
- (c) the Construction Side Deed;
- (d) each Facilities Management Side Deed;
- (e) the Financiers Tripartite Deed;
- (f) the Labour Services Agreement;
- (g) the Cooperation and Interface Deed;
- (h) the Independent Certifier Deed;
- (i) the Master Licence Agreement, the Securitisation Agreement and the Payment Directions Deed;
- (j) each Material Subcontract and any guarantee given in connection with it;
- (k) each Collateral Warranty; and
- (l) the Project Security.

**"Project Security"** means the Security Interest granted by the Project Company in favour of NSW Health to secure performance of the Project Company's obligations under this deed and the other Project Documents, in the form contained in schedule 8.

**"Proposed Use"** means in respect of any area of land in a Construction Site, the use shown in respect of that area of land on the drawing entitled "RNSH PPP Footprint Plan at the Commencement Date of Stage 4" as it may be updated from time to time in accordance with this deed (or as it may be replaced pursuant to clause 13.7(c)).

**"Proprietary Material"** means:

- (a) the Detailed Designs, the Works Program and the Operations Manual;
- (b) any Material prepared or created by or on behalf of the Project Company or a Subcontractor in conjunction with any application for or modification of any Development Approval or Consent; and

- (c) any other Material created by or on behalf of the Project Company or a Subcontractor in connection with the design, construction, commissioning, operation, or facilities management (including maintenance or repair) of the whole or any part of the Health Facilities and any other Material required to use or maintain the whole or any part of the Health Facilities, and, in each case, which is the subject of any Intellectual Property Right.

**"Qualifying Change in Law"** means any General Change in Law, other than a General Change in Law with respect to Tax:

- (a) which requires the Project Company to incur, during the Operations Phase for one or more Health Facilities, Capital Expenditure or operating expenditure in respect of such Health Facilities, other than where such additional operating expenditure resulting from the relevant General Change in Law affects businesses generally, or would ordinarily be expected to be incorporated into the Monthly Payment through the indexation of relevant parts of the Monthly Payment; or
- (b) which is a Change in Law in respect of an Environmental Law which occurs after the third anniversary of Financial Close and which impacts on the Works in respect of any Stage (including their execution, Completion or Commissioning).

**"Quality Assurance (Works) Plan"** means the quality assurance plans for the Works developed in accordance with the Facility Specification.

**"Quality Assurance (Services) Plan"** means the quality assurance plans for the Support Services developed in accordance with the Support Services Specifications.

**"Quarter"** has the meaning given to that term in schedule 5.

**"Quarterly Service Payment"** has the meaning given to that term in schedule 5.

**"R&E Defect"** means any latent or patent defect in the R&E Facility Stage 1 or the R&E Facility Stage 2 or any part of them, attributable to:

- (a) defective design;
- (b) defective workmanship or defective materials, plant or machinery used in the construction of the R&E Facility, or any part of it;
- (c) defective installation of anything in or on the R&E Facility, or any part of it, having regard to Good Industry Practice and to applicable standards and codes of practice current at the date of such installation;
- (d) defective preparation of the R&E Facility construction site; or
- (e) any failure to comply with the R&E Facility Construction Contract.

**"R&E Facility"** means the Research and Education Facility the subject of the R&E Facility Construction Contract which has been completed as at the date of this deed for NSW Health by a Third Party Contractor, including Associated Infrastructure.

**"R&E Facility Basement Extension"** means the basement extension the subject of the R&E Facility Construction Contract to be constructed for NSW Health by a Third Party Contractor, including Associated Infrastructure.

**"R&E Facility Construction Contract"** means the contract for the design and construction of the R&E Facility specified in Schedule 22.

**"R&E Facility Defects Correction Period"** means:

- (a) in respect of the R&E Facility, (but subject to paragraph (b)) a period of one year commencing on the date which is 12 months after Financial Close;
- (b) in respect of any floor (or part thereof) of the R&E Facility which is not substantially occupied and in use for Health Functions a period of one year commencing on the date which is 12 months after Financial Close, a period of one year commencing on the date on which that floor (or part thereof) of the R&E Facility is substantially occupied and in use for Health Functions; and
- (c) in respect of the R&E Facility Basement Extension, a period of one year commencing on the date that occupation and use of the R&E Facility Basement Extension commences.

**"R&E Facility Structural Defect"** means any R&E Defect relating to a structural component of the R&E Facility (including the roof and the façade) which affects:

- (a) the capacity of that component to carry load or resist force; or
- (b) the weather proofing of the roof or façade.

**"R&E Facility Works"** means the work to be carried out under the R&E Facility Construction Contract.

**"Ramsay Deed"** means the document titled "North Shore Private Hospital Deed of Agreement" between North Shore Private Hospital Pty Ltd ABN 67 059 183 596, NSCCAHS and NSW Health dated on or about 25 August 2008, a copy of which has been provided to the Project Company on or prior to the date of this deed.

**"Rates"** means all rates, taxes or charges or other amounts which any Relevant Authority levies by reference to the Health Facilities or the Hospital Campus, but excluding head works costs or other contributions levied by reference to the Works or the Support Services and excluding any Land Tax.

**"Refinancing"** means:

- (a) any amendment to any Financing Agreement;
- (b) the exercise of any right, or the request for any waiver or consent, under any Financing Agreement;
- (c) any other step or arrangement that has a substantially similar effect to (a) or (b); or
- (d) any new contractual or financing arrangements entered into in relation to the Project,

but excluding any action set out in (a) to (d) above that is assumed in the Base Case at the date of Financial Close,

which is likely to:

- (c) give rise to a Refinancing Gain;
- (f) increase or change the profile of the liabilities of NSW Health under a Project Document; or
- (g) in the case of any new financing arrangement entered into in relation to the Project, adversely affect any of NSW Health's rights or obligations under a Project Document.

**"Refinancing Base Case"** means, other than for an Assumed Refinancing, the project financial model produced by the Project Company demonstrating the effect of a Refinancing proposal, produced on the assumptions that:

- (a) the Refinancing will proceed as proposed; and
- (b) the NSW Health Refinancing Share will be paid as a single amount on the Refinancing date.

**"Refinancing Base Case Equity Return"** means the nominal blended internal rate of return to Equity Investors (before Equity Investor tax but after Project Company tax) expressed as a percentage as stated in the Refinancing Base Case.

**"Refinancing Gain"** means, in respect of a Refinancing (other than an Assumed Refinancing) an amount equal to the greater of zero and  $(A - B) - C$ , where:

A = the net present value of the Distributions (taking into account the effect of the Refinancing and using the Base Case current immediately prior to the Refinancing but without reference to payment to NSW Health of NSW Health Refinancing Share) to be made to each Equity Investor over the Term.

The recovery by NSW Health and the Project Company of adviser costs, swap breakage costs and other reasonable professional fees and expenses (including any amounts on account of mortgage duty payable by NSW Health), which are properly incurred as a direct result of the Refinancing, shall be taken into account in calculating the Distributions available.

B = the net present value of the Distributions (but without taking into account the effect of the Refinancing and using the Base Case current immediately prior to the Refinancing) to be made to each Equity Investor over the Term.

C = any adjustment required to raise the Pre-Refinancing Equity Return to the Base Case Equity Return, being the notional amount which, if received by the Equity Investors as at the proposed date for the Refinancing, would increase the Pre-Refinancing Equity Return to the Base Case Equity Return.

The discount rate used to calculate A and B will be the Base Case Equity Return.

**"Refinancing Report"** has the meaning given to that term in clause 9.3.

**"Refurbished Facility"** means from the Commencement Date of Stage 3, that part of the building known as the "Douglas Building" and/or "building no. 53" which the Project Company is required to refurbish as part of the Works.

**"Relevant Amount"** has the meaning given in clause 36.1(a).

**"Relevant Authority"** means any court or tribunal with the relevant jurisdiction, any local, state, national or supra-national government, council, agency, authority, inspectorate, department, ministry, official or public or statutory person.

**"Relevant Breach"** has the meaning given to that term in clause 33.2(a).

**"Relief Event"** means:

- (a) fire, explosion, storm, lightning, cyclone, hurricane, tempest, mudslide, flood, ionising radiation, earthquakes, war (declared or undeclared), armed conflict, terrorism, riot, civil commotion (including protests), droughts declared as a state of emergency and high seas inundation;
- (b) nuclear, chemical or biological contamination and infectious disease outbreak which, in each case, substantially frustrates or renders it impossible for the Project Company to perform relevant obligations under this deed;
- (c) failure by any Relevant Authority or a provider of gas, water, sewage or electricity utilities to carry out works or provide services which it is obliged to carry out or provide;
- (d) shortage of water, power, fuel or transport;
- (e) any event or occurrence which causes loss or damage to the Works, a Construction Site or a Health Facility;
- (f) any blockade or embargo;
- (g) any official or unofficial strike, lockout, go slow or other dispute generally affecting the construction or facilities management industry or a significant sector of it, but excluding such industrial action:
  - (i) affecting only one or more Construction Sites or Health Facilities; or
  - (ii) where it constitutes a Compensation Event;
- (h) any event or occurrence which causes a deprivation of possession of or access to:
  - (i) the Hospital when the same is outside the control of either NSW Health or the Project Company other than any event or occurrence arising from the Reserved Matters; or
  - (ii) a Construction Site when the same is outside the control of either NSW Health or the Project Company and caused by an event or occurrence arising from the Reserved Matters to which the licence under clause 5.1 is not subject; and
- (i) an Approval Delay Event,

but excluding any of the events or occurrences which occurs or arises (directly or indirectly) as a result of the action or inaction (as the case may be) of the Project Company or any Project Company Related Party.

**"Representative"** has the meaning given to that term in clause 40.1.

**"Reserved Matters"** means all (if any) Adverse Rights, and any other affectations or encumbrances shown on or described in the Information Documents provided to the Project Company by or on behalf of NSW Health prior to the date of this deed.

**"Residual Building Equipment"** means all FF&FE which is:

- (a) of a type equivalent to that listed as Group 1 and "Classification A" or "Class A" in Appendix A to Volume 2.2 of the Facility Specification or any other types of FF&FE used in the R&E Facility or Retained Facilities which the Project Company is required to maintain as part of the Support Services; and
- (b) located in Building 1 or Building 2 on the Hard FM Start Date.

**"Residual Facility"** means for the period until such building is vacated by NSW Health and all NSW Health Related Parties the buildings which the Project Company is required to demolish and/or remove as a part of the Works and Associated Infrastructure.

**"Resolution Period"** means the period of 5 Business Days from the date on which a referral notice described in clause 4.6(h) or clause 40.1 is served.

**"Retail Head Lease"** means a lease entered into pursuant to the Agreement for Retail Services.

**"Retail Head Lessee"** means InfraShore Retail Developments Pty Ltd.

**"Retail Precincts"** has the meaning given to that term in the Agreement for Retail Services.

**"Retained Facility"** means the following buildings (identified on plan titled "Buildings to be demolished, divested and retained"):

- (a) the building known as the "Douglas Building" and/or "building no. 53", excluding the Construction Site for Works for Stage 3, and the Refurbished Facility;
- (b) the multi-deck car park existing on the date of this deed; and
- (c) the building known as the "Chapel",

and their Associated Infrastructure.

**"RNSH PPP Footprint"** means the areas that encompass the Project Company's responsibility for delivery of the Support Services, as denoted in the RNSH PPP Footprint Plans, in accordance with the Project Deed from time to time excluding any public road as shown on the RNS PPP Footprint Plans.

**"RNSH PPP Footprint Plans"** means the plans which are Annexure N as they may be updated (including pursuant to clause 13.7(b)), agreed and initialled by the parties from time to time.

**"Schedule of Rates"** means the schedule of rates in schedule 5 setting out the rates applicable for each item of works as described in that schedule.



**"Securitisation Agreement"** means the document entitled "Royal North Shore Hospital and Community Health Services - Securitisation Agreement" between NSW Health and ISAM Trust.

**"Securitisation Payment"** means the amount payable by ISAM Trust to NSW Health under the Securitisation Agreement as determined thereunder and defined as the "Purchase Price".

**"Security Interest"** means:

- (a) a mortgage, charge, pledge, bill of sale, lien, hypothecation, title retention, right of set-off or right to withhold payment of a deposit or other money;
- (b) any profit a prendre, easement, restrictive covenant, any equity or interest in the nature of an encumbrance, garnishee order, writ of execution, lease, licence or agreement to use or occupy, assignment of income or monetary claim; and
- (c) an agreement to create or give any arrangement referred to in paragraphs (a) or (b) of this definition.

**"Security Trust Deed"** means the security trust deed to be entered into between, amongst others, the Security Trustee and the Project Company.

**"Security Trustee"** means BNY Trust (Australia) Registry Limited (ACN 000 334 636) as trustee of the Royal North Shore Hospital PPP Security Trustee, and any replacement security trustee appointed in accordance with the Financing Agreements.

**"Senior Debt"** has the meaning given to that term in Schedule 21.

**"Service Payment"** means the fees payable to the Project Company in respect of the Support Services, calculated in accordance with schedule 5.

**"Side Deed"** means each of the Construction Side Deed and each of the Facilities Management Side Deeds and, where the context permits, any other side deed executed in accordance with clause 7.2(c) in the form of schedule 6.

**"Site Access Date"** means, for a Construction Site, the date set out as the site access date for that Construction Site in the Site Access Schedule.

**"Site Access Schedule"** means the site access schedule set out in Annexure A and updated from time to time in accordance with clause 11.3(f).

**"Site Audit Statement"** means a site audit statement issued under the CLM Act or similar written confirmation issued by the Site Auditor.

**"Site Auditor"** means a person who is accredited as a site auditor under the CLM Act.

**"Site Conditions"** means the conditions of each Construction Site (whether latent or patent), including climatic, hydrological, geological, ecological, environmental, geotechnical, archaeological, and atmospheric surface and subsurface conditions or characteristics physical and structural conditions on, above or in the vicinity of the Construction Site, conditions of roads, Utility services and other structures and infrastructure and vegetation on the Construction Site.

**"Site Plan"** means in relation to the Construction Sites, each of the site plans, identified in the current Site Access Schedule.

"**Soft FM Services**" has the meaning given to that term in the Support Services Specifications.

"**Soft FM Start Date**" has the meaning given in schedule 5.

"**Specifications**" means the requirements of NSW Health in respect of the Project as set out in the Facility Specification and the Support Services Specifications, as amended in accordance with the Change Procedure.

"**Specified Group 1A Equipment**" means the following Group 1A Equipment:

- (a) Item FE - 1600, Audiometric Booth;
- (b) Item FE - 5900, Laminar Flow Cabinet; and
- (c) Item FE - 88552246, Automated Medication Dispensing Machine.

"**Stage**" means each stage of the Works as detailed in the Facility Specification.

"**Start Date**" has the meaning given to that term in the Labour Services Agreement.

"**State**" means the Crown in right of the state of New South Wales.

"**Step In Rights**" means the step in rights set out in clause 19.3 of this deed or clauses 1.2(h) or (i) of schedule 3 to the Labour Services Agreement.

"**Subcontract**" means each Key Subcontract, each Material Subcontract and any other contract or agreement entered into by the Project Company and/or any Subcontractor in connection with the performance of the Works or the Support Services or any part of the Works or the Support Services, but excludes the Labour Services Agreement.

"**Subcontractor**" means each of the Material Subcontractors and any other subcontractor or sub-subcontractor of any level (including suppliers, tradespersons and consultants) involved in performance of any of the Works or Support Services.

"**Support Services**" has the meaning given to that term in the Support Services Specifications.

"**Support Services Equipment**" means equipment and items not comprising part of a Health Facility that are provided or used principally in the provision of part of the Support Services.

"**Support Services Specifications**" means Annexure C.

"**Target Completion Date**" means, in respect of each Milestone and Stage (where applicable), the date described as its target completion date in schedule 3, as may be extended under the terms of this deed.

"**Target DA Approval Date**" means the date described as such in schedule 3, as may be extended under the terms of this deed.

"**Target Financial Close Date**" means the date that is 3 Business Days after the date of this deed.

"**Tax**" means any present or future tax, levy, impost, deduction, charge, duty, compulsory loan or withholding, including the GST, (together with any related interest, penalty, fine or expense

in connection with any of them) levied or imposed by any government agency, other than any imposed on net overall income.

**"Temporary Works"** means temporary works, facilities, fencing, utilities and structures required for storage, security, staff meetings and amenities and other activities necessary for and incidental to the carrying out the Works, but not forming part of the Works or the Hospital.

**"Term"** means the period which begins on the date of this deed and ends on the Expiration Date, or, if earlier, upon termination of this deed pursuant to clause 34 or clause 23.5 or clause 28.3(b).

**"Termination Date"** means the last day of the Term.

**"Termination Notice"** has the meaning given to that term in clause 34.2.

**"Third Party Contractor"** means each contractor, tradesperson, supplier or other person engaged to provide any Third Party Facility Works.

**"Third Party Facility"** means a facility, not forming part of the Project or an Additional Commercial Development, which is constructed, or to be constructed, on or adjacent to a Construction Site, including, but not limited to:

- (a) the Private Hospital or any extension to it;
- (b) the EA Works; and
- (c) Stage 3 of the R&E Facility.

**"Third Party Facility Works"** means any development, design, demolition, remediation, refurbishment, construction and commissioning works associated with establishment of a Third Party Facility.

**"Unforeseeable Health Functions"** means functions and services provided or to be provided at the Health Facilities, including activities and services to be undertaken in connection with or which are incidental or ancillary to such functions and services, of which the Project Company was unaware prior to the date of this deed and which a prudent and competent contractor experienced in the construction and maintenance of similar health facilities would not have reasonably foreseen, assuming that it had done all those things which such a contractor would reasonably have done (including reviewing all documents and information provided to the Project Company or otherwise generally reasonably available) for the purposes of submitting a proposal for the Project (including everything the Project Company warrants it has done under clause 2.4).

**"Unidentified Pre-existing Contamination"** means any Contamination on the Hospital Campus which is not identified in, or reasonably inferable from, an Environmental Assessment, or in geotechnical investigations carried out by Coffey Geotechnics Pty Ltd on the Hospital Campus prior to the date of this deed, and that is not, or will not be, disturbed by reason of the carrying out of the Works by the Project Company or any Project Company Related Party.

**"Uninsurable"** means, in relation to a risk, either that:

- (a) insurance required pursuant to clause 26.1 is not available in the recognised international insurance market with reputable insurers of good standing in respect of

that risk at the time that insurance is ought to be obtained and coverage is not available under the Terrorism Insurance Act or similar legislative scheme; or

- (b) the insurance premium payable for insuring that risk is at such a level that the risk is not generally being insured against in the international insurance market with reputable insurers of good standing by prudent, competent and experienced providers in Australia of services similar to the Support Services at the time at which the insurance was sought to be obtained.

**"Utility"** means water, electricity, gas, telecommunications and electronic communications (including voice and data), drainage, and sewerage and supply of all supporting structures and media necessary for such services.

**"Vacated Facilities"** means each facility referred to in the definition of "Residual Facility" and each facility referred to in the definition of "Divested Facility" and their Associated Infrastructure, from the date they are vacated by NSW Health or NSW Health Related Parties until they no longer form part of the RNS PPP Footprint.

**"Variation Proposal"** means a report issued pursuant to schedule 16, setting out the following:

- (a) the effect of the proposed Contract Variation on:
- (i) the workmanship, quality, appearance, durability, functional integrity or fitness for purpose of any part of the relevant Works or Health Facility;
  - (ii) the design, construction and Completion of the Works;
  - (iii) the ability of the Project Company to deliver the Health Facilities comprised in each Stage or provide the Support Services in accordance with this deed;
  - (iv) the Project Company's performance of any other obligation under the Project Documents (including its ability to meet any of the Target Completion Dates);
  - (v) the Hospital or RNSH PPP Footprint (including maintenance and lifecycle requirements and forecast costs thereof) and delivery of the Support Services after the Expiration Date; and
  - (vi) the delivery of the Support Services or the Health Functions;
- (b) the time within, and the manner in which the Project Company proposes to implement the Contract Variation;
- (c) whether or not the required capital expenditure (if any) can be accommodated within the next planned refurbishment or renovation by the Project Company of areas within the Hospital;
- (d) the Estimated Cost Effect as a result of the proposed Contract Variation, calculated in accordance with schedule 19, including calculations supporting the requirements for:
- (i) staged payments matching the payments to relevant Subcontractors;

- (ii) if appropriate:
- A. a lump sum amount for the capital component of any Contract Variation together with the Project Company's proposal in relation to the timing of such payment; and
  - B. any associated changes in the Monthly Payment as a result of any consequential operating costs or savings; or
  - C. any increase or decrease to the Monthly Payment to cover the relevant capital cost or savings and operating costs or savings; and
  - D. details of the way in which the Project Company proposes to fund the proposed Contract Variation; and
- (c) the time period required to seek funding for the Contract Variation; and
- (f) any necessary amendments to the Specifications, the Operations Manual, the Detailed Design, the Works, the Works Program and the Project Documents.

"**Variation Saving**" has the meaning given to that term in paragraph 17 of schedule 19.

"**Volunteer**" means any person who holds identification issued by NSCCAHS indicating that person has volunteer status and any other person who the Project Director notifies to the Project Company is a Volunteer.

"**Warning Notice**" has the meaning given to that term in clause 33.2.

"**Waste**" has the meaning given to that term in the *Protection of the Environment Operations Act 1997* (NSW).

"**Weighted Average Base Case Equity Return**" means the Base Case Equity Return as updated from time to time in accordance with clause 29 as a result of a funded Variation or Compensation Event.

"**Works**" means in respect of a Stage, the development, design, demolition and remediation works (if necessary), refurbishment, construction and Commissioning Works for that Stage, including all site investigations and testing, all connection and installation of Utilities, and procurement of associated plant, equipment and material, all in accordance with the Project Documents.

"**Works Program**" means, for each Stage, the detailed program of Works, based on the Detailed Design for that Stage, and showing the sequences of activities constituting the critical path and the inter-dependencies between activities, developed and provided in accordance with clause 10.2 and updated in accordance with clause 11.3.

## 1.2 Rules for interpreting this deed

Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this deed, except where the context makes it clear that a rule is not intended to apply.

- (a) A reference to:
- (i) Legislation is to that Legislation as amended, re-enacted or replaced;
  - (ii) a document or deed, or a provision of a document or deed, is to that document, deed or provision as amended, supplemented, replaced or novated;
  - (iii) a party to this deed or to any other document or deed includes a permitted substitute or a permitted assign of that party;
  - (iv) a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person;
  - (v) anything (including a right, obligation or concept) includes each part of it;
  - (vi) a schedule, annexure or exhibit are references to schedules, annexures or exhibits to this deed and a reference to a Project Document includes any schedule, annexure or exhibit to that Project Document; and
  - (vii) a reference to day or month means a reference to a calendar day or calendar month respectively.
- (b) Other than where otherwise specified in Schedule 5, a reference to the Phrase "indexed by reference to the CPI" means multiplied by  $CPI_{n-1}/CPI_0$  where:
- $CPI_{n-1}$  = CPI for Quarter n-1
- $CPI_0$  = will be CPI for the Quarter ending 30 June 2008
- n = the number of Quarters from the Quarter ending 30 June 2008
- (c) A singular word includes the plural, and vice versa.
  - (d) A word which suggests one gender includes the other genders.
  - (e) If a word is defined, another part of speech has a corresponding meaning.
  - (f) If an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing.
  - (g) A reference to any document in an **agreed form** means the document which has been accepted and agreed by the parties to this deed, and certified and initialled by the parties to this deed for the purposes of identification.
  - (h) A reference to **dollars** or **\$** is to the lawful currency of Australia.
  - (i) The words **subsidiary**, **holding company** and **related body corporate** have the same meanings as in the Corporations Act.
  - (j) "**includes**" in any form is not a word of limitation.

**1.3 No joint venture**

Nothing in any Project Document constitutes a joint venture, partnership, agency or fiduciary relationship between NSW Health and the Project Company.

**1.4 Business Days**

If the day on or by which a person must do something under this deed is not a Business Day:

- (a) if the act involves a payment that is due on demand, the person must do it on or by the next Business Day; and
- (b) in any other case, the person must do it on or by the previous Business Day.

**1.5 Multiple parties**

If a party to this deed is made up of more than one person, or a term is used in this deed to refer to more than one party:

- (a) an obligation of those persons is joint and several;
- (b) a right of those persons is held by each of them severally; and
- (c) any other reference to that party or term is a reference to each of those persons separately, so that (for example) a representation, warranty or undertaking is given by each of them separately.

**1.6 Contra proferentum**

In the interpretation of this deed, no rule of construction applies to the disadvantage of one party on the basis that the party put forward or drafted this deed or any provision in it.

**1.7 Approvals and consents**

- (a) Unless expressly stated otherwise, all approvals, consents, decisions or exercises of discretion required to be given or made by the Project Company under this deed or any other Project Document must not be unreasonably withheld or delayed.
- (b) All approvals, consents, decisions or exercises of discretion required to be given or made by NSW Health or the Project Director:
  - (i) relating to, or arising under or in connection with this deed or any Project Document to which it is a party;
  - (ii) relating to the satisfaction of a condition precedent pursuant to the terms of this deed; or
  - (iii) sought in relation to or in connection with, or referable to, or determinative of, the occurrence of, any Project Company Termination Event,

and regardless of whether the requirement of the approval, consent, decision or exercise of discretion is express or implied, NSW Health or the Project Director (as the case may be), has or have the right to give or make its approval, consent or decision or exercise its discretion conditionally or unconditionally or to withhold its

approval, consent, decision or exercise of discretion, but in giving or withholding its approval, consent, decision or exercise of discretion, or in imposing any conditions, NSW Health or the Project Director (as the case may be) (but always excluding an approval, consent, decision or exercise of discretion expressed in this deed or any Project Document to be at the absolute discretion or sole discretion of NSW Health or the Project Director) must act reasonably.

- (c) Without limitation, NSW Health or the Project Director will not be acting unreasonably if, in giving or withholding any approval or consent, or in imposing any conditions, NSW Health or the Project Director:
- (i) acts in accordance with relevant government policies;
  - (ii) adopts a "whole of government" approach; or
  - (iii) acts to protect the reputation of NSW Health or the State.
- (d) The Project Company acknowledges that NSW Health and the Project Director, in granting any approval, consent or endorsement, will not assume any duty of care, responsibility or liability to the Project Company or any other person and will not be taken to have agreed that any matter the subject of any approval, consent or endorsement is in compliance with the Project Documents.

## **1.8 Discontinuance of bodies or associations**

- (a) If an authority, institution, association or body referred to in this deed is reconstituted, renamed or replaced, or if its powers or functions are transferred to another organisation, this deed refers to that new organisation.
- (b) If an authority, institution, association or body referred to in this deed ceases to exist, this deed refers to the organisation which serves the same purpose or object as that authority, institution, association or body.

## **1.9 Exercise of functions**

- (a) This deed does not in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of NSW Health to exercise any of its functions pursuant to any applicable laws. This clause 1.9 does not limit the contractual obligations of NSW Health pursuant to this deed, provided that anything which NSW Health is required to do under any Law will not be deemed to be an act or omission by NSW Health under this deed or any other Project Document (except to the extent expressly provided in this deed), and will not entitle the Project Company to make any claim against NSW Health arising out of the subject matter of this deed and the other Project Documents.
- (b) The Project Company acknowledges and agrees that NSW Health, in performing any of its duties and obligations, is not obliged to exercise any power, function or duty within the responsibility of any other Government Agency or to influence, override or direct any other Government Agency in the proper exercise of its legal duties and functions.
- (c) If NSW Health is required under the terms of this deed to exercise best or reasonable endeavours, the Project Company acknowledges that NSW Health in so acting does not agree to:



- (i) interfere with or influence the exercise by any person of a statutory power or discretion;
- (ii) exercise a power or discretion or otherwise act in a manner that it regards as not in the public interest; or
- (iii) develop policy or legislate by reference only or predominantly to the interests of the Project.

### 1.10 Priority of Interpretation

- (a) Subject to clause 1.10(b), in the event of any ambiguity, discrepancy or inconsistency between the documents forming this deed and other documents defining or identifying NSW Health's requirements or the Project Company's obligations in respect of the Project, the following order of precedence in decreasing priority, will apply:
  - (i) compliance with applicable Law;
  - (ii) the provisions of this deed (other than the Specifications and other Annexures to this deed and the Project Company Proposals);
  - (iii) the Specifications and other Annexures to this deed (other than the Project Company Proposals and Annexure N);
  - (iv) each document provided or agreed in accordance with this deed;
  - (v) Annexure N; and
  - (vi) the Project Company Proposals.
- (b) To the extent that the Project Company Proposals impose greater or more onerous obligations and liabilities on the Project Company than the other provisions of this deed and the Specifications, the Project Company must satisfy and meet the obligations and liabilities in the Project Company Proposals unless the Project Director otherwise directs in writing.

## 2. Project Parameters

### 2.1 Objectives

NSW Health and the Project Company acknowledge and agree that the parties' intentions in entering into the Project Documents are that:

- (a) in consideration of NSW Health paying the Construction Payments to Project Company in accordance with this deed, the Project Company will finance, design, construct and commission the Stages and provide certain services in connection with the Hospital in accordance with this deed;
- (b) NSW Health and/or NSCCAHS and/or NSW Health Tenants may provide the Health Functions in connection with the Hospital;
- (c) the design, construction and commissioning of the Stages, and the provision of the Support Services, will facilitate the provision of high quality Health Functions;

- (d) NSW Health will pay the Service Payment to the Project Company to provide the Support Services in accordance with this deed;
- (e) the Project Company will pay a Licence Payment Amount to NSW Health under the Licence, as determined under the Master Licence Agreement, to occupy and use the Construction Sites and the Hospital.
- (f) the Hospital will be owned by NSW Health at all times.
- (g) the Project Company will transfer possession of and facilities management responsibility for the Hospital to, or in accordance with the direction of, NSW Health at the end of the Term, in accordance with this deed; and
- (h) the Project Company must carry out its obligations under this deed so as to accommodate, support and facilitate the provision of the Health Functions and, without limiting the foregoing, so as not to cause a Health Functions Disruption.

## 2.2 Interface with Health Functions

- (a) The Project Company acknowledges that it will bear the risk of the provision of the Support Services and carrying out of the Works so as not to cause a Health Functions Disruption.
- (b) Without limiting the provisions of the Specifications or clause 2.2(a), the Project Company must consult with the Project Director from time to time on the best method of coordinating and integrating the Support Services and the Works with the Health Functions, and the Partnering Protocol and the Operations Manual must implement such coordination and integration requirements.
- (c) Nothing in the Information Documents or the Project Documents is to be implied as giving undertakings by NSW Health or any NSW Health Related Party that it will carry out the Health Functions, or that the Health Functions will be carried out in a particular manner or at a particular time.
- (d) Without limiting the foregoing, except as expressly provided by this deed:
  - (i) no representation, warranty or advice of any kind has been or is given by or on behalf of NSW Health regarding the Health Functions;
  - (ii) the Project Company releases and indemnifies NSW Health and its officers, agents and employees in respect of any Claims or Losses which the Project Company may suffer in connection with the Health Functions; and
  - (iii) the Project Company will not be entitled to any relief from obligations, nor any compensation in respect of the carrying out of the Health Functions or the impact the Health Functions may have on performance of the Works or Support Services.
- (e) The Project Company must not, without the prior written consent of the Project Director, modify its work practices or change how it provides the Support Services in any way which causes or may cause a Health Functions Disruption or, without limiting the foregoing, increases the costs of providing the Health Functions or of otherwise operating the Health Facilities.

- (f) NSCCAHS is an area health service under the *Health Services Act 1997 (NSW)* which, amongst other things, provides health services in Sydney and as at the date of this deed, at the Hospital.
- (g) It is the intention of the parties that, in the day-to-day performance of its obligations under this deed, and particularly in coordinating and integrating the Support Services and the Works with the Health Functions, the Project Company will communicate, coordinate and cooperate with NSCCAHS and NSW Health Tenants, as well as NSW Health, notwithstanding the fact that neither NSCCAHS nor any NSW Health Tenant is a party to this deed, and such interface will be specifically acknowledged in the Partnering Protocol and the Operations Manual.

### 2.3 Adherence to Objectives

- (a) Each party must, in accordance with and subject to the provisions of this deed, perform its obligations under this deed having regard to and with the aim of satisfying the objectives referred to in clause 2.1.
- (b) Where a party to this deed (the "**First Party**") is entitled to assert against the other party to this deed any claim or to obtain any benefit, relief or remedy, pursuant to or arising out of this deed, the First Party will be obliged to take reasonable and appropriate steps to mitigate, prevent or eliminate the effects of the event or circumstance in respect of which the claim, benefit, relief or remedy has arisen.
- (c) Each party to this deed (the "**First Party**") undertakes to cooperate with the other (the "**Second Party**") in order to facilitate the performance of the Project Documents, and in particular must (and must procure that those for whom it is responsible will):
  - (i) use reasonable endeavours to avoid unnecessary complaints, disputes and claims against or with the Second Party; and
  - (ii) subject to compliance by the Second Party with its obligations under this deed and NSW Health's rights under clauses 19, 32 and 34, not interfere with the rights and obligations of the Second Party under the Project Documents and not in any way hinder, prevent or delay the Second Party from performing its obligations under this deed.

### 2.4 Project Company Acknowledgments

- (a) The Project Company acknowledges that, except as expressly provided by this deed, no representation, warranty or advice of any kind has been or is given by or on behalf of NSW Health or any NSW Health Related Party, in respect of the accuracy, completeness or current application of the Information Documents and that no NSW Health Related Party assumes any duty of care or other responsibility for any such Information Document or any other information, data or material.
- (b) The Project Company hereby releases and indemnifies NSW Health and each NSW Health Related Party, on demand, from and against any Loss or Claim incurred, suffered or arising from:
  - (i) any reliance or use by the Project Company or any Project Company Related Party on Information Documents, including any information, data or material which is "misleading or deceptive" or "false or

- misleading" (within the meaning of those terms in sections 52 and 53 (respectively) of the *Trade Practices Act 1974* (Cth) or any equivalent provision of state or territory legislation);
- (ii) any inaccuracy, omission, unfitness for any purpose or inadequacy or incompleteness of any kind whatsoever in the Information Documents; and
  - (iii) any failure to make available to the Project Company any information, data, material or other information relating to the Project except where such failure constitutes a breach by NSW Health or a NSW Health Related Party (as applicable) of its express obligations under a Project Document.
- (c) The Project Company warrants that prior to the date of this deed it:
- (i) examined this deed (including, for the avoidance of doubt, the Specifications), the Construction Sites, the Hospital and the Hospital Campus and their surroundings, and any other information that was made available by NSW Health, or any other person on behalf of NSW Health, to the Project Company for the purpose of submitting a proposal for the Project;
  - (ii) examined, and relied solely upon its own investigations, assessment, skill, expertise and enquiries in respect of all information relevant to the risks, contingencies and other circumstances having an effect on its proposal for the Project and its obligations under the Project Documents;
  - (iii) satisfied itself that there is nothing in the Facility Specification which is inconsistent with, or would prevent it from performing and satisfying, its obligations under the Support Services Specifications or the other provisions of this deed, and that there is no defect or omission in the Specifications or the Project Company Proposals which may prevent the PPP As-Built Health Facilities, the R&E Facility or the Retained Facilities (as constructed or refurbished (as applicable)) from being Fit for Intended Purposes;
  - (iv) satisfied itself as to the correctness and sufficiency of its proposal to satisfy its obligations under the Project Documents, has made adequate allowance for the costs of complying with all the obligations of the Project Company, and of all matters and things necessary for the due and proper performance and completion of the Works and the performances of the Support Services in accordance with the Project Documents;
  - (v) informed itself of all matters relevant to the employment of labour at each Construction Site, the Works and the Hospital and Hospital Campus and all industrial matters relevant to each Construction Site, the Works, the Hospital and Hospital Campus and the Support Services, including matters with respect to Health Staff Members; and
  - (vi) was given the opportunity to itself undertake, and to request others to undertake, tests, enquiries and investigations:
    - A. relating to the subject matter of Information Documents; and

- B. for design purposes and otherwise,
- and for this purpose was given access to such parts of the Construction Sites, Hospital and Hospital Campus as it required.
- (d) The Project Company:
- (i) acknowledges that the Information Documents do not form part of this deed;
- (ii) warrants that it did not in any way rely upon:
- A. any Information Document or any other information, data, representation, statement or document made, or provided to the Project Company, by NSW Health or anyone on behalf of NSW Health other than information provided in respect of Health Staff Members, which NSW Health agrees does not constitute an Information Document; or
- B. the accuracy, adequacy, suitability or completeness of such Information Document or any other information, data, representation, statement or document other than information provided in respect of Health Staff Members, which NSW Health agrees does not constitute an Information Document,
- for the purposes of entering into this deed;
- (iii) agrees that it enters into this deed solely based on its own independent investigations, interpretations, deductions, information and determinations; and
- (iv) acknowledges that it is aware that NSW Health has entered into this deed relying upon the warranties, acknowledgments and agreements in this clause 2.4.
- (e) The Project Company acknowledges and agrees that:
- (i) the Project Company accepts full liability for the Specifications and Project Company Proposals and for the performance of its obligations under the Project Documents and it will not be relieved of any of its obligations under this deed, or otherwise arising out of or in connection with the Project, notwithstanding:
- A. that the draft Specifications were proposed by NSW Health;
- B. the existence, in the Facility Specification, of requirements which are inconsistent with, or compliance with which would prevent the Project Company from performing and satisfying, its obligations under the Support Services Specifications and the other provisions of this deed; or
- C. the existence of a defect or omission in the Specifications or Project Company Proposals which may prevent the PPP As-Built Health Facilities, the R&E Facility or the Retained

Facilities (as constructed or refurbished) from being Fit for Intended Purposes;

- (ii) the Project Company has been given full and adequate opportunity to undertake a review and investigation of the draft Specifications and Project Documents, and identify and correct all such inconsistencies, defects and omissions, prior to the date of this deed; and
  - (iii) the Project Company will not, subject to the express provisions of this deed to the contrary, be entitled to any compensation or relief under the Project Documents as a result of any such inconsistencies, defects and omissions.
- (f) The Project Company acknowledges and agrees that neither NSW Health nor any NSW Health Related Party has any liability for any damage, expense, loss or liability which the Project Company suffers or incurs in respect of the incorrectness or inaccuracy of any assumption by any person made in the calculation of the investment in the Project or elsewhere relating to:
- (i) taxation requirements;
  - (ii) the availability of taxation rulings;
  - (iii) Project revenue; or
  - (iv) Project costs, including the costs of financing, designing, constructing, commissioning and maintaining the Stages and the Hospital and providing the Support Services,

except where that incorrectness or inaccuracy is due to, or constitutes, a Compensation Event.

- (g) The Project Company acknowledges that, in consideration of NSW Health:
- (i) granting a licence to the Project Company or its nominee to operate the Car Park Facilities under the Car Park Licence Agreement; and
  - (ii) entering into the Agreement for Retail Services,

the Project Company will be responsible for the servicing and repayment of funds borrowed by it in order to fund the construction of the New Multi-Deck Car Park Facility or the carrying out of the Base Retail Fit Out.

## **2.5 Appointment of Project Company**

- (a) NSW Health appoints the Project Company to carry out the Project in accordance with and subject to the terms of the Project Documents.
- (b) Subject to clause 3.1, this deed and the rights and obligations of the parties under it will take effect on the execution of this deed by both parties.

## **2.6 Compliance with Law**

- (a) Each party must comply with all Law and requirements of all Relevant Authorities applicable to its obligations in respect of the Project.

- (b) The Project Company must promptly give the Project Director:
- (i) copies of all notices, orders or directions given to or received by it, its related bodies corporate or the Material Subcontractors in connection with the Project pursuant to any Law; and
  - (ii) copies of all documents given by it or its related bodies corporate or the Material Subcontractors to a Relevant Authority in connection with the Project pursuant to any Law.

## 2.7 Exclusion of *Civil Liability Act 2002 (NSW)*

- (a) To the extent permitted by Law, the operation of Part 4 of the *Civil Liability Act 2002 (NSW)* is excluded in relation to any and all rights, obligations and liabilities arising under or in relation to this deed, howsoever such rights, obligations or liabilities are sought to be enforced.
- (b) The Project Company agrees that:
- (i) in each Subcontract, it will include provisions that, to the extent permitted by Law, effectively exclude the operation of Part 4 of the *Civil Liability Act 2002 (NSW)* in relation to all rights, obligations or liabilities arising under or in relation to that Subcontract howsoever such rights, obligations or liabilities are sought to be enforced; and
  - (ii) it must require and ensure that each Subcontractor will include in any further Subcontract, provisions that, to the extent permitted by Law, each such further Subcontract will include provisions that effectively exclude the operation of Part 4 of the *Civil Liability Act 2002 (NSW)* in relation to all rights, obligations or liabilities arising under or in relation to such further Subcontract howsoever such rights, obligations or liabilities are sought to be enforced.

## 2.8 Car Parking and Retail

The Project Company acknowledges that NSW Health has on the date of this deed entered into the Car Park Licence Agreement and the Agreement for Retail Services (which includes an agreement to enter into the Retail Head Lease) and that:

- (a) the Project Company is aware of the contents of the Car Park Licence Agreement and the Agreement for Retail Services;
- (b) NSW Health has no liability for any Claim or Loss, delay or any other effects which the Project Company suffers or incurs in connection with any act, omission of the counterparties to the Car Park Licence Agreement and the Agreement for Retail Services and (on and from its execution) the Retail Head Lease or their assignees or successors ("**Counterparties**") under or in relation to the Car Park Licence Agreement or the Agreement for Retail Services and (on and from its execution) Retail Head Lease (respectively); and
- (c) each of the Counterparties is relying upon the Project Company to perform its obligations under this deed to enable them to perform to their respective obligations to NSW Health.

---

**PART B – PRELIMINARY MATTERS**


---

**3. Conditions, Representations, Warranties and Undertakings**
**3.1 Conditions Precedent**

- (a) The rights and obligations of the parties under this deed will not commence unless and until:
  - (i) this deed and the other Project Documents entered into or to be entered into by NSW Health have received the approval of the Treasurer of New South Wales under section 20 of the PAFA Act; and
  - (ii) the PAFA Act Guarantee has been executed by the State and NSW Health.
- (b) The rights and obligations of the parties under this deed (other than the provisions of clauses 3.1, 3.3, 4.2, 4.3, 4.4, 4.5, 6, 7, 8, 9, 14, 20, 21, 22, 23, 24, 25, 38, 39, 40, 41, 42 and paragraph 13(c) of schedule 14) and each other Project Document will not commence unless and until the Conditions Precedent have been satisfied, or waived by NSW Health.
- (c) The Project Company must procure the satisfaction of the Conditions Precedent by the Target Financial Close Date.
- (d) If the Conditions Precedent have not been satisfied or waived by 5.00 pm on the Target Financial Close Date, the Project Director may, in its absolute discretion, terminate this deed and each other Project Document at any time after the Target Financial Close Date and this deed will then be without further effect, except in relation to rights and obligations arising before such termination.
- (e) When the Project Company is of the opinion that a Condition Precedent has been satisfied it will give the Project Director written notice and the Project Director will give written notice to the Project Company whether or not it agrees that the Condition Precedent has been satisfied. If such notice is not given by the Project Director within 10 Business Days of receipt of the written notice from the Project Company, the Condition Precedent will be deemed to have been satisfied.
- (f) The Project Director may, in its absolute discretion, extend the Target Financial Close Date by notice in writing to the Project Company.

**3.2 Representation and warranties**

- (a) NSW Health represents and warrants that:
  - (i) it has the power to execute, deliver and perform its obligations under the Project Documents and all necessary action has been taken to authorise such execution, delivery and performance;
  - (ii) the Project Documents to which NSW Health is party are NSW Health's valid and binding obligations enforceable against NSW Health in accordance with their respective terms subject to the availability of equitable remedies and, to the extent applicable, Laws relating to the enforcement of creditors' rights;



- 
- (iii) the execution, delivery and performance of the Project Documents to which NSW Health is a party by NSW Health will not contravene any Law to which NSW Health is subject; and
- (iv) NSW Health has or will, in accordance with the Site Access Schedule, have full and proper right to use and licence each of the Construction Sites and the Hospital for the purposes of the Project in accordance with this deed.
- (b) The Project Company represents and warrants that:
- (i) it is a company, duly incorporated and existing under Australian law and has the capacity and power to execute, deliver and perform its obligations under the Project Documents and all necessary corporate and other action has been taken to authorise that execution, delivery and performance;
- (ii) the information provided by the Project Company to NSW Health, its officers, employees, advisers or agents in connection with the Project Documents is true, accurate and complete in all material respects and not misleading in any material respect (including by omission);
- (iii) the legal and beneficial ownership of each member of the Project Company Group, and the Project Company Group structure, are as set out in Schedule 2, subject to changes consented to by NSW Health in accordance with clause 39.2;
- (iv) the Project Documents to which the Project Company is a party are the Project Company's valid, legal and binding obligations enforceable against the Project Company in accordance with their terms subject to equitable remedies and Laws in respect of the enforcement of creditors' rights;
- (v) the execution, delivery and performance of the Project Documents by the Project Company will not contravene any Law to which the Project Company is subject, or any deed or arrangement binding on the Project Company;
- (vi) the Project Company has not at any time since its incorporation and does not conduct any business other than the Project;
- (vii) the Project Company is not acting as trustee of any settlement or as agent for or on behalf of any other entity;
- (viii) the Project Company does not (in any capacity) have immunity from the jurisdiction of a court or from legal process (whether through service of notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise);
- (ix) the Project Company is not in default of its material obligations under any Project Document to which the Project Company is expressed to be a party;
- (x) no Project Company Termination Event has occurred and is continuing;

- (xi) no circumstances, proceedings or obligations exist or are threatened which may have a material adverse effect upon the Project Company or its ability to perform its financial or other obligations under any Project Document or Subcontract to which the Project Company is expressed to be a party;
  - (xii) prior to the date of this deed, it had no knowledge of any part of the proposal by any other proponent for the Project and has not directly or indirectly communicated any part of its proposal for the Project to any other proponent; and
  - (xiii) it has not entered into any contract or arrangement or arrived at any understanding with any other proponent in relation to the Project to the effect that it will pay money to or confer any benefit upon any other proponent as a result of entering into this deed or providing its proposal for the Project.
- (c) Each representation and warranty contained in this deed:
- (i) is made on the date of this deed; and
  - (ii) other than those contained in clauses 3.2(b)(xii) and 3.2(b)(xiii), will be deemed to be repeated on the date of Financial Close and on each anniversary of the date of this deed,
- with references to the facts and circumstances then subsisting.
- (d) Each party enters into this deed in reliance upon the warranties and representations made by the other in this deed.

### 3.3 Project Company General Undertakings

The Project Company must:

- (a) immediately upon becoming aware that any litigation, arbitration, administrative or adjudication or mediation proceedings, which may adversely affect the Project and/or the Project Company's or a Key Subcontractor's ability to perform its obligations under the Project Documents, have been commenced or threatened, give NSW Health notice of such litigation, arbitration, administrative or adjudication or mediation proceedings;
- (b) not without the prior written consent of NSW Health (and whether by a single transaction or by a series of transactions whether related or not) sell, transfer, lend or otherwise dispose of (other than by way of security) the whole or any part of its business or assets which would materially affect the ability of the Project Company to perform its obligations under the Project Documents;
- (c) not cease to be resident in Australia or transfer in whole or in part its undertaking, business or trade outside Australia;
- (d) not undertake the performance of its obligations under the Project Documents for the provision of the Works and/or the Support Services otherwise than through itself or a Subcontractor;

- (e) not without the prior written consent of NSW Health incorporate any company or purchase or acquire or subscribe for any shares in any company, save where such company is involved in the provision of the Support Services or Works;
- (f) not without the prior written consent of NSW Health make any loans or grant any credit or give any guarantee or indemnity to or for the benefit of any person or otherwise voluntarily or for consideration assume any liability (whether actual or contingent) in respect of any obligation of any other person except in the ordinary course of business and/or as contemplated by the Project Documents and/or Financing Agreements; and
- (g) not change or cease its business or start any other business other than that to be carried on by it under the Project Documents and Financing Agreements.

### **3.4 Status of Obligations**

All warranties, representations, undertakings, indemnities and other obligations made, given or undertaken by the Project Company in the Project Documents are cumulative and none shall be given a limited construction by reference to any other.

---

## **4. Project Management**

### **4.1 Appointment of Project Director**

NSW Health must appoint, and ensure that at all times there is appointed, a natural person to be the Project Director, who will:

- (a) exercise the powers, duties, discretions and authorities as are:
  - (i) delegated by NSW Health to be exercised by the Project Director under the Project Documents as agent for NSW Health; or
  - (ii) expressed in the Project Documents to be exercised by the Project Director; and
- (b) have the full power and authority, subject to the powers of delegation by NSW Health, to act for and on behalf of and to bind NSW Health under the Project Documents to the extent of the delegation and in compliance with the delegation.

### **4.2 Notification of details of Project Director**

- (a) NSW Health must procure that the Project Company is notified within 5 Business Days after the date of this deed of the identity and address of the Project Director and as soon as practicable of any changes in the identity or address of the Project Director.
- (b) To the extent that NSW Health delegates its powers, duties, discretions and authorities to the Project Director under clause 4.1(a)(i), NSW Health must notify the Project Company of the delegation and the extent of that delegation.
- (c) Nothing in this clause 4 restricts the ability of NSW Health to replace the Project Director at any time.

### 4.3 Delegation by Project Director

- (a) The Project Director may from time to time:
  - (i) appoint one or more individuals to assist the Project Director in exercising his or her powers, duties, discretions or authorities; or
  - (ii) vary or terminate in whole or part the appointment of, or the powers, duties, discretions or authorities of such representatives.
- (b) The appointment of a representative by the Project Director does not prevent the Project Director from exercising any of his or her powers, duties, discretions and authorities.
- (c) The Project Director must, as soon as practicable after any appointment of an individual in accordance with paragraph (a), notify the Project Company Representative of such appointment and the extent of such appointment.
- (d) Any action taken by such individual which is within the scope of their appointment will be deemed to be an act of and will bind the Project Director and NSW Health.

### 4.4 Management of Project Documents

- (a) The Project Company must comply with the directions of the Project Director made under, or purported to be made under, a provision of a Project Document.
- (b) A direction of the Project Director includes any instruction, order, request, requirement, or authorisation of the Project Director and may be given orally. If given orally, a direction must be promptly confirmed in writing by the Project Director.
- (c) Actions of the Project Director and its delegates in accordance with clause 4 are binding on NSW Health to the extent set out in clause 4.2, including where rights and obligations under the Project Documents are expressed to be rights and obligations of the Project Director. If the Project Director fails to comply with the obligations in this deed that are expressed to be the obligations of or the responsibility of the Project Director, such failure will be deemed to be a failure of NSW Health.
- (d) No direction or consent of the Project Director is to be taken as approval of any Support Services that do not conform to the Specifications or this deed, and the Project Director has no authority orally to waive any provision of, or release the Project Company from, its obligation under the Project Documents. Without limiting clause 4.9, any such approval, waiver or release must be expressly identified as such, can only be given in writing, and is only effective if signed by the Project Director and, for the avoidance of doubt, no delegate of the Project Director is authorised or empowered to give any such approval, waiver or release.

### 4.5 Project Company Representative

The Project Company must:

- (a) appoint and ensure that at all times there is appointed a natural person to be the Project Company Representative, who:

- (i) may exercise the powers, duties, discretions and authorities of the Project Company under the Project Documents as agent for the Project Company; and
  - (ii) will have the full power and authority to act for and on behalf of and to bind the Project Company under the Project Documents; and
- (b) notify NSW Health within 5 Business Days after the date of this deed of the identity and address of the Project Company Representative and of any changes as soon as practicable in the identity or address of the Project Company Representative.

Actions of the Project Company Representative are binding on the Project Company.

#### 4.6 Project Co-ordination Group

- (a) Before the Project Company commences the Works, and until the Termination Date, NSW Health and the Project Company must establish a committee (to be known as the "**Project Co-ordination Group**") comprising:
- (i) three representatives of the Project Company;
  - (ii) two representatives of NSW Health or NSCCAHS; and
  - (iii) the Project Director.

The Project Director shall be the chairperson of the Project Co-ordination Group.

- (b) Members of the Project Co-ordination Group may, at their own cost, arrange for such advisers, consultants and subcontractors, as they require from time to time to attend meetings of the Project Co-ordination Group.
- (c) During the Construction Phase the Project Co-ordination Group must meet at intervals of not more than one month or less frequently if agreed by the Project Director and the Project Company to discuss and review any matters relating to the relevant Works including:
- (i) development, design, construction and commissioning issues;
  - (ii) the Works Program, Partnering Protocol and each Interface Protocol;
  - (iii) preparation of and compliance with the Management Plans;
  - (iv) issues arising from the reports or documents provided by the Project Company to the Project Director, including the Construction Reports; and
  - (v) resolve any dispute referred to it under clause 4.6(h).
- (d) During the Interim Services Phase and Operations Phase the Project Co-ordination Group must meet at intervals of not more than one month or such other period as is agreed by the Project Director and the Project Company, to discuss any matters relating to the Hospital, including:
- (i) the provision of the Support Services;

- (ii) preparation of and compliance with the Operations Manual;
  - (iii) issues arising from the reports or documents provided by the Project Company to NSW Health, including the Monthly Performance Report, Monthly Performance Report and other notices and reports given under clause 18 and clause 29.6;
  - (iv) continuous improvement obligations under the Support Services Specifications;
  - (v) coordination, management and scheduling of maintenance, refurbishment, and cleaning services;
  - (vi) facilities management and maintenance issues generally; and
  - (vii) resolve any dispute referred to it under clause 4.6(h).
- (e) Meetings of the Project Co-ordination Group must be conducted in such manner and in accordance with such procedures as its members may from time to time agree, provided that the Project Director, at least one representative from the Project Company, and at least one representative from NSW Health or NSCCAHS must be present in order for there to be a quorum at a meeting of the Project Co-ordination Group.
- (f) The Project Co-ordination Group will not have any legal responsibility to NSW Health or the Project Company and will not have any power to require NSW Health or the Project Company to act or refrain from acting in any way.
- (g) Subject to clauses 4.6(h) to 4.6(j), the decisions of the Project Co-ordination Group do not affect the rights or obligations of either NSW Health or the Project Company under any of the Project Documents, except as set out in this clause 4.6.
- (h) If any dispute arises between the Project Company and NSW Health and/or the Director-General of the NSW Department of Health, a party may by notice to all other parties refer the dispute to the Project Co-ordination Group for resolution. The referral notice must specify in reasonable detail the nature of the dispute.
- (i) A decision of the Project Co-ordination Group in respect of matters referred to it under clause 4.6(h) may only be made by unanimous agreement of the members of the Project Co-ordination Group.
- (j) If a dispute is referred to the Project Co-ordination Group, the Project Co-ordination Group will meet to resolve the dispute. If the dispute is not resolved within the Resolution Period, either NSW Health or the Project Company may refer the dispute to the Representatives in accordance with clause 40.1(a).

---

## **5. Construction Sites**

### **5.1 Site Licences**

- (a) NSW Health must permit the Project Company, its Subcontractors and any officer, adviser, employee or agent of any of them, and in accordance with and subject to any restrictions in the Specifications to enter, occupy and use:

- 
- (i) each Construction Site in accordance with the Site Access Schedule, to the extent reasonably necessary for the performance of the Works; and
  - (ii) the Hospital, to the extent reasonably necessary for the performance of the decanting in accordance with the Commissioning and Decanting Plan, the Interim Services and the Support Services; and
  - (iii) any other areas identified in the Site Access Schedule or in the Commissioning and Decanting Plan, to the extent, and for a period, reasonably necessary for the performance of the Works. If such areas are owned by NSW Health on the date of this deed, access will be subject to the same licence provisions as apply to the Construction Sites and if such areas are owned by a third party or a third party has an interest in that land, on equivalent licence or other rights of access which NSW Health has to such lands with those third parties (as notified prior to the date of this deed).
- (b) The licence granted in accordance with this clause 5.1 is granted in consideration of payments to be made under the Master Licence Agreement for the applicable licence thereunder which will be satisfied by the issue of Promissory Notes thereunder and the receipt of NSW Health of a licence fee of \$10 (receipt of which is acknowledged by NSW Health) in respect of any other licence under this clause 5.1 and is subject to:
- (i) the statutory right of any Relevant Authority or provider of Utilities to have access to the Construction Sites, the Works and the Hospital;
  - (ii) the Project Director's right to enter the Construction Site for the purpose of inspecting any part of the Construction Site provided that the Project Director complies with reasonable site safety and security requirements;
  - (iii) the rights of NSW Health and NSW Health Related Parties to enter, occupy and use the Hospital to carry out the Health Functions and of NSW Health to exercise its rights under this deed;
  - (iv) the rights of NSW Health to grant rights to enter, occupy and use the Hospital to NSW Health Related Parties and NSW Health Tenants;
  - (v) the right of NSW Health to require the Project Company to surrender any part of a Construction Site pursuant to clause 5.1(c);
  - (vi) the Adverse Rights under all dealings registered on or before the date of this deed on the titles to the land on which the Construction Sites are situated:
    - A. provided that the licence under this clause 5.1 will not be subject to:
      - 1) the easement for water supply works DP214911;
      - 2) the easement for sewerage purposes G193894;
      - 3) easements S339507 and S349301; and

- 
- 4) registered dealings 7 to 10, 13 to 15, 21, 22, 23 and 42 to 47 in the Second Schedule of the title except to the extent the term of the dealing exceeds the duration shown on the title; and
- B. except, in respect of any part of the Construction Sites to which the Project Company has exclusive possession, the following registered dealings:
- 1) Dealing #20 - Y325424;
- 2) Dealing #41 - 7018121;
- 3) Dealing #49 - AD156482;
- 4) Dealing #50 - AD156483; and
- 5) Reservations and dealings 1-5; and
- (vii) in respect of the Hospital, except as set out above, any Adverse Rights.
- (c) NSW Health may, at any time:
- (i) notify the Project Company that its licence will no longer apply to any part of a Construction Site, provided that such action will not adversely affect the ability of the Project Company to perform its obligations under the Project Documents. The Project Company must surrender the relevant part of the Construction Site to NSW Health 5 Business Days after receipt of the notice referred to in this clause, at which time the relevant part of the Construction Site will cease to be part of a Construction Site for the purposes of the Project Documents; or
- (ii) grant a concurrent licence, lease or right to access, occupy or use any part of:
- A. any Construction Site to which the Project Company has non-exclusive access; or
- B. the Hospital or the RNSH PPP Footprint,
- to a NSW Health Tenant for the purpose of providing Health Functions.
- (d) The Project Company acknowledges and agrees that, except to the extent a Compensation Event or Relief Event applies, NSW Health has no liability for any Claim or Loss, delay or any other effects which the Project Company or its Subcontractors suffer or incur in connection with the activities set out in clauses 5.1(a), (b), or (c) and the Project Company will not be entitled to any compensation under the Project Documents for such Claim, Loss, delay or any other effect.
- (e) The Project Company acknowledges that access to any land other than the Construction Sites, the Hospital, the Private Hospital and any other areas identified in the Site Access Schedule or in the Commissioning and Decanting Plan, to which access is required for the purposes of carrying out the Project or any part of it, is the sole responsibility and risk of the Project Company, and the Project Company acknowledges and agrees that NSW Health has no liability for any Claim, Loss,



delay or any other effects which the Project Company or its Subcontractors suffer or incur due to inability to obtain, or restrictions on, access to that land, and the Project Company will not, subject to the express provisions of this deed to the contrary, be entitled to any compensation or relief under the Project Documents for any such Claim, Loss, delay or any other effect on the ability of the Project Company or its Subcontractors to comply with the Project Company's obligations under this deed caused by inability to obtain, or restrictions on, access to that land.

- (f) The licence granted under this deed:
- (i) is personal to the Project Company;
  - (ii) is non-exclusive, except to the extent otherwise specified for the Construction Site in the Site Access Schedule; and
  - (iii) will not operate or be deemed to operate in any way as a demise of any part of the Construction Site or the Hospital and the Project Company is not entitled to any estate, right or interest in the Construction Site or the Hospital or any part of the Construction Site or the Hospital, other than the rights created by the provisions of this deed.
- (g) Nothing in this deed:
- (i) confers on the Project Company any rights as a tenant of the Construction Site or the Hospital; or
  - (ii) creates a relationship of landlord and tenant between the parties.
- (h) The Project Company must make good, if applicable, in accordance with the Works Program and the performance of the Support Services any disturbance or damage caused to any part of the Construction Site or the Hospital in connection with the Project Company's or a Subcontractor's entry, occupation or use of the Construction Site or the Hospital;
- (i) The Project Company:
- (i) must avoid or minimise unnecessary interference with the passage of people and vehicles and the operations and activities carried out of, on or from areas adjacent to the Construction Site;
  - (ii) must promptly deliver to the Project Director a copy of every notice received by the Project Company which affects the Construction Site or any Adjoining Property;
  - (iii) is solely responsible for any person who enters the Construction Site or the Hospital on behalf of, or with the permission of, the Project Company;
  - (iv) must not except as permitted under this licence, do or permit to be done on any part of the Construction Site or the Hospital anything which may cause a nuisance, annoyance, disturbance or damage to the Construction Site or the Hospital or any land adjacent to the Construction Site or the Hospital;

- 
- (v) must not do or permit to be done on any part of the Construction Site anything which may cause NSW Health to breach any of its obligations under any Adverse Rights to which the licence granted under clause 5.1(a)(i) is subject;
  - (vi) must not do or permit to be done on any part of the Hospital anything which may cause NSW Health to breach any of its obligations under any Adverse Rights to which this licence is subject;
  - (vii) must not without the prior written consent of the Project Director, exhibit on any part of the exterior of the Construction Site or the Hospital any notice, sign, signboard or advertisement;
  - (viii) must not do anything to cause any part of the Construction Site or the Hospital or any land adjacent to the Construction Site or the Hospital to become unclean or untidy except:
    - A. in accordance with the Works Program; or
    - B. where permitted in the course of performing any Support Services;
  - (ix) must not breach any statutory or other lawful requirements relating to the Project Company's use, access and occupation of the Construction Site or the Hospital; or
  - (x) must not enter into or grant or agree to enter into or grant any rights or other arrangements with any person or persons relating to all or any part of the Construction Site or the Hospital except as permitted by this deed.
- (j) Prior to accessing a Construction Site in respect of which the Project Company has exclusive possession, each Additional Works Contractor, Third Party Contractor (and each of their respective subcontractors of any tier) and any other contractors engaged by NSW Health or any NSW Health Related Party (and each of their respective subcontractors of any tier), must sign and deliver to the Project Company a Site Access Deed in substantially the same form as Schedule 26, and the Project Company may refuse to grant access to a Construction Site in respect of which the Project Company has exclusive possession to any such person who has not done so.
- (k) The parties agree to do everything reasonably necessary, and within their respective powers, to procure the consent and co-operation of the registered owner of the easements referred to in clause 5.1(b)(vi)A and otherwise do everything reasonably necessary to:
- (i) alter, extinguish and register the relevant easements;
  - (ii) make any changes to those easements; or
  - (iii) agree to the entry into substitute easements,
- to the extent necessary to enable the Works to be carried out in accordance with this deed.
- (l) NSW Health will procure that the Private Hospital owner agrees to access by the Project Company to Lot 22 in Deposited Plan 863329 as set out in the Site Access

Schedule provided that the Project Company has first used its best endeavours to negotiate and agree an Interface Protocol on reasonable terms with the Private Hospital owner in accordance with clause 3.4 of the Ramsay Deed.

## 5.2 Site Condition

Subject to the express provisions of this deed, NSW Health makes no representation and gives no warranty, and the Project Company accepts entire responsibility (including any financial or other consequences which result whether directly or indirectly) in relation to:

- (a) each Construction Site in its current location, state and physical condition (including latent and patent defects in any Construction Site); and
- (b) Site Conditions, including any existing Contamination or Artefacts, Existing Infrastructure and other things on or adjacent to the Construction Sites or the Hospital Campus, including the existence, location, condition and availability of Utilities, and the suitability or otherwise of any Existing Infrastructure on or in the Construction Sites or the Hospital Campus for carrying out the Works and providing the Support Services.

## 5.3 Security

Without limiting the obligations under the Specifications, during the Construction Phase for each Construction Site, the Project Company will have full responsibility for the security of such Construction Site and any Adjoining Property to the extent to which connection and installation of Utilities or any other part of the Works or Temporary Works is being carried out by the Project Company.

## 5.4 Environmental obligations

- (a) In undertaking the Works and providing the Support Services (as applicable), the Project Company must:
  - (i) comply with all Environmental Laws and all relevant industry standards and codes of practice;
  - (ii) not Contaminate or Pollute the Construction Sites, the Hospital, the Hospital Campus or Adjoining Property or any part of them;
  - (iii) not bring any Waste on to a Construction Site, the Hospital or the Hospital Campus;
  - (iv) keep the Hospital and the RNSH PPP Footprint in a good and safe condition so that they do not present a risk of harm to the Environment;
  - (v) ensure, in accordance with Good Industry Practice, the protection of the Environment from harm;
  - (vi) notify the Project Director immediately if, in the course of the Works or the provision of the Support Services:
    - A. an incident occurs which could be a breach of an Environmental Law; or

- B. the Project Company becomes aware that a complaint has been made in relation to Contamination of or Pollution of or from a Construction Site or Health Facility;
- (vii) provide the Project Director with any information held or controlled by the Project Company relating to any Contamination affecting, or Pollution of or from, any part of the Construction Sites, the Hospital or the Hospital Campus;
- (viii) in respect of the Works, undertake all necessary remediation work on each area of the land in each Construction Site so that at Completion each such area of land is suitable for its Proposed Use as evidenced by a Site Audit Statement issued in accordance with clause 13.6;
- (ix) promptly comply with any Environmental Notice served on the Project Company, Key Subcontractor or Subcontractor, or NSW Health:
- A. during the Term in accordance with clause 5.4(c); and
- B. after the Term, if relating to Contamination of, Pollution of or from or the disposal of Waste to a Construction Site, the Hospital or the Hospital Campus at any time during the Term by the Project Company, a Key Subcontractor or a Subcontractor;
- (x) within seven days of receipt of any Environmental Notice served on the Project Company, provide a copy of the same to the Project Director and promptly provide to the Project Director copies of all reports, invoices and other documents relating to the Project Company's compliance with the Environmental Notice and any other information relating to the Environmental Notice or the Project Company's compliance with it as the Project Director may request; and
- (xi) if and to the extent that Hazardous Materials are encountered in an Existing Health Facility in which Works are to be carried out under this deed:
- A. carry out the Works so that they comply with this deed; and
- B. if any delay or disruption is caused to the Works, or the cost of carrying out the Works so that they comply with this deed is increased as a result of the Hazardous Materials (other than or in excess of those Hazardous Materials identified in or reasonably inferable from an Environmental Assessment or Condition Survey Report), the Project Company must issue a Project Company Variation Request, which shall be deemed to be a NSW Health Variation Request.
- (b) The Project Company will not be in breach of clause 5.4(a)(ii) or clause 5.4(a)(iii) by virtue of bringing onto, or storing on, a Construction Site or a Health Facility, Permitted Hazardous Substances for the purposes of carrying out its obligations under this deed, provided that such Permitted Hazardous Substances are procured, used and stored in accordance with Good Industry Practice and in compliance with applicable Law.

- (c) Any Environmental Notice will be deemed to be a NSW Health Variation Request except to the extent that:
- (i) the Pollution or Contamination the subject of the Environmental Notice is caused or contributed to by the Project Company, a Key Subcontractor or a Subcontractor;
  - (ii) the Project Company has obligations referred to in clause 5.4(d)(iii) or (iv) in respect of Pollution or Contamination that is the subject of the Environmental Notice; or
  - (iii) compliance with the Environmental Notice requires remediation of Contamination within the boundaries of a Construction Site to no higher standard than that required under clause 5.4(a)(viii).
- (d) In undertaking the Support Services, the Project Company has no obligations in respect of Pollution or Contamination except:
- (i) under clauses 5.4(a)(ii), (iii), (v) (but only as it applies to the manner of performance of an obligation referred to in clause 5.4(d)(iii)), (vi), (vii), (ix) and (x) of this deed;
  - (ii) to the extent the Pollution or Contamination is caused by the Project Company, a Key Subcontractor or a Subcontractor;
  - (iii) to the extent the Project Company has obligations in respect of the Pollution or Contamination under the Support Services Specifications; or
  - (iv) to the extent that the Project Director instructs the Project Company to undertake additional or alternative works or services under clause 19 of this deed in respect of Pollution or Contamination that causes or results from an event referred to in paragraph (a) or paragraph (c) of the definition of Emergency Event.

## 5.5 Artefacts

All Artefacts discovered on or under the surface of the Construction Site or the Hospital Campus will, as between NSW Health and the Project Company, be the absolute property of NSW Health. The Project Company must:

- (a) at its expense, take every precaution to prevent Artefacts being removed, disturbed, damaged or destroyed;
- (b) immediately upon discovery of any Artefact notify the Project Director of such discovery;
- (c) comply with any Consent relating to the Artefact;
- (d) without limiting paragraph (c) above, comply with any directions or orders to suspend or cease undertaking Works or Support Services, or to perform additional work or services, imposed by any Relevant Authority upon NSW Health or the Project Company in respect of such Artefact; and
- (e) continue to perform its obligations under this deed, except to the extent compliance with this clause prevents such performance.

## 5.6 Native Title Application

- (a) If there is a Native Title Application with respect to a Construction Site or the Hospital Campus, or any part of them, the Project Company must continue to perform its obligations under this deed, unless otherwise:
- (i) directed by the Project Director;
  - (ii) ordered by a Relevant Authority; or
  - (iii) required by Law.
- (b) For the purposes of clause 5.6(a)(i), the Project Director may by written notice direct the Project Company to suspend any or all of its obligations under this deed until such time as the Project Director gives the Project Company further written notice.
- (c) If there is a Native Title Application with respect to a Construction Site, the Project Company must, at the request of the Project Director, provide all reasonable assistance in connection with NSW Health's involvement with such Native Title Application (including giving to NSW Health and any other person authorised by NSW Health, access to the relevant Construction Site or that part of the Construction Site which is the subject of the Native Title Application when reasonably required by NSW Health for that purpose).

## 5.7 Utilities and Rates

- (a) The Project Company must arrange for extension, relocation, adjustment, connection, obtaining, provision and separate metering of any Utilities which the Project Company needs to perform its obligations under the Project Documents and which are required to provide the Health Functions.
- (b) The Project Company must, in performing the Works and the Support Services, ensure the continuous supply of Utilities to the Hospital at all times in accordance with the Specifications.
- (c) Except as otherwise provided in this deed, on and from Financial Close NSW Health must pay for usage of Utilities.
- (d) The Project Company must pay for usage by the Project Company Related Parties of Utilities used in carrying out the Works.
- (e) The Project Company must ensure that telecommunications and electronic communications (including voice and data) usage by Project Company Related Parties is separately metered and paid for by the Project Company.
- (f) NSW Health must pay for Rates and Land Tax, if any, in respect of each Construction Site and the RNSH PPP Footprint until the Termination Date, provided that if a Construction Site or the RNSH PPP Footprint or part of a Construction Site or the RNSH PPP Footprint becomes subject to Rates or Land Tax as a result of Additional Commercial Development, the Project Company must pay for such Rates and/or Land Tax and must, as soon as practicable after written request from the Project Director, arrange for the relevant Rates and Land Tax to be invoiced to the Project Company or a relevant user and paid direct to the Relevant

Authority by the Project Company or the relevant user in respect of that part of the Construction Site and/or the RNSH PPP Footprint.

## 5.8 Ownership of Certain Property

- (a) Without limiting clause 5.5, if the Project Company removes any material (excluding Disposables) from the Hospital Campus (whether or not required by any Relevant Authority) then, unless otherwise required by Law, prescribed by this deed or directed by the Project Director, as between the Project Company and NSW Health, ownership in all such material remains the property of NSW Health.
- (b) Ownership of Disposables transfers to the Project Company immediately upon the relevant material leaving the Construction Site or the RNSH PPP Footprint.
- (c) Subject to clauses 11.10 to 11.18 (inclusive) and 5.8(b), as between the Project Company and NSW Health, all chattels and non-fixtures comprising the Health Facilities and Support Services Equipment, will be and remain the property of the Project Company or the Subcontractors (as applicable) until the end of the Term.

## 6. Approvals and Consents

### 6.1 Development Approvals

- (a) NSW Health must:
  - (i) provide to the Project Company a copy of each NSW Health Development Approval (other than as modified by the Early Works Development Approval);
  - (ii) carry out assessments allocated to NSW Health in the Applications Resources Schedule;
  - (iii) apply for and obtain any Consents relating to matters allocated to NSW Health in the Applications Resources Schedule;
  - (iv) comply with and carry out all activities and works and make all payments required by any condition of a Consent to the extent that condition is in respect of matters allocated to NSW Health in the Applications Resources Schedule; and
  - (v) where an application for a Consent can only be lodged with the consent of a third party as owner of the relevant Construction Site, procure that such consent is obtained within sufficient time to enable the Project Company to meet its obligations under clause 6.1(b),

within the period of time allowed for the completion of that task by NSW Health in the Works Program and, where the task is not specifically identified in the Works Program, within a reasonable period having regard to the Works Program.

- (b) The Project Company:
  - (i) [not used]

- 
- (ii) subject to paragraph (iii) and clause 6.5, must apply for, and diligently pursue the processing of the application in order to obtain by the Target DA Approval Date, the Project Company Development Approvals and Consents required for the Project;
  - (iii) is not required to obtain any Consents with respect to any subdivision required for the Project; and
  - (iv) must ensure that all applications for the Project Company Development Approval:
    - A. comply with, give effect to and satisfy the conditions and requirements of the applicable Law and all relevant and applicable planning instruments and controls;
    - B. are in accordance with the Project Company Proposals;
    - C. are prepared by the dates set out in schedule 12 (as updated in accordance with the Works Program);
    - D. are generally consistent with the plans and elevations which are Annexure L; and
    - E. are consistent with the proposed PPP As Built Health Facilities and the Works satisfying or exceeding the Specifications.
  - (c) The Project Company must submit to the Project Director for review drafts of Project Company Development Approval applications and other materials relevant to the applications in accordance with the Specifications and this clause 6.1.
  - (d) The Project Company must make available such further information as the Project Director may reasonably request relating to the Project Company Development Approval applications, in such form as the Project Director may reasonably request.
  - (e) The Project Director may within the time allowed in the Works Program review the draft Project Company Development Approval application documentation and give the Project Company comments, recommendations and representations regarding the draft Project Company Development Approval application documentation, provided that such comments shall be limited to matters impacting upon the compliance of the draft Project Company Development Approval application with the requirements of this deed.
  - (f) If, within the time allowed in the Works Program, the Project Director gives the Project Company comments, recommendations and representations in accordance with clause 6.1(e) regarding the draft Project Company Development Approval application documentation, the Project Company must amend the draft Project Company Development Approval application documentation to reflect the Project Director's comments, recommendations or representations and the draft Project Company Development Approval application documentation must be re-submitted in accordance with this clause 6.1. The Project Company must not submit any Project Company Development Approval application to a Relevant Authority or otherwise progress draft Project Company Development Approval application documentation unless and until it has received no comments from the Project



- Director in accordance with the time allowed in the Works Program and clause 6.1(e) in respect of submitted draft documentation and it has complied with its obligations under this clause 6.1(f).
- (g) The Project Company acknowledges that any participation by the Project Director or any other representatives of NSW Health or other stakeholders in the Development Approval application process is solely for the benefit of NSW Health, and the Project Director, any other representatives of NSW Health and other stakeholders, as the case may be, are not under any obligation to participate in the Project Company Development Approval process, and will not, in reviewing the draft Project Company Development Approval application documentation, assume any duty of care or responsibility to ascertain errors, omissions, defects or non-compliance with this deed.
- (h) The Project Company acknowledges that participation by the Project Director, or any other representatives of NSW Health or other stakeholders in the Project Company Development Approval process and/or review of any documentation by the Project Director in accordance with this deed and/or any comments, recommendations or representations made by the Project Director in accordance with this clause 6.1 are solely for the purpose of monitoring the performance of the Project Company, and:
- (i) the Project Company is solely responsible for ensuring that the Project Company Development Approval is obtained in accordance with the Specifications and the Project Company's obligations under this deed, and no action or inaction of the Project Director, or any other representatives of NSW Health or other stakeholders in the Project Company Development Approval process will be taken to constitute acceptance that the Project Company Development Approval, or compliance with it, will satisfy the Specifications; and
- (ii) except as expressly provided in this deed, no action or inaction of the Project Director, or any other representatives of NSW Health or other stakeholders in the Project Company Development Approval process under this clause 6.1 will entitle the Project Company to make any claim under this deed or in any way relieve, alter, limit or change the Project Company's obligations under the Project Documents.
- (i) If the Project Company and the Project Director are unable to agree on appropriate amendments to reflect the comments, recommendations or representations made to the Project Company by the Project Director in accordance with this clause 6.1, such dispute will be dealt with in accordance with clause 40.
- (j) NSW Health must provide all reasonable assistance to the Project Company to enable the Project Company to apply for and obtain the Project Company Development Approvals, but excluding:
- (i) the payment of or allowance of any money; or
- (ii) satisfaction of other conditions (other than conditions and those parts of conditions that can only be performed by the owner, NSW Health, a NSW Health Related Party or the State or other Relevant Authority, such as the transfer or dedication of land or conditions relating to the provision of Health Functions within the RNSH PPP Footprint).

- (k) Nothing in this clause 6.1 is to be taken to limit clause 12.

## 6.2 Other Consents

The Project Company must in a timely manner, obtain, or procure the obtaining of all other Consents, and the Project Company must perform its obligations, exercise its rights and carry out the Project so as not to cause a breach of the terms of any of the Consents in effect from time to time.

## 6.3 Copies of Approvals and Consents

The Project Company, upon receipt by it, must provide to the Project Director a copy of every Consent obtained in relation to the Project and any amendments to or notices relating to such Consents.

## 6.4 Conditions and Costs of Consents

- (a) The Project Company must comply with, carry out and fulfil all conditions and requirements imposed under or in connection with all Consents obtained in relation to the Project (including, for the avoidance of doubt NSW Health Development Approvals), including payment of relevant fees, contributions and levies, but excluding conditions and those parts of conditions which:
- (i) can only be performed by the owner, NSW Health, a NSW Health Related Party or the State (including a Minister of the NSW Government or a NSW Ministerial corporation) such as the transfer or dedication of land or conditions relating to the provision of Health Functions within the RNSH PPP Footprint; or
  - (ii) relate to the design and construction of any Health Facilities other than the PPP As Built Health Facilities; or
  - (iii) require the doing of something which is a matter allocated to NSW Health in the Applications Resources Schedule; or
  - (iv) are described in paragraph (b).
- (b) As between the parties, NSW Health must comply with, carry out and fulfil any condition of a Consent if, but only to the extent that, the condition requires something to be done which is for the purpose of any proposed development of or on land which as at the date of this deed is, or will be, located outside the RNSH PPP Footprint as at the Completion of Stage 4 and is not connected in any way with design, construction, commissioning of the Works or use of the PPP As-Built Health Facilities (whether or not also connected with the use of other Health Facilities).
- (c) Where a Relevant Authority provides, or indicates that it will provide, a Consent (other than a NSW Health Development Approval or NSW Health Development Approval Modification Approval) subject to certain conditions, the Project Company may contest the imposition of such conditions, but only if such contest:
- (i) is made in good faith by appropriate proceedings;

- (ii) does not involve any material risk to the delivery of the Project or the Health Functions in accordance with the Project Documents;
  - (iii) is made at no cost to NSW Health and does not expose NSW Health to any potential Loss or Claim;
  - (iv) is permitted by, and is conducted in accordance with, applicable Law; and
  - (v) is conducted by and in the name of the Project Company.
- (d) Where the Project Director gives written direction within 10 Business Days of receipt of an advice regarding a proposed condition to a Consent, to contest the imposition of that condition, the Project Company must contest the imposition of such condition, provided that:
- (i) NSW Health will provide the Project Company with reasonable assistance relating to the contest as may be requested by the Project Company; and
  - (ii) such direction will constitute a Compensation Event.
- (e) The Project Company must keep NSW Health informed of the progress and nature of any contest under this clause 6.4, and must consult in good faith with the Project Director regarding the conduct of any such contest.
- (f) Where a condition to a Consent necessitates a Contract Variation the Project Company must, subject to the provisions of this clause 6.4, implement the condition in accordance with clause 22.
- (g) Except as expressly provided in this clause 6.4, the Project Company must not (and will procure that any Project Company Related Party, does not) without the prior written consent of the Project Director apply for or agree to any change, relaxation or waiver of any Consent, or of any condition attached to it.

## 6.5 NSW Health Development Approval Health Facilities Modification

If the Project Company is of the opinion that a NSW Health Development Approval Health Facilities Modification is required in order to enable the Project to be carried out then:

- (a) the Project Company must by written notice to NSW Health advise NSW Health of:
  - (i) the need for the NSW Health Development Approval Health Facilities Modification and the reasons for it;
  - (ii) the details of the NSW Health Development Approval Health Facilities Modification relating to the Works; and
  - (iii) the proposed timetable for making applications for any NSW Health Development Approval Health Facilities Modification Approvals.
- (b) if NSW Health does not agree that a NSW Health Development Approval Health Facilities Modification is required in order to enable the Project to be carried out, then the matter may be referred to dispute resolution in accordance with clause 40.

- 
- (c) if the Parties agree, or it is determined, that a NSW Health Development Approval Health Facilities Modification is required in order to enable the Project to be carried out, then the Project Company must (at the cost of NSW Health) promptly prepare all necessary documentation relating to the Works to support the making of applications by NSW Health for the necessary NSW Health Development Approval Health Facilities Modification Approval and provide them to NSW Health.
  - (d) NSW Health must promptly prepare, review and finalise the necessary applications and supporting documentation for the necessary NSW Health Development Approval Health Facilities Modification Approval and:
    - (i) make an application for each NSW Health Development Approval Health Facilities Modification Approval;
    - (ii) consult with and keep informed the Project Company in respect of that application;
    - (iii) upon the determination of that application promptly inform the Project Company of the result of that determination;
    - (iv) if the application is refused, unless the parties have agreed otherwise, commence and prosecute any necessary appeals or reviews to obtain NSW Health Development Approval Health Facilities Modification Approval; and
    - (v) if a NSW Health Development Approval Health Facilities Modification Approval is granted, provide to the Project Company a copy of that NSW Health Development Approval Health Facilities Modification Approval.
- 

## **7. Subcontracts**

### **7.1 Subcontracting**

- (a) The Project Company must not subcontract the performance of the Works and/or the Support Services or any part of them except in accordance with this clause 7.
- (b) The Project Company is not relieved of any of its liabilities or obligations under this deed as a result of any subcontracting of the Works and/or the Support Services or approval of any Subcontractor, and the Project Company is at all times responsible for the performance of all Subcontractors.

### **7.2 Subcontract Requirements**

- (a) The Project Company must promptly provide to the Project Director a copy of each Material Subcontract entered into or proposed to be entered into involving any of the Works or the Support Services.
- (b) The Project Company must ensure that no Material Subcontractor (other than a Key Subcontractor) is engaged in connection with the Works or the Support Services without the Project Company and the relevant Material Subcontractor having delivered to the Project Director a duly executed Collateral Warranty.

- (c) The Project Company must ensure that no Key Subcontractor is engaged in connection with the Works or the Support Services without the Project Company and the relevant Key Subcontractor having delivered to the Project Director a duly executed Side Deed in respect of its Key Subcontract.

### 7.3 Subcontracting Obligations

The Project Company must:

- (a) comply with its obligations under and enforce the terms of any Subcontract to which it is a party;
- (b) ensure that the relevant Subcontractor complies with the obligations imposed on the Subcontractor under the Subcontract to which it is a party;
- (c) not later than the tenth day of each month provide to the Project Director:
- (i) a statutory declaration, signed by an authorised officer of the Project Company, confirming that all amounts payable under Subcontracts to which it is a party which fell due for payment in the month immediately preceding have been paid or otherwise discharged by the Project Company except for those amounts genuinely in dispute; and
  - (ii) details of each formal dispute with a Subcontractor arising in connection with the Works or the Support Services;
- (d) not without the Project Director's prior written consent permit any variation or amendment to, departure from, termination or assignment or replacement of:
- (i) a Key Subcontract; or
  - (ii) a Material Subcontract, where it may impact the rights of NSW Health or the ability of the Project Company to satisfy its obligations under the Project Documents,
- provided that the Project Director's consent will not be withheld in respect of a termination or assignment of a Key Subcontract or replacement of the Key Subcontractor if the majority (by value) of the Key Subcontractor's services are removed in respect of any Market Tested Services;
- (e) give the Project Director notice of the termination or material amendment of a Material Subcontract immediately upon the Project Company becoming aware of such termination or material amendment;
- (f) not without the Project Director's prior written consent, compromise or waive any claim it may have against a Material Subcontractor, where it may impact the rights of NSW Health or the ability of the Project Company to satisfy its obligations under the Project Documents;
- (g) not engage any new subcontractor, who would become a Material Subcontractor on such engagement, without NSW Health's prior written consent; and
- (h) obtain and ensure that NSW Health has the benefit of warranties and guarantees offered by Subcontractors and suppliers with respect to any part of the Works or any part of the Support Services.

**7.4 Ability to Perform Obligations**

The Project Company must ensure that each Subcontractor is reputable and has, or has access to, sufficient experience, expertise and ability to perform its obligations to the standards required by this deed.

**7.5 Insurance**

The Project Company must ensure that no Subcontractor in connection with the Works or the Support Services is engaged by it (either directly or indirectly) without the relevant Subcontractor:

- (a) having taken out workers compensation insurance; and
- (b) being insured for public liability insurance and professional indemnity insurance,

as required under schedule 14, to the extent, and for insured amounts, applicable to the relevant Works or Support Services to be performed by the Subcontractor.

**7.6 Agreed Form**

Unless otherwise agreed in writing by the Project Director, each Key Subcontract must be in an agreed form.

**7.7 Amendment and Termination**

The Project Company agrees that, no amendment to, departure from, termination or assignment or replacement of a Material Subcontract made without the written consent of the Project Director will be binding on NSW Health or affect or prejudice the rights of NSW Health against the Project Company under this deed, or under a Side Deed or a Collateral Warranty, or in any other way.

---

**8. Workforce****8.1 Employee Requirements**

- (a) The Project Company must ensure that each employee of the Project Company and each Subcontractor engaged in the provision of any of the Works or the Support Services must be appropriately qualified, skilled and experienced to perform their assigned tasks and must complete the training detailed in the Specifications from time to time.
- (b) Prior to, and as a condition of employment by the Project Company or any Subcontractor in relation to the Project, the Project Company must (and ensure that each Subcontractor does):
  - (i) during a Construction Phase, make an investigation of each prospective employee as required under the Facility Specification; and
  - (ii) from the Hard FM Start Date, make an investigation of each prospective employee,

who have been or will be working on a Construction Site or a Health Facility continuously for more than 20 days or intermittently for more than 20 days out of any 12 weeks.

This investigation shall include an investigation by the Project Company of the prospective employee's criminal history, medical and employment histories. The results of the investigation made by the Project Company or Subcontractor will be made available to the Project Director prior to an offer of employment being made to a prospective employee.

- (c) The Project Director may require the Project Company to deny employment to a prospective employee in connection with the Project if the background investigation reveals information indicating that that person would not be an appropriate employee at a Construction Site or a Health Facility. The Project Director may require the Project Company to undertake further investigations before confirming whether an offer of employment in connection with the Project may be made to the prospective employee. The Project Director will notify the Project Company of its decision within 20 Business Days of a request being made by the Project Company, or of further information being provided to the Project Director.
- (d) Subject to clause 8.1(e), for the purposes of this clause 8, employees of the Project Company shall include any person employed or engaged in any way in the provision of the Project, including Health Staff Members.
- (e) The obligations set out in clauses 8.1(b) and 8.1(c) shall not apply in respect of staff members in the NSCCAHS Division of the NSW Health Division who are directed by the Director-General of the NSW Department of Health to provide services to, and to be under the supervision, direction and management of, the Project Company in accordance with clause 2(b) of the Labour Services Agreement.
- (f) In the event of any inconsistency between the terms of this clause 8 and the terms of the Labour Services Agreement, the terms of the Labour Services Agreement will prevail unless the Project Director otherwise directs.

## **8.2 NSW Health Checks**

- (a) Notwithstanding the making of searches, enquiries, checks and completion of all forms by the Project Company pursuant to clause 8.1, the Project Director may carry out a police check in respect of each person notified by the Project Company to the Project Director pursuant to clause 8.1 and may, from time to time, carry out such other searches, enquiries and checks, including security checks, to ensure the Project Company's and each Subcontractor's compliance with this clause 8.
- (b) The Project Company must procure, and provide to the Project Director, the consent of each prospective employee of the Project Company or the Subcontractor to the making of the searches, enquiries and checks referred to in paragraph (a) above.
- (c) The Project Director may require that the Project Company or a Subcontractor discontinue employment of any person in connection with the Project if:
  - (i) the Project Director's searches, enquiries and checks reveal information indicating that that person does not comply with the requirements of this deed; or

- (ii) if the Project Director considers that that person is unsuitable or unqualified to perform the part of the Support Services or the Works assigned to that person.

### **8.3 Conduct of Staff**

- (a) Whilst engaged in the provision of the Works or Support Services on or at the Construction Sites or at a Health Facility, the Project Company must comply with the rules, regulations, policies, procedures, protocols and requirements relating to the conduct of staff as may be made and enforced by NSW Health from time to time and must ensure that its officers, employees, agents and Subcontractors do likewise.
- (b) The Project Company must give written notice to the Project Director and take or procure appropriate disciplinary action against any person employed by the Project Company or any Subcontractor who transgresses any such rules, regulations, policies, procedures, protocols or requirements.

### **8.4 Project Company's and Subcontractor's Employees**

Other than as expressly provided in this deed, the Project Company will be entirely responsible for the employment and conditions of service of the Project Company's employees and must procure that any Subcontractor is likewise responsible for its employees, and that the Subcontractor complies with the same obligations and requirements as required of the Project Company under this clause.

### **8.5 Labour Relations**

The Project Company must, and must procure that any Subcontractor must, subject to the requirements of the Labour Services Agreement:

- (a) establish, maintain and administer a human resources policy and an industrial relations policy for the Works and the Support Services so as to ensure the timely and economical completion of the Works and the Support Services; and
- (b) ensure that all persons employed or engaged in the Works and/or the Support Services are paid all amounts, receive such benefits and allowances and are employed subject to such conditions to which they may be or become entitled to as a result of their employment on the Works and/or the Support Services by virtue of any applicable Law.

### **8.6 Independent Contractors and Subcontractors**

- (a) The Project Company and all Subcontractors are independent contractors and nothing contained in this deed will be construed as constituting any relationship with NSW Health other than, with respect to the Project Company, that of principal and independent contractor, nor will it be construed as creating any relationship whatsoever between NSW Health and the Project Company's and Subcontractors' employees.
- (b) Neither the Project Company nor any Subcontractors, nor any of their employees, are or will be deemed, by virtue of this deed, or any subcontract, to be employees of NSW Health or the State.



- (c) The Project Company indemnifies (and must procure that any Subcontractor indemnifies the Project Company), and at all times holds NSW Health fully and effectively indemnified (and must procure that the Project Company is fully and effectively indemnified by each Subcontractor) against any and all Claims and Losses arising directly or indirectly out of or in connection with any claim that NSW Health is the employer of the Project Company's employees or any Subcontractor's employees.
- (d) Without limiting paragraphs (a), (b) or (c) above, the Project Company is responsible for, and must procure that any Subcontractor is responsible for:
- (i) remuneration and benefits, including superannuation contributions, annual leave, sick leave, long service leave, overtime and penalty rates and provision of accommodation and sustenance;
  - (ii) work care levies, group tax, payroll tax, fringe benefits tax, superannuation guarantee charges and other imposts or levies imposed by law; and
  - (iii) any payment upon termination of service,
- payable to or in respect of the Project Company's employees or contractors, or any Subcontractor's employees or contractors.
- (e) A reference to employees of the Project Company or a Key Subcontractor in this clause 8.6 does not include Health Staff Members.

## 8.7 Occupational health and safety obligations

In undertaking the Works and providing the Support Services, the Project Company must:

- (a) keep each of the Construction Sites and Health Facilities in a good and safe condition so that they do not present a risk to the health or safety of any person; and
- (b) ensure the safety of people from harm in providing the Works and the Support Services.

## 8.8 Principal contractor under OH&S Regulation

- (a) For the purposes of Section 210 of the *Occupational Health and Safety Regulation 2001* (NSW) (the "**OH&S Regulation**") NSW Health hereby:
- (i) appoints the Project Company as the 'principal contractor' for executing the construction work forming part of the Support Services and Works under this deed; and
  - (ii) authorises the Project Company to exercise such authority of NSW Health as is necessary to enable the Project Company to discharge the responsibilities imposed on a 'principal contractor' by Chapter 8 of the OH&S Regulation.

- (b) Without limiting the Project Company's obligations under this deed, the Project Company must comply with the duties of a 'principal contractor' under the OH&S Regulation.
- (c) If the Project Company fails to comply with the duties of a 'principal contractor' referred to in this clause 8.8, NSW Health may have the Project Company's obligations carried out by NSW Health or by others, and the cost incurred by NSW Health in having those duties carried out will be a debt due from the Project Company, payable on demand.
- (d) Without limiting the obligations of the Project Company under the Support Services Specifications with respect to occupational health, safety and rehabilitation, the Project Company must, if requested by the Project Director, provide the Project Director with a copy of the site specific occupational health and safety management plan, the relevant Subcontractors' safe work method statements and other registers, records and documents that the Project Company is required to prepare and maintain in connection with its obligations as a 'principal contractor' under the OH&S Regulation.
- (e) The Project Company will remain the 'principal contractor' under the OH&S Regulation, regardless of whether it subcontracts the performance of the Works and/or the Support Services, or any part of them, to any person.

---

## 9. Financing

### 9.1 Financing Agreements

The Project Company must not, without the prior written consent of the Project Director:

- (a) enter into any financing agreements (including in respect of present or contingent indebtedness, deferred purchase or leasing arrangements or similar obligations, but excluding indebtedness incurred in the ordinary course of business) other than the Financing Agreements or financing agreements required for implementing an Assumed Refinancing; or
- (b) make any material amendment to or, waive, vary or change any term or provision of the Financing Agreements if such waiver, variation or change is of a material nature unless it is made for the purpose of implementing an Assumed Refinancing.

### 9.2 Copies of Financing Agreements

Without limiting clause 9.1, the Project Company must deliver to the Project Director a certified complete copy of each financing agreement entered into by the Project Company and each amendment, or waiver of any term or provision of the Financing Agreements, in each case within 10 Business Days of its execution or creation.

### 9.3 Refinancing

- (a) The Project Company must in respect of any Refinancing (other than an Assumed Refinancing):
  - (i) not effect any Refinancing without the prior written consent of the Project Director, provided that the Project Director must not

unreasonably withhold or delay its consent to a proposed Refinancing if the Project Director is satisfied that the purpose of the Refinancing is:

- A. to cure an actual or potential event of default under the Financing Agreements;
- B. to enable the Security Trustee to exercise its rights under the Financier's Tripartite Deed; or
- C. to enable the Financiers to waive a cash lock up or funding restrictions under the Financing Agreements in order to make payments as they fall due to NSW Health or the Key Subcontractors,

provided that to the extent that additional funding is raised as a consequence of the Refinancing pursuant to clause 9.3(a) (i), (A), (B) or (C), that amount must not be taken into account in any determination of the Senior Debt under Schedule 21; and

- (ii) submit to the Project Director a report in respect of any proposed Refinancing (a "**Refinancing Report**")
- (b) A Refinancing Report must include:
- (i) full details of the proposed Refinancing and the reasons why the Project Company wishes to effect it;
  - (ii) any term sheet which will form the basis for any financing documentation or amendment to the Financing Agreements or other documents which are relevant to the proposed Refinancing;
  - (iii) the impact that the proposed Refinancing will or may have on:
    - A. liabilities of NSW Health (whether actual or contingent) under the Project Documents;
    - B. the Licence Payment Amounts;
  - (iv) information on the actual cash flow (including actual revenues and costs) of the Project Company from the date of Financial Close to the date of the Refinancing Report (and estimated to the proposed date for the Refinancing), set out in the same format as the Base Case;
  - (v) details of the actual timing and amounts of investment in and Distributions to Equity Investors from the date of Financial Close to the date of the Refinancing Report and estimated to the proposed date for the Refinancing;
  - (vi) a pre-Refinancing financial model (including actual cash flows referred to in clauses 9.3(b)(iv) and 9.3(b)(v) above) with projections for the cash flow of the Project Company from the estimated date of the Refinancing to the end of the Term, including projected Distributions before taking the Refinancing into account;

- (vii) a post-Refinancing financial model (including actual cash flows per clauses 9.3(b)(iv) and 9.3(b)(v) above) with projections for the cash flow of the Project Company from the estimated date of Refinancing to the end of the Term, including projected Distributions after taking the Refinancing into account;
  - (viii) a calculation of the Refinancing Gain; and
  - (ix) such other information as requested by the Project Director including in relation to the assumptions for the projections in the pre-Refinancing financial model and post-Refinancing financial model required under clauses 9.3(b)(vi) and 9.3(b)(vii) above.
- (c) The Project Company must, in respect of an Assumed Refinancing, submit a written notice to NSW Health notifying it of the Project Company's intention to undertake an Assumed Refinancing not less than 20 Business Days prior to the proposed Assumed Refinancing, which notice must set out a confirmation that the Project Company considers the Refinancing is an Assumed Refinancing (the "Refinancing Notice"). If NSW Health requests any reasonable details in respect of a proposed Assumed Refinancing within 10 Business Days of receipt of the Refinancing Notice, the Project Company must provide those details within 5 Business Days of NSW Health's request.
- (d) The Project Company may implement an Assumed Refinancing without the need to obtain NSW Health's prior consent.
- (e) Without limiting the Project Company's obligations under clause 9.2, the Project Company must, within 5 Business Days of execution of any document in connection with a Refinancing, deliver to the Project Director a certified true copy of each such document together with a printed copy of the revised Base Case and one electronic copy of the revised Base Case (complete with all material formulae and data) in accordance with clause 29.10 and full details of any recalculation of the Licence Payment Amounts.

#### **9.4 Payment to NSW Health of Refinancing Gain**

- (a) The Project Company must (or must procure that the Equity Investors) in respect of any Refinancing (other than an Assumed Refinancing) pay or account to NSW Health for NSW Health Refinancing Share;
- (b) NSW Health may elect to receive NSW Health Refinancing Share as:
  - (i) a single payment made on or about the date of the Refinancing;
  - (ii) a reduction in the Monthly Payment over some of the remaining period of the Term; or
  - (iii) a combination of (i) and (ii) above.
- (c) If NSW Health elects to receive NSW Health Refinancing Share under clause 9.4(b)(i) and the payment cannot be fully satisfied out of the first Distribution after the Refinancing, payment of the balance will be made by reductions in the Monthly Payment in accordance with clauses 9.4(d) to 9.4(f) below.

- (d) To the extent that NSW Health elects to receive NSW Health Refinancing Share over all or part of the remaining period of the Term, as a reduction of the Monthly Payment, or will receive it in accordance with clause 9.4(c), the reduction will be spread over the same term over which the Equity Investors receive their share of the Refinancing Gain.
- (e) Any reduction in Monthly Payment shall be calculated as the quarterly reduction in the Monthly Payment which when inserted into the Refinancing Base Case (after adjusting for the treatment of NSW Health Refinancing Share not being paid as a single amount) allowing for the taxation effects of the changes, produces an equity return in the post-refinancing model equal to the Refinancing Base Case Equity Return.
- (f) NSW Health Refinancing Share, whether in the form of a lump-sum payment or a reduction in Monthly Payment, will not be contingent on the performance by the Project Company of its obligations under this deed.

## **PART C – DESIGN AND CONSTRUCTION OBLIGATIONS**

### **10. Design and Works Programs**

#### **10.1 The Project Company's Detailed Design obligations**

- (a) The Project Company must develop, complete and submit the Detailed Design for each of the Stages:
  - (i) in accordance with the Facility Specification;
  - (ii) in accordance with all applicable Consents and Law;
  - (iii) in accordance with the Partnering Protocol, each Interface Protocol and the Project Company Proposals;
  - (iv) by the dates specified in Part A of schedule 12 (as updated in accordance with the Works Program) and in accordance with the Detailed Design Program;
  - (v) in accordance with clause 10.4;
  - (vi) without limitation to any other obligation of the Project Company, in accordance with Good Industry Practice, and in compliance with the applicable Quality Assurance (Works) Plan;
  - (vii) so that the Support Services are able to be provided in accordance with or so exceed the requirements of the Support Services Specifications;
  - (viii) so that the Support Services are able to be provided in accordance with all applicable Consents and Law; and
  - (ix) so that the Stage (as constructed) is, and will remain at all relevant times during the Term, Fit for Intended Purpose.
- (b) Where a requirement set out in the Facility Specification is not nominated as being mandatory, such requirement is a minimum requirement, which the Project

Company must meet or better. If the Project Company seeks to better a minimum requirement it must identify, with the documentation submitted in accordance with clause 10.4 in respect of that requirement, the relevant requirement and details of how it has been bettered, and how such betterment will provide value for money to NSW Health. Notwithstanding any other provision of this deed, whether an item better the requirements of the Facility Specification and provides value for money, will be determined at the sole discretion of the Project Director.

- (c) The Project Company acknowledges and agrees that to the extent to which any:
- (i) amendment to the Detailed Design of a PPP As-Built Health Facility;
  - (ii) variation to the Works in respect of a PPP As-Built Health Facility; or
  - (iii) variation to a PPP As-Built Health Facility (as constructed),
- is required by the Project Company to enable the implementation of automatic guided vehicles as a means of delivering the Support Services, the Project Company must carry out such amendment or variation at its own cost.
- (d) NSW Health acknowledges and agrees that the Project Company is entitled to:
- (i) use automated guided vehicles within the Hospital at its election and discretion at all times throughout the Term; and
  - (ii) develop the Detailed Design and carry out the Works so as to enable the use of the automated guided vehicles as a means of delivering the Support Services,
- (e) The Project Company must incorporate requirements relating to the use of automated guided vehicles in the Detailed Design for the relevant PPP As-Built Health Facilities and in doing so must use Good Industry Practice.

## **10.2 The Project Company's Works Program obligations**

The Project Company must develop and complete the Works Program for each Stage:

- (a) in accordance with the Project Company Proposals;
- (b) in accordance with the initial Works Program which appears as Annexure F;
- (c) in accordance with the Commissioning and Decanting Plan;
- (d) by the date and in accordance with the requirements set out in part B of schedule 12 (as updated in accordance with the Works Program);
- (e) in accordance with clause 10.4;
- (f) without limitation to any other obligation of the Project Company, in accordance with Good Industry Practice, and in compliance with the applicable Quality Assurance (Works) Plan and Quality Assurance (Services) Plan;
- (g) so that the Stage and the Support Services are in accordance with or exceed the requirement of the Specifications;

- (h) so that the Stage and the Works comply with all applicable Consents and Law;
- (i) so that the Stage (as constructed) is, and will remain at all relevant times during the Term, Fit for Intended Purpose; and
- (j) so that the numbers and locations of the Car Park Spaces are provided for use in accordance with and at the times indicated in the plans contained in the Car Park Licence Plan.

### **10.3 The Project Company's Management Plans obligations**

The Project Company must develop and complete the Management Plans for each Stage:

- (a) in accordance with the Project Company Proposals;
- (b) by the date set out in Part D of schedule 12 (as updated in accordance with the Works Program);
- (c) in accordance with clause 10.4 and the requirements set out in the Specifications;
- (d) with the appropriate level of professional care and in compliance with the applicable Quality Assurance (Works) Plan and Quality Assurance (Services) Plan; and
- (e) so that the Works comply with all applicable Consents and Law.

### **10.4 Preparation of Design and Works Documentation**

- (a) The Project Company must, submit to the Project Director for review by the Project Director the draft Detailed Design, Detailed Design Program, Management Plans and Works Program as and when required in accordance with schedule 12 (as updated in accordance with the Works Program), each in hard copy and manipulable electronic format.
- (b) The draft Detailed Design documentation submitted in accordance with clause 10.4(a) must contain the following information:
  - (i) identification of the Stage and Construction Site to which it relates;
  - (ii) identification of the part of the Detailed Design Program to which it relates;
  - (iii) any details and information required in accordance with clause 10.4(d);
  - (iv) a design development report demonstrating that issues of planning, design, materials selection, buildability and building services have been coordinated and integrated into the draft Detailed Designs,
  - (v) all relevant Design Data;
  - (vi) information relating to the changes to relevant documents and drawings from those previously submitted in accordance with this clause 10.4; and
  - (vii) any other information required by the Specifications.

- 
- (c) The draft Management Plans, Detailed Design Program and Works Program documentation submitted in accordance with clause 10.4(a) must contain the following information:
- (i) identification of the Stage and Construction Site to which it relates;
  - (ii) in the case of a draft Management Plan, the specific Management Plan to which it relates;
  - (iii) in the case of a draft Detailed Design Program, the specific Detailed Design documentation to which it relates;
  - (iv) in the case of a draft Works Program, a critical path time line, including milestones and interdependencies; and
  - (v) any other information required by the Specifications.
- (d) If required by the Project Director, the Project Company must make available at the cost and expense of the Project Company, such further information as the Project Director may reasonably request relating to the development of the Detailed Design, Detailed Design Program, Management Plans and/or Works Program, in such form as the Project Director may reasonably request.
- (e) Subject to the draft documentation complying with paragraph (b) or paragraph (c), whichever is applicable, and the Project Company having complied with any reasonable requests of the Project Director under paragraph (d), within 20 Business Days after receiving the draft Detailed Design, Detailed Design Program, Management Plans, Works Program documentation and/or any additional information requested by the Project Director under clause 10.4(d), the Project Director may review the draft Detailed Design, Detailed Design Program, Management Plans and/or Works Program documentation and give the Project Company comments, recommendations and representations regarding the draft Detailed Design, Detailed Design Program, Management Plans and/or Works Program documentation, provided that such comments shall be limited to matters impacting upon the compliance of the draft Detailed Design, Detailed Design Program, Management Plans and/or Works Program documentation with the requirements of this deed. If no requests for further information are received by the Project Company in accordance with clause 10.4(d) during the 20 Business Day period referred to in this clause 10.4(e), the 20 Business Day period will be taken to have commenced upon receipt by the Project Director of the draft Detailed Design, Detailed Design Program, Management Plans and/or Works Program documentation.
- (f) If the Project Director gives the Project Company comments, recommendations and representations regarding the failure of the draft Detailed Design, Detailed Design Program, Management Plans and/or Works Program documentation to comply with the requirements of this deed, the Project Company must amend the draft Detailed Design, Detailed Design Program, Management Plans and/or Works Program documentation to reflect the Project Director's comments, recommendations or representations and the draft Detailed Design, Detailed Design Program, Management Plans and/or Works Program documentation must be re-submitted in accordance with this clause 10.4.



- (g) The Project Company acknowledges that any participation by the Project Director or any other representatives of NSW Health or other stakeholders in the design and works development process is solely for the benefit of NSW Health, and the Project Director, any other representatives of NSW Health and other stakeholders are not under any obligation to participate in the design and works development process, and will not, in reviewing draft Detailed Design, Detailed Design Program, Management Plans and Works Program documentation, assume any duty of care or responsibility to ascertain errors, omissions, defects or non-compliance with this deed.
- (h) The Project Company acknowledges that participation by the Project Director or any other representatives of NSW Health or other stakeholders in the design and works development process and/or review of any documentation by the Project Director in accordance with this deed and/or any comments, recommendations or representations made by the Project Director in accordance with this clause 10.4 are solely for the purpose of monitoring the performance of the Project Company, and:
- (i) the Project Company is solely responsible for ensuring that the design and construction and/or refurbishment of each Stage complies with the Specifications and the Project Company's obligations under this deed, and no action or inaction of the Project Director or any other representatives of NSW Health or other stakeholders in the design and works development process will be taken to constitute acceptance that the Detailed Design, Detailed Design Program, Management Plans and Works Program or any part of them are in compliance with the Specifications; and
  - (ii) no action or inaction of the Project Director or any other representatives of NSW Health or other stakeholders in the design and works development process under this clause 10.4 will entitle the Project Company to make any claim under this deed or in anyway relieve, alter, limit or change the Project Company's obligations under the Project Documents.
- (i) If the Project Company and the Project Director are unable to agree to appropriate amendments to reflect the comments, recommendations or representations made to the Project Company by the Project Director in accordance with this deed, such dispute will be dealt with in accordance with clause 4.6(h) and/or clause 40.

## 10.5 Proprietary Materials

- (a) The Project Company represents and warrants that in respect of the PPP As-Built Health Facilities:
- (i) neither the development nor use for or in relation to the Project of any Proprietary Material (or any component or any modification, adaptation or derivative of any Proprietary Material) will infringe any Intellectual Property Rights or other rights of any person or otherwise contravene any Law or give rise to any liability to make royalty or other payments to any person;
  - (ii) there is not, and the Project Company must not create or allow, any Security Interest over any Intellectual Property Rights in any Proprietary Material (or any component or any modification, adaptation or derivative

- of any Proprietary Material) that prevents the Proprietary Material from being used in accordance with the licence granted under clause 10.5(b);
- (iii) it holds all rights and interests (including all Intellectual Property Rights) in, or has obtained all necessary licences, consents and waivers relating to, any Proprietary Materials to be licensed to NSW Health under clause 10.5(b) and is not, and will not be, prevented from so licensing these rights and interests;
  - (iv) it has the right to sub-license to NSW Health, on the terms of clause 10.5(b), any Proprietary Material the Intellectual Property Rights in which are owned by a third party; and
  - (v) there has not, and will not be, any assignments, licences, options or other dealings with the Intellectual Property Rights in the Proprietary Materials licensed to NSW Health under the licence granted under clause 10.5(b), in a way that conflicts with or derogates from, or would conflict with or derogate from, these rights.
- (b) The Project Company gives to NSW Health an irrevocable, perpetual, fully paid-up royalty free, non-exclusive licence to use, anywhere in the world, any Proprietary Materials for the purposes of the Project or for any other project involving the PPP As-Built Health Facilities other than any Proprietary Materials for an Existing Health Facility upon which Works are carried out.
- (c) The licence granted under clause 10.5(b):
- (i) includes a licence of all the Intellectual Property Rights in the Proprietary Materials, including rights to reproduce, distribute, publish, perform, communicate to the public, adapt and otherwise freely exploit the Proprietary Materials for the purposes referred to in clause 10.5(b);
  - (ii) includes the right to sub-license use of any Proprietary Materials to any person for the purposes referred to in clause 10.5(b); and
  - (iii) will survive fundamental breach, repudiation, rescission, frustration, suspension, discharge, termination or expiration of this deed.
- (d) The Project Company may register or patent any registrable or patentable Intellectual Property Right which it:
- (i) develops;
  - (ii) discovers; or
  - (iii) first reduces to practice,
- in respect of the Project, but in doing so, must not conflict with or derogate from the licence granted under clause 10.5(b).
- (e) NSW Health acknowledges that, except as provided for under this clause 10.5, the Project Company and applicable third parties retain ownership of the Intellectual Property Rights and Moral Rights in all Proprietary Materials developed by the Project Company or those third parties in connection with the Project.

- (f) The Project Company will be responsible for, and will release and indemnify each of NSW Health, its employees and agents, and any sub-licensees permitted under the licence granted under clause 10.5(b), on demand, from and against all liability for:
- (i) any Claims brought by any third party; and
  - (ii) any other Loss,
- which may arise out of, or in consequence of, an actual, potential or alleged breach of a representation or warranty given under clause 10.5(a). The indemnity in this clause 10.5(f) (and the related provisions in clauses 10.5(g) and 10.5(h)) will survive fundamental breach, repudiation, rescission, frustration, suspension, discharge, termination or expiration of this deed.
- (g) If there is, or is likely to be, a claim of the type described in clause 10.5(f), the Project Company must, at its expense, use its best endeavours to:
- (i) modify or replace the Proprietary Materials or the aspect of the PPP As-Built Health Facility that is subject of the Claim so that the infringement (or alleged infringement) is removed; and
  - (ii) if the modification or replacement under sub-clause (i) cannot be achieved, promptly procure the right for NSW Health to continue to use the Proprietary Materials or the aspect of the PPP As-Built Health Facility that is subject of the Claim.
- (h) Without limiting clause 10.5(g), where NSW Health wishes to contest a claim of the type described in clause 10.5(f):
- (i) NSW Health will give notice of the relevant claim as soon as reasonably practicable setting out full particulars of the claim;
  - (ii) NSW Health may either:
    - A. require that the Project Company, at its own expense and with the assistance and co-operation of NSW Health, have the conduct of the claim, including its compromise or settlement; or
    - B. at the Project Company's expense and with the assistance and co-operation of the Project Company, have the conduct of the claim, including its compromise or settlement;
  - (iii) if NSW Health wishes to have conduct of the claim, the Project Company will give reasonable security to NSW Health for any cost or liability arising out of the conduct of the claim by NSW Health; and
  - (iv) if NSW Health wishes the Project Company to have conduct of the claim, the Project Company must not enter into any compromise or settlement of the claim without the prior written consent of NSW Health.
- (i) Notwithstanding anything to the contrary in this clause 10.5, the liabilities, obligations and responsibilities of the Project Company under this clause 10.5 do not include liabilities, obligations or responsibilities for any infringement of Moral

Rights or Intellectual Property Rights with respect to any Health Facility other than a PPP As-Built Health Facility unless that infringement arises from a breach of this deed by the Project Company or any Project Company Related Party.

- (j) NSW Health must, without limiting clause 2.4, use reasonable endeavours to grant or procure the grant to the Project Company of a licence to use the as-built versions of the Building No 53 (Douglas Building) drawings that are contained in the Information Documents for the purposes of providing the Works and the Support Services.

## **10.6 Car Parking and Retail Fit Out**

The Project Company must:

- (a) obtain from the Counterparties all of their requirements relating to design and construction of the New Multi-Deck Car Park Facility, the Community Health Car Park Facility and the Retail Precincts (and the Health Facilities in which the Retail Precincts are located);
- (b) permit the Counterparties to monitor and review the Project Company's design, construction and commissioning of the New Multi-Deck Car Park Facility, the Community Health Car Park Facility, the Retail Precincts (and the Health Facilities in which the Retail Precincts are located) including during:
  - (i) design development;
  - (ii) preparation of the Operations Manual;
  - (iii) preparation of the Commissioning and Decanting Plan; and
  - (iv) Commissioning,
 carried out by the Project Company in accordance with the Project Deed, and adequately address comments and suggestions of the Counterparties in respect of that design, construction and commissioning;
- (c) provide to the Counterparties for their review and comment, any document (including designs, specifications, plans, drawings, testing plans and other technical information) developed by NSW Health or the Project Company in connection with the New Multi-Deck Car Park Facility, the Community Health Car Park Facility, the Retail Precincts (and the Health Facilities in which the Retail Precincts are located); and
- (d) as reasonably requested by NSW Health or the Counterparties, meet with NSW Health or the Counterparties, as the case may be, to discuss any issues arising from the Project which relate to the Car Park Facilities or Retail Precincts.

---

## **11. Health Facilities Construction**

### **11.1 R&E Facility**

- (a) NSW Health must:

- (i) provide to the Project Company, in a timely manner, a copy of the R&E Facility Construction Contract and all variations, amendments, design documents and notices under the R&E Facility Construction Contract which are relevant to the provision of the Support Services;
- (ii) use its best endeavours to procure the completion of the R&E Facility in accordance with the terms of the R&E Facility Construction Contract, all applicable Laws and all relevant Consents;
- (iii) ensure that the Project Company is entitled to accompany NSW Health to undertake completion inspections that NSW Health is entitled to make on the works prior to their Completion (as defined in the R&E Facility Construction Contract);
- (iv) procure the provision to the Project Company as and when received by NSW Health of all relevant operating and maintenance manuals, licences, access codes, as-built drawings or work-as-executed drawings and all other documents which are reasonably required to enable the Project Company to carry out the Works and the Support Services at the R&E Facility;
- (v) procure that the Project Company and its officers, employees, agents, consultants and Subcontractors (as appropriate) are given such training as NSW Health is entitled to receive under the R&E Facility Construction Contract in respect of the plant, equipment, machinery and facilities at the R&E Facility; and
- (vi) without limiting clause 2.4, use reasonable endeavours to grant or procure the grant to the Project Company of a license to use the as-built versions of the R&E Facility drawings that are contained in the Information Documents for the purposes of providing the Works and the Support Services,

to the extent, and on such terms, provided for or permitted under the terms of the R&E Facility Construction Contract.

- (b) If NSW Health becomes aware of any matter which will, or is likely to, give rise to a delay or acceleration in carrying out the works comprising the R&E Facility, NSW Health must give the Project Company a notice setting out detailed particulars of the delay or acceleration as soon as reasonably practicable.
- (c) Any delay of the carrying out of the works comprising the R&E Facility will not give rise to any compensation or adjustment to the relevant Monthly Payment.
- (d) The payment of the relevant Monthly Payment will be accelerated or delayed (as appropriate) for a period commensurate with the relevant delay or acceleration in carrying out the R&E Facility Works.
- (e) NSW Health must notify the Project Company when the works in respect of the R&E Facility are complete and comply with the requirements of the R&E Facility Construction Contract.
- (f) The Project Company must:

- (i) accompany NSW Health on the inspections referred to in clause 11.11(a)(iii);
- (ii) carry out all other inspections, and provide all information and confirmations, in respect of the R&E Facility as required by the Specifications;
- (iii) not hinder, prevent or delay the R&E Facility construction contractor in completing works associated with the R&E Facility; and
- (iv) by the date specified in Schedule 12 (as updated in accordance with the Works Program), develop an Interface Protocol with the R&E Facility construction contractor in relation to the interface between the R&E Facility works and the Project.

## **11.2 The Project Company's obligation to construct**

The Project Company must carry out all of the Works:

- (a) by the dates specified in the Works Program;
- (b) in accordance with the Specifications and this deed;
- (c) in accordance with the Project Company Proposals;
- (d) in accordance with Good Industry Practice, and using good quality new and undamaged materials and with a level of skill, care and due diligence reasonably expected of the engineering and construction profession for facilities in the nature of the Stage;
- (e) so that the Works do not cause an Health Functions Disruption, damage the Construction Site, Adjoining Property or Existing Infrastructure;
- (f) so that the Support Services are able to be provided in accordance with the Support Services Specifications and all applicable Consents and Law;
- (g) so that the Stages (including as constructed) comply with all applicable Consents and Law;
- (h) so that the Stages (as constructed) are, and will remain at all relevant times during the Term, Fit for Intended Purpose; and
- (i) in accordance with:
  - (i) the Detailed Design;
  - (ii) the Management Plans;
  - (iii) the Quality Assurance (Works) Plan;
  - (iv) all applicable Law; and
  - (v) without limiting the foregoing, the Building Code.

### 11.3 Works Program Amendments

- (a) The Project Company must update the Works Program:
- (i) upon finalising the Detailed Design of each Stage; and
  - (ii) during the Construction Phase for each Stage, monthly to take account of changes to the program and delays, including delays for which relief has been given under this deed, provided that no alteration, addition or modification to a Works Program shall adjust a Target Completion Date unless such adjustment has been agreed or determined in accordance with clauses 20, 21 or 22.
- (b) The Project Company must promptly submit the updated Works Program to the Project Director as it is further amended in accordance with this clause 11.3, and in the case of amendments made in accordance with clause 11.3(a)(ii), the updated Works Program must be submitted at least 7 Business Days prior to the end of each month.
- (c) Without limiting the rights NSW Health may have, if the Project Director reasonably considers that activities undertaken in compliance with the updated portion of the Works Program may cause a Health Functions Disruption or change the obligations of NSW Health or a NSW Health Related Party, the Project Director may within 5 Business Days of receipt of the updated Works Program by written notice direct the Project Company to further amend the updated portions of the Works Program specifying:
- (i) the reasons why such amendments are required; and
  - (ii) such reasonable time within which such amendment must occur,
- and the Project Company must:
- (iii) further amend the Works Program as directed by the Project Director; and
  - (iv) submit the further developed, updated or amended Works Program to the Project Director for review in accordance with this clause 11.3 within the time specified in the Project Director's notice.
- (d) If so required in writing by the Project Director, the Project Company, must meet and consult with relevant stakeholders in relation to amendments to the Works Program, after which the Project Director may, under clause 11.3(c), request that the Project Company make further amendments to the updated portion of the Works Program.
- (e) The Project Company must not make any alteration, addition or modification to the Works Program other than in accordance with this clause 11.3 and clause 22.
- (f) The Project Company must update the Site Access Schedule at the same time and in the same manner as the Works Program is updated in accordance with clauses 11.3(a) to 11.3(e). The updated Site Access Schedule must reflect the Site Access Dates which are consistent with the site access required for the Works shown in the approved Works Program but no Site Access Date can be brought forward without

the express written approval of the Project Director, which may be withheld at the discretion of the Project Director.

- (g) Notwithstanding the provisions of this clause 11.3, the Project Company acknowledges that, at any time during the Construction Phase, the Project Director may direct rescheduling of any of the Works set out in the Works Program and any of the Site Access Dates set out in the Site Access Schedule:
  - (i) in accordance with the Specifications; or
  - (ii) where the Project Director, in his discretion, determines that carrying out the Works in accordance with the Works Program will disrupt or may disrupt the Health Functions.
- (h) Each of the Project Company and NSW Health undertakes to comply with the provisions of the Partnering Protocol.

#### **11.4 Commissioning and Decanting Plan**

- (a) The Project Company must develop and complete a Commissioning and Decanting Plan for each Stage:
  - (i) by the date set out in part F of schedule 12 (as updated in accordance with the Works Program);
  - (ii) based on the form of Commissioning and Decanting Plan which appears as Annexure G;
  - (iii) in accordance with the Quality Assurance (Works) Plan and the other requirements set out in the Specifications;
  - (iv) so that the Stage and the Health Facilities comprised in the Stage are in compliance with the Specifications;
  - (v) so that Stage and the PPP As-Built Health Facilities comprised in the Stage comply with all applicable Consents and Law; and
  - (vi) so as to ensure that those parts of the PPP As-Built Health Facilities comprised by the Stage will be, and will remain at all relevant times during the Term, Fit for Intended Purpose.
- (b) The Project Company acknowledges and agrees that:
  - (i) the Commissioning and Decanting Plan is intended to provide a detailed description of how the Project Company intends to comply with its obligation to ensure that the Health Facilities comply with the Specifications and this deed;
  - (ii) the Commissioning and Decanting Plan will provide for training, demonstrations, testing education, support and familiarisation of and with relevant Health Facilities for the benefit of relevant NSW Health Staff, in accordance with the Specifications;



- 
- (iii) the Commissioning and Decanting Plan will require ongoing development, amendment and updating throughout the Construction Phase to take into account:
- A. Changes in Law;
  - B. changes to the manner in which any Health Facility is to be used or the manner in which the Health Functions are to be provided;
  - C. deficiencies in or omissions from the Commissioning and Decanting Plan;
  - D. changes in Good Industry Practice; and
  - E. Contract Variations.
- (c) The Project Company must:
- (i) continue to develop and promptly amend or update the Commissioning and Decanting Plan to take into account the occurrence of the events and circumstances referred to in clause 11.4(b)(iii); and
  - (ii) promptly submit the Commissioning and Decanting Plan to the Project Director and Independent Certifier as it is further developed, amended or replaced for review in accordance with this clause 11.4.
- (d) Without limiting any other rights NSW Health may have, if the Project Director reasonably considers that:
- (i) the Commissioning and Decanting Plan has ceased to comply with the requirements of this deed;
  - (ii) the Commissioning and Decanting Plan has caused or is likely to cause an Health Functions Disruption; or
  - (iii) the Project Company has not further developed, updated or amended the Commissioning and Decanting Plan in accordance with the requirements of clause 11.4(c) above,
- the Project Director may by written notice direct the Project Company to further develop, update or amend the Commissioning and Decanting Plan specifying:
- (iv) the reasons why such development, updating or amending is required; and
  - (v) such reasonable time within which such development, updating or amending must occur,
- and the Project Company must:
- (vi) further develop, update or amend the Commissioning and Decanting Plan as directed by the Project Director in order to comply with the requirements of this deed; and

- 
- (vii) submit the further developed, updated or amended Commissioning and Decanting Plan to the Project Director for review in accordance with this clause 11.4 within the time specified in the Project Director's notice.
- (e) The Project Company must submit to the Project Director and the Independent Certifier for their review drafts of the Commissioning and Decanting Plan in accordance with the Specifications and this clause 11.4.
- (f) The draft Commissioning and Decanting Plan documentation submitted in accordance with this clause 11.4 must identify the Stage, Stages or parts of a Stage, (as well as Health Facility, Health Facilities or parts of the Hospital) to which it relates and contain all technical data in hard copy and in manipulable electronic format in respect of the Commissioning of the relevant Stage.
- (g) If required by the Project Director, the Project Company must make available such further information as the Project Director may reasonably request relating to the development of a Commissioning and Decanting Plan, in such form as the Project Director may reasonably require.
- (h) Subject to the draft Commissioning and Decanting Plan documentation complying with clause 11.4(f), and the Project Company having complied with any reasonable requests of the Project Director under clause 11.4(g), within 10 Business Days after receiving the draft Commissioning and Decanting Plan documentation and/or any additional information requested by the Project Director under clause 11.4(g), the Project Director may review the draft Commissioning and Decanting Plan documentation and give the Project Company comments, recommendations and representations regarding the draft Commissioning and Decanting Plan documentation, provided that such comments shall be limited to matters impacting upon the compliance of the draft Commissioning and Decanting Plan documentation with the requirements of this deed. If no requests for further information are received by the Project Company in accordance with clause 11.4(g) during the 10 Business Day period referred to in this clause 11.4(h), the 10 Business Day period will be taken to have commenced upon receipt by the Project Director of the draft Commissioning and Decanting Plan documentation.
- (i) If the Project Director gives the Project Company comments, recommendations and representations regarding the draft Commissioning and Decanting Plan documentation under clause 11.4(h), the Project Company must amend the draft Commissioning and Decanting Plan documentation to reflect the Project Director's comments, recommendations or representations and the draft Commissioning and Decanting Plan documentation must be re-submitted in accordance with this clause 11.4. Each relevant part of the draft Commissioning and Decanting Plan documentation will not be considered final unless and until the Project Company has received no comments from the Project Director in accordance with clause 11.4(h) in respect of draft materials submitted to the Project Director and/or it has complied with its obligations under this clause 11.4(i).
- (j) The Project Company acknowledges that any participation by the Project Director or any other representatives of NSW Health or other stakeholders in the Commissioning and Decanting Plan development process is solely for the benefit of NSW Health, and the Project Director, any other representatives of NSW Health and other stakeholders are not under any obligation to participate in the Commissioning and Decanting Plan development process, and will not, in reviewing the draft Commissioning and Decanting Plan documentation, assume any

duty of care or responsibility to ascertain errors, omissions, defects or non-compliance with this deed.

- (k) The Project Company acknowledges that participation by the Project Director, or any other representatives of NSW Health or other stakeholders in the Commissioning and Decanting Plan development process and/or review of any documentation by the Project Director in accordance with this deed and/or any comments, recommendations or representations made by the Project Director in accordance with this clause 11.4 are solely for the purpose of monitoring the performance of the Project Company, and:
- (i) the Project Company is solely responsible for ensuring that each PPP As-Built Health Facility is completed in compliance with the Specifications and the Project Company's obligations under this deed, and no action or inaction of the Project Director, or any other representatives of NSW Health or other stakeholders in the Commissioning and Decanting Plan development process will be taken to constitute acceptance that the Commissioning and Decanting Plan or compliance with it is in compliance with the Specifications; and
  - (ii) no action or inaction of the Project Director or any other representatives of NSW Health or other stakeholders in the Commissioning and Decanting Plan development process under this clause 11.4 will entitle the Project Company to make any claim under this deed or in anyway relieve, alter, limit or change the Project Company's obligations under the Project Documents.
- (l) If the Project Company and the Project Director are unable to agree on appropriate amendments to reflect the comments, recommendations or representations made to the Project Company by the Project Director in accordance with clause 11.4(h), such dispute will be dealt with in accordance with clause 4.6(h) and/or clause 40.

## 11.5 Construction reports

The Project Company must give the Project Director, no later than the fifth Business Day of each calendar month, during the Construction Phase for each Stage, a report which includes:

- (a) details of the progress of that Stage, with a comparison to the progress projected in the Works Program for that Stage;
- (b) the revised Works Program prepared in accordance with clause 11.3;
- (c) details of expenditure and significant items which may impact the Works Program, and any adjustment to the Project Company's progressive payment or drawdown schedules;
- (d) a report on Subcontractor status, giving details of each Subcontractor package budget, contract value, works program, work performed, payments made, outstanding claims, progress against budget and program and any disputes with Subcontractors;
- (e) any quality assurance audit report prepared in the preceding month in accordance with clause 11.9;

- (f) details of test results in relation to any testing required to be carried out in accordance with the Specifications;
- (g) a report on any serious accident or dangerous occurrences during the preceding month; and
- (h) a report on the progress of any work undertaken by a Relevant Authority for the purposes of extension, adjustment or relocation of Utilities in connection with the Stage.

#### **11.6 The Project Director's right to enter and inspect**

- (a) Subject to clause 11.6(c), the Project Director and/or its representatives may enter a Construction Site and inspect the Works on that Construction Site, and any drawings, documents, test results, samples and specifications used in relation to such Works, at any reasonable time and upon reasonable notice, but must not cause unnecessary disruption to the Project Company, any Subcontractor or any other authorised user of a Construction Site, and must comply with the reasonable safety and security requirements of the Project Company and the relevant Construction Contractor. The Project Company must provide all reasonable assistance to the Project Director and/or its representative in the exercise of their rights as set out in this clause 11.6(a).
- (b) The Project Company must procure that the Project Director and its representatives are afforded an opportunity to attend site meetings relating to the Works at least monthly and that agendas for such site meetings are sent to the Project Director at least five Business Days in advance of the meetings and (whether or not the Project Director or its representatives have attended) that a copy of the minutes of site meetings is promptly supplied to the Project Director.
- (c) If an Emergency Event occurs, the Project Director will be entitled to exercise the rights described in clause 11.6(a) at any time and without giving the Project Company prior notice.
- (d) The cost of any inspection carried out by the Project Director and/or its representatives pursuant to clause 11.6(a) will be borne by NSW Health unless the inspection shows that the Works have not been carried out in accordance with the Specifications or the requirements of this deed.

#### **11.7 The Project Director's right to comment**

- (a) Based on the information provided to the Project Director in accordance with clause 11.5 and/or any inspection carried out in accordance with clause 11.6, the Project Director may give the Project Company written comments, recommendations and representations regarding the Works, provided that such comments shall be limited to matters impacting upon the compliance of the Works with the requirements of this deed.
- (b) If the Project Director gives the Project Company written comments, recommendations and representations regarding the Works in accordance with clause 11.7(a), the Project Director and the Project Company must meet to discuss and establish the rectifications or changes required to the Works.

- (c) If the Project Company and the Project Director are unable to agree to appropriate rectifications or changes to reflect the written comments, recommendations or representations made to the Project Company by the Project Director in accordance with this deed, such dispute will be dealt with in accordance with clause 4.6(h) and/or clause 40.
- (d) The Project Company acknowledges that the rights of review, inspection and comment granted to the Project Director in accordance with clause 11.5, clause 11.6 and this clause 11.7 are solely for the benefit of NSW Health, and the Project Director is not under any obligation to review reports or inspect the Works or make comments, and will not, in reviewing reports or inspecting a Construction Site or the Works, assume any duty of care or responsibility to ascertain errors, omissions, defects or non-compliance with this deed.

### 11.8 Failure to meet Milestones

- (a) The Project Company must ensure that each Milestone under each Works Program occurs on or before the Target Completion Date relevant to that Milestone.
- (b) If the Project Company fails to achieve a Milestone by the relevant Target Completion Date, it will, no later than 5 Business Days after such failure, produce a report in writing to the Project Director (the "**Construction Milestone Failure Report**") setting out:
  - (i) the reasons that the Milestone was not achieved by the relevant Target Completion Date;
  - (ii) the date by which the Milestone will be achieved; and
  - (iii) the impact, if any, of the delay on achieving Completion of the Works for a PPP As Built Health Facility to which the Milestone relates, by the Target Completion Date for that PPP As Built Health Facility.
- (c) Without limiting the Project Director's rights under clause 11.7, if the Project Director does not believe the Project Company will achieve Completion of the Works for a PPP As Built Health Facility by the Target Completion Date for that PPP As Built Health Facility,
 

the Project Director will give written notice to the Project Company requiring the Project Company to promptly prepare and submit within 10 Business Days of the notice to the Project Director for the Project Director's approval a draft plan (the "**Corrective Action Plan**") describing in detail the current state of the Works and the actions and measures the Project Company will diligently pursue for remedying or curing the failure to meet a Milestone, including acceleration of the Works.
- (d) Within 10 Business Days after receipt of the draft Corrective Action Plan, the Project Director must either:
  - (i) approve the draft Corrective Action Plan by notifying the Project Company; or
  - (ii) reject the draft Corrective Action Plan by notifying the Project Company and providing reasons to the Project Company for its decision.

- (e) If the Project Director approves a draft Corrective Action Plan the Project Company must comply with and diligently pursue the remedy or cure of the failure in accordance with the Corrective Action Plan and amend the Works Program accordingly. Nothing in this clause 11.8 limits the Project Director's rights under clause 11.3.
- (f) If the Project Director rejects a draft Corrective Action Plan pursuant to clause 11.8(d)(ii), the Project Director and the Project Company must meet to discuss and establish a Corrective Action Plan.
- (g) If the Project Company and the Project Director are unable to agree to a Corrective Action Plan in accordance with this clause 11.8, such dispute will be dealt with in accordance with clause 4.6(h) and/or clause 40.
- (h) The Project Company will not be relieved of any obligation, liability or responsibility under this deed or otherwise arising under Law by virtue of any notice given under this clause 11.7 or the implementation of any Corrective Action Plan.

## **11.9 Quality Assurance (Works) Plan**

- (a) The Project Company must develop and complete a Quality Assurance (Works) Plan for each of the Stages:
  - (i) by the date set out in part C of schedule 12 (as updated in accordance with the Works Program); and
  - (ii) in accordance with the Facility Specification.
- (b) The Project Company must:
  - (i) audit its own compliance with the Quality Assurance (Works) Plan at intervals not exceeding 3 months and in accordance with the audit program which has been agreed to by the Project Director at the date of this deed;
  - (ii) have its compliance with the Quality Assurance (Works) Plan audited at intervals not exceeding twelve months by an independent auditor acceptable to the Project Director;
  - (iii) permit the Project Director or his representative to be present during such audits; and
  - (iv) deliver to the Project Director an audit report, within a reasonable time of completion of each audit.
- (c) NSW Health has the right, at any time prior to the Completion of the last Health Facility, to audit, at its own cost:
  - (i) the Project Company's compliance with the Quality Assurance (Works) Plan; and
  - (ii) the compliance by the Subcontractors with their respective quality assurance plans which have been prepared to enable the Project

Company to comply with its obligations under clause 11.9(a) and 11.2(i)(iii).

(d) If the audit performed by NSW Health referred to in clause 11.9(c) reveals that:

- (i) the Project Company is not complying with the Quality Assurance (Works) Plan; and
- (ii) any Subcontractor is not complying with their respective quality assurance plans referred to in clause 11.9(c)(ii),

the Project Company shall reimburse NSW Health for the costs of carrying out such an audit.

(e) The Project Company shall not be relieved of any liability under this deed as a result of:

- (i) compliance with the quality assurance requirements under this deed; or
- (ii) anything which NSW Health does or does not do with respect to the quality assurance requirements under this deed, including auditing the Project Company's or a Subcontractor's compliance with those requirements under clause 11.9(c).

#### 11.10 Group 1 Equipment

(a) The Project Company must, in accordance with the Specifications and the Works Program:

(i) supply, commission, install, maintain, repair and replace sufficient Group 1A Equipment (and in any event no less than the minimum amount of Group 1A Equipment specified in Appendix C to volume 2.2 of the Facility Specification) to meet the requirements of the Specifications and this deed, provided that the Project Company warrants that the Specified Group 1A Equipment is fit for its ordinary purpose, and will be maintained by the Project Company in accordance with the Support Services Specifications or, in the absence of specification, so as to remain fit for its ordinary purpose; and

(ii) supply the Group 1B Equipment in accordance with contracts to:

A. supply the Group 1B Equipment on terms and conditions which:

- 1) permit the novation of those contracts to NSW Health or NSCCAHS at the election of the Project Company;
- 2) are no less favourable to the purchaser than the terms and conditions of the New South Wales Department of Commerce draft electromedical period contracts provided to the Project Company on or prior to the date of this deed;

- 3) require the supplier to install and commission the Group 1B Equipment; and
  - 4) are otherwise reasonably satisfactory to NSW Health,  
**("Group 1B Supply Agreements")**; and
- B. maintain the Group 1B Equipment on terms and conditions which:
- 1) require the supplier to maintain the Group 1B Equipment for a term of 5 years;
  - 2) are renewable at NSW Health's or NSCCAHS's option; and
  - 3) are otherwise reasonably satisfactory to NSW Health,  
**("Group 1B Maintenance Agreements")**.
- (b) Upon Completion of each Stage in which Group 1B Equipment is installed, the Project Company must
- (i) ensure the contract price payable under the Group 1B Supply Agreements in respect of that Stage is or has been paid and
  - (ii) novate each Group 1B Supply Agreement and Group 1B Maintenance Agreement to NSW Health (or NSCCAHS if directed to do so by NSW Health) in respect of that Stage.
- (c) Following novation of each Group 1B Supply Agreement and Group 1B Maintenance Agreement to NSW Health or NSCCAHS in accordance with clause 11.10(b)(ii), NSW Health or NSCCAHS (as the case may be) will be responsible for the maintenance, repair and replacement of the Group 1B Equipment.

### 11.11 Group 1TA Equipment

- (a) Until Completion of Stage 2, the Project Company may (provided that it has supplied the minimum required Group 1A Equipment in accordance with clause 11.10(a)) but is not obliged to elect to utilise Group 1TA Equipment. If the Project Company elects to utilise Group 1TA Equipment, the Project Company must, in accordance with the Specifications and the Works Program:
- (i) decommission and select the items of Group 1TA Equipment it wishes to utilise;
  - (ii) relocate, install and commission the selected items of Group 1TA Equipment; and
  - (iii) maintain and replace the selected Group 1TA Equipment in accordance with the Support Services Specifications.
- (b) If any item of the selected Group 1TA Equipment:



- (i) is not available for decommissioning, relocation, installation or commissioning under clause 11.11(a) on the date specified in the Works Program; or
- (ii) cannot be commissioned to the Project Director's satisfaction (otherwise than due to a failure by the Project Company or a Subcontractor to comply with its obligations in installing or commissioning the Group 1TA Equipment),

the Project Company may either:

- (iii) replace the item of Group 1TA Equipment with an item of Residual Building Equipment or Additional Residual Building Equipment and utilise the replacement item pursuant to clause 11.11(a) as if it were Group 1TA Equipment; or
  - (iv) procure, install and commission a replacement item of Group 1A Equipment in accordance with clause 11.10.
- (c) NSW Health must ensure that all title in Group 1TA Equipment, Residual Building Equipment or Additional Residual Building Equipment selected by the Project Company under this clause 11.11 is transferred to the Project Company promptly following Completion of the Stage in which such equipment is installed.
  - (d) NSW Health must ensure that the Project Company has the benefit of all warranties provided by any supplier or manufacture of the Group 1TA Equipment, Residual Building Equipment or Additional Residual Building Equipment selected by the Project Company under this clause 11.11 promptly following Completion of the Stage in which such equipment is installed.

#### 11.12 Other Transferable Equipment

- (a) Promptly after the Hard FM Start Date, the Project Company will jointly with NSW Health (or a person nominated by NSW Health) compile a list of all FF & FE located within the Douglas Building and the Chapel and assign a "group" and "category" classification to each item of FF & FE based on the list of FF & FE which is Appendix A to Volume 2.2 of the Facility Specification ("**Douglas Building and Chapel FF & FE List**").
- (b) The Project Company must maintain, repair and replace the Group 1TA R&E Equipment and FF&FE listed in the Douglas Building and Chapel FF&FE List.
- (c) NSW Health must ensure that with effect from the Hard FM Start Date the Project Company has the benefit of all warranties provided by any supplier or manufacturer of Group 1TA R&E Equipment in connection with the Group 1TA R&E Equipment.
- (d) If any item of Group 1TA R&E Equipment is not located in the R&E Facility on the Hard FM Start Date, NSW Health may elect to:
  - (i) provide a replacement item of Group 1TA R&E Equipment to the Project Company with an equivalent item in good working order; or
  - (ii) not provide a replacement item of Group 1TA R&E Equipment on the basis that no Abatement or Deduction may be made by NSW Health in

respect of the item of Group 1TA R&E Equipment which has not been replaced by NSW Health with an equivalent item in good working order.

- (e) If any item of Group 1TA R&E Equipment or Douglas Building and Chapel Equipment cannot be commissioned to the Project Director's satisfaction (otherwise than due to a failure by the Project Company or a Subcontractor to use Good Industry Practice in installing or commissioning the Group 1TA R&E Equipment or Douglas Building and Chapel Equipment), NSW Health may elect to:
- (i) replace the item of Group 1TA R&E Equipment or Douglas Building and Chapel Equipment with an equivalent item in good working order; or
  - (ii) not provide a replacement item of Group 1TA R&E Equipment or Douglas Building and Chapel Equipment on the basis that no Abatement or Deduction may be made by NSW Health in respect of the item of Group 1TA R&E Equipment or Douglas Building and Chapel Equipment which has not been replaced with an equivalent item in good working order.

### 11.13 Group 1TB Equipment

- (a) The Project Company must, in accordance with the Specifications, the Works Program and the Commissioning and Decanting Plan:
- (i) decommission, relocate, install and commission all items of Group 1TB Equipment;
  - (ii) if that Group 1TB Equipment must be decommissioned, relocated, installed and commissioned by a specialist contractor, engage a specialist Subcontractor to install, commission and test the Group 1TB Equipment;
  - (iii) where Appendix C to Volume 2.2 of the Facility Specification indicates that baseline testing of an item of Group 1TB Equipment shall be undertaken before the item is relocated in accordance with clause 11.13(a)(ii), procure that that item is:
    - A. decommissioned by a specialist Subcontractor following completion of baseline testing; and
    - B. relocated, installed and commissioned by a specialist Subcontractor to the same baseline standard.
- (b) The Project Company must reimburse to NSW Health on demand:
- (i) any reasonable costs incurred by NSW Health in rectifying, or procuring the rectification of any damage to, or defect in, the Group 1TB Equipment which results from; or
  - (ii) the costs incurred by NSW Health in replacing any item of Group 1TB Equipment which is destroyed as a consequence of,

the Project Company's failure to use Good Industry Practice or to ensure that a specialist Subcontractor used a Good Industry Practice in decommissioning, relocating, installing or commissioning the Group 1TB Equipment.

- (c) Following commissioning of the Group 1TB Equipment, NSW Health is responsible for the maintenance and replacement of the Group 1TB Equipment.

#### 11.14 Group 2 Equipment

- (a) NSW Health:
- (i) must ensure the Group 2 Equipment (other than Group 2TB Equipment) is supplied new and delivered (including unloaded) to a location agreed with the Project Company in accordance with the Works Program and the Commissioning and Decanting Plan;
  - (ii) must give the Project Company at least 5 Business Days' notice of delivery of Group 2 Equipment;
  - (iii) ensure that all title in Group 2A Equipment is transferred to the Project Company upon delivery to the Project Company in accordance with clause 11.14(a)(i);
  - (iv) must ensure that the Project Company has the benefit of all warranties provided by any supplier or manufacturer of Group 2A Equipment;
  - (v) must, subject to this clause, if any item of Group 2 Equipment:
    - A. is not delivered in accordance with clause 11.14(a)(i); or
    - B. cannot be commissioned to the Project Director's satisfaction (otherwise due to a failure by the Project Company or a Subcontractor to use Good Industry Practice in installing or commissioning the Group 2 Equipment),
 procure a replacement item of Group 2 Equipment; and
  - (vi) is responsible for the maintenance, repair and replacement of the Group 2B Equipment.
- (b) Without limiting the other provisions of this deed, the Project Company must:
- (i) acknowledge in writing to the Project Director receipt of each item of Group 2 Equipment within 1 Business Day of delivery;
  - (ii) store, inspect and test each item of Group 2A Equipment for physical damage and any defects or deficiencies which impact on, or are likely to impact on, provision of the Health Functions or the intended use or functionality of Group 2A Equipment or the provision of any of the Support Services by the Project Company;
  - (iii) inspect each item of Group 2B Equipment for physical damage in accordance with Good Industry Practice;
  - (iv) permit NSW Health or a person nominated by NSW Health to attend any inspection and testing carried out under clause 11.14(b)(ii) and clause 11.14(b)(i);

- (v) provide a written report to the Project Director within 5 Business Days of delivery of the Group 2 Equipment which identifies any:
    - A. physical damage, defects or deficiencies in the Group 2A Equipment which impact on, or are likely to impact on, provision of the Health Functions or the intended use or functionality of Group 2A Equipment or the provision of any of the Support Services by the Project Company; and
    - B. patent physical damage to the Group 2B Equipment;
  - (vi) not install, commission or otherwise work with or use:
    - A. Group 2A Equipment that has been found on inspection to be damaged, defective or deficient; or
    - B. Group 2B Equipment that has been found on inspection to be physically damaged;
  - (vii) procure the installation and commissioning (including testing) of the Group 2 Equipment in accordance with the Specifications and the Works Program; and
  - (viii) subject to this clause, maintain, repair and replace the Group 2A Equipment in accordance with the Support Services Specifications.
- (c) The Project Company must reimburse to NSW Health on demand:
- (i) any reasonable costs incurred by NSW Health in rectifying, or procuring the rectification of any damage to the Group 2B Equipment which results from; or
  - (ii) the costs incurred by NSW Health in replacing any item of any Group 2B Equipment which is destroyed as a consequence of,
- the Project Company or a Subcontractor failing to use Good Industry Practice in installing or commissioning the Group 2B Equipment.

### 11.15 Group 2TB Equipment

- (a) The Project Company:
  - (i) must inspect and test each item of Group 2TB Equipment for patent physical damage six months prior to the date for equipment transfer in accordance with the Works Program in accordance with Good Industry Practice; and
  - (ii) must report any such damage to the Group 2TB Equipment in writing to the Project Director within 5 Business Days of the completion of the inspection and testing required by clause 11.15(b)(i).
- (b) NSW Health must:
  - (i) within 10 Business Days following receipt of a report from the Project Company under clause 11.15(a)(ii), either confirm that there is no

- change to the list of Group 2TB Equipment in the Facility Specification or revise the schedule of Group 2TB Equipment and notify the Project Company in writing and (if applicable) provide a revised schedule of Group 2TB Equipment to the Project Company;
- (ii) decommission and make each such item of the Group 2TB Equipment available to the Project Company on the date on which such item of the Group 2TB Equipment is to be relocated in accordance with the Works Program and Commissioning and Decanting Plan;
- (iii) must, subject to this clause 11.15, if any item of Group 2TB Equipment:
- A. is not made available in accordance with clause 11.15(b)(ii);  
or
- B. cannot be commissioned to the Project Director's satisfaction (otherwise due to a failure by the Project Company or a Subcontractor to use Good Industry Practice in installing or commissioning the Group 2TB Equipment),
- procure a replacement item of Group 2TB Equipment; and
- (iv) is responsible for the maintenance, repair and replacement of the Group 2TB Equipment.
- (c) Prior to relocating the Group 2TB Equipment, the Project Company must:
- (i) acknowledge in writing to the Project Director receipt of each item of Group 2TB Equipment within 1 Business Day of it being made available to the Project Company;
- (ii) inspect each item of Group 2TB Equipment for patent physical damage (other than fair wear and tear); and
- (iii) provide a written report to the Project Director within 5 Business Days of delivery of the Group 2TB Equipment which identifies to the Project Director's reasonable satisfaction any such physical damage (other than fair wear and tear) in the Group 2TB Equipment.
- (d) Once the Project Director is reasonably satisfied with the report provided in accordance with clause 11.15(c)(iii):
- (i) NSW Health must decommission each item of Group 2TB Equipment prior to its relocation;
- (ii) the Project Company must (subject to clause 11.15(d)(i)):
- A. relocate, install and commission(including testing) the decommissioned Group 2TB Equipment in accordance with the Specifications and Good Industry Practice;;
- B. not install, commission or otherwise use Group 2TB Equipment that is patently damaged in the course of relocation, installation or commissioning; and

- C. if directed to do so by the Project Director, dispose of unused or defective Group 2TB Equipment at a location nominated by the Project Director at the relevant time.
- (e) The Project Company must reimburse to NSW Health on demand:
- (i) any reasonable costs incurred by NSW Health in rectifying, or procuring the rectification of any damage to the Group 2TB Equipment which results from; or
  - (ii) the costs incurred by NSW Health in replacing any item of Group 2TB Equipment which is destroyed as a consequence of,
- the Project Company or a Subcontractor failing to use Good Industry Practice in relocating, installing or commissioning the Group 2TB Equipment.

### 11.16 Group 3 Equipment

- (a) NSW Health:
- (i) must ensure that, where applicable, the Group 3TB Equipment and Group 3B Equipment is made available to be relocated in accordance with the Works Program and Commissioning and Decanting Plan;
  - (ii) must decommission the Group 3TB Equipment;
  - (iii) must procure the installation and commissioning of the Group 3B Equipment;
  - (iv) is responsible for the maintenance, repair and replacement of the Group 3B Equipment and the Group 3TB Equipment; and
  - (v) retains the benefit of all warranties provides by any supplier or manufacturer of Group 3B Equipment in connection with any item of Group 3B Equipment.
- (b) The Project Company must coordinate the relocation by NSW Health of the Group 3 Equipment using Good Industry Practice in accordance with the Works Program and Commissioning and Decanting Plan.

### 11.17 Group 4 Equipment

- (a) NSW Health must ensure that the Group 4 Equipment is made available to the Project Company in accordance with this clause 11.17.
- (b) The Project Company may:
- (i) within 15 Business Days after the Hard FM Start Date, identify (in a manner agreed by the Parties) the items of Residual Building Equipment that it elects to take possession of and utilise after the Commencement Date of Stage 2; and
  - (ii) within 20 Business Days after the Hard FM Start Date, provide the Project Director with written notice of all Residual Building Equipment

that it has identified in accordance with clause 11.17(b)(i) ("**First PC Notice**").

- (c) Subject to this deed, on or after the Completion Date of Stage 2 the Project Company may (but is not obliged to) take possession of and utilise the Group 4 Equipment identified in the First PC Notice to satisfy the requirements of the Specifications.
- (d) If the Project Company elects to take possession of and utilise any item of Group 4 Equipment in accordance with this clause 11.17, it:
  - (i) must within 15 Business Days after the Completion Date of Stage 2,
    - A. confirm the items of Group 4 Equipment identified in the First PC Notice;
    - B. identify (in a manner agreed by the Parties) the items of Additional Residual Building Equipment,
 

that it elects to take possession of and utilise and provide the Project Director with written notice of all such Group 4 Equipment ("**Second PC Notice**"); and
  - (ii) may take possession of all Group 4 Equipment that it has identified in the Second PC Notice provided that it does so within 30 Business Days of the Completion Date of Stage 2.
- (e) NSW Health must ensure that any item of FF&FE identified in the First PC Notice or the Second PC Notice is not removed from the Hospital Campus.
- (f) Following receipt of the Second PC Notice or from 16 Business Days after the Completion Date of Stage 2, NSW Health may remove any item of Group 4 Equipment that is not listed in either the First PC Notice or Second PC Notice from Building 1 or Building 2 (as relevant) provided that removal is completed within 30 Business Days of the Completion Date of Stage 2.
- (g) NSW Health must ensure that:
  - (i) all title in any item of Group 4 Equipment taken into the possession of the Project Company under clauses 11.17(d) is transferred to the Project Company promptly following the Project Company taking possession of that item of Group 4 Equipment; and
  - (ii) all title in Group 4 Equipment remaining in Building 1 and Building 2 following the removal of Group 4 Equipment by the Project Company in accordance with clauses 11.17(d) and by NSW Health in accordance with clause 11.17(f) ("**Residual Group 4 Equipment**") is transferred to the Project Company.
- (h) NSW Health acknowledges that the Project Company intends to transfer title to the Residual Group 4 Equipment to the Construction Contractor which may take possession of and use for its own purposes, sell or otherwise dispose of any Residual Group 4 Equipment.

---

**11.18 Equipment general provisions**

Except as expressly provided by this deed:

- (a) NSW Health retains title in the Group 1TB Equipment, Group 2B Equipment, Group 2TB Equipment, Group 3B Equipment and 3TB Equipment at all times and NSW Health retains title in the Group 1B Equipment at all times following novation of the Group 1B Supply Agreements in accordance with clause 11.10(b);
- (b) the Project Company releases and indemnifies NSW Health and its respective officers, agents, contractors, advisers and employees in respect of any Claims or Losses which the Project Company may suffer in connection with the Group 1 Equipment, Group 2 Equipment and Group 3 Equipment;
- (c) subject to any entitlement in connection with a Contract Variation, the Project Company will not be entitled to any relief from obligations, nor any compensation in respect of the location, condition, age or fitness for purpose of the Group 1B Equipment, Group 1T Equipment, Group 1TA Equipment, Group 2 Equipment, Group 2TB Equipment, Group 3TB Equipment or Group 3B Equipment or the impact Group 1B Equipment, Group 1T Equipment, Group 1TA Equipment, Group 2 Equipment, Group 2TB Equipment, Group 3TB Equipment or Group 3B Equipment may have on performance of the Support Services; and
- (d) each party must perform its obligations under clause 11.10 to 11.17 in accordance with the Works Program and the Commissioning and Decanting Plan.

---

**12. Variations**

The Project Company must not make or implement any alteration, addition or modification to a Detailed Design, a Construction Site or the Works other than in accordance with clause 20, clause 21 or clause 22.

---

**13. Completion and Commissioning****13.1 Due Dates**

The Project Company must:

- (a) achieve Completion of each Milestone by the Target Completion Date for that Milestone; and
- (b) achieve Completion of each Stage by the Target Completion Date for that Stage.

**13.2 Completion**

- (a) Once the Project Company considers it has achieved Completion of a Stage, the Project Company must serve on the Project Director and the Independent Certifier a Notice of Completion, provided that, for the avoidance of doubt, the Commencement Date in respect of a the relevant Stage will not be deemed to have occurred until the date nominated by the Project Director in accordance with clause 13.5.



- (b) Upon serving the Notice of Completion, the Project Company must:
- (i) consult with the Independent Certifier about the tasks necessary to achieve Completion and allow the Independent Certifier and Project Director to attend the relevant Construction Site and take input from appropriately qualified persons regarding specialist activities necessary to achieve Completion;
  - (ii) provide sufficient information to the Independent Certifier to enable him or her to determine if Completion of that Stage has been achieved in accordance with the requirements of this deed;
  - (iii) provide copies of any tests derived from the Commissioning Works and copies of test certificates to the Independent Certifier and Project Director;
  - (iv) provide entry on to the relevant Construction Site by NSW Health Related Parties and other persons required for Health Functions (in accordance with the Specifications) and support aspects of Completion;
  - (v) permit entry on to the relevant Construction Site, and co-ordinate with specialist contractors and persons appointed by the Project Director to undertake installation of any NSW Health Provided Items;
  - (vi) with the assistance of NSW Health Related Parties, verify that all FF & FE has been Commissioned (as required in accordance with the Facility Specification) and that all training, education and support components of Completion and Commissioning have been completed; and
  - (vii) with the assistance of NSW Health Related Parties, facilitate achievement of Accreditation of each Health Facility comprised in the Stage.
- (c) Any minor omissions or defects which, individually or in aggregate, do not have an adverse effect on the occupation of the relevant Stage and/or do not have an adverse effect on the ability of NSW Health, the State and the NSW Health Staff to provide the Health Functions or the Project Company's ability to provide the Support Services in accordance with this deed and can be rectified within 20 Business Days will be set out by the Project Company in a list attached to a Notice of Completion and must be completed or made good, as the case may be, to the reasonable satisfaction of the Independent Certifier as soon as practicable after Completion, and in any event not more than 20 Business Days after Completion, in accordance with a minor defects rectification program and which must be agreed by the Independent Certifier, the Project Company and the Project Director prior to the Independent Certifier certifying Completion of the relevant Stage in accordance with this clause 13.2.
- (d) If, upon inspection of the Stage, the Independent Certifier is of the opinion that Completion of the Stage has been achieved in accordance with the requirements of this deed, the Independent Certifier must issue a certificate to the Project Director and the Project Company certifying that Completion of the Stage has been achieved.

- (e) If, upon inspection of the Stage, the Independent Certifier is of the opinion that Completion of the Stage has not been achieved in accordance with the requirements of this deed, the Independent Certifier must notify the Project Director and the Project Company, and the Project Company must rectify the deficiencies identified by the Independent Certifier and serve a new Notice of Completion upon the Project Director and the Independent Certifier, upon receipt of which the Independent Certifier will again be required to determine if Completion has been achieved in accordance with this clause 13.2.
- (f) If, upon inspection of the relevant Stage, the Independent Certifier is satisfied that Completion of the Stage has been achieved in accordance with the requirements of this deed, the Project Company will ensure that the Independent Certifier notifies the Project Director in writing that Completion has been achieved.

### 13.3 Commissioning of other facilities

- (a) The Project Company acknowledges that, as a precondition to Completion of:
- (i) Stage 4, it must procure the installation and commissioning of all Operational Equipment; and
  - (ii) Stage 2, it must procure the completion of the Minimum Briefed Retail Fit Out for that Stage (and such works are included in the Works) as set out in Schedule 11.
- (b) NSW Health acknowledges and agrees that Completion of the Works in respect of Stage 2 does not require Completion of any fit out works for the Retail Premises (as defined in Schedule 11) in excess of the Minimum Briefed Retail Fit Out within the areas shown as "Premises" on the drawing numbered DWG-RE-AR-1503 in Schedule 11 and:
- (i) the design development process will include the preparation of design and specification of the Minimum Briefed Retail Fit Out and, at the discretion of the Project Company, preparation of design and specification of fit out of the Premises in excess of the required Minimum Briefed Retail Fit Out; and
  - (ii) even if the design development process results at any time in carrying out and completion of design development for fit out of the Premises in excess of the required Minimum Briefed Retail Fit Out or works in relation to such excess are commenced (or if commenced are subsequently changed or abandoned), Project Company has no obligation to achieve Completion of any such excess fit out in order to achieve Completion of Stage 2 under this deed if it has completed the Minimum Briefed Retail Fit Out.

### 13.4 Commencement

- (a) The Project Director must, within 2 Business Days of receiving notice under clause 13.2(f), issue a Commencement Certificate to the Project Company in respect of each PPP As-Built Health Facility comprised in the relevant Stage.
- (b) The issue of a Commencement Certificate to the Project Company in respect of a Stage will not constitute an approval by NSW Health of the Project Company's

performance of its obligations under this deed or evidence that the relevant PPP As-Built Health Facility satisfies or is capable of satisfying the Specifications.

### 13.5 Commencement Date

The Project Director must nominate, in the Commencement Certificate for a Stage, a Commencement Date for that Stage, which shall be the later of:

- (a) the date of the Commencement Certificate; or
- (b) the Target Completion Date for that Stage unless the parties agree the Commissioning and Decanting Plan is to be completed prior to the Target Completion Date and have agreed to an earlier Commencement Date for that Stage.

### 13.6 Environmental Audit

- (a) The Project Company must, prior to the issue of a Notice of Completion for a Stage:
  - (i) undertake the Final Contamination Assessment of the land within each Construction Site for the Works comprised in that Stage which must confirm:
    - A. that each part of such land which is intended to form part of the RNSH PPP Footprint after the Commencement Date of Stage 4 is suitable for the Proposed Use of that portion; and
    - B. that each part of such land which is to be within or form part of a Divested Facility or a Residual Facility or is not intended to form part of the RNSH PPP Footprint after the Commencement Date of Stage 4 is suitable for industrial use;
  - (ii) if further specified remediation work requiring removal, treatment or isolation of Contamination is required in order to achieve the confirmations set out in (A) and (B) above, the Project Company must undertake that remediation work before issuing the Notice of Completion; and
  - (iii) obtain the Final Site Audit Statement in respect of the land within each Construction Site for the Works comprised in that Stage, which must confirm:
    - A. each part of such land which is intended to form part of the RNSH PPP Footprint after Completion of Stage 4, is suitable for the Proposed Use of that portion of the Construction Site; and
    - B. each portion of such land which is to be within or form part of a Divested Facility or Residual Facility or is not intended to form part of the RNSH PPP Footprint after Completion of Stage 4 is suitable for industrial use;

provided that:

- C. if it is not possible to obtain such a Final Site Audit Statement due to Contamination beyond the boundaries of the relevant Construction Site then (except to the extent that that Contamination beyond the boundaries of the relevant Construction Site is required by clause 5.4(c)(i), (ii) or (iii) of this deed to be remediated by the Project Company), the Project Company must issue a Project Company Variation Request, which shall be deemed to be a NSW Health Variation Request;
  - D. the assessment of the suitability of land will be carried out having regard to the effect of any slabs, hardstand, capping or other features or structures that mitigate the risk presented by Contamination which are either retained on site or put in place as part of the Works or the remediation; and
  - E. a Final Site Audit Statement may be subject to conditions but not conditions that require further specified removal, treatment or isolation of Contamination in order to achieve the confirmations set out in (A) and (B) above.
- (b) Copies of each of the Final Contamination Assessment and the Final Site Audit Statement must be provided to the Independent Certifier and the Project Director on or prior to the date on which the Notice of Completion is issued in accordance with clause 13.2.

### 13.7 Drawings and Survey

- (a) No later than 60 Business Days after the Completion of each Stage, the Project Company must give the Project Director a complete set of "work as executed" architectural and engineering drawings of that Stage in hard copy and manipulable electronic format, which comply with the requirements of the field data capture specification, as detailed in the Facility Specification.
- (b) Prior to the Commencement Date for a Stage, the Project Company must provide the Project Director with a detailed survey from the NSW Health Surveyor (who must be appointed in accordance with Part I of schedule 12 (as updated in accordance with the Works Program)) which:
  - (i) will comply with NSW Health's required form of survey;
  - (ii) shows the location of the completed Stage on the relevant Construction Site (as the case may be); and
  - (iii) certifies that the completed work is located in accordance with the Detailed Design.
- (c) Prior to the Commencement Date of Stage 4, the Project Company will prepare and deliver to the Project Director an updated Stage 4 RNSH PPP Footprint Plan for approval by the Project Director (as soon as practicable and whether before or after the Commencement Date) which identifies any changes to Annexure N which are necessary by reason of the carrying out of the Works.

---

## **14. Independent Certifier**

### **14.1 Nominations and Qualifications**

The Project Company acknowledges that:

- (a) prior to the date of this deed, it nominated in writing at least three persons (each an **"Independent Certifier Candidate"**) to be the Independent Certifier for the purposes of the Project; and
- (b) each Independent Certifier Candidate nominated by it:
  - (i) has the appropriate qualifications and experience to act as an independent certifier;
  - (ii) has no interest or duty which conflicts with its role as Independent Certifier in respect of the Project; and
  - (iii) is able and prepared to act in accordance with the terms of the Independent Certifier Deed.

### **14.2 Appointment**

Prior to the date of Financial Close, the Project Company and the Project Director must agree on the identity of the Independent Certifier and appoint the Independent Certifier in accordance with the terms of the Independent Certifier Deed. If the Project Director and the Project Company cannot agree, the parties will request that the President of the Royal Australian Institute of Architects (or its replacement or equivalent) nominate the Independent Certifier who meets the requirements set out in clause 14.1(b) and such Independent Certifier will be appointed as soon as practicable in accordance with the Independent Certifier Deed.

### **14.3 Costs and Expenses of the Independent Certifier**

The costs and expenses of the Independent Certifier (including the professional fees of the Independent Certifier) will be paid in the following proportions:

- (a) 50% by the Project Company; and
- (b) 50% by NSW Health.

### **14.4 Replacement**

- (a) If the Independent Certifier Deed is terminated before its scheduled expiry, or if any incumbent Independent Certifier ceases to act as Independent Certifier for the purposes of this deed, the Project Company and the Project Director must, unless otherwise agreed by the Project Company and NSW Health, prior to termination or cessation, and in any case within 10 Business Days after the termination of the Independent Certifier Deed or cessation, whichever is applicable, appoint another person to act as Independent Certifier.
- (b) The replacement Independent Certifier must meet the requirements set out in clause 14.1(b).

- 
- (c) If the Project Director and the Project Company cannot agree, the parties will request that the President of the Royal Australian Institute of Architects (or its replacement or equivalent) nominate an Independent Certifier who meets the requirements set out in clause 14.1(b) and such Independent Certifier will be appointed as soon as practicable in accordance with the Independent Certifier Deed.

#### **14A. Construction Payment and Operations Variation**

## **PART D – OPERATION OBLIGATIONS**

---

### **15. Services**

#### **15.1 Interim Services Phase**

- (a) During an Interim Services Phase, the Project Company must provide:
- (i) the Interim R&E Hard FM Services for the period from the day following Financial Close to the Hard FM Start Date;
  - (ii) Backlog Maintenance and Refurbishment for the period from the day following Financial Close to the Hard FM Start Date;
  - (iii) the Interim Hard FM Services for the period from the Interim Hard FM Start Date to the Hard FM Start Date; and
  - (iv) the Interim Soft FM Services for the period from the Interim Soft FM Start Date to the Soft FM Start Date.
- (b) The Project Company must:
- (i) provide the Interim Services and Mobilisation Activities at all times in accordance with, and duly and punctually perform its obligations arising in or under:
    - A. the Support Services Specifications;
    - B. Good Industry Practice, and in an appropriate, effective and efficient, dependable and cooperative manner;
    - C. all applicable Consents and Law;
    - D. the Mobilisation Activities and Interim Services Plan;
    - E. the Labour Services Agreement;

- F. any other plans prepared pursuant to the Project Company's obligations under the Support Services Specifications; and
  - G. each other Project Document;
  - (ii) allocate such resources and staff as is necessary to enable the due and proper performance of this deed; and
  - (iii) obtain and maintain all Consents which it is necessary to have for the provision of the Interim Services.
- (c) During an Interim Services Phase, NSW Health must, to the extent contemplated by the Mobilisation Activities and Interim Services Plan, provide to the Project Company access to facilities, records, information systems and resources required to enable the Project Company to provide the Interim Services and Mobilisation Activities, provided that any failure by NSW Health to comply with its obligations under this clause which causes the Project Company to suspend its activities during the provision of the Interim Services and has a material adverse effect on the Project Company's ability to provide the Soft FM Services or the Hard FM Services will not give rise to any compensation or adjustment to the relevant Monthly Payment.
- (d) During the Interim Services Phase, and prior to each subsequent Start Date, NSW Health will cooperate with and coordinate its activities with (and will procure that the Director General of the New South Wales Department of Health cooperates with and coordinates its activities with) the Project Company in relation to the availability of the numbers and award profile descriptions of staff in the workforce of staff members in the NSCCAHS Division of the NSW Health Service existing as at the date of this deed in a manner which is consistent with the selection of staff and restructuring activities to be undertaken pursuant to the Labour Services Agreement.

## 15.2 Provision of Services

The Project Company must:

- (a) provide the Hard FM Services from the Hard FM Start Date to the Termination Date;
- (b) provide the Soft FM Services from the Soft FM Start Date to the Termination Date;
- (c) without limiting clauses 15.2(a) and 15.2(b), provide the Support Services at all times in accordance with, and duly and punctually perform its obligations arising in or under:
  - (i) the Support Services Specifications;
  - (ii) the Operations Manual;
  - (iii) Good Industry Practice, and in an appropriate, effective and efficient, dependable and cooperative manner;
  - (iv) all applicable Consents and Law;
  - (v) the Labour Services Agreement;



- (vi) any other plans prepared pursuant to the Project Company's obligations under the Support Services Specifications; and
- (vii) each other Project Document;
- (d) allocate such resources and staff as is necessary to enable the due and proper performance of this deed;
- (e) obtain and maintain all Consents which it is necessary to have for the provision of the Support Services;
- (f) provide the Support Services such that each PPP As-Built Health Facility, the R&E Facility and each Retained Facility remains Fit for Intended Purpose; and
- (g) subject to the express terms of this deed, ensure that the Hospital is available at all times to NSW Health, NSW Health Staff, NSW Health Tenants, Patients, and visitors of and to the Hospital for the purposes of provision of the Health Functions subject to any planned maintenance identified in an agreed Monthly Maintenance Plan.

### 15.3 Operations Manual

- (a) The Project Company must develop and complete each Operations Manual:
  - (i) in accordance with the Project Company Proposals;
  - (ii) by the times set out in Part G of schedule 12 (as updated in accordance with the Works Program);
  - (iii) in accordance with the Specifications;
  - (iv) so that the Hospital and the Support Services are in compliance with the Specifications;
  - (v) so that the Hospital and the Support Services comply with all applicable Consents and Law; and
  - (vi) so that each PPP As-Built Health Facility, the R&E Facility and each Retained Facility remains Fit for Intended Purpose.
- (b) The Project Company acknowledges and agrees that:
  - (i) each Operations Manual is intended to provide a detailed description of how the Project Company intends to comply with its obligations under this deed; and
  - (ii) Operations Manuals will require ongoing development, amendment and updating throughout the Term to take into account:
    - A. Changes in Law, Consents and Policy;
    - B. changes to the manner in which the relevant Health Facility is being used or the manner in which the Health Functions are being provided;

- 
- C. deficiencies in or omissions from an Operations Manual;
  - D. changes in the requirements of Relevant Authorities or providers of Utilities;
  - E. Contract Variations;
  - F. changes to work practices;
  - G. changes in Good Industry Practice; and
  - H. the requirements of the Support Services Specifications.
- (c) The Project Company must:
- (i) continue to develop and promptly amend or update the Operations Manual:
    - A. to take into account the occurrence of the events and circumstances referred to in clause 15.3(b)(ii) above;
    - B. as required under the Specifications; and
    - C. in any event, update the Operations Manual at least every 12 months by no later than 31 January in each Contract Year; and
  - (ii) promptly submit each Operations Manual to the Project Director as it is further developed, amended or replaced for review in accordance with this clause 15.3.
- (d) Without limiting any other rights NSW Health may have, if the Project Director reasonably considers that:
- (i) operation in compliance with any Operations Manual has ceased to comply with the requirements of this deed;
  - (ii) operation in compliance with any Operations Manual may cause an Health Functions Disruption; or
  - (iii) the Project Company has not further developed, updated or amended any Operations Manual in accordance with the requirements of paragraph (c) above,
- the Project Director may by written notice direct the Project Company to further develop, update or amend the Operations Manual specifying:
- (iv) the reasons why such development, updating or amending is required; and
  - (v) such reasonable time within which such development, updating or amending must occur,

and the Project Company must:

- 
- (vi) further develop, update or amend the relevant Operations Manual as directed by the Project Director in order to comply with the requirements of this deed; and
  - (vii) submit the further developed, updated or amended Operations Manual to the Project Director for review in accordance with this clause 15.3 within the time specified in the Project Director's notice.
- (e) If so required in writing by the Project Director, the Project Company must, as part of the Operations Manual development process, meet and consult with relevant stakeholders in relation to successive iterations of the Operations Manual, and/or conduct Operations Manual development workshops, meetings, presentations and submissions for the Project Director, other representatives of NSW Health, other stakeholders, and their respective consultants and advisers, at such times and places as the Project Director may require, and must ensure that any relevant comments or requirements of such parties are addressed and accommodated, to the extent they are consistent with the requirements of this deed.
- (f) The Project Company must submit to the Project Director for review by the Project Director the draft Operations Manual in accordance with the time set out in Part G of schedule 12 (as updated in accordance with the Works Program).
- (g) The draft Operations Manual documentation submitted in accordance with clause 15.3(f) must contain all technical data in hard copy and in manipulable electronic format in respect of the operation of the relevant Health Facility.
- (h) If required by the Project Director, the Project Company must make available at the cost and expense of the Project Company, such further information as the Project Director may reasonably request relating to the development of the Operations Manual, in such form as the Project Director may reasonably request.
- (i) Subject to the draft Operations Manual documentation complying with paragraph (g), and the Project Company having complied with any reasonable requests of the Project Director under paragraph (h), within 10 Business Days after receiving the draft Operations Manual documentation and/or any additional information requested by the Project Director under paragraph (h), the Project Director may review the draft Operations Manual documentation and give the Project Company comments, recommendations and representations regarding the draft Operations Manual documentation, provided that such comments shall be limited to matters impacting upon the compliance of the draft Operations Manual documentation with the requirements of this deed. If no requests for further information are received by the Project Company in accordance with paragraph (h) during the 10 Business Day period referred to in this clause 15.3(i), the 10 Business Day period will be taken to have commenced upon receipt by the Project Director of the draft Operations Manual documentation.
- (j) If the Project Director gives the Project Company comments, recommendations and representations regarding the draft Operations Manual documentation under clause 15.3(i), the Project Director and the Project Company must meet to discuss and establish the amendments required to the draft Operations Manual documentation and, if any amendments are effected, the draft Operations Manual documentation must be re-submitted in accordance with this clause 15.3. Each relevant part of the draft Operations Manual documentation will not be considered final unless and until the Project Company has received no comments from the Project Director in

accordance with clause 15.3(i) in respect of draft Operations Manual documentation submitted to the Project Director and/or it has complied with its obligations under this clause 15.3(j).

- (k) The Project Company acknowledges that any participation by the Project Director or any other representatives of NSW Health or other stakeholders in the Operations Manual development process is solely for the benefit of NSW Health, and the Project Director, any other representatives of NSW Health and other stakeholders are not under any obligation to participate in the Operations Manual development process, and will not, in reviewing draft Operations Manual documentation, assume any duty of care or responsibility to ascertain errors, omissions, defects or non-compliance with this deed.
- (l) The Project Company acknowledges that participation by the Project Director or any other representatives of NSW Health or other stakeholders in the Operations Manual development process and/or review of any documentation by the Project Director in accordance with this deed and/or any comments, recommendations or representations made by the Project Director in accordance with this clause 15.3 are solely for the purpose of monitoring the performance of the Project Company, and:
  - (i) the Project Company is solely responsible for the provision of the Support Services in compliance with the Support Services Specifications and the Project Company's obligations under this deed, and no action or inaction of the Project Director or any other representatives of NSW Health or other stakeholders in the Operations Manual development process will be taken to constitute acceptance that the Operations Manual or compliance with it is in compliance with the Support Services Specifications; and
  - (ii) no action or inaction of the Project Director or any other representatives of NSW Health or other stakeholders in the Operations Manual development process under this clause 15.3 will entitle the Project Company to make any claim under this deed or in anyway relieve, alter, limit or change the Project Company's obligations under the Project Documents.
- (m) If the Project Company and the Project Director are unable to agree to appropriate amendments to reflect the comments, recommendations or representations made to the Project Company by the Project Director in accordance with this clause 15.3, such dispute will be dealt with in accordance with clause 40.
- (n) Without limiting clause 18.6, the Project Director will have the right at any time to audit the Project Company's compliance with the Operations Manual or any part of it. The Project Director must give the Project Company at least 20 Business Days' notice of its intention to exercise this right.
- (o) The Project Company acknowledges that, notwithstanding the preparation of schedules and programs for provision of Support Services in accordance with the Support Services Specifications, at any time during the Operations Phase:
  - (i) the Project Director may direct rescheduling of Support Services set out in the relevant monthly program or schedule within the relevant month in which the relevant Support Services were to be provided;

- (ii) it must amend any relevant program or plan to reflect the directed rescheduling under clause 15.3(o)(i) and re-submit the relevant program, schedule or plan to the Project Director; and
- (iii) any such required amendment will not constitute a NSW Health Variation Request and must be complied with by the Project Company.

#### **15.4 Planned Maintenance**

- (a) Without limiting its other obligations under this deed, the Project Company must implement the Programmed Maintenance Plan as reviewed or modified from time to time pursuant to this deed.
- (b) As part of the annual review of each Operations Manual, the Project Company must review the Programmed Maintenance Plan, so as to plan for works for the following 5 years (including any period after the expiry of the Term to the extent that it may be relevant for the purposes of achieving the Handover Condition for that Health Facility) to ensure it will meet the Project Company's obligations under this deed, and such review and any proposed modifications to it (other than minor or immaterial modifications) shall be subject to the review procedure set out in clause 15.3.
- (c) In addition the Project Company must:
  - (i) no later than 31st January in each Contract Year provide to the Project Director a draft of the Annual Maintenance Program for that Contract Year which must:
    - A. include the commencement date, details and duration of planned maintenance;
    - B. be prepared on the basis that any disruption to the Health Functions should be minimised;
    - C. provide a breakdown of planned maintenance to show how the Project Company will meet its obligations under this deed and how planned maintenance will meet or otherwise relate to the Programmed Maintenance Plan;
  - (ii) provide NSW Health with the opportunity to comment on each Annual Maintenance Program consistent with the review procedure set out in clause 15.3;
  - (iii) not make any variations to any Annual Maintenance Program (other than minor or immaterial variations) unless they are approved in writing by the Project Director.
- (d) The Project Company must ensure that planned maintenance is carried out, so far as practicable, in a manner and at times which will facilitate the continued performance of the Support Services and the Health Functions.

#### **15.5 Defects**

- (a) Except in relation to Defects to which paragraph (b) applies and except to the extent a Defect causes the Project Company to fail to meet a KPI, in which case, the

rectification periods set out in the Support Services Specifications for that KPI will apply, but otherwise (subject to clause 15.5(h)), without limiting its other obligations under this deed, from the Hard FM Start Date the Project Company must remedy or make safe any other Defect as soon as is reasonable given the nature of the Defect and the impact of the Defect on the provision of the Support Services or the Health Functions, after such Defect is advised to the Project Company or the Project Company otherwise becomes aware of it.

- (b) The Project Company must during the R&E Facility Defects Correction Period:
- (i) notify the Project Director as soon as it becomes aware of a R&E Defect and advise the Project Director of the impact of the R&E Defect on the provision of the Support Services or the Health Functions;
  - (ii) make safe the R&E Defect as soon as is reasonable given the nature of the R&E Defect and the impact of the R&E Defect on the provision of the Support Services or the Health Functions;
  - (iii) if requested by the Project Director, complete any defects notice required to be served under the R&E Facility Construction Contract;
  - (iv) permit and facilitate the access of the R&E Facility construction contractor to the R&E Facility to address the R&E Defect in accordance with any relevant Interface Protocol; and
  - (v) perform a temporary fix or rectification (each as defined in schedule 5) of the R&E Defect if so requested by the Project Director at NSW Health's cost, which request will be a deemed NSW Health Variation Request.
- (c) If, during the R&E Facility Defects Correction Period, the Project Company issues a notice to the Project Director identifying a R&E Defect:
- (i) NSW Health must either:
    - A. promptly procure rectification of the R&E Defect; or
    - B. give the Project Company a direction (in writing) pursuant to clause 15.5(b)(v);
 and the Project Company is not:
    - C. otherwise obliged to rectify the R&E Defect; and
    - D. provided that the Project Company has complied with its obligations under clause 15.5(b), liable for a failure to meet the performance standards of the Support Services or any other obligations under the Project Deed (including liability for Deductions) to the extent that the failure is directly caused by the R&E Defect.
- (d) If the Project Company identifies a R&E Facility Structural Defect after the R&E Facility Defects Correction Period, the Project Company:

- (i) is not liable for a failure to meet the performance standards of the Support Services or any other obligations under the Project Deed (including liability for Deductions) to the extent that the failure is directly caused by the R&E Facility Structural Defect; and
  - (ii) is not obliged to rectify the R&E Facility Structural Defect, unless directed by NSW Health to do so as a deemed NSW Health Variation Request.
- (e) After the R&E Defects Correction Period, at the request of the Project Company, NSW Health must assign to the Project Company and Thiess Services Pty Ltd (or subject to clause 7, any replacement Key Subcontractor providing Hard FM Services) the benefit of all or any warranties in favour of NSW Health under the R&E Facility Construction Contract in relation to the R&E Facility (except to the extent that a warranty concerns components of the R&E Facility referred to in the definition of R&E Facility Structural Defect).
- (f) NSW Health:
- (i) releases and indemnifies the Project Company from liability for any Claims by the R&E Facility Construction Contractor (or its subcontractors) against NSW Health or NSW Health Related Parties or the Project Company or a Key Subcontractor, in relation to the rectification of R&E Defects by the Project Company or a Key Subcontractor; and
  - (ii) releases the Project Company in respect of any loss or diminution of any entitlement, right or benefit of NSW Health or a NSW Health Related Party in connection with the R&E Facility Construction Contract where such loss or diminution arises from the rectification of R&E Defects by the Project Company or a Key Subcontractor.
- (g) Any dispute as to whether a defect in a Health Facility constitutes a Defect, R&E Defect or R&E Facility Structural Defect for the purposes of this deed must be referred for dispute resolution in accordance with clause 4.6(h) and/or clause 40.
- (h) Without limiting clause 15.2, clause 15.5(a):
- (i) does not apply in relation to Defects in a Residual Facility;
  - (ii) does not apply in relation to Defects in a Divested Facility or a Vacated Facility; and
  - (iii) applies in relation to Defects in a Retained Facility from the Hard FM Start Date.
- (i) If the Project Company identifies a structural defect at any time in the Extended Multi-Deck Car Park Facility, the Project Company:
- (i) is not liable for a failure to meet the performance standards of the Support Services or any other obligations under the Project Deed (including liability for Deductions) to the extent that the failure is directly caused by that defect; and

- (ii) is not obliged to rectify that defect, unless directed by NSW Health to do so as a deemed NSW Health Variation Request.

---

## 16. Alterations, Additions and Modifications

The Project Company must not make any alteration, addition or modification to an Operations Manual (except in accordance with clause 15.3), the Hospital or the Support Services, other than in accordance with clause 20, clause 21 or clause 22.

---

## 17. Additional Commercial Development

- (a) If the Project Company identifies an area of the RNSH PPP Footprint in respect of which it wishes to pursue Additional Commercial Development and the Project Company is of the opinion that such Additional Commercial Development will:
- (i) result in a benefit to NSW Health and the Hospital; and
  - (ii) not disrupt the provision of the Health Functions or Support Services,
- the Project Company may submit to the Project Director a Project Company Variation Request and a Variation Proposal (including the Estimated Cost Effect of the proposal) in relation to the proposed Additional Commercial Development.
- (b) If so required by the Project Director, the Project Company must consult with relevant stakeholders in relation to the proposed Additional Commercial Development, and/or conduct presentations on the Additional Commercial Development for the Project Director, NSW Health, other stakeholders, and their respective consultants, advisers, at such times and places as the Project Director may require.
- (c) The Project Company acknowledges that:
- (i) the Project Director is under no obligation to agree to the Project Company Variation Request submitted under clause 17(a);
  - (ii) if the Project Director agrees to the Project Company Variation Request, he may do so on such terms and conditions as he in his absolute discretion determines; and
  - (iii) nothing in this clause 17 or any other provision of this deed in any way limits the rights of NSW Health or NSW Health Tenants to undertake any additional development of the Hospital, including the building of new buildings or the extension of existing buildings.

---

## 18. Information, Monitoring and Audit

### 18.1 Notification of Safety Issues

The Project Company must:

- (a) identify and enquire into:
- (i) any activity performed in respect of the Support Services which may give rise to health and safety risks for NSW Health Staff, Health Staff



Members, the Project Company's officers, Patients, employees, agents or consultants, any Subcontractor or any of their respective officers, employees, agents or consultants; and

- (ii) any accidents or other incidents involving any (or any risk of) loss, injury or damage to persons (including death) or property of any kind, which occurs on or about a Construction Site or the Hospital as a result of or in connection with the Project Company performing the Support Services;
- (b) in the case of the matters referred to in clause 18.1(a)(i), give the Project Director written notice of each such matter as soon as reasonably practicable after it is identified; and
- (c) in the case of the matters referred to in clause 18.1(a)(ii), give the Project Director a detailed written report of such matters as soon as reasonably practicable after such accident or incident occurs.

## 18.2 Notification of Industrial Issues

The Project Company must:

- (a) keep the Project Director regularly informed of any industrial action which may affect the provision of the Works or the Support Services;
- (b) promptly inform the Project Director of:
  - (i) any industrial action which causes the Project Company to suspend or cease the provision of the Works or the Support Services; and
  - (ii) what action or measures (including settlement) the Project Company has taken or proposes to take to overcome, or minimise the effects of, such industrial action; and
- (c) promptly inform the Project Director of any industrial action affecting the Project Company or any Subcontractor or any employees of either of them which may impede the provision of the Health Functions.

## 18.3 Notification of Emergency Events

The Project Company must immediately inform the Project Director of:

- (a) any event or circumstances reasonably likely to constitute or cause an Emergency Event;
- (b) any other incident which causes the Project Company to suspend or cease carrying out all or any part of the Works or the Support Services or which may adversely impact the provision of the Health Functions; and
- (c) what action or measures the Project Company has taken or proposes to take to respond to, overcome, or minimise the effects of, such incident, event or circumstances.

**18.4 Notification of damage or defect**

- (a) The Project Company must advise the Project Director promptly in writing of any:
- (i) material damage or repairs affecting the Works, a Construction Site or the Hospital during a Construction Phase; and
  - (ii) without limiting clause 15.5(b), material damage or repairs affecting the Works, a Construction Site, a Health Facility or the Hospital during an Operations Phase,

of which the Project Company is aware, and to the extent that the Project Company bears risk under clause 25.1, the action the Project Company proposes to take to correct that material damage, Defect or disrepair, and the estimated time that correction will require.

- (b) For the purposes of this clause 18.4, material Defect, damage or repairs mean any Defect or damage the cost of repair of which is in excess of \$5,000 (indexed by reference to the CPI).

**18.5 Monitoring and Records**

- (a) The Project Company must monitor its performance in the delivery of the Support Services and maintain the information programs, plans, procedures, standards, policies, systems, records and manuals required in accordance with the procedures set out in the Support Services Specifications.
- (b) The Project Company will promptly provide to the Project Director copies of all information, records or documents which NSW Health reasonably requires in relation to the PPP As-Built Health Facilities or the Health Facilities in the RNSH PPP Footprint from time to time and their operation (including copies of any documents issued to or between members of the Project Company Group, lodged with the Australian Securities and Investment Commission or any relevant stock exchange).
- (c) The Project Company must retain all records and statements in relation to the Project for at least five years after the Project Company's obligations under this deed have ended.

**18.6 Plans, Procedures, Standards Audit**

- (a) Without limiting clause 18.5, the Project Company must, during the Operations Phase, have its compliance with the programs, plans, procedures, standards, policies, systems, records and manuals prepared and maintained in accordance with the Support Services Specifications, audited as required by the Support Services Specifications at intervals not exceeding twelve months by an independent auditor acceptable to the Project Director.
- (b) The Project Company must permit the Project Director or his representative to be present during such audits and deliver to the Project Director an audit report, within a reasonable time of completion of each audit.
- (c) NSW Health may require additional audits of the programs, plans, procedures, standards, policies, systems, records (including financial records) and manuals

prepared and maintained in accordance with the Support Services Specifications, at its own cost, provided that if an additional audit performed by NSW Health reveals that the Project Company or its Subcontractor is not complying with the requirements of the specifications with respect to programs, plans, procedures, standards, policies, systems, records and manuals the Project Company shall reimburse NSW Health for the costs of carrying out such an audit, and any subsequent audit to confirm rectification of the non-compliance.

## 18.7 Financial Reporting

- (a) The Project Company must keep proper books of account and all other financial and financial planning records that would be expected of a prudent and competent person undertaking similar obligations as the Project Company undertakes under the Project Documents. In particular, the Project Company must keep and maintain a full record of the construction, operation and financing costs incurred in performing the Works and providing the Support Services and details of funds held to cover such costs.
- (b) The Project Company must ensure that each Construction Contractor and Facilities Manager keep proper books of account and all other financial and financial planning records in relation to the Project that would be expected of a prudent and competent construction contractor, operator or maintenance contractor (as the case may be).
- (c) The Project Company must have its, and must ensure that each Construction Contractor and Facilities Manager or their respective guarantors has its, financial statements audited annually.
- (d) No later than the date which is three months prior to the commencement of each Contract Year during the Operations Phase, the Project Company must provide to the Project Director its and its Facilities Manager's annual business plan and budget in relation to the Project for the following Contract Year which shall be in such detail and provide such information as the Project Director may reasonably request.
- (e) Within 20 Business Days after each six month period during a financial year, the Project Company must provide to the Project Director its unaudited management accounts, a statement of financial performance, a cash flow statement and a statement of financial position, together with details of any financial indebtedness and an explanation of any material variations between actual results and budget year to date.
- (f) No later than four months after the end of each financial year, the Project Company must provide to the Project Director its audited financial statements for that financial year and the audited financial statements of each Construction Contractor or the Construction Contractor Guarantor during the Construction Phase and the audited financial statements of the Facilities Manager or the Facilities Manager Guarantor during the Operations Phase.
- (g) The Project Company will promptly provide to the Project Director copies of all documents, reports, plans, materials, certificates, notices, materials (including but not limited to any updated financial models or reports) which the Project Company provides to the Financiers.

- (h) Each of the documents to be provided to the Project Director in accordance with this clause 18.7 must be accompanied by a certificate signed by two authorised officers of the relevant entity certifying that the information provided is accurate, complete and correct in all respects.
- (i) The Project Company must prepare (or procure preparation of) the accounts and financial statements required under this clause 18.7 in compliance with all legal requirements and without limitation in accordance with the accounting principles generally accepted in Australia and consistently applied.

## 18.8 NSW Health Inspection

- (a) The Project Director and/or its representatives may carry out or procure the carrying out of an inspection of a Construction Site or the Hospital or any part of it, to assess whether the Project Company is complying with its obligations under this deed. Provided clause 18.8(e) does not apply and no Project Company Termination Event has occurred and is continuing, this right may not be exercised in relation to each individual Construction Site and Health Facility more often than twice in each calendar year.
- (b) The Project Director must notify the Project Company in writing a minimum of 5 Business Days in advance of the date it wishes to carry out the inspection. The Project Director must consider any reasonable requests by the Project Company for the inspection to be carried out on a different date if such request is made at least 2 Business Days prior to the notified date and the Project Company is able to demonstrate that carrying out the inspection on the notified date would materially prejudice the Project Company's ability to provide the Support Services.
- (c) When carrying out any inspection, the Project Director and its representatives must cause the minimum disruption reasonably practicable to the provision of the Support Services by the Project Company, and must comply with the reasonable Construction Site safety and Construction Site security requirements of the Project Company. The Project Company must provide reasonable assistance to the Project Director in carrying out the inspection, including providing access to any systems, registers, manuals, records (including financial records), plans and programs maintained in relation to the Hospital or Construction Site or in accordance with the relevant Operations Manual.
- (d) The cost of any inspection carried out in accordance with this clause 18.8, except where clause 18.8(e) applies or a Project Company Termination Event has occurred and is continuing, will be borne by NSW Health. The Project Company must give the Project Director any reasonable assistance required by the Project Director from time to time during the carrying out of any inspection.
- (e) If an inspection shows that the Project Company has not complied or is not complying with its obligations under this deed, the Project Director:
  - (i) must notify the Project Company of the details of the non-compliance;
  - (ii) must specify a reasonable period within which the Project Company must carry out appropriate rectification and/or remedy activities; and

- (iii) will be entitled to be reimbursed by the Project Company for the cost of the inspection and any reasonable administrative costs incurred by NSW Health in relation to the inspection.
- (f) The Project Company must at its own cost carry out such rectification and/or remedy activities within the period specified by the Project Director, and the Project Director may carry out or procure the carrying out of an additional inspection to assess compliance with the requirement to carry out such rectification and/or remedy activities.

## 18.9 NSW Health Financial Audit

- (a) At any time up to 6 months after the Termination Date, the Project Director may give notice to the Project Company (a "**Financial Audit Notice**") requiring an independent audit of any annual financial statements of the Project Company or other financial information of the Project Company provided pursuant to clause 18.7 (excluding annual financial statements of a Facilities Manager or the Construction Contractor or other financial information provided in respect of a Facilities Manager or any other person apart from the Project Company) to be undertaken for the purpose of reviewing any such financial statements or other financial information and verifying their accuracy, correctness and completeness.
- (b) If the Project Director gives a Financial Audit Notice under this clause 18.7:
  - (i) the Project Director will appoint, and notify the Project Company of, an appropriately trained and qualified person to carry out and complete the audit (the **Financial Auditor**), at NSW Health's cost and expense of NSW Health, on terms and conditions of appointment determined by the Project Director; and
  - (ii) the Project Company must, within a reasonable period, make its financial statements, other financial reports and accounts and all source information, documentation and data required for the preparation of such annual financial statements or other financial reports, available for audit by the Financial Auditor.
- (c) Upon request by the Financial Auditor, the Project Company must make available to the Financial Auditor an appropriately trained and qualified member of the Project Company's staff (or staff of a Subcontractor) to extract any relevant information from the Project Company's accounting system for the purposes of the audit.
- (d) If the written report of the Financial Auditor (the "**Financial Auditor's Report**") states that any annual financial accounts, or any other financial reports, or any part of them is not accurate, complete and correct, then:
  - (i) the Project Company must:
    - A. fix the inaccuracy, incorrectness or incompleteness in the affected accounts or data and re-issue the affected accounts or data to the Project Director; and

- B. as applicable, promptly take steps to remedy the inaccuracy, incorrectness or incompleteness in its monitoring, measuring and reporting systems;
- (ii) if the inaccuracy, incorrectness or incompleteness has affected the amount of any Monthly Service Payment or any other account, that has been paid to the Project Company, the Project Director will determine, and notify the Project Company of, the amount of the appropriate adjustment to the affected amounts and that amount will be added to or deducted from (as the case may be) the next Monthly Invoice scheduled after the date of the Project Director's notice; and
- (iii) the Project Company will reimburse NSW Health the costs of the Financial Auditor in carrying out the audit pursuant to this clause 18.9.

## **PART E – ADVERSE EVENTS AND CHANGE**

### **19. Emergencies and NSW Health Step In**

#### **19.1 Project Director may instruct**

If an Emergency Event occurs, the Project Director may instruct the Project Company to immediately suspend performance of the Support Services or the Works, perform any Support Services or the Works in respect of which the Project Company is in breach and/or to procure that such additional or alternative services are undertaken by the Project Company, as and when required by the Project Director, in each case to ensure that the Emergency Event is dealt with and normal operation of the Hospital and Construction Site resumes as soon as is reasonably practicable.

#### **19.2 Payment for additional or alternative services**

- (a) Subject to paragraph (b) below, any additional third party costs incurred by the Project Company or its Subcontractor in providing the additional or alternative services under clause 19.1 will be borne by NSW Health and paid in accordance with clause 29.
- (b) The Project Company will bear the cost of any additional or alternative services provided by the Project Company where the relevant Emergency Event arose (directly or indirectly) as a result of any negligence, wilful misconduct, breach or default of the Project Company or Project Company Related Party.

#### **19.3 NSW Health Step-In**

If:

- (a) the Project Company fails to promptly remedy a breach which has given rise to an Emergency Event and the Project Director reasonably believes that action must be taken in respect of the Emergency Event;
- (b) the Project Company is unable or unwilling to provide additional or alternative services requested under clause 19.1, and the Project Director reasonably believes that action must be taken in respect of the Emergency Event;

- (c) the Project Director reasonably believes that the Project Company must suspend provision of the Support Services and/or NSW Health must take step in action in response to an Emergency Event or to discharge a legislative, public or constitutional duty, or
- (d) the Project Company's breaches of this deed cause NSW Health to be in breach of any of its obligations under the Car Park Licence Agreement, Agreement to Retail Services or the Retail Head Lease,

NSW Health may exercise the Step In Rights in accordance with the procedure set out in schedule 15.

---

## 20. Compensation Events

If and to the extent that a Compensation Event (or its effects):

- (a) is or is likely to be the cause of a delay in:
  - (i) obtaining a Development Approval by the relevant Target DA Approval Date;
  - (ii) achieving Completion of a Milestone or Stage by the relevant Target Completion Date for that Milestone or Stage; or
  - (iii) achieving Completion of a Stage by the Longstop Date for that Stage;
- (b) affects the ability of the Project Company to comply with any of its other obligations or exercise of any of its rights under this deed or any other Project Document; and/or
- (c) causes the Project Company to incur additional or increased costs or causes the Project Company to lose revenue in respect of the Project,

then the Project Company is entitled to apply for relief from its obligations and/or claim compensation under this deed in accordance with the provisions of schedule 17.

---

## 21. Relief Events

- (a) If and to the extent that a Relief Event (or its effects):
  - (i) is or is likely to be the cause of a delay in:
    - A. obtaining a Development Approval by the relevant Target DA Approval Date;
    - B. achieving Completion of a Milestone or a Stage by the relevant Target Completion Date for that Milestone or Stage; or
    - C. achieving Completion of a Stage by the Longstop Date for that Stage; or
  - (ii) affects the ability of the Project Company to perform any of its other obligations under this deed or any other Project Document,

then the Project Company is entitled to apply for relief from its affected obligations in accordance with the provisions of schedule 18, but, for the avoidance of doubt, shall not be entitled to any compensation for additional or increased costs or lost revenue in respect of such Relief Event.

(b) Nothing in this deed will affect:

(i) any entitlement of NSW Health to make a Deduction; or

(ii) any Deduction made,

as a result of schedule 5 during the period in which the Relief Event is subsisting, or:

(iii) any obligation on the Project Company to:

A. satisfy or exceed the Specifications; or

B. take remedial action (including, where applicable, provision of back-up Utilities), rectify, reinstate or replace to deal with the effects or consequences of such Relief Event,

to the extent the Project Company is not prevented from doing so by the relevant Relief Event.

---

## **22. Change Procedure**

### **22.1 Proposal of Changes in Services**

Either party may propose a Contract Variation in accordance with the Change Procedure.

### **22.2 Project Company Changes**

Where a request for a Contract Variation is made by the Project Company pursuant to clause 22.1, the Project Company will not be entitled to any extension of time, nor relief from any other obligation, nor any compensation in respect of the implementation of any Contract Variation which it requests unless such Contract Variation is deemed pursuant to clause 22.4 to be a NSW Health Variation Request or is made pursuant to the obligation of the Project Company under paragraph 1(b) of schedule 16.

### **22.3 NSW Health Change**

Where a request for a Contract Variation is made by the Project Director or there is deemed to be a NSW Health Variation Request pursuant to clause 22.4 or clause 22.6(c)(i) or a Project Company Variation Proposal is made pursuant to the obligations of the Project Company under paragraph 1(b) of schedule 16, the Change Procedure will apply in respect of any extension of time, relief from any other obligation, and/or any compensation payable in respect of the implementation of that Contract Variation.

### **22.4 Deemed NSW Health Variation Requests**

Any Contract Variation which arises:

(a) as a direct result of a Compensation Event;



- (b) under clause 5.4(a)(xi) or clause 5.4(c);
- (c) under clause 6.4(f);
- (d) under clause 13.6(a)(iii)C;
- (e) under clause 22.6;
- (f) under clause 22.8(c);
- (g) under clause 22.9;
- (h) under clause 23.9;
- (i) under clause 24.2(c);
- (j) under clause 27.2(d);
- (k) under clause 28.3(b)(ii);
- (l) under clause 4.2(h) of Part A of schedule 5;
- (m) under paragraph 18 of schedule 14;
- (n) under paragraph 8 of schedule 16;
- (o) as a direct result of the provision or carrying out of, or proposed provision of or carrying out of, an Unforeseeable Health Function; or
- (p) as a direct result of a request made by NSW Health to the Project Company under clauses 15.5(b)(v), 15.5(d)(ii) or 15.5(i)(ii),

will be deemed to be a NSW Health Variation Request upon the Project Company's written request for a Contract Variation, provided that the Project Company, at the time it issues the relevant request for Contract Variation notifies the Project Director under which of clauses 22.4(a) to (p) such request is being made.

## **22.5 No Other Change**

Without limiting the other provisions of this deed, but subject to clause 22.7, the Project Company must not implement any Contract Variation except in accordance with this clause 22.

## **22.6 Additional Work**

- (a) If NSW Health wishes to make a change to the Hospital or carry out work on the RNSH PPP Footprint which would, if implemented, be Additional Work, the Project Director may issue to the Project Company a request for the Project Company to provide a proposal for the procurement of that Additional Work ("**Additional Work Request**").
- (b) Within 60 Business Days of receipt of an Additional Work Request, the Project Company must prepare and submit (in draft) to the Project Director a detailed proposal for the procurement of the Additional Work ("**Procurement Proposal**"). A draft Procurement Proposal must include a detailed estimate of the:

- 
- (i) Capital Expenditure required to carry out the Additional Work broken down into such cost categories as NSW Health requires;
  - (ii) calculation of the Estimated Cost Effect (less the Capital Expenditure) of carrying out the Additional Work in accordance with the draft Procurement Proposal; and
  - (iii) the details required under paragraph 8 of schedule 16 for the Support Service.
- (c) If the draft estimate of the Capital Expenditure required to carry out that Additional Work:
- (i) is less than \$500,000 (in 31 December 2007 dollars) indexed by reference to CPI, the parties agree that the Additional Work Request will be deemed to be a NSW Health Variation Request under paragraph 2(b) of schedule 16; or
  - (ii) is equal to or greater than \$500,000 (in 31 December 2007 dollars) indexed by reference to CPI, the Procurement Proposal must be a proposal in which the Project Company is engaged by NSW Health in the capacity of a managing contractor to issue a request for tender to not less than 3 contractors nominated by the Project Company and approved by the Project Director to carry out the relevant Additional Work and the draft Procurement Proposal must include with it a detailed tender process satisfactory to the Project Director for the selection of successful tenderer.
- (d) If required by the Project Director, the Project Company must make available such further information as the Project Director may request relating to a draft Procurement Proposal in such form as the Project Director may request.
- (e) Within 40 Business Days after receiving the draft Procurement Proposal, the Project Director may:
- (i) direct the Project Company to implement the Procurement Proposal;
  - (ii) give the Project Company comments, recommendations and representations regarding the draft Procurement Proposal; or
  - (iii) withdraw the Additional Work Request and elect not to proceed with the Procurement Proposal.
- (f) If the Project Director gives the Project Company comments, recommendations and representations regarding the draft Procurement Proposal the Project Company must amend the draft Procurement Proposal to reflect the Project Director's comments, recommendations or representations and the draft Procurement Proposal must be re-submitted in accordance with clause 22.6(b).
- (g) Where:
- (i) *not used*; or
  - (ii) the Project Company and the Project Director are unable to agree on the form of a Procurement Proposal pursuant to clause 22.6(b),

then:

- (iii) NSW Health may undertake, or appoint an Additional Work Contractor to undertake, the Additional Work; and
  - (iv) the Project Company must not hinder, prevent or delay NSW Health or any Additional Work Contractor from undertaking the Additional Work and NSW Health may request that the Project Company and the Additional Work Contractor enter into a co-ordination and interface agreement with respect to all or any of the design, construction, completion, commissioning, hand over and facilities management of the Additional Work. The Project Company must comply with all such requests.
- (h) Unless otherwise determined by the Project Director, the Project Company will be responsible for all aspects of the Support Services as they relate to Additional Work, after completion or installation of Additional Work pursuant to this clause 22.6. The resultant changes to the Support Services and the Service Payment will be determined in accordance with schedule 16, and the Project Company releases NSW Health, the State, their respective delegates, employees, contractors and agents from any liability, duty or obligation to the Project Company (or any person claiming through or on behalf of the Project Company, including any Subcontractor) in respect of Claim or Loss connected with such Additional Work, except for any rights of the Project Company arising from a Compensation Event.
- (i) The parties acknowledge and agree that Additional Works will not be carried out under the Construction Contract.

## 22.7 Minor Changes

Notwithstanding the other provisions of this deed, the Project Company may implement Minor Changes in accordance with the written consent or directions of the Project Director without reference to the Change Procedure, provided that the Project Company will not be entitled to any extension of time or other relief from the performance of its obligations in accordance with this deed in respect of Minor Changes, and the Project Company must comply with and will only be compensated in accordance with schedule 19 in respect of any Minor Changes.

## 22.8 Third Party Facilities

- (a) NSW Health or a NSW Health Tenant may engage Third Party Contractors to construct Third Party Facilities or perform work on the RNSH PPP Footprint and on, or in the vicinity of, any Construction Site at any time during the Term.
- (b) The Project Company must:
  - (i) develop Interface Protocols referred to in paragraphs (a), (b) and (c) of the definition of Interface Protocols by the dates specified in schedule 12 (as updated in accordance with the Works Program);
  - (ii) develop an Interface Protocol with any Third Party Contractor in relation to the interface between the relevant Third Party Facilities and the Project; and

- (iii) not hinder, prevent or delay any Third Party Contractor in carrying out their activities.
- (c) Unless otherwise determined by the Project Director, NSW Health will issue a NSW Health Variation Request with respect to the provision of Support Services to any Third Party Facility and the Project Company will issue a NSW Health Variation Proposal to NSW Health in accordance with Schedule 16. If the NSW Health Variation Proposal issued by the Project Company is accepted by NSW Health:
  - (i) the Project Company will be responsible for all aspects of the Support Services as they relate to that Third Party Facility, after completion or installation of the Third Party Facility pursuant to this clause 22.8.
  - (ii) the resultant changes to the Support Services and the Service Payment will be determined in accordance with schedule 16; and
  - (iii) the Project Company releases NSW Health, the State, their respective delegates, employees, contractors and agents from any liability, duty or obligation to the Project Company (or any person claiming through or on behalf of the Project Company, including any Subcontractor) in respect of Claim or Loss connected with the provision of Support Services to that Third Party Facility, except for any rights of the Project Company arising from a Compensation Event.

## **22.9 Cogeneration**

- (a) NSW Health may, at its sole discretion, give the Project Company notice that it requires a Contract Variation providing for the termination of any cogeneration used to provide energy generation to the Health Facilities.
- (b) Within six months after issue of the notice under clause 22.9(a), the Project Company will ensure that cogeneration ceases to be used to provide energy generation in lieu of mains power supply to the Hospital (except where used as emergency backup power generation).
- (c) Paragraph 21 of Schedule 16 will apply to the determination of the Estimated Cost Effect of a Contract Variation the subject of a notice under clause 22.9(a).

## **23. Force Majeure**

### **23.1 Ability to make Deductions**

Nothing in this clause 23 will affect:

- (a) any entitlement to make a Deduction; or
  - (b) any Deduction made,
- as a result of schedule 5 during the period in which a Relief Event is subsisting, or:
- (c) any obligation on the Project Company to:
    - (i) satisfy or exceed the Specifications; or

- (ii) take remedial action (including, where applicable, provision of back-up Utilities), rectify, reinstate or replace to deal with the effects or consequences of such Relief Event,

to the extent the Project Company is not prevented from doing so by the relevant Relief Event.

### **23.2 Notify**

On the occurrence of a Force Majeure Event, the Project Company must notify the Project Director as soon as practicable. The notification will include all updated details required to be provided in accordance with schedule 18 in relation to the Relief Event which has become a Force Majeure Event.

### **23.3 Consultation and Relief**

As soon as practicable following notification in accordance with clause 23.2, the parties must consult with each other in good faith and use all reasonable endeavours to agree to appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of this deed.

### **23.4 Relief**

- (a) If the Project Company believes that a Force Majeure Event has occurred and the Project Company provides evidence to the Project Director that:
  - (i) the Force Majeure Event has occurred and caused an inability to comply with the Project Company's obligations;
  - (ii) the impact of the Force Majeure Event could not reasonably have been mitigated or recovered by the Project Company acting in accordance with Good Industry Practice, without incurring material expenditure in excess of the amount it is entitled to recover under any insurance policy in respect of the Force Majeure Event; and
  - (iii) the Project Company is using best endeavours to perform its obligations under this deed,

without limiting the other provisions of this clause 23, NSW Health must grant such relief as is appropriate, taking into account the likely effect of delay.

- (b) The Project Company must notify the Project Director if at any time it receives or becomes aware of any further information relating to the Force Majeure Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading, and the relief given in accordance with this clause 23.4 will be amended accordingly.
- (c) If the Project Director disagrees that a Force Majeure Event has occurred or that the Project Company is entitled to any relief under this clause 23.4, the parties will seek to resolve the matter in accordance with clause 4.6(h) and/or clause 40.

### 23.5 Unable to Agree

If the parties are unable to agree on appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of this deed, on or before the date falling 180 days after the date of the commencement of the relevant Relief Event and such Relief Event is continuing or its consequence remains such that the affected party has been or is unable to comply with a material part of its obligations under this deed during that 180 day period then, subject to clause 23.6, either party may terminate this deed by giving 20 Business Days' written notice to the other party.

### 23.6 Notice to Continue

If the Project Company during the subsistence of a Force Majeure Event gives notice to the Project Director under clause 23.5 that it wishes to terminate this deed, then the Project Director has the option either to accept such notice or to respond in writing on or before the date falling 10 Business Days after the date of its receipt stating that it requires this deed to continue in whole. If the Project Director gives the Project Company such notice, then:

- (a) NSW Health must pay to the Project Company the Monthly Service Payment (less costs not incurred as a result of non-provision of Support Services and proceeds received from business interruption or delay in start up insurances) from the day after the date this deed would have terminated in whole under clause 23.5 (or in the case of a Force Majeure Event occurring during the Construction Phase, from the Target Completion Date for that Stage except that any extension of time to the Target Completion Date for that Stage granted by the Project Director as a result of the occurrence of the Relief Event giving rise to the Force Majeure Event will be limited to 180 days unless otherwise agreed in accordance with clause 23.3) as if the Support Services then required to be provided under this deed were being fully provided;
- (b) to the extent the non-provision of Support Services is caused by the Force Majeure Event then, during the period referred to in clause 23.6(a) that NSW Health is obliged to continue to pay the Project Company:
  - (i) the operation of clause 11 of Schedule 5 is suspended;
  - (ii) no Deduction may be made under clause 3 of Schedule 5; and
  - (iii) Failure Points will not accrue,
 in respect of the non-provision of Support Services; and
- (c) this deed will not terminate until expiry of written notice (of at least 30 Business Days) from NSW Health to the Project Company that they wish this deed to terminate.

### 23.7 Mitigation

The parties must at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay and the Project Company will at all times during which a Force Majeure Event is subsisting take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event.

---

**23.8 Event Ceases**

The affected party must notify the other party as soon as practicable after the Force Majeure Event ceases or no longer causes the affected party to be unable to comply with a material part of its obligations under this deed. Following such notification this deed will continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

**23.9 Not all Health Facilities affected**

Where a Force Majeure Event prevents the Project Company from carrying out its obligations under this deed in respect of some but not all of the Stages or Health Facilities, as the case may be, either party may after 180 days after the occurrence of the relevant Relief Event propose a Contract Variation in accordance with the relevant provisions of clause 22, under which the affected Stages or Health Facilities, as the case may be, cease to be subject to this deed.

---

**24. Change in Law****24.1 Requirement to comply**

Without limiting clause 2.6, the Project Company acknowledges that it must, in performing the Project, comply, and procure that all Subcontractors comply, with all applicable Law, and it is not entitled to any compensation or extension of time or relief from performance of its obligations under this deed as a result of any Change in Law, unless and to the extent, such Change in Law constitutes or gives rise to a Compensation Event.

**24.2 Implementation Relief**

- (a) Notwithstanding clause 24.1, to the extent it is able to do so, NSW Health will use all reasonable endeavours to avail the Project Company of any relief, implementation arrangements or programs which are extended to NSW Health, for NSW Health operated hospitals generally, in respect of compliance with any Change in Law.
- (b) The Project Company will not be required to comply with a Change in Law falling under paragraph (c) or (d) of the definition of Change in Law to the extent that and for so long as the Project Director has given the Project Company written notice requiring it not to comply with such Change in Law. For the purposes of clause 24.2(b), a decision by NSW Health or the Project Director not to proceed with a Contract Variation resulting from a Change in Law falling under paragraph (c) of the definition of Change in Law shall be deemed to be a written notice requiring the Project Company not to comply with that Change in Law.
- (c) If a Change in Law falling under paragraph (c) or (d) of the definition of Change in Law which is not also a change to Legislation affects the performance of the Interim R&E Hard FM Services or would require a Contract Variation in respect of the Works, the Project Company has no obligation to comply with that Change in Law unless and to the extent that NSW Health has issued a NSW Health Variation Request requiring the Project Company to comply with that Change in Law and a resulting Contract Variation has been agreed with the Project Company.

### 24.3 Beneficial Change in Law

Where a Beneficial Change in Law occurs, the Service Payment will be adjusted in accordance with schedule 19 as if the Beneficial Change in Law resulted in a Contract Variation and the Variation Saving arose due to a NSW Health Variation Request provided that NSW Health shall be entitled to:

- (a) 100% of any Variation Saving which arises as a result of any amendment to or repeal of division 16D or section 51AD of the *Income Tax Assessment Act 1936* (Cth); and
- (b) 50% of any Variation Saving which arises from any other Beneficial Change in Law.

## PART F – LOSS, DAMAGE AND INSURANCE

### 25. Loss and Damage

#### 25.1 Risk of loss or damage

- (a) Except as expressly provided in this deed, during each Construction Phase for a Stage, the Project Company bears the risk of loss or damage to Works relating to that Stage, to any Health Facility to the extent forming part of that Stage and to the Construction Site in or on which the relevant Works are carried out.
- (b) Except as expressly provided in this deed, during each Operations Phase for a Health Facility, the Project Company bears the risk of loss or damage to that Health Facility and to the RNSH PPP Footprint on or in which that Health Facility is located.
- (c) The Project Company must, in accordance with clause 27 but subject to clause 25.8, promptly make good any loss or damage to the Works, the Construction Sites or the Health Facilities (as applicable) caused during the period it bears the risk of loss or damage.

#### 25.2 Project Company's Indemnity

The Project Company must, subject to clauses 25.3 and 25.8, be responsible for, and must release and indemnify NSW Health, NSCCAHS, the State and their respective officers, employees and agents on demand from and against each of:

- (a) any Claim or Loss in respect of:
  - (i) death or personal injury;
  - (ii) loss of or damage to property (including property belonging to NSW Health or the State or for which it is responsible); and
  - (iii) third party suits, claims, actions, demands, proceedings, penalty, costs, charges or expenses (excluding, for the avoidance of doubt, any Claim or Loss in respect of a suit, claim, action or proceeding initiated by a NSW Health Related Party),



which may arise out of, or in consequence of, the design, construction, operation or maintenance activities of the Project Company or the performance or non-performance by the Project Company of its obligations under this deed or any Project Document or the presence on or possession of or access to the Construction Sites, the Works or the Hospital or the Hospital Campus by the Project Company or any Project Company Related Party, including any Contamination of or Pollution occurring on or from any Construction Site; and

- (b) any Claim or Loss suffered by or incurred in connection with any:
- (i) breach or failure to comply with the terms of any Project Document by the Project Company or any Project Company Related Party; or
  - (ii) negligent, or unlawful acts or omissions or wilful misconduct by the Project Company or any Project Company Related Party.

Without limiting this clause 25.2, and to the extent permitted by law, if NSW Health incurs any loss, expense (including any fines or penalties) or damage pursuant to the provisions of the Occupational Health and Safety Act 2000 or the OH&S Regulation arising from the Works on the Hospital Campus or any matter related to the Works on the Hospital Campus, the Project Company will reimburse (on demand) NSW Health for any such loss, expense (including any fines or penalties) or damage.

### **25.3 Project Company not obliged to indemnify and limitation on liability**

- (a) The Project Company will not be obliged to release or indemnify NSW Health, NSCCAHS, the State and their respective officers, employees and agents under a Project Document for any Claim or Loss to the extent only that the Claim or Loss is caused by:
- (i) negligent or unlawful acts or omissions or wilful misconduct of NSW Health or a NSW Health Related Party, where such Claim or Loss did not occur as a result of a failure by the Project Company to provide the Support Services;
  - (ii) a breach of NSW Health of its express obligations under a Project Document or a breach by the Director-General of the New South Wales Department of Health of its express obligations under the Labour Services Agreement;
  - (iii) the Project Company following the express directions of NSW Health or the Project Director with respect to its obligations under this deed, where such directions are given in accordance with this deed;
  - (iv) any fraudulent or negligent act or omission of NSW Health, including any fraudulent or negligent act or omission of their respective officers, employees, agents and contractors; or
  - (v) a failure by the Director-General of the New South Wales Department of Health to comply with the Industrial Law regarding the entitlements and benefits of Health Staff Members.
- (b) Notwithstanding the provisions of any Project Document, the Project Company is not liable or responsible for any Claim or Loss to the extent that NSW Health or the

Director-General of the NSW Department of Health is expressly obliged to pay or bear such Claim or Loss under the Labour Services Agreement.

#### **25.4 Damage by NSW Health or NSW Health Related Parties**

Loss of or damage to the Works, the Hospital, the Hospital Campus or a Construction Site or any part of the Works, the Hospital, the Hospital Campus or a Construction Site by NSW Health or NSW Health Related Party will not (subject to paragraph (a) of the definition of Compensation Event) be a Compensation Event. NSW Health will have no obligation to indemnify the Project Company or any Project Company Related Party in respect of such damage.

#### **25.5 Responsibility for Related Parties**

The Project Company will be responsible, as against NSW Health, for the acts or omissions of the Project Company Related Parties as if they were the acts or omission of the Project Company and, subject to clause 25.4, NSW Health will be responsible, as against the Project Company, for the acts or omissions of NSW Health Related Parties as if they were the acts or omissions of NSW Health.

#### **25.6 Claims Procedure**

- (a) Where NSW Health wishes to make an indemnity demand under this deed on the Project Company in respect of a Claim, NSW Health must give notice of the relevant Claim as soon as reasonably practicable, setting out full particulars of the Claim (provided that failure to give such notice must not affect Project Company's indemnity obligations under this deed, except to the extent the Project Company is precluded or prejudiced by such failure).
- (b) NSW Health must exercise all rights and remedies reasonably available to it in respect of such Claim to mitigate such Claim and shall advise the Project Company, at the Project Company's request, of the status of any such action.
- (c) Subject to the rights of insurers under policies of insurance maintained pursuant to clause 26, the Project Company may investigate, and, upon acknowledging its obligation to indemnify under this deed, may defend or compromise in good faith in a commercially reasonable manner any Claim for which indemnification is sought under this deed, and NSW Health must cooperate with all reasonable requests of the Project Company in connection with such action, provided, that no Claim shall be compromised without the prior written consent of NSW Health.

#### **25.7 Costs of claims**

The Project Company must, if it wishes to have conduct of any Claim, give reasonable security to NSW Health for any cost or liability arising out of the conduct of the Claim by the Project Company.

#### **25.8 Residual, Divested and Vacated Facilities**

- (a) Subject to clause 25.8(b), the Project Company will not be responsible for, and will not be liable to give the release and indemnity referred to in clause 25.2 in respect of any loss or damage to:
  - (i) a Residual Facility, a Divested Facility or a Vacated Facility; or

- (ii) prior to the Hard FM Start Date, the R&E Facility.
- (b) Clause 28.5(a) will not apply in respect of, and to the extent, loss or damage arises as a consequence of any:
  - (i) breach or failure to comply with the terms of any Project Document by the Project Company or any Project Company Related Party; or
  - (ii) negligent, or unlawful acts or omissions or wilful misconduct by the Project Company or any Project Company Related Party.

but only to the extent such loss or damage is the subject of an indemnity under any insurance policy held by the Project Company or a Project Company Related Party.

---

## **26. Insurance**

### **26.1 Project Company's Requirement to Maintain**

The Project Company must take out and maintain or procure the taking out and maintenance of the insurances specified in schedule 14, at the times, in the manner and in the form specified in schedule 14, and any other insurances as may be required by applicable Law. The Project Company will otherwise comply with the requirements of schedule 14 in all respects.

### **26.2 Limit of Liability**

Neither failure to comply, nor full compliance by the Project Company with the insurance provisions of this deed, will limit or relieve the Project Company of its liabilities and obligations under this deed.

### **26.3 Insurance proceeds**

The Project Company must pay to NSW Health the net amount it recovers under any insurance policy (other than the proceeds of delay in start-up insurance or business interruption insurance) in connection with any event which results in NSW Health making a payment to the Project Company pursuant to Part B or Part C of schedule 21, which are not used to repair, reinstate or replace part or parts of the Works, the Construction Sites or the Health Facilities or used or expected to be used in respect of the Project Company's or a Subcontractor's own loss or damage or to discharge any insured legal liability to third parties.

---

## **27. Reinstatement**

### **27.1 Project Company's Obligation to Reinstatement**

If any loss or damage occurs to any part of the Works or the Hospital (except loss or damage arising in relation to a Defect to which clause 15.5(b) applies and loss or damage to:

- (a) a Residual Facility, a Vacated Facility or a Divested Facility; or
- (b) prior to the Hard FM Start Date, the R&E Facility),

the Project Company must (without limiting its other obligations under this document):

- (c) promptly repair or replace or remedy the loss or damage so that, to the greatest extent possible, the Project Company continues to comply with its obligations under the Project Documents;
- (d) without limiting the Project Company's other obligations under this deed, promptly provide the Project Director with written notice of any such loss or damage and any required replacement, reinstatement or repair;
- (e) as soon as practicable, provide the Project Director with a further detailed report of all action being taken or to be taken to effect replacement, reinstatement or remedy the loss or damage, including the estimated time such action will require;
- (f) consult with the Project Director as to the programming of the works needed to effect the relevant replacement, reinstatement or remedy;
- (g) in carrying out the relevant replacement, reinstatement or remedy activities, minimise the impact on the Works, the Hospital and the Health Functions and keep the Project Director fully informed of the progress of the repair and replacement activities; and
- (h) apply all insurance proceeds and amounts paid to the Project Company under clause 26.3 received in respect of such loss or damage towards the cost of the relevant replacement, reinstatement or remedy.

## **27.2 Direction Not to Replace or Reinstale**

NSW Health may, in its absolute discretion, direct the Project Company, by written notice, not to carry out its obligations under clause 27.1. If such notice is given:

- (a) the Project Company waives (to the extent permitted by the applicable policy) in favour of and for the benefit of NSW Health, the Project Company's right to make a claim under a policy of insurance required under clause 26.1, other than claims in respect of the Project Company's or a Subcontractor's own loss or damage or any insured legal liability to third parties;
- (b) the Project Company must pay to NSW Health all proceeds it receives from the policies of insurance required under clause 26.1, other than proceeds in respect of the Project Company's or a Subcontractor's own loss or damage or any insured legal liability to third parties;
- (c) the Project Company will be relieved of its obligations to perform the Works or provide the Support Services, to the extent reasonably determined by NSW Health in the context of the loss or damage; and
- (d) NSW Health will issue a NSW Health Variation Request in relation to changes to obligations of the Project Company to perform the Works or provide the Support Services.

## **27.3 NSW Health May Repair or Reinstale**

Without limiting any other provision of this deed, and subject to clause 27.2, if the Project Company does not comply with clause 27.1:

- (a) NSW Health may give the Project Company written notice that NSW Health intends to remedy, repair or reinstale any loss or damage (or have such work done

by a nominee) which the Project Company was (and is) obliged to repair, replace or remedy under clause 27.1; and

- (b) if the Project Company:
- (i) does not commence complying with its obligations under clause 27.1 within 14 days of the issue of that notice by NSW Health; or
  - (ii) having commenced to comply with its obligations under clause 27.1, ceases to comply with its obligations (as reasonably determined by NSW Health),

NSW Health may, without further notice, elect to remedy, repair or reinstate any loss or damage or to have such work done by a person nominated by NSW Health. The costs and expenses incurred in doing such work or having such work done by another person will be a debt due and payable by the Project Company to NSW Health. The Project Company shall make no Claim against NSW Health in respect of such work, and shall indemnify NSW Health and NSW Health Related Parties against any Claim or Loss (including any legal costs on a full indemnity basis) NSW Health or any NSW Health Related Party (as applicable) pays, suffers, incurs or is liable for, in respect of such work.

---

## **28. Uninsurable Risks**

### **28.1 Obligation**

Nothing in clause 26 will oblige the Project Company to take out or maintain insurance in respect of a risk which is or becomes Uninsurable.

### **28.2 Risks Become Uninsurable**

To the extent that any risk required to be insured against under the policies to be effected in accordance with clause 26 becomes Uninsurable then:

- (a) the Project Company must notify the Project Director within 5 Business Days of the risk becoming Uninsurable; and
- (b) if both parties agree, or it is determined in accordance with clause 4.6(h) and/or clause 40, that the risk is Uninsurable and that the risk being Uninsurable is not caused by the actions of the Project Company or a Project Company Related Party,

then the parties must meet to discuss the means by which the risk should be managed (including considering the issue of self-insurance by either party).

### **28.3 Consequences**

- (a) If the requirements of clause 28.2 are satisfied with respect to a Material Risk, but the parties cannot agree as to how to manage the Material Risk, then this deed will continue but with the Monthly Payment being adjusted to deduct an amount agreed by the Project Company and the Project Director to be equal to the premium that was payable for insurance for such Material Risk immediately prior to it becoming Uninsurable. If the parties are unable to agree the amount equal to the premium that was payable in respect of insurance for the relevant Material Risk immediately prior to it becoming Uninsurable, the matter must be referred for determination in accordance with clause 4.6(h) and/or clause 40.

- (b) If this clause 28.3 applies, on the occurrence of the Material Risk the Project Director must (at the Project Director's option) either:
- (i) pay to the Project Company an amount equal to the insurance proceeds that would have been payable had the relevant insurance continued to be available less the loss of equity return component of the business interruption insurances and clause 27.2 will apply;
  - (ii) only in respect of a Material Risk required to be insured under paragraph 9 of schedule 14, if part, but not all of the Hospital is affected, make a NSW Health Variation Request pursuant to the relevant provisions of the Change Procedure, under which the affected part of the Hospital ceases to be subject to this deed; or
  - (iii) only in respect of a Material Risk required to be insured under paragraph 9 of schedule 14, if all of the Hospital is affected, pay to the Project Company an amount equal to the amount set out in Part C of schedule 21 and this deed will terminate.
- (c) NSW Health and the Project Company agree that any Contract Variation (and associated calculation of the Estimated Cost Effect in accordance with schedule 19) undertaken as a result of a NSW Health Variation Request under clause 28.3(b)(ii) will be undertaken on the basis that the Monthly Payment will be unchanged from what it would have been on and from the occurrence of the Material Risk, had the Material Risk not occurred, less, without double counting, the amount of any costs avoided as a result of the Contract Variation.
- (d) Without limitation, any Contract Variation (and the calculation of the associated Estimated Cost Effect) resulting from the application of clause 28.3(b)(ii) will have the effect that:
- (i) the Project Company is deemed to have complied with all of its obligations under the Project Documents to which NSW Health is a party (including so as to complete the Works or part of the Works) at the time that it is (or would, but for the Material Risk have been) required to carry out such obligations under the Project Documents to which NSW Health is a party, but only to the extent that its failure to do so results or would have resulted from the occurrence of the Material Risk; and
  - (ii) the Project Company is not in breach of the Project Documents to which NSW Health is a party, and is not subject to any Deductions and no Project Company Termination Event occurs or will occur to the extent that the failure of the Project Company to comply with its obligations under any Project Document to which NSW Health is a party, any Deductions or the occurrence of any Project Company Termination Event results from or would have resulted from the occurrence of the Material Risk.

#### **28.4 Obligation to Monitor**

- (a) Where a risk which is required to be insured against under the policies to be effected in accordance with clause 26 is Uninsurable, the Project Company must approach the insurance market on a regular basis to establish whether that risk remains Uninsurable and must advise NSW Health accordingly.

- (b) If a risk which is required to be insured against under the policies to be effected in accordance with clause 26 is no longer Uninsurable, the Project Company must:
- (i) immediately notify NSW Health;
  - (ii) obtain separate quotations to cover the risk in accordance with the requirements set out in clause 26 and schedule 14 from 3 respectable insurance companies in the commercial insurance market (or as otherwise agreed by NSW Health acting reasonably) and provide these quotations to NSW Health within 10 Business Days of submission to NSW Health of the notice described in paragraph (i) above together with such other documentation or information as NSW Health reasonably requires in connection with those quotations;
  - (iii) within 2 Business Days of receipt of confirmation from NSW Health that one of the quotations provided under paragraph (ii) above is acceptable, effect insurance with the provider of the quote to cover the risk in accordance with the requirements set out in clause 26 and schedule 14; and
  - (iv) update the Base Case to incorporate the price of the quotation that is accepted by NSW Health and submit a revised Base Case to NSW Health in accordance with clause 29.10.
- (c) The parties acknowledge and agree that the Monthly Payment will be adjusted to include an amount which is equal to the premium that is payable for the insurance in respect of which the quotation has been obtained.

## **PART G – PAYMENT PROVISIONS**

### **29. Payment Provisions**

#### **29.1 Payments**

- (a) NSW Health must pay the Project Company the Monthly Interim Services Payment, calculated in accordance with schedule 5, for each month, or part of a month, during the Interim Services Phase.
- (b) NSW Health must pay the Project Company an amount in respect of each Operating Month, calculated in accordance with schedule 5, and otherwise increased or decreased in accordance with the provisions of this deed.
- (c) NSW Health must pay the Project Company any other amount due by NSW Health under the Project Documents in accordance with this clause 29.

#### **29.2 Invoices**

On or about the fifteenth day:

- (a) of each month during the Interim Services Phase, the Project Company must submit to the Project Director an invoice for the Monthly Interim Services Payment for the preceding month; and

- (b) of each Operating Month the Project Company must submit to the Project Director an invoice for the preceding Operating Month in the form of the Pro Forma Invoice;
- (c) following the Termination Date, the Project Company must submit to the Project Director an invoice; and
- (d) of each month during the Term where under a provision of the Project Documents NSW Health is obliged to pay or reimburse the Project Company for any other amount, the Project Company may submit an invoice for any such amount, and must provide appropriate details and identify the provision under which the obligation to pay or reimburse arises.

Each such invoice will constitute a "**Monthly Invoice**" for the purposes of this deed.

### **29.3 Payment of Invoices**

- (a) Subject to clause 29.5, NSW Health will pay the amount of the Monthly Invoice submitted to it under clause 29.2 within 20 Business Days of its submission of the Monthly Invoice and, where required, the Monthly Performance Report in accordance with clause 29.6.
- (b) Where a Monthly Invoice shows a net amount owed by the Project Company to NSW Health, the Project Company will pay that amount to NSW Health within 20 Business Days of the Monthly Invoice or, other than in the case of the Monthly Invoice submitted after the Termination Date, at the option of the Project Director, carry forward that amount to the next Monthly Invoice in reduction of accounts which would otherwise have been owed by NSW Health to the Project Company.

### **29.4 Disputed Amounts**

If the Project Director disputes, in good faith, any amount set out in a Monthly Invoice, NSW Health will be entitled to withhold payment of the amount so disputed (the "**Disputed Amount**"). Disputed Amounts will be resolved in accordance with clause 4.6(h) and/or clause 40. Until the dispute is resolved in accordance with clause 4.6(h) and/or clause 40, and subject to the outcome of that dispute, the Disputed Amount will be taken not to be due and payable for the duration of the dispute.

### **29.5 Determination of Dispute**

If the determination of any dispute referred to in clause 29.4 shows that:

- (a) NSW Health has withheld any amount which the Project Company was entitled to be paid;
- (b) the Project Company has withheld any amount which NSW Health was entitled to be paid; or
- (c) the Project Company has claimed and received any amount which it was not entitled to be paid,

NSW Health will pay such amount to the Project Company or the Project Company will repay such amount to NSW Health, as the case may be, with interest in each case on that amount at the Prescribed Rate calculated on a daily basis and compounded quarterly from the date on which payment should have been made (in the case of failure to pay by NSW Health) or from



the date on which over payment was made (in the case of excessive claims by the Project Company) until all relevant monies have been paid in full and whether before or after judgement.

## **29.6 Monthly Reconciliations**

- (a) Before the eighth day of each Operating Month, and on or before the date that is eight days following the Termination Date, the Project Company must provide to the Project Director a performance and payment report for the preceding Operating Month accompanied by information clearly setting out the derivation and calculation of the Deductions and a Monthly Performance Report in accordance with the requirements of the Support Services Specifications (each a "**Monthly Performance Report**").
- (b) Each Monthly Performance Report must be accompanied by a statutory declaration, signed by an authorised officer of the Project Company, confirming, to the best of the relevant authorised officer's knowledge and belief, the accuracy of the Monthly Performance Report, compliance with the provisions of this deed, payment to all Subcontractors of all amounts which fell due for payment in the Operating Month preceding the Operating Month to which the relevant Monthly Performance Report relates, compliance with the Consents and applicable Law and certifying that no Project Company Termination Event has occurred and is continuing.

## **29.7 Late Payments**

If any payment due under this deed remains unpaid after its due date or is overpaid, such payment or overpayment will bear interest calculated at the Prescribed Rate from the day after the date on which the payment was due or overpaid (as applicable) to (and including) the date of payment or repayment (as applicable). The right of a party to receive interest in respect of the late payment of any sum due or in respect of an overpayment will be without prejudice to any other rights that party may have under this deed.

## **29.8 Rights of Set-Off**

The Project Company will not be entitled to retain or set off any amount due to NSW Health by it, but NSW Health may (subject to clauses 14A.1(e) and 14A.2(c) and Schedule 21) retain or set off any amount due and payable to it by the Project Company under any Project Document.

## **29.9 Set-Off and Disputed Amounts**

If the payment or deduction of any amount referred to in clause 29.8 above is disputed then any undisputed element of that amount must be paid and the disputed element will be dealt with in accordance with clause 29.5.

## **29.10 Base Case and Service Payment Adjustments**

- (a) As soon as reasonably practicable following any adjustment to the Monthly Payment in accordance with schedule 19, or where this deed provides for a revised Base Case to be submitted to NSW Health, the Project Company must submit to the Project Director for approval:
  - (i) one certified hard copy and one electronic copy of the revised schedule 5, using the same methodology to produce the indicative schedule 5, but

based on the Target Completion Dates as at the date of this deed, actual date of Financial Close and the actual cost of funding to the Project Company, determined as at the actual date of Financial Close;

- (ii) a proposed revised base case ("**Proposed Base Case**") and all supporting formulae and data;
- (iii) an instruction manual outlining how to use the Proposed Base Case, which is acceptable to the Project Director, acting reasonably; and
- (iv) a certificate from an auditor acceptable to the Project Director confirming that an independent audit of the Proposed Base Case has been completed and that:
  - A. calculations in the Proposed Base Case have been checked and are in all material respects internally consistent and mathematically correct;
  - B. the Proposed Base Case allows changes in assumptions to correctly flow through to the results;
  - C. any macros in the Proposed Base Case that govern the calculation of the Proposed Base Case are correct;
  - D. the input data used in the Proposed Base Case is consistent with all relevant supporting project documentation, formulae or constants;
  - E. the calculations of any relevant ratios and financial covenants in the Proposed Base Case have been checked and that the Proposed Base Case correctly reflects the definitions contained in the Financing Agreements;
  - F. the Proposed Base Case correctly incorporates the relevant structural features in the Financiers' term sheets such as reserve accounts, lock up provisions, default provisions and amortisation;
  - G. the accounting assumptions and outputs from the Proposed Base Case are in accordance with the generally accepted accounting principles in Australia;
  - H. the income taxation assumptions and outputs from the Proposed Base Case are in accordance with the relevant income tax legislation; and
  - I. the Proposed Base Case has a nominal blended post-tax internal rate of return to the Equity Investors equal to the nominal blended post-tax internal rate of return to Equity Investors of the cashflows calculated in accordance with paragraph 14(c) of schedule 19.

- (b) The Project Company must:

- 
- (i) allow the Project Director 15 Business Days to approve the Proposed Base Case and/or the revised schedule 5 or submit proposed amendments to the Proposed Base Case and/or the revised schedule 5; and
  - (ii) if required by the Project Director, make available, at the cost and expense of the Project Company, the appropriate personnel to explain the Proposed Base Case and/or the revised schedule 5 or provide information in relation to the Proposed Base Case and/or the revised schedule 5 in such form as the Project Director reasonably requests.
- (c) The Project Director must approve the Proposed Base Case and/or the revised schedule 5 or submit proposed amendments within 15 Business Days of receipt of the Proposed Base Case and/or the revised schedule 5 pursuant to clause 29.10(a). If the Project Director approves the Proposed Base Case and/or the revised schedule 5 submitted by the Project Company in accordance with clause 29.10(a), then the Proposed Base Case will be the Base Case for the purposes of this deed and/or schedule 5 will be replaced with the schedule 5 submitted in accordance with clause 29.10(a).
- (d) If the Project Director submits amendments to the Proposed Base Case and/or the revised schedule 5 in accordance with clause 29.10(c), then:
- (i) the Project Company and the Project Director must consult in good faith with respect to, and use their reasonable endeavours to establish, the amendments required to the Proposed Base Case and/or the revised schedule 5; and
  - (ii) if, and to the extent that, those amendments are agreed, the revised Proposed Base Case and/or the revised schedule 5 (as applicable) agreed by the Project Director and the Project Company will be the Base Case or schedule 5 (as applicable) for the purposes of this deed.
- (e) If the Project Director and the Project Company do not agree on the amendments required to be made to the Proposed Base Case and/or the revised schedule 5 within 10 Business Days after the commencement of the consultation pursuant to clause 29.10(d) or if no consultation is held, within 12 Business Days after the date when the Project Director submitted amendments to the Proposed Base Case and/or the revised schedule 5 in accordance with clause 29.10(c), then:
- (i) the Project Director and the Project Company must refer the dispute for resolution by an independent expert in accordance with clause 40.2; and
  - (ii) the base case and/or the new schedule 5, as determined by the independent expert under clause 40.2, will be the Base Case and/or the schedule 5 for the purposes of this deed.
- (f) The Project Company acknowledges and agrees that the Project Director's review of, comment on, rejection of, or direction in respect of the Base Case, schedule 5, the Proposed Base Case and/or the revised schedule 5 is solely for the benefit of NSW Health for the purpose of monitoring the performance of the Project Company, and NSW Health does not assume any duty of care or responsibility to ascertain errors, omissions, defects or non-compliance with this deed, and no action or inaction on the part of the Project Director will entitle the Project Company to

make any claim or in any way relieve, alter, limit or change the Project Company's obligations and liabilities to NSW Health under the Project Documents.

- (g) The parties acknowledge and agree that the Base Case and schedule 5 have been prepared on an indicative basis and must be adjusted and/or completed at the date of Financial Close in accordance with the Financial Close Protocol. The adjusted Base Case and adjusted and/or completed schedule 5, together with the documents required under clause 29.10(a), must be delivered to the Project Director at the date of Financial Close. The adjusted Base Case and adjusted and/or completed schedule 5 which otherwise comply with the requirements set out in this clause 29.10 will be initialled by the Project Director and the Project Company at the date of Financial Close and such documents will then become the agreed form Base Case and schedule 5 for the purposes of this deed.

### **29.11 Payment of Health Staff Member Costs**

From the Start Date until the end of the Management Period, NSW Health will, on or about the fifteenth day after each Operating Month, submit to the Project Company an invoice for the actual Health Staff Member Costs ("**Health Staff Member Invoice**") and the Project Company must pay to NSW Health the amount in the Health Staff Member Invoice within 3 Business Days of receipt of payment of the Monthly Invoice by NSW Health under clause 29.3.

---

## **30. Benchmarking**

### **30.1 Benchmarking Exercise**

If either the Project Company or the Project Director requires, by giving written notice to the other party no less than 20 Business Days before a Benchmark Date, the Project Company must undertake a benchmarking exercise (the "**Benchmarking Exercise**") at the times and in respect of the Support Services, including Support Services relating to the Car Park Facilities, specified in the relevant notice, in accordance with the procedure set out in schedule 20.

### **30.2 Purpose of Benchmarking**

The parties acknowledge that the purpose of the Benchmarking Exercise is as set out in paragraph 2 of schedule 20. The Project Company must undertake the Benchmarking Exercise in good faith.

### **30.3 Market Testing**

The Project Company must carry out any market testing exercise in the circumstances, at the times and in accordance with the procedure set out in schedule 20.

### **30.4 Benchmarked Service Rates**

Prior to the date of Financial Close, the Project Company must provide to the Project Director, in respect of the Support Services which are subject to the Benchmarking Exercise, the rates for key inputs to those Support Services, (where prices are calculated by reference to rates per hour, volume or quantity) and a reconciliation to the total cost for each of those Support Services upon which the relevant aggregated operating costs in the Base Case are calculated.

**30.5 Benchmarking of Insurance Component of Service Payment**

- (a) Three months prior to each Insurance Benchmark Date, the Project Company must obtain separate quotations from three reputable insurance companies in the commercial insurance market at that time, for annual premium costs (including levies and costs such as fire services levy, GST, stamp duty and withholding taxes) (on the basis that premiums are paid quarterly) of obtaining the Benchmarked Insurances.
- (b) On each Insurance Benchmark Date, if the annual insurance premiums for the Benchmarked Insurances is greater or less than the annual insurance premiums (indexed by reference to the CPI) for the Benchmarked Insurances at Financial Close or the last Insurance Benchmark Date on which an adjustment to the Monthly Service Payment occurred under this clause, the Monthly Service Payment will be adjusted in accordance with Part A of schedule 5 by reference to the Insurance Adjustment, being the amount by which the annual insurance premium for the Benchmarked Insurance:
- (i) exceeds the annual Insurance Component; or
  - (ii) is less than the annual Insurance Component,

provided that any increase or decrease in the cost of obtaining the Benchmarked Insurance which is attributable to the Project Company's or a Subcontractor's performance under the Project Documents or the insurance history of (or other relevant acts or omissions of) the Project Company or a Subcontractor under or in relation to any existing or previous insurance policy will be disregarded.

**PART H – TERMINATION****31. Financiers Tripartite Deed**

The provisions set out in this part H of this deed are subject to the Financiers Tripartite Deed.

**32. Non-Performance of Obligations**

- (a) Without prejudice to any other rights or remedies of NSW Health under this deed or the other Project Documents, if the Project Company fails to perform or comply with any of its obligations or agreements contained in this deed or the other Project Documents, the Project Director may (but shall be under no obligation to) perform or comply (or procure performance or compliance) with such obligations or agreements, and the amount of any costs or expenses incurred in such performance or compliance will be a debt, due and payable on demand, from the Project Company to NSW Health.
- (b) The Project Director shall give to the Project Company as much notice as is practicable of its intent to take any action under this clause 32 and, if notice in advance is not practicable, will advise the Project Company promptly after the taking of such action.

### 33. Project Default and Persistent Breach

#### 33.1 Project Default

- (a) If, at any time:
- (i) during the Term, a representation or warranty given by the Project Company in a Project Document to which NSW Health is a party proves to be untrue;
  - (ii) during the Term, there is fraud, collusive, misleading or deceptive conduct on the part of the Project Company or a Subcontractor in the performance of the Project or any part of it;
  - (iii) during the Term, the Project Company commits a breach of any of its obligations under this deed or any other Project Document, other than a breach specifically referred to in clause 34.1 or a breach of a KPI;
  - (iv) during the Construction Phase, the Project Company fails to comply with the terms of a Corrective Action Plan produced under clause 11.8;
  - (v) during the Term, an obligation to provide funding under the Financing Facilities is terminated, withdrawn or cancelled;
  - (vi) any matter relating to the Project Company or a Material Subcontractor becomes subject to a direction under, or having effect as if it were a direction under section 14 of the *Australian Securities and Investments Commission Act 2001* (Cth), or to an investigation under, or taken to be under, the *Australian Securities and Investments Commission Act 2001* (Cth);
  - (vii) with effect from the Commencement Date of Stage 2, during the Operations Phase, the Project Company incurs a Deduction:
    - A. of greater than 6% of the Monthly Service Payment twice in any period of three consecutive Operating Months;
    - B. with respect to Area Failures of greater than 4% of the Monthly Service Payment twice in any period of three consecutive Operating Months; or
    - C. with respect to Quality Failures of greater than 4% of the Monthly Service Payment twice in any period of three consecutive Operating Months,
  - (viii) during the period in which the Project Company is providing "Transitional Help Desk Services" pursuant to clause 9.11 of the Support Services Specifications, more than 15% of the responses to "Transitional Customer Surveys" carried out in an Operating Month pursuant to clause 9.11 of the Support Services Specifications report an "Unsatisfactory Response" (as defined in clause 9.11.1(g) of the Support Services Specifications) twice in any period of three consecutive Operating Months;

(each a "**Breach**") the Project Director may give the Project Company notice (a "**Breach Notice**") in writing specifying that a Breach has occurred and giving reasonable details of the Breach.

- (b) Upon receipt of the Breach Notice in respect of any Breach referred to in clauses 33.1(a)(i) to 33.1(a)(vii), the Project Company must:
- (i) if the Breach is remediable and can reasonably be remedied within 5 Business Days of receipt of a Breach Notice, remedy the Breach within 5 Business Days of receipt of the Breach Notice; or
  - (ii) if the Breach is capable of being remedied but cannot reasonably be, or is not, remedied within such 5 Business Day period despite the Project Company diligently pursuing a remedy of the Breach, within 10 Business Days of receipt of the Breach Notice, submit a plan in form and substance acceptable to the Project Director (the "**Cure Plan**"), which Cure Plan must contain full details of all steps which the Project Company is taking, or proposes to take, in order to remedy or mitigate the effect of such Breach, and the Project Company must comply with, pursue and diligently implement the Cure Plan in accordance with its terms; or
  - (iii) if the Breach is not capable of being remedied, within 10 Business Days of receipt of the Breach Notice, submit a plan, in form and substance acceptable to the Project Director (the "**Prevention Plan**"), which Prevention Plan must contain full details of all steps which the Project Company is taking, or proposes to take, in order to prevent the recurrence of such Breach, and the Project Company must comply with, pursue and diligently implement the Prevention Plan in accordance with its terms.
- (c) If, following service of a Breach Notice under paragraph (a) in respect of any Breach referred to in clauses 33.1(a)(i) to 33.1(a)(vii), the Project Company:
- (i) if the Breach is remediable and can reasonably be remedied within 5 Business Days of receipt of the Breach Notice, fails to remedy the Breach in accordance with paragraph (b)(i);
  - (ii) if the Breach is capable of being remedied but cannot reasonably be remedied within 5 Business Days of receipt of the Breach Notice, fails to provide or implement a Cure Plan in accordance with paragraph (b)(ii); or
  - (iii) if the Breach is not capable of being remedied, fails to provide or implement a Prevention Plan in accordance with paragraph (b)(iii),
- a "**Project Default**" will occur and this deed may be terminated by NSW Health in accordance with clause 34.
- (d) Upon receipt of the Breach Notice in respect of a Breach referred to in clause 33.1(a)(viii) (a "**Helpdesk Breach Notice**"), the Project Company must within 10 Business Days of receipt of the Helpdesk Breach Notice, submit a plan in form and substance acceptable to the Project Director (the "**Helpdesk Cure Plan**"), which must contain full details of all steps which the Project Company is taking, or

proposes to take, in order to remedy or mitigate the effect of such Breach, and the Project Company must comply with, pursue and diligently implement the Cure Plan in accordance with its terms.

- (e) If, following service of a Helpdesk Breach Notice under clause 33.1(d), the Project Company fails to remedy or mitigate the effect of such Breach, or implement the Helpdesk Cure Plan within the period set out in the Helpdesk Cure Plan, the Project Director may, by written notice direct the Project Company to provide the "Helpdesk Services" (as described in clauses 9.1 to 9.10 of the Support Services Specifications) provided that NSW Health and the Project Company will share the costs of implementing the Helpdesk Services in accordance with Part A, clause 16 of schedule 5.

### 33.2 Persistent Breach

- (a) If a certain type or class of a breach, other than a breach of a KPI or a breach otherwise referred to in clause 33.1 (each such type or class a "**Relevant Breach**") of the Project Company's obligations (or any obligation) under a Project Document has occurred more than once (whether or not remedied and whether or not in respect of the same Health Facility), then the Project Director may serve a notice on the Project Company (a "**Warning Notice**"):

- (i) specifying that the notice is a formal Warning Notice;
- (ii) giving reasonable details of the Relevant Breach; and
- (iii) stating that the Relevant Breach is a breach which, if it recurs or continues, may result in a termination of this deed.

- (b) If the Project Company commits frequent breaches (each a "**Frequent Breach**") of this deed, other than a breach of a KPI or a breach otherwise referred to in clause 33.1, which, in aggregate:

- (i) substantially frustrate the objects of this deed; or
- (ii) impair the ability of NSW Health, NSCCAHS or NSW Health Related Parties to provide the Health Functions; or
- (iii) otherwise adversely affect the interests of NSW Health, including the ability of NSW Health to administer this deed; or
- (iv) indicate that the Project Company does not intend to be or does not regard itself as being bound by this deed,

(whether or not such breaches are of the same type or class and whether or not they are remedied and whether or not in respect of the same Health Facility) then the Project Director may serve a notice (a "**Frequent Breach Notice**") on the Project Company:

- (v) specifying that the notice is a formal Frequent Breach Notice;
- (vi) giving reasonable details of the relevant Frequent Breaches; and
- (vii) stating that, if Frequent Breaches continue, they may result in a termination of this deed.



- (c) If, following service of a Warning Notice under clause 33.2(a), a Relevant Breach specified in the Warning Notice has continued or recurred after the date falling 30 days after the date of service of the relevant Warning Notice, then the Project Director may serve another notice (a "**Final Notice**") on the Project Company:
- (i) specifying that it is a Final Notice;
  - (ii) stating that the Relevant Breach specified has been the subject of a Warning Notice served within the twelve month period prior to the date of service of the Final Notice; and
  - (iii) stating that if the Relevant Breach continues or recurs four times within the six month period after the date of service of the Final Notice, it will be deemed to be a "**Persistent Breach**", and this deed may be terminated in accordance with clause 34.
- (d) If, within the period of six months following service of a Frequent Breach Notice under clause 33.2(b), another breach of this deed occurs, then it will be deemed to be a "**Persistent Breach**" and this deed may be terminated in accordance with clause 34.

## **34. Termination of this Deed**

### **34.1 Project Company Default Termination**

NSW Health will be entitled to terminate this deed by notice in writing to the Project Company (subject to clause 34.2) if:

- (a) Completion of:
  - (i) Stage 1 has not occurred by the Target Completion Date for Stage 1;
  - (ii) Stage 2 has not occurred by the Target Completion Date for Stage 2;
  - (iii) Stage 3 has not occurred by the Target Completion Date for Stage 3; or
  - (iv) Stage 4 has not occurred by the Target Completion Date for Stage 4,

and the Independent Certifier reasonably forms the view and certifies that the Project Company will not achieve Completion (as relevant) of:

  - (v) Stage 1 by the Longstop Date for Stage 1;
  - (vi) Stage 2 by the Longstop Date for Stage 2;
  - (vii) Stage 3 by the Longstop Date for Stage 3; or
  - (viii) Stage 4 by the Longstop Date for Stage 4.
- (b) the Project Company abandons the Project or displays an intention to permanently abandon the provision of the Works or a material part of any of the Support Services;
- (c) an Insolvency Event occurs in respect of the Project Company;

- (d) an Insolvency Event occurs in relation to the Construction Contractor, the Facilities Manager, the Construction Contractor Guarantor or the Facilities Manager Guarantor (in each case whether or not the Project Company is in breach of this deed) and the Construction Contractor, Facilities Manager, Construction Contractor Guarantor or Facilities Manager Guarantor is not replaced within 90 days by a party which:
- (i) is reputable, solvent and has the resources and experience to perform its obligations under the Construction Contract or the Facilities Management Contract (or in the case of the Construction Contractor Guarantor or the Facilities Manager Guarantor, the obligations under the relevant guarantee); and
  - (ii) complies with clauses 7.2 to 7.6 (inclusive);
- (e) an Illegality Event occurs;
- (f) a breach by the Project Company of its obligations under clause 39 occurs;
- (g) with effect from the Commencement Date of Stage 2, the Project Company incurs Deductions in relation to:
- (i) more than 10 Level A Area Failure events in any one Operating Month; or
  - (ii) more than 20 Level A Area Failures over a period of three consecutive Operating Months,
- provided that where multiple Level A Area Failures are attributable to the same cause, event or failure, and the Project Company demonstrates to the reasonable satisfaction of the Project Director that the Level A Area Failures are attributable to the same cause, event or failure, and that it is diligently implementing a remedy or rectification of such cause, event or failure, such Level A Area Failures will, for the purposes of this clause only, be treated as one Level A Area Failure;
- (h) a Persistent Breach occurs; or
- (i) a Project Default occurs.

### 34.2 Termination by NSW Health

- (a) At any time while a Project Company Termination Event is subsisting NSW Health may terminate this deed by notice ("Termination Notice") to the Project Company stating:
- (i) the Project Company Termination Event in respect of which the notice is given;
  - (ii) that NSW Health is terminating this deed under this clause 34.2; and
  - (iii) that this deed will terminate on the date falling 20 Business Days after the date of receipt of the notice.

- (b) Subject to the provisions of the Financiers Tripartite Deed, this deed will terminate on the date falling 20 Business Days after the date of receipt by the Project Company of a Termination Notice.

### **34.3 Project Company Notice of Project Company Termination Event**

Without limiting NSW Health's rights or the Project Company's other obligations under this deed, the Project Company must notify the Project Director immediately upon becoming aware of a Project Company Termination Event or an event or occurrence which, with the giving of notice, or lapse of time, would, or is likely to, become a Project Company Termination Event.

### **34.4 NSW Health Action Following Project Company Termination Event**

Without limiting NSW Health's other rights and remedies under this deed, where a Project Company Termination Event has occurred and is subsisting, NSW Health may take any action it considers appropriate or necessary to overcome the effects of the Project Company Termination Event or preserve the Project, which may include NSW Health's representatives entering and remaining on or in a Construction Site or the Hospital, and the amount of any costs or expenses incurred in taking such action shall be payable upon demand by the Project Company to NSW Health.

### **34.5 NSW Health Default Termination**

If a NSW Health Default is subsisting and:

- (a) the Project Company has served a written notice of its intention to terminate this deed (the "**Project Company Termination Notice**") on the Project Director within 20 Business Days of becoming aware of the NSW Health Default; and
- (b) the Project Company Termination Notice specifies NSW Health Default in respect of which the Project Company Termination Notice is given,

this deed will terminate on the day falling 120 days after the date the Project Director receives the Project Company Termination Notice, unless NSW Health rectifies or overcomes the effect of NSW Health Default in that 120 day period.

### **34.6 Voluntary Termination**

- (a) NSW Health may elect, at any time during the Term, to terminate this deed by notice ("**Voluntary Termination Notice**") to the Project Company stating:
- (i) that NSW Health is terminating this deed under this clause 34.6; and
- (ii) that this deed will terminate on the date falling 120 days after the date of receipt of the Voluntary Termination Notice or such later date as specified in the Voluntary Termination Notice.
- (b) If NSW Health issues a Voluntary Termination Notice, this deed will terminate on the date falling 120 days after the date of receipt by the Project Company of a Voluntary Termination Notice or such later date as specified in the Voluntary Termination Notice.

## **35. Consequences of Termination**

### **35.1 Consequences of Termination**

If this deed is terminated under clause 34, clause 23 or clause 28:

- (a) compensation will be calculated in accordance with schedule 21 and be payable by NSW Health in accordance with clause 35.2;
- (b) the Project Director may require the Project Company, at no cost to NSW Health (except for the compensation under paragraph (a)), to transfer its title, interest and rights in and to any Health Facilities and/or Works and novate the Construction Contract and/or the Facilities Management Contract to NSW Health or to a replacement contractor; and
- (c) the Project Company must comply with the provisions of clause 37.

### **35.2 Compensation Provisions**

If this deed is terminated pursuant to:

- (a) clause 34.2, the provisions of Part A of schedule 21 will apply (provided however, that if this deed is terminated due to an event of the type described in clause 34.1(b), then the Project Company will receive no compensation);
- (b) clause 34.5, the provisions of Part B of schedule 21 will apply;
- (c) clause 34.6, the provisions of Part B of schedule 21 will apply; and
- (d) clause 23.5 or clause 28.3, the provisions of Part C of schedule 21 will apply,

provided always that all compensation received by the Project Company as a result of a Compensation Event will reduce the Project Company's entitlement under paragraphs (a)-(d) by that amount of compensation received to that extent that to do otherwise would amount to NSW Health being required to pay the same amount twice.

### **35.3 Accrued Rights**

Except as expressly provided in this deed, the termination of this deed is without prejudice to the rights, duties and liabilities of either party accrued prior to termination, including any rights, duties and liabilities accrued by either party as a result of the termination of this deed. The clauses of this deed which expressly or impliedly have effect after termination will continue to be enforceable notwithstanding termination.

## **36. Audit on Expiry and Handover Security**

### **36.1 Handover Audit**

- (a) Without prejudice to any other provision of this deed, approximately:
  - (i) 3 years; and
  - (ii) 1 year,

prior to the Expiration Date, the Project Director will be entitled to procure the carrying out of a project audit by an independent expert (the "**Independent Assessor**") appointed by agreement between the parties (or in default of agreement within two Business Days of a nomination made in writing by NSW Health, appointed by the President of the Australian Institute of Quantity Surveyors) (the "**Handover Audit**") of the Hospital to assess whether they have been and are being maintained by the Project Company in accordance with its obligations under this deed and to determine the aggregate of the amount (if any) required to be expended or reserved against during or for the balance of the period up until the Expiration Date to ensure that the Hospital are in the Handover Condition on the Expiration Date (less any amounts which will be paid by the Project Company during that period for any scheduled maintenance or lifecycle replacements to be performed during the period) and the amount (if any) for making good or rectifying any breaches by the Project Company of the Specifications and this deed (the aggregate amount as updated by each subsequent Handover Audit less the amount calculated in accordance with clause 36.7 is the "**Relevant Amount**").

- (b) The cost of each Handover Audit will be shared equally by NSW Health and the Project Company.

### 36.2 Security

- (a) Within 20 Business Days of the Project Director notifying the Project Company of the results of the Handover Audit, the Project Company must provide the Project Director a bank guarantee which:
- (i) must be substantially in the form of schedule 25;
  - (ii) must have a face value of the Relevant Amount;
  - (iii) expires no earlier than the date which is 12 months after the Expiration Date;
  - (iv) is in favour of NSW Health; and
  - (v) is given by a bank licensed in Australia and is satisfactory to the Project Director with a credit rating of not less than A-(S&P) / A3 (Moody's)/A-(Fitch) with an address for service in Sydney.
- (b) If any bank guarantee produced under clause 36.2(a) fails to comply with the requirements of clause 36.2(a)(i) to 36.2(a)(v) then the Project Company must promptly provide NSW Health with a replacement guarantee which complies with clause 36.2(a)(i) to 36.2(a)(v) and upon receipt of such guarantee, NSW Health will return to the Project Company the bank guarantee being replaced.
- (c) If clause 36.2(b) applies in respect of any bank guarantee which complies with clause 36.2(a) within 10 Business Days of the Project Company's obligations under clause 36.2(b) coming into effect, then irrespective of anything contained in, and without limiting NSW Health's right under, this deed, NSW Health may make demand under the bank guarantee and hold the proceeds as security for the performance of the Project Company's obligations under this deed.
- (d) If the Project Company fails to provide a bank guarantee which complies with the terms of clause 36.2(a), then NSW Health may deduct from each payment of the

Gross Monthly Service Payment an amount equal to 120% of the Relevant Amount divided by the number of months until the scheduled expiry of the Term and will pay such amount into an interest bearing account in the name of NSW Health and established by NSW Health (the "**Retention Fund Account**") until this deed has expired or is terminated.

### **36.3 Notification of Handover Audit**

- (a) The Project Director must notify the Project Company in writing a minimum of 10 Business Days in advance of the date it wishes to procure the carrying out of the Handover Audit.
- (b) The Project Director must consider in good faith any reasonable request by the Project Company for the Handover Audit to be carried out on a different date if such request is made at least 5 Business Days prior to the notified date and the Project Company (acting reasonably) is able to demonstrate that carrying out the Handover Audit on the notified date would materially prejudice the Project Company's ability to provide the Support Services.

### **36.4 Minimise Disruption**

- (a) The Project Director must use its reasonable endeavours to procure that the Independent Assessor in carrying out the Handover Audit minimises any disruption caused to the provision of the Support Services by the Project Company.
- (b) The Project Company must afford the Independent Assessor (free of charge) any reasonable assistance required by the Independent Assessor during the carrying out of the Handover Audit.
- (c) The Project Director will provide a copy of the Handover Audit to the Project Company promptly after receiving it from the Independent Assessor.

### **36.5 Results of Handover Audit**

If the Handover Audit reveals work required to rectify breaches of the Project Company's obligations under this deed or to ensure the Health Facilities are in the Handover Condition on the Expiration Date (taking into account any scheduled maintenance or lifecycle replacement to be performed during the period), the Independent Assessor:

- (a) must notify the Project Company of the required rectification (which, for the purposes of this clause 36 includes repair and/or replacement) and/or other work; and
- (b) must specify a reasonable period within which the Project Company must carry out such work.

### **36.6 Rectification Work**

The Project Company must carry out the required rectification and/or maintenance work notified pursuant to clause 36.5 to the satisfaction of the Independent Assessor within the period specified and any costs it incurs in carrying out such rectification and/or maintenance work will be at its own expense subject to clause 36.7.

### 36.7 Reduction of the Relevant Amount

- (a) If and to the extent that the Project Company carries out the required rectification and/or maintenance within the specified period as notified pursuant to clause 36.5(b) to the satisfaction of the Independent Assessor, the Relevant Amount will be reduced by the costs estimated in the Handover Audit for undertaking the relevant work.
- (b) If clause 36.2(d) applies, then:
- (i) if and to the extent that the Project Company carries out the required rectification and/or maintenance work to the satisfaction of the Independent Assessor, NSW Health will reimburse the Project Company's costs of so doing by withdrawing amounts from, and to the extent there are moneys standing to the credit of, the Retention Fund Account and paying these to the Project Company;
  - (ii) if the amount in the Retention Fund Account is insufficient to cover the Project Company's costs, NSW Health will reimburse the Project Company's costs from any amounts which subsequently stand to the credit of the Retention Fund Account as a result of the deductions made from the Gross Monthly Service Payment pursuant to clause 36.2(d). In the event that the amount remaining in the Retention Fund Account on the expiration of the Term is insufficient to cover the Project Company's costs which have not been reimbursed, the Project Company will bear the balance of such costs itself; and
  - (iii) if all the required rectification and/or maintenance work identified by the Independent Assessor has been carried out to the satisfaction of the Independent Assessor, on the later of the Termination Date and the expiry of the period notified pursuant to clause 36.5(b), then NSW Health will pay any credit balance on the Retention Fund Account (including accrued interest) to the Project Company as soon as practicable.

### 36.8 Failure to Carry Out Work

If and to the extent that the Project Company fails to carry out the necessary rectification and/or maintenance work to the appropriate level of professional care, in accordance with Good Industry Practice and to the satisfaction of the Independent Assessor, and within the specified period as notified pursuant to clause 36.5(b), NSW Health will be entitled to carry out itself, or procure, such rectification and/or maintenance work, and the cost of such rectification and/or maintenance work will be a debt due and payable against the Project Company to NSW Health.

NSW Health may (subject to clause 14A.1(c) and 14A.2(c) and Schedule 21) deduct or set off that amount against any amount otherwise payable by NSW Health to the Project Company, or may take any other enforcement action available to it including under the security provided under clause 36.2(a), in respect of an unpaid debt owed to it.

## **37. Transition to State or Another Project Company**

### **37.1 Duty to Co-operate**

During the final three months prior to the Expiration Date or during the period after any notice of termination has been given under clauses 34.2 or 34.6, and in either case for a period of twelve months thereafter, the Project Company must co-operate fully with the transfer of responsibility for the Support Services (or any of the Support Services) to NSW Health or any new contractor of such services the same or similar to the Support Services ("New Project Company"), including:

- (a) transfer or procure the transfer of all title, interest and rights in and to the Project, the Support Services Equipment (including a twelve-month supply of maintenance spare parts and consumables for such Support Services Equipment), and/or the Works to NSW Health or the New Project Company:
  - (i) free from any Security Interests;
  - (ii) in a state and condition which complies with this deed; and
  - (iii) which will, without further action by any party, immediately vest in and become the absolute property of NSW Health or the New Project Company;
- (b) liaising with the Project Director and/or any New Project Company, and providing reasonable assistance and advice concerning the Support Services and their transfer to NSW Health or to such New Project Company; and
- (c) allowing any such New Project Company access (at reasonable times and on reasonable notice) to the Hospital or Construction Site, but not so as to interfere with or impede the provision of the Support Services.

### **37.2 Handover of documents on Termination Date**

On or before the Termination Date, the Project Company must provide to the Project Director and/or to any New Project Company all and any documents and information concerning the Construction Sites, the Works, the Hospital and the Support Services which is required for the efficient transfer of responsibility for their performance including the following:

- (a) a complete Operations Manual (in electronic and hard copy format) which is up to date as at the Termination Date;
- (b) all data recorded for the provision of the Support Services during the Term;
- (c) all valid and unexpired warranties, guarantees and similar documentation (in hard copy) obtained for materials and workmanship for each of the Health Facilities; and
- (d) a licence to use a copy of all software applications (excluding off the shelf software) necessary to perform the Support Services to meet the requirements of this deed.



**37.3 Transfer of Responsibility**

The Project Company must facilitate the smooth transfer of responsibility for the Support Services to a New Project Company or to NSW Health, as the case may be, and the Project Company must take no action at any time during the Term or thereafter which is calculated or intended, directly or indirectly, to prejudice or frustrate or make more difficult such transfer.

**PART I – ADMINISTRATION OF PROJECT****38. Information and Confidentiality****38.1 Keep Confidential**

The parties must keep confidential all matters relating to this deed and the Project Documents and must use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any matters relating to this deed.

**38.2 Permitted Disclosure**

Clause 38.1 will not apply to:

- (a) any disclosure of information that is reasonably required by persons engaged in the performance of the obligations of a party to this deed, including without limitation, the provision of a copy of this deed to each Construction Contractor, the Facilities Manager and any guarantors of the obligations of such parties;
- (b) any matter which a party can demonstrate is already generally available and in the public domain otherwise than as a result of breach of clause 38.1;
- (c) any disclosure which is required by any Law (including any order of a court of competent jurisdiction), the Guidelines or in accordance with clause 40;
- (d) any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- (e) any provision of information to the Financiers or the Financiers' professional advisers or insurance advisers or rating agencies or, where it is proposed that a person should or may provide funds (whether directly or indirectly, on initial issue or secondary sale, and whether by loan, equity participation or otherwise) to the Project Company, ISAM Trust or FinCo to enable the Project Company to carry out its obligations under this deed, to that person but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- (f) any disclosure of information to any prospective permitted assigns or prospective investors in or unitholders or shareholders of the Project Company, ISAM Trust or FinCo in each case to the extent reasonably necessary to enable a decision to be taken on the proposal;
- (g) any disclosure by the Project Director, of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise to:

- (i) any proposed new contractor, its advisers and lenders should NSW Health decide to re-tender this deed pursuant to the terms of this deed;
- (ii) any person in connection with a Benchmarking Exercise;
- (h) any registration or recording of the Consents and the Licences;
- (i) any disclosure of information by the Project Director to any department, office or agency of the government of the State;
- (j) any disclosure by the Project Director of any document relating to this deed to which it is a party and which the Project Company (acting reasonably) has agreed with the Project Director contains no Commercially Sensitive Information; and
- (k) any disclosure of information that is reasonably required by a person in order to exercise, or to enjoy the rights under the licence of Proprietary Materials granted under clause 10.5(b).

### **38.3 Obligations Preserved**

Where disclosure is permitted under clause 38.2, other than paragraphs (b), (c), (g), (h) or (i), the party providing the disclosure must ensure that the recipient of the information will be subject to the same obligation of confidentiality as that contained in this deed.

### **38.4 Auditor-General**

Notwithstanding the other provisions of this clause 38, the parties acknowledge that the Project Documents will be made available to the Auditor-General in accordance with the *Public Finance and Audit Act 1983* (NSW), and the Project Documents and any related documents and information may be tabled in Parliament by or on behalf of NSW Health and will be published in accordance with the Guidelines, and NSW Health and the Project Director may make the Project Documents (other than the Subcontracts) or any of them available to any party, subject to the deletion of Commercially Sensitive Information.

### **38.5 Exploitation of Information**

The Project Company must not make use of this deed or any information issued or provided by or on behalf of NSW Health in connection with this deed otherwise than for the purposes of this deed, except with the written consent of the Project Director.

### **38.6 Expiry**

On or before the Termination Date, the Project Company must ensure that all documents or computer records in its possession, custody or control which contain information relating to any Patient or NSW Health Staff at or of any Health Facility, including any documents in the possession, custody or control of any Subcontractor are delivered up to the Project Director.

---

## **39. Assignment or Change of Control**

### **39.1 Assignment**

- (a) Subject to any express provision of this deed, neither party may, without the prior written consent of the other, assign, grant a Security Interest over, or otherwise dispose of all or any benefit, right or interest under the Project Documents, provided

always that an assignment by NSW Health of its interest to any other governmental body, agency or department (in each case constituting the State or supported by a guarantee from the State on terms no less favourable than those contained in the PAFA Act Guarantee) will not require the Project Company's prior written consent.

- (b) The provisions of clause 39.1(a) do not apply to the granting of Security Interests in accordance with the Financing Agreements.

### 39.2 Change of Ownership

- (a) The Project Company undertakes to NSW Health that the legal and beneficial ownership of each member of the Project Company Group and the Project Company Group structure will remain as set out in Part B of schedule 2 until the date which is 3 years after Financial Close. NSW Health acknowledges and agrees that any change in legal or beneficial ownership of a Preference Unit (as defined in the Common Terms Deed) issued by Infrashore Holdings Trust is permitted under this deed provided that such change in legal or beneficial ownership does not give rise to a Change in Control.
- (b) Subject to clause 39.2(c), the Project Company must not permit any direct or indirect change to the legal and beneficial ownership of any member of the Project Company Group or any change to the Project Company Group structure without the prior written consent of NSW Health.
- (c) For the purposes of clauses 39.2(a) and 39.2(b):
- (i) any change in the direct or indirect beneficial or legal ownership of any equity interests (including shares or units) that are listed on a prescribed financial market or that are not listed on a prescribed financial market but which are equity interests (including shares or units) in a managed fund, trust or other entity (or responsible entity, trustee or custodian of each entity) that is managed by a related body corporate of ABN AMRO Australia Pty Ltd or any change in the direct or indirect interest in a member of the Project Company Group by such entities;
  - (ii) any transfer of equity interests by a person to its related body corporate; and
  - (iii) any transfer of equity interests in any member of the Project Company Group to any related body corporate of ABN AMRO Australia Pty Ltd, or to a managed fund, trust or other entity (or responsible entity, trustee or custodian of each entity) that is either managed by a related body corporate of ABN AMRO Australia Pty Ltd or in which more than 50% of the equity interests are directly or indirectly owned by a related body corporate of ABN AMRO Australia Pty Ltd,

will be disregarded. For the avoidance of doubt, any changes to the beneficial or legal ownership of the equity interests referred to in this clause will not constitute a change to the legal or beneficial ownership of equity interests held directly or indirectly by the issuer of the equity interests referred to in this clause.

- (d) If equity interests (including shares or units) in an entity with ultimate control of any member of the Project Company Group are listed on a prescribed financial

market and a Change in Control occurs due to the transfer of such shares or interests on that market:

- (i) promptly after the Project Company becomes aware of the Change in Control, the Project Company must notify the Project Director, providing:
  - A. full details of the Change in Control including the acquisition of voting power, the change in equity interests or any other event which has caused or constituted the Change in Control;
  - B. all other information necessary for NSW Health to determine whether to consent, or not to consent, to the Change in Control of the Project Company;
- (ii) the Project Director must notify the Project Company with 20 Business Days of receipt of the Project Company's notice under paragraph (i) whether NSW Health accepts the Change in Control or rejects the Change in Control; and
- (iii) if NSW Health rejects the Change in Control, the Project Company (without causing there to be any other Change in Control as a result, other than one in relation to which the Project Company has obtained NSW Health's prior written consent) will procure that the relevant person or persons cease to have the voting power or control or to hold the share capital or other equity interests which gave rise to that Change in Control within 90 days after the date on which NSW Health gives notice of their refusal to give consent to the Change in Control.

### **39.3 Change in Ownership of Material Subcontractors**

- (a) If a Change in Control of a Material Subcontractor has occurred, the Project Company must promptly notify the Project Director.
- (b) The Project Company will provide to the Project Director in its notification under this clause 39.3:
  - (i) full details of the Change in Control, including the acquisition of voting power, the change in equity interests or any other event which has caused or constituted the Change in Control; and
  - (ii) all other information necessary for NSW Health to determine whether to exercise its rights under clause 39.3(c), in relation to the Change in Control of the Material Subcontractor.
- (c) If NSW Health determines that it does not approve of the Change in Control, because:
  - (i) the person or entity which now exercises Control of the relevant Material Subcontractor is not a reputable entity or person to properly carry out the obligations of the relevant Material Subcontractor under the relevant Project Documents; or
  - (ii) as a result of the Change in Control, the relevant Material Subcontractor no longer:

- 
- A. has sufficient expertise and ability; or
  - B. is of sufficiently high financial and commercial standing, to properly carry out the obligations of the relevant Material Subcontractor under the relevant Project Documents; or
  - (iii) the person or entity which now exercises Control of the relevant Material Subcontractor is an unsuitable entity or person, having regard to the activities or business of that entity or person, and their compatibility with the obligations of the relevant Material Subcontractor under the Project Documents,
- the Project Company must at its own cost, terminate any Material Subcontract with that Material Subcontractor and re-tender those Works or Support Services being provided by that Material Subcontractor, in accordance with Part B of schedule 20, within 60 days.
- (d) If NSW Health determines that it does not approve of the Change in Control for a reason other than that specified in clause 39.3(c) then:
    - (i) the Project Company must at its own cost, terminate any Material Subcontract with that Material Subcontractor and re-tender those Works or Support Services being provided by the Material Subcontractor, in accordance with Part B of schedule 20, within 60 days; and
    - (ii) NSW Health will pay to the Project Company:
      - A. any costs associated with terminating any relevant Project Documents reasonably incurred by the Project Company as a direct result of the termination. Such costs shall include redundancy payments for employees of the Material Subcontractor and any demobilisation costs that have been incurred as a result of termination; and
      - B. any costs reasonably incurred and directly associated with the entry into the Project Documents with a replacement Material Subcontractor and any increased costs to the Project Company in performing those Project Documents with the relevant Material Subcontractor; and
    - (iii) the Service Payment will be adjusted in accordance with schedule 20.
  - (e) The exercise of NSW Health's rights under clause 39.3(c) or 39.3(d) will not relieve the Project Company of any of its obligations under this deed including the provision of the Works and Support Services in accordance with this deed.

---

## 40. Dispute Resolution

### 40.1 Dispute Resolution Procedure

- (a) If any dispute arises between NSW Health and/or the Director-General of the NSW Department of Health and the Project Company, which has been referred to but has not been resolved by the Project Co-ordination Group in accordance with clauses

4.6(h) to 4.6(j), any party to the dispute may by notice ("**Referral Notice**") to all other parties refer the dispute to the Director General of the Department and the Chief Executive Officer of the Project Company (or their delegates with authority to bind NSW Health or the Project Company (as relevant)) (the "**Representatives**") for resolution. The Referral Notice must specify in reasonable detail the nature of the dispute.

- (b) The joint decisions of the Representatives in respect of matters referred to them under this clause 40.1 will be reduced to writing and will be contractually binding on the parties.
- (c) If a dispute is referred to the Representatives, the Representatives and their delegates will meet to resolve the dispute.
- (d) If the Representatives do not resolve the dispute within the Resolution Period, the Project Co-ordination Group will:
  - (i) refer the dispute to expert determination under clause 40.2; or
  - (ii) refer the dispute to arbitration under clause 40.3; or
  - (iii) refer the dispute to resolution by some other dispute resolution procedure,

within 2 Business Days after the expiration of the Resolution Period.
- (e) If:
  - (i) the Project Co-ordination Group cannot agree within the 2 Business Days period referred to in clause 40.1(d) on:
    - A. whether the dispute should be referred to expert determination, arbitration or some other dispute resolution procedure; or
    - B. the expert or arbitrator to be appointed for the dispute resolution process; or
  - (ii) the Representatives do not:
    - A. meet before the expiry of the relevant Resolution Period; or
    - B. on the expiration of the Resolution Period refer the dispute for resolution in accordance with clause 40.1(d),

then the Project Co-Ordination Group or the Representatives (as the case may be) may request the President of the Institute of Arbitrators and Mediators Australia ("**President**") to:

    - (iii) select the process for resolution of the dispute; and
    - (iv) nominate a committee of not less than 3 experts or arbitrators (as the case may be) ("**Selected Committee**").

- (f) If the President has nominated a Selected Committee the Project Director must within 3 Business Days of being notified of the members of the Selected Committee advise the Project Company of the expert or arbitrator for the purposes of clause 40.2 or clause 40.3 as the case may be, chosen from the Selected Committee. If the Project Director fails to select a member of the Selected Committee as the expert or arbitrator within that period of 3 Business Days then the Project Company will be entitled to select the expert or arbitrator for the purposes of clause 40.2 or clause 40.3 respectively.
- (g) This clause 40.1 has no application to the appointment of an independent expert under clause 36.1.

## 40.2 Expert Determination

- (a) If a dispute is referred to expert determination under this deed then the Project Director will appoint, upon the referral in accordance with clause 40.1(d) as expert, in relation to that dispute, a qualified person considered appropriate by the Representatives, or if the Representatives do not select an expert in accordance with this clause 40.2(a), an expert will be selected in accordance with clauses 40.1(e) and 40.1(f). The Project Director must engage the selected expert by way of letter setting out:
- (i) the details of the dispute;
  - (ii) the expert's fees; and
  - (iii) any other matter which is relevant to the engagement.
- (b) The expert must be engaged on terms which require the expert to:
- (i) initiate such enquiries and investigations as it considers necessary or desirable for the purposes of performing its functions; and
  - (ii) determine and inform the parties to the dispute of a time for presentation to the expert by the parties of their respective positions. Unless the Representatives otherwise agree the presentation must be no later than 5 Business Days after the appointment of the expert. The expert may ignore any submission or response not made within this stipulated time-frame, unless the parties otherwise agree.
- (c) The expert may request further information from either party. The request must be in writing with a time-limit for the response. The expert must send a copy of the response to the other party and give the other party a reasonable opportunity to comment.
- (d) The expert must make its determination or finding in respect of the dispute within 20 Business Days after the presentation referred to in clause 40.2(b). Any determination of a dispute by the expert will include a determination as to the award of costs. The expert must not tax the costs of a party. The fees and expenses of the expert will be borne by the parties equally.
- (e) Any determination made by the expert will be binding on all parties unless referred to arbitration or legal proceedings within 10 Business Days after the relevant decision.

- (f) The expert must act as an expert and not an arbitrator. The expert must have no interest or duty which conflicts with its role as an independent expert.
- (g) The expert must keep confidential all materials and information made available to that expert in respect of the dispute.
- (h) The expert is released by the parties to this deed from liability (other than for fraud, negligence or wilful misconduct) in acting as an expert.

### **40.3 Arbitration**

- (a) If under clause 40.1 a dispute is referred to arbitration the following provisions will apply:
  - (i) The Representatives will select a qualified person considered appropriate by the Representatives, or if the Representatives do not select an arbitrator in accordance with this clause 40.3(a)(i), an arbitrator will be selected in accordance with clauses 40.1(e) and 40.1(f), and the Project Director must appoint the selected arbitrator within 10 Business Days of the Representatives' selection or the selection in accordance with clauses 40.1(e) and 40.1(f).
  - (ii) The arbitration must be conducted in accordance with and subject to the Arbitration Law.
  - (iii) The arbitrator must:
    - A. initiate such enquiries and investigations as it considers necessary or desirable for the purposes of performing its functions; and
    - B. determine and inform the parties of a time for presentation to the arbitrator by the parties of their respective positions in relation to the dispute.
  - (iv) In any arbitration each party to the dispute will be permitted to be represented by a legal practitioner, call witnesses and present evidence.
  - (v) The parties to the dispute and the arbitrator will not be bound by the rules of evidence.
  - (vi) The Representatives will request the arbitrator to make its determination within 20 Business Days after completion of presentations.
  - (vii) Any determination made by the arbitrator to this clause 40.3 will include a determination relating to costs. The arbitrator may not tax the costs of a party.
  - (viii) Any determination made by the arbitrator will be binding on all parties.

### **40.4 Continued Performance of Obligations Pending Resolution of Dispute**

Notwithstanding the existence of a dispute the parties must continue to perform their respective obligations under this deed.



**40.5 Related disputes**

The parties acknowledge and agree that a dispute or difference arising under a Subcontract may concern the respective rights and obligations of NSW Health and the Project Company under this deed. The Project Company must inform the Project Director immediately of any formal disputes and differences and the consequences (if any) on the operation of this deed. In such circumstances and if NSW Health consents, the Project Company may join the Subcontractor in the dispute resolution process under this deed, provided that the relevant Subcontractor agrees to be bound by decisions made in accordance with the dispute resolution process under this deed to the same extent as NSW Health and the Project Company.

**40.6 Dispute under Independent Certifier Deed**

The parties acknowledge and agree that:

- (a) the provisions of this clause 40 will not apply to any dispute between the parties which is to be resolved under the provisions of the Independent Certifier Deed; and
- (b) the parties shall be bound by the terms of any resolution of any dispute between the parties which is resolved under the provisions of the Independent Certifier Deed.

**41. Notices****41.1 How to give a notice**

A notice, consent or other communication under this deed is only effective if it is:

- (a) in writing, signed by or on behalf of the person giving it;
- (b) addressed to the person to whom it is to be given; and
- (c) either:
  - (i) delivered or sent by pre-paid mail (by airmail, if the addressee is overseas) to that person's address; or
  - (ii) sent by fax to that person's fax number and the machine from which it is sent produces a report that states that it was sent in full.

**41.2 When a notice is given**

A notice, consent or other communication that complies with this clause 41 is regarded as given and received:

- (a) if it is delivered or sent by fax:
  - (i) by 5.00 pm (local time in the place of receipt) on a Business Day - on that day; or
  - (ii) after 5.00 pm (local time in the place of receipt) on a Business Day, or on a day that is not a Business Day - on the next Business Day; and
- (b) if it is sent by mail:
  - (i) within Australia – 2 Business Days after posting; or

- (ii) to or from a place outside Australia – 5 Business Days after posting.

### 41.3 Address for notices

A person's address and fax number are those set out below, or as the person notifies the sender:

#### NSW Health

Address: Level 16, Tower A, Zenith Centre  
821 Pacific Highway  
Chatswood  
NSW 2057

Fax number: (02) 8644 2240

Attention: Chief Executive, Health Infrastructure

with a copy to:

Address: Royal North Shore Hospital Redevelopment Office  
Royal North Shore Hospital  
Pacific Highway  
St Leonards NSW 2065

Fax number: (02) 9926 5935

Attention: Project Director, Royal North Shore Hospital Redevelopment

#### The Project Company

Address: Level 22 ABN AMRO Tower  
88 Phillip Street  
Sydney 2000

Fax number: (02) 8259 5425

Attention: Director, InfraShore

with a copy to: ABN AMRO

Address: Level 22 ABN AMRO Tower  
88 Phillip Street  
Sydney 2000

Fax number: (02) 8259 5425

Attention: Director, Project Management, Structured Finance

---

## 42. General

### 42.1 Governing Law and Submission to Jurisdiction

- (a) This deed is governed by the Law in force in New South Wales.
- (b) Each party submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in New South Wales, and any court that may hear appeals from any of

those courts, for any proceedings in connection with any Project Document, and waives any right it might have to claim that those courts are an inconvenient forum.

## 42.2 Liability for Taxes

- (a) Subject to clause 42.2(b) and clause 42.3, the Project Company must indemnify NSW Health against, and must pay NSW Health on demand the amount of, all Taxes (excluding Rates and Land Tax) incurred in connection with:
- (i) the negotiation, preparation, execution, stamping and registration of this deed or any Project Document;
  - (ii) the transactions that this deed or any Project Document contemplates; and
  - (iii) any amendment to, or any consent, approval, waiver, release or discharge of or under, this deed or any Project Document.
- (b) NSW Health will pay and indemnify the Project Company against all stamp duty in respect of this deed, the Securitisation Agreement, the Master Licence Agreement, the Payment Direction Deed and the Financing Agreements which is payable to the State, provided that NSW Health will not pay or indemnify the Project Company in respect of any fine, penalty or additional liability resulting from any failure or any delay in paying or submitting any relevant document or any other breach of applicable Law.
- (c) Any amount payable by NSW Health under paragraph (b) will be paid by NSW Health within 20 Business Days of submission by the Project Company to the Project Director of a stamp duty invoice, together with copies of receipts or other evidence, satisfactory in all respects to the Project Director, of payment of the stamp duty in respect of the relevant documents.
- (d) If NSW Health notifies the Project Company within 14 days after execution of this deed or a Licence that it will attend to lodgement and stamping of the relevant document, the Project Company must promptly deliver all executed copies of the documents in its possession to NSW Health to enable it to arrange lodgement and must co-operate with NSW Health to arrange stamping, payment of any assessment and to dispute an assessment (at NSW Health's cost) in accordance with NSW Health's directions.

## 42.3 GST gross up and GST on claims

- (a) Words defined in *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* have the same meaning in this clause.
- (b) If a party (the "**Supplier**") makes a supply to another party (the "**Recipient**") under or in connection with this deed, then (unless the consideration is expressly stated to be inclusive of GST) the consideration for that supply ("**GST Exclusive Consideration**") is exclusive of GST, and in addition to paying or providing that GST Exclusive Consideration the recipient must:
- (i) pay to the Supplier an amount equal to any GST for which the Supplier is liable on that supply, without deduction or set-off of any other amount; and

- 
- (ii) make that payment as and when (and in the same manner) the GST Exclusive Consideration or part of it must be paid or provided, except that the recipient need not pay unless the Supplier has issued to the Recipient a tax invoice (or an adjustment note) for that supply, which includes such particulars as required by the GST Law to obtain a credit for that GST.
- (c) The Supplier must refund to the Recipient any overpayment by the Recipient for GST, but the supplier need not refund to the Recipient any amount for GST paid to the Commissioner of Taxation unless the Supplier is entitled to a refund or credit of that amount.
- (d) Where an amount is payable (the "**Indemnity Amount**") by one party (the "**Indemnifier**") to another party (the "**Indemnified**") for or in satisfaction of a Claim or a right to make a Claim under or in connection with this deed that gives rise to a liability for GST:
- (i) if the Indemnified is subject to GST on the Indemnity Amount, the Indemnifier must increase the Indemnity Amount (as reduced by clause 42.3(d)(ii)) by an additional amount as notified by the Indemnified to the Indemnifier sufficient that the total amount payable by the Indemnifier (after discounting for the amount of any GST liability payable by the Indemnified on that total) is equal to an amount which will put the Indemnified in the same position in relation to the Indemnity Amount as if GST had not been payable on it; and
- (ii) any amount recoverable under the indemnity, warranty or obligation to reimburse includes the amount of GST payable on the cost or expense in relation to which the indemnity is paid, but will exclude the amount of any input tax credit or reduced input tax credits or other credit to which the party receiving the Indemnity Amount is entitled in respect of the cost or expense recovered.
- (e) If a party has a Claim under or in connection with this deed whose amount depends on actual or estimated revenue or which is for a loss of revenue, revenue must be calculated without including any amount received or receivable as reimbursement for GST (whether that amount is separate or included as part of a larger amount).
- (f) Any reference in this clause to GST payable by a party includes any GST payable by the representative member of any GST group of which that party is a member. Any reference to input tax credits to which a party is entitled includes input tax credits to which the representative member of the party's GST group is entitled.
- (g) If the GST law treats part of a supply as a separate supply for the purpose of determining whether GST is payable on that part of the supply or for the purpose of determining the period to which that part of the supply will be attributable, such part of the supply will be treated as a separate supply for the purposes of this clause.
- (h) Within 20 Business Days of the occurrence of an adjustment event relating to a taxable supply made by the Supplier under or in connection with this deed the Supplier must provide to the Recipient an adjustment notice relating to that adjustment event.

- (i) Subject to clause 42.3, if a Construction Payment or Operations Variation Payment is due and payable by NSW Health to the Project Company in accordance with the Project Deed, NSW Health is obliged to pay the GST arising in relation to the Construction Payment or Operations Variation Payment to the Project Company when it receives the benefit of an input tax credit in respect of that amount, provided that:
- (i) NSW Health takes all reasonable efforts to obtain the benefits of the input tax credit, and NSW Health shall be taken to have received the benefit of the input tax credit where the tax credit reduces an amount otherwise payable to the Australian Tax Office; and
  - (ii) NSW Health has received tax invoice in respect of the Construction Payment or Operations Variation Payment from the Project Company.
- (j) If at any time this deed is terminated NSW Health is only obliged to pay the Project Company under clause 42.3(i) an amount equal to the relevant GST payment when it receives the benefit of an input tax credit in respect of any Construction Payment or Operations Variation Payment, provided that NSW Health takes all reasonable efforts to obtain the benefit of the input tax credit and NSW Health shall be taken to have received the benefit of the input tax credit where the input tax credit reduces an amount otherwise payable to the Australian Taxation Office. The obligation of NSW Health to pay the Project Company an amount equal to the relevant GST payment when it receives the benefit of an input tax credit in respect of a Construction Payment or Operations Variation Payment is independent of any compensation paid or payable by NSW Health in accordance with clause 35.2. Notwithstanding the termination of this deed, NSW Health is obliged to take all reasonable efforts to obtain the benefit of the input tax credit and to pay to the Project Company an amount equal to the relevant GST payment when it receives the benefit of an input tax credit in respect of the Construction Payment or Operations Variation Payment.

#### 42.4 Liability for Expenses

Despite any contrary provision in another Project Document:

- (a) subject to clause 42.2 and paragraph (b) below, each party must pay its own expenses incurred in the negotiation, preparation and execution of this deed or any Project Document;
- (b) subject to clause 22, a party which requests any consent, waiver, amendment, supplement, replacement, novation or assignment (including, for the avoidance of doubt, a Refinancing) under the Project Documents shall pay all costs associated with such consent, waiver, amendment, supplement, replacement, novation or assignment;
- (c) Project Company must pay the reasonable costs of NSW Health incurred in relation to performing its obligations under clauses 14A.1(g) and 14A.2(e); and
- (d) without limiting clauses 32 and 34.4, the Project Company shall pay all expenses associated with a breach of this deed or any Project Document by it.

#### **42.5 Cost of Obligations**

A party to this deed which has an obligation to do anything under this deed must perform that obligation at its cost, unless this deed expressly provides otherwise.

#### **42.6 Giving effect to this deed**

Each party must do anything (including execute any document), and must ensure that its employees and agents do anything (including execute any document), that the other party may reasonably require to give full effect to this deed.

#### **42.7 Operation of this deed**

- (a) Subject to paragraph (b) below, this deed contains the entire agreement between the parties about its subject matter. Any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by this deed and has no further effect.
- (b) If a provision of this deed is inconsistent with a provision of the Financiers Tripartite Deed, the provision of the Financiers Tripartite Deed prevails.
- (c) Any right that a person may have under this deed is in addition to, and does not replace or limit, any other right that the person may have.

#### **42.8 Severance**

If at any time any provision of this deed or any other Project Document is or becomes illegal, invalid or unenforceable in any respect under applicable Law, that provision is to be severed to the extent necessary to make this deed enforceable, and it will not affect or impair the legality, validity or enforceability of any other provision of the relevant Project Document.

#### **42.9 Amendment and waivers in writing**

- (a) This deed may only be amended, supplemented, replaced or novated by a document signed by or on behalf of each party to this deed.
- (b) The non-exercise of or a delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. Any waiver or consent given by a party will only be effective if given or confirmed in writing.
- (c) Nothing in paragraph (b) prevents the partial waiver of a power or right, but paragraph (b) applies equally to such partial waiver.

#### **42.10 Consequential Loss**

- (a) The Project Company's liability or responsibility (however and whenever arising) for any Consequential Loss ("**C/L Liability**") suffered or incurred by the Health Entities, arising under, out of or in any way in connection with the Works, the Support Services or any Project Document, will be wholly or partially discharged as follows:

- (i) where the Project Company and the Health Entities (or either) have an entitlement to recover or be indemnified in respect of such C/L Liability under a policy or policies of insurance which the Project Company has obtained (or caused to be obtained) in compliance with clause 26 of this deed, by the amount or amounts actually recovered by the Project Company and the Health Entities (or either) from, or for which the Project Company and the Health Entities (or either) are otherwise actually indemnified by, the insurer or insurers of such policy or policies of insurance in respect of such C/L Liability (**actual insurance proceeds**) to the extent the Project Company or the insurer or insurers of such policy or policies accounts to the Health Entities suffering or incurring the Consequential Loss occasioning the C/L Liability for such actual insurance proceeds (or an amount equal to such actual insurance proceeds); and
- (ii) where, but for a failure of the Project Company to comply with its obligations under clause 26 of this deed to obtain an insurance policy or policies or cause an insurance policy or policies to be obtained, or but for any Conduct (as defined in paragraph 16(d) of Schedule 14) or omission by the Project Company which has resulted in a loss of or reduction of the recovery or indemnity under such insurance policy or policies the Project Company and the Health Entities (or either) would have been entitled to recover from, or be indemnified by, an insurer or insurers of such policy or policies in respect of such C/L Liability, by the amount which the Project Company and Health Entities (or either) would have been entitled to recover from, or be indemnified by, an insurer or insurers of such policy or policies in respect of such C/L Liability (**"putative insurance proceeds"**).
- (b) NSW Health:
- (i) agrees that under no circumstances shall the Project Company be liable in any way whatever to the Health Entities, nor shall the Health Entities have any remedy (whether contractual, tortious, statutory or otherwise) against the Project Company, in respect of any Consequential Loss suffered or incurred by the Health Entities, other than for the Discharge Amount (if any) for that Consequential Loss; and
- (ii) waives, surrenders and abandons any and all rights and remedies (whether contractual, tortious, statutory or otherwise) that the Health Entities have or may have in the future, against the Project Company in respect of any Consequential Loss suffered or incurred by them, arising under, out of, or in any way in connection with, the Works, the Support Services or any Project Document, however and whenever arising, except in respect of the Discharge Amount (if any) for that Consequential Loss.
- (c) In determining the amount which the Project Company or the Health Entities are entitled to recover or for which they are entitled to be indemnified under an insurance policy for the purposes of clause 42.10(a)(i), or the amount which they would have been entitled to recover or for which they would have been entitled to be indemnified under an insurance policy for the purposes of clause 42.10(a)(ii), the parties agree that the Project Company or the Health Entities are not entitled to recover or be indemnified to the extent that an insurance policy responds to provide

cover or indemnity above the limit of cover or indemnity required to be effected for the particular risk pursuant to clause 26 of this deed.

- (d) The parties agree that, in this clause 42.10:
- (i) **"Discharge Amount"** means in respect of any Consequential Loss (however and whenever arising) suffered or incurred by any Health Entities arising under, out of or in any way in connection with the Works, the Support Services or any Project Document, the amount by which the Project Company's liability for such Consequential Loss is to be discharged pursuant to clauses 42.10(a)(i) and 42.10(a)(ii) (or either); and
  - (ii) **"Health Entities"** means NSW Health, the State, the NSW Health Related Parties and their respective officers, employees and agents. References to the Health Entities mean each person described in the previous sentence individually, collectively and in any combination of two or more of them.

#### 42.11 Operation of indemnities

- (a) No indemnity in this deed limits the effect or operation of any other indemnity in this deed.
- (b) Unless expressly provided otherwise, each indemnity in this deed is a continuing obligation, separate and independent from the other obligations of the parties.
- (c) Each indemnity in this deed survives the expiry or termination of this deed.
- (d) A party may recover a payment under an indemnity in this deed before it makes the payment in respect of which the indemnity is given.
- (e) NSW Health holds for itself and on trust for each NSW Health Related Party the benefit of each indemnity and release in this deed expressed to be for the benefit of that NSW Health Related Party.

#### 42.12 Exercise of Remedies

- (a) If the Project Company breaches any of its obligations under this deed or any other Project Document, NSW Health or the Project Director may exercise any or all of the rights and powers and pursue any or all of the remedies available to NSW Health under the Project Documents and/or enforce any other legal or equitable remedy available under applicable Law.
- (b) Each and every right, power and remedy of NSW Health shall be cumulative and in addition to any other right, power and remedy, whether under a Project Document or applicable Law, which may be exercised by NSW Health and the exercise of a right, power or remedy shall not be construed to be a waiver of the right to exercise any other right, power or remedy.
- (c) No delay or omission by NSW Health or the Project Director in the exercise of any right, power or remedy shall impair such right, power or remedy or constitute a waiver of the relevant breach.



**42.13 Counterparts**

This deed may be executed in counterparts.

**42.14 Attorneys**

Each person who executes this deed on behalf of a party under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so under that power of attorney.