

BLAKE DAWSON WALDRON
L A W Y E R S

Orange and Associated Health Services PPP Project Deed

Health Administration Corporation

**Pinnacle Healthcare (OAHS) Pty Limited as trustee of the Pinnacle Healthcare
(OAHS) Trust**

Execution Version

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ORANGE AND ASSOCIATED HEALTH SERVICES PPP PROJECT DEED

DATE 21 December 2007

PARTIES

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

Pinnacle Healthcare (OAHS) Pty Ltd ACN 120 747 588 as trustee of the Trust (the Project Company)

RECITALS

- 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 Construction Health Facilities in consideration of the Construction Payment and manage, maintain and provide certain services in connection with certain health facilities in consideration of the Service Payment, in accordance with the terms and conditions of this deed.
- C. Ancora has agreed to provide finance to the Project Company and to enter into the Securitisation Deed 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.

Abandon means:

- (a) wholly or substantially ceases to carry out the Works contemplated by the Works Program for 20 consecutive Business Days or for 60 Business Days (whether consecutive or not) in any Contract Year and/or ceases to provide all or a substantial part of the Services for 5 consecutive Business Days or for 20 Business Days (whether consecutive or not) in any six month period; or
- (b) expresses or displays an intention to permanently cease performance of all or a substantial part of the Works or the Services and the Project Company does not, within 5 Business Days of the Project Director giving to the Project Company written notice of such expression or display, recommence performance of the relevant Works or Services or otherwise satisfy the Project Director that it is not,

and does not intend to, permanently cease performance of all or a substantially part of the Works or the Services.

Acceptable Group 3TA Equipment has the meaning given to that term in clause 11.13(d)(i).

Accreditation means each accreditation in respect of each Construction Health Facility 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 a Site (other than a Health Facility or a Project Company Facility) carried out or to be carried out by the Project Company.

Additional Work means any work requiring Capital Expenditure (other than in respect of the Works), to be carried out in relation to the Project including any change in or addition to a Health Facility, but excluding works in relation to Third Party Facilities and life cycle maintenance and refurbishment contemplated by or required for performance of the Services.

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.

Adjoining Property means any land or property adjoining or in close proximity to or the vicinity of a 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.

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) affecting or impacting a Site as at the date of this deed, including rights of access, use and/or occupation granted to NSW Health Tenants.

Amaroo Building (Bloomfield) means the buildings and infrastructure on the Amaroo Building (Bloomfield) Site and their associated facilities, including plant, fixtures, fittings, furniture, equipment, electrical goods, grounds, paths and gardens (but excluding NSW Health Provided Items until such time as a NSW Health Provided Item is deemed to become part of the Amaroo Building (Bloomfield) under clauses 11.10(c), 11.11(e), 11.12(d) or 11.13(f)), provided or to be provided in accordance with the Facility Specification.

Amaroo Building (Bloomfield) Site means the land so designated on the relevant Site Plan.

Ancora means Ancora (OAHS) Pty Limited ACN 127 920 647 or such other entity approved by NSW Health.

Annual Maintenance Program has the meaning given to that term in the Support Services Specification.

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

Approval Delay Event means an event or circumstance occurs so that a Project Company 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(b).

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

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.

ASIC means the Australian Securities and Investments Commission.

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

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 10.30am 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 Reference Rate means [REDACTED]

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.

Bathurst Defect Rectification Period means the period commencing on the New Bathurst Hospital (Stage 1) Completion Date and ending on the seventh anniversary of the New Bathurst Hospital (Stage 1) Completion Date.

Bathurst Site Plan means the site plan set out in Part A of Annexure A.

Bathurst Subcontractor Warranties has the meaning given to that term in clause 15.5(e).

Bedding-In Period has the meaning given to that term in schedule 5.

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

Benchmarked Insurances means those insurances set out in paragraphs 7, 7A 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.

Bloomfield Facilities means each of the buildings described in part C of schedule 3 on the Bloomfield Site or Orange Health Campus Site, and, in respect of each, its associated facilities, including buildings, plant, fixtures, fittings, equipment, electrical goods and furniture, and including grounds, paths and gardens (but excluding NSW Health Provided Items until such time as a NSW Health Provided Item is deemed to become part of a Bloomfield Facility under clauses 11.10(e), 11.11(e), 11.12(d) or 11.13(f)), provided or to be provided in accordance with the Facility Specification.

Bloomfield Site means the land designated Bloomfield South and Bloomfield North on the relevant Site Plan.

Bond Trust Deed means the document so entitled to be entered into between, amongst others, the Bond Trustee and Ancora.

Bond Trustee means BNY Trust Company of Australia Limited (ABN 49 050 294 052) as trustee under the Bond Trust Deed and any replacement Bond Trustee appointed in accordance with the Financing Agreements.

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.

Canobolas Building (Bloomfield) means the buildings and infrastructure on the Canobolas Building (Bloomfield) Site and their associated facilities, including plant, fixtures, fittings, furniture, equipment, electrical goods, grounds, paths and gardens (but excluding NSW Health Provided Items until such time as a NSW Health Provided Item is deemed to become part of the Canobolas Building (Bloomfield) under clauses 11.10(e), 11.11(e), 11.12(d) or 11.13(f)), provided or to be provided in accordance with the Facility Specification.

Canobolas Building (Bloomfield) Site means the land so designated on the relevant Site Plan.

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.

Cessation Date means the date on which all of the decanting and de-commissioning processes and activities (including any relevant certifications) set out in the Specifications in respect of Orange Base Hospital are completed.

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 the coming into effect or implementation after the date of this deed of:

- (a) Legislation;
- (b) any applicable judgement of a relevant court of law which changes a binding precedent;
- (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:

- (e) has been published or of which public notice has been given; or
- (f) a party experienced and competent in the delivery of works and/or services similar to the Works and 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, fine, order or adverse judgement (at common law or in equity) under, arising out of, or in any way in connection with, this deed or the Project.

Classification A FF&FE means FF&FE which is described as "Classification A" or "Class A" in the Facility Specification.

Clinical Equipment means equipment identified as clinical equipment in the Facility Specification.

Collateral Warranty means a collateral warranty in favour of NSW Health by a Material Subcontractor on the terms set out in schedule 10.

Commencement Certificate means a certificate issued by the Project Director in accordance with clause 13.3 in the form contained in part B of schedule 13.

Commencement Date means:

-
- (a) for each of:
- (i) New Bathurst Hospital (Stage 1);
 - (ii) Orange Base Hospital;
 - (iii) the Bloomfield Facilities;
 - (iv) the Residences; and
 - (v) the Community Health Facilities,
- the Hard FM Start Date;
- (b) for the New Bathurst Hospital (Stage 2), the New Bathurst Hospital (Stage 2) Completion Date;
- (c) for the New Orange Hospital, the date so stated in the Commencement Certificate for the New Orange Hospital in accordance with clause 13.4;
- (d) for the New Orange Acute Mental Health Facility, the date so stated in the Commencement Certificate for the New Orange Acute Mental Health Facility in accordance with clause 13.4;
- (e) for the New Orange Forensic Mental Health Facility, the date so stated in the Commencement Certificate for the New Orange Forensic Mental Health Facility in accordance with clause 13.4; and
- (f) for the Refurbishment Areas each of:
- (i) the Hard FM Start Date; and
 - (ii) the date so stated in the Commencement Certificate for the relevant Refurbishment Area in accordance with clause 13.4.

Commercially Sensitive Information means, subject to the terms of the Guidelines, any information relating to the Financing Facilities, the Project Company's cost structure or profit margins, any of 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 the Project Company, its shareholders, its financiers or its Subcontractors.

Commissioning means any installation, commissioning, testing or running in of plant, equipment, machinery or facilities required to ascertain the ability of each Health Facility, or any part of it, to comply with the Specifications to the extent they apply to that Health Facility, and any operational commissioning, including training, education, familiarisation and support required to ascertain the ability of each Health Facility, or any part of it, to comply with the Specifications to the extent they apply to that Health Facility, all decanting and recanting of equipment in accordance with the Specifications and the Works Program including any services required to be provided to a Health Facility, or any part of it, in connection with such decanting and recanting of equipment or to facilitate the NSW Health Decanting Process, and any installations of NSW Health Provided Items required in accordance with the Specifications.

Commissioning Plan means the plan or procedures for the Commissioning Works developed in accordance with clause 11.4.

Commissioning Works means the process of carrying out the Commissioning of a Health Facility.

Community Health Facilities means each of the facilities described in part D of schedule 3 and **Community Health Facility** means any of them and, in respect of each, its associated facilities, including plant, fixtures, fittings, furniture, equipment, electrical goods, grounds, paths and gardens on the relevant Community Health Facility Site (but excluding NSW Health Provided Items until such time as a NSW Health Provided Item is deemed to become part of a Community Health Facility under clauses 11.10(e), 11.11(c), 11.12(d) or 11.13(f)), provided or to be provided in accordance with the Facility Specification.

Community Health Facility Site means, for each Community Health Facility, the land described against that Community Health Facility in column 2 in part D of schedule 3.

Comparable Services has the meaning given to that term in paragraph 2.1 of schedule 20.

Compensation Event means each of:

- (a) a breach by NSW Health or the Director-General of the New South Wales Department of Health of their respective 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 (including, for the avoidance of doubt, where its obligations are to be performed by a certain time or to achieve a KPI, to perform its obligations by that time or to achieve that KPI respectively) 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 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 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 a NSW Health Development Approval or the modification, withdrawal, revocation, suspension or replacement of

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- a 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 not reasonably discoverable by the inspection and testing required by clauses 11.10 to 11.13 (inclusive) 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) any official or unofficial strike, lockout, go slow or other Industrial Action by the Health Staff Members where such an action is as a consequence of matters wholly unrelated to any action or inaction of the Project Company or a Project Company Related Party;
 - (k) an official or unofficial strike, lockout, go slow or other Industrial Action 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 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 Industrial Action by staff employed by the Director-General of the New South Wales Department of Health (excluding Health Staff Members), 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 and such action or inaction constituted a failure by the Project Company or a Project Company Related Party as the case may be to act in accordance with Good Industry Practice;
 - (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 under clause 11.3(f). For the avoidance of doubt it will not be a Compensation Event if the Project Director or NSW Health reschedules the Works or amends the Works Program 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) Group 2T Equipment and Group 3T Equipment not being made available consistent with the Commissioning Plan; or
 - (ii) delays to or rescheduling of the NSW Health Decanting Process,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 or NSW Health in respect of Unidentified Pre-existing Contamination;

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- (p) any:
- (i) Defect in the subsurface condition of Existing Infrastructure; or
 - (ii) latent defect in the structural condition of Existing Infrastructure, in respect of a Health Facility or Site other than the Construction Health Facilities or New Bathurst Hospital (Stage 1) (excluding Daffodil House, Poole House, the Dental Building and the Doctor's Residence), in each case which is discovered during the carrying out of the Works or Services and, in the case of (ii) only, which was not identified in the Condition Survey Report;
- (q) any material deterioration in the condition of the Existing Buildings to which the Condition Survey Report relates between the date of the Condition Survey Report and the Commencement Date for the relevant Health Facility which includes those Existing Buildings;
- (r) comments made by the Project Director under clause 6.1(f) 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;
- (s) where the Project Company has complied with the Interface Deed, the New Bathurst Hospital (Stage 2) Works substantially prevent or interfere with the performance of Services by the Project Company;
- (t) Third Party Facility Works substantially prevent or interfere with the performance of Services by the Project Company, provided that the Project Company has not hindered, prevented or delayed the Third Party Contractor, and has used its best endeavours to co-operate, co-ordinate and communicate with the relevant Third Party Contractor;
- (u) the Project Director requires that a condition to a Consent be contested in accordance with clause 6.4(c);
- (v) presence of friable asbestos in an Existing Building that is required to be removed or remediated, other than as part of the Works;
- (w) an amendment to the New Bathurst Hospital Construction Contract after the date of this deed; and
- (x) any inconsistency in the New Bathurst Hospital buildings (as completed) and the contract documents as defined in the New Bathurst Hospital Construction Contract (excluding a Defect to which clause 15.5(b) applies),

but excluding any event or occurrence which occurs or arises (directly or indirectly) as a result of the action or inaction (as the case may be) of the Early Services Contractor under the Early Services Deed.

Completion means:

- (a) in respect of the Works for a Construction Health Facility, the stage of construction or refurbishment (as applicable) where:
- (i) the Works for the relevant Construction Health Facility are 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 Construction Health Facility 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 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) Commissioning of the relevant Construction Health Facility, including all plant and equipment, has been carried out in accordance with the Commissioning Plan and the Specifications;
 - (iii) all Consents:
 - (A) then necessary for the occupation of the relevant Construction Health Facility for Health Functions; and
 - (B) then necessary for the use of the relevant Construction Health Facility for its intended purpose; and
 - (C) required by the Specifications,have been issued and conditions of those Consents have been satisfied;
 - (iv) any work required under clause 13.5 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 Works for the relevant Construction Health Facility and any other work required for the occupation of the relevant Construction Health Facility 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 Construction Health Facility 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 Construction Health Facility; and

- (viii) in respect of the relevant Construction Health Facility 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

provided that, in respect of the New Orange Hospital, provided it meets all other requirements for Completion, it will be deemed to be Complete notwithstanding that the Post Completion Expansion Works have not been Completed;

- (b) in respect of a Milestone, when the Milestone is completed in accordance with the terms of the requirements of this deed; and
- (c) in respect of the Post Completion Expansion Works, when the Post Completion Expansion Works have been completed in accordance with paragraph (a) of this definition to the extent they were not satisfied as at Completion of the New Orange Hospital.

Condition Survey Report means the report by Tyrells entitled "Orange and Associated Health Services Public Private Partnership Project – Condition Audit and Report" dated October 2006.

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.

Conservation Management Plan means the conservation management plan in relation to each of the Greater Bloomfield Site and the New Bathurst Hospital Site.

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 Hansen Yuncken Pty Limited (ABN 38 063 384 056) 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 Health Facility means each Health Facility described in Part F of schedule 3.

Construction Payment means the payment by NSW Health to the Project Company on the Full Service Commencement Date which must equal the amount of the Securitisation Payment as determined under the Securitisation Deed.

Construction Phase means, in respect of a Site or a Health Facility, the period commencing on the date when the Project Company is granted access to the relevant Site or Health Facility under a Works Program, and ending on the following Commencement Date for the Health Facility.

Construction Report means each report provided in accordance with clause 11.4.

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

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

Contract Variation means a 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 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 twelve 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.

Co-ordination Agreement means each co-ordination agreement in the agreed form, between the Project Company, each Construction Contractor and a Facilities Manager.

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

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;

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- (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.

Deed of Common Provisions means the deed so entitled, dated on or about the date of Financial Close, between, amongst others, Ancora, the Bond Trustee, the Security Trustee and the Financial Guarantor.

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 construction of such Health Facilities, or any part of them;
- (c) defective installation of anything in or on the Health Facilities, or any part of them or a Site, having regard to Good Industry Practice and to applicable standards and codes of practice current at the date of such installation; or
- (d) defective preparation of a Site.

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 Project.

Design Development Independent Expert means the person appointed from time to time under the Design Development Independent Expert Deed.

Design Development Independent Expert Deed means the deed to be entered into, substantially in the form set out in schedule 27.

Detailed Design means, for a Construction Health Facility, 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 Construction Health Facility to be prepared by the Project Company by the date set out in part A of schedule 12 and in accordance with the Specifications.

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

Discriminatory Change in Law means a Change in Law, other than a Change in Law with respect to 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 other persons; or
- (c) a Site, 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 policies in respect of privately financed projects and not to other projects.

Disposables means rubbish, waste, waste products (including Clinical Waste as defined in the Support Services Specification) 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, 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 of the Project Company, or any payment, loan or financial accommodation by the Project Company to a related body corporate, other than on arm's length terms.

Early Services Contractor means Spotless P&F Pty Limited.

Early Services Deed means the document so entitled dated 28 November 2007 between NSW Health and the Early Services Contractor.

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

- (a) prevents provision of the 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 Services or operation of a Health Facility; or
- (c) will require the provision of the Services or alternate services materially greater than that required in the Support Services Specification,

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.

Energy Payment has the meaning given to that term in schedule 5.

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 the Stage 1 environmental site assessment report(s) in relation to each of the Orange Health Campus Site and the New Bathurst Hospital Site.

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 Site, the Works, a Health Facility or a Project Company Facility or its use:

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

Environmental Reports means each of the documents listed in schedule 26.

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).

Equipment Obsolescence Schedule means the schedule set out in schedule 28.

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

Equity Margin means the Base Case Equity Return at Financial Close less the Base Case Equity Reference Rate as at Financial Close, as determined in accordance with the Financial Close Protocol.

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

Everest Babcock & Brown means Everest Babcock & Brown Limited ACN 112 480 145.

Excluded Purposes means, in respect of a Health Facility or any part of a Health Facility, any purpose which:

- (a) is in direct competition with a service or activity provided by NSW Health or NSW Health Related Parties from time to time;

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- (b) adversely affects NSW Health's ability to recruit or retain staff to provide the Health Functions; or
 - (c) is inconsistent with or constitutes a breach of Consents or applicable Law.

Existing Building means those buildings and fixtures included in the Health Facilities described in Parts A to E of schedule 3.

Existing Health Facilities means the Health Facilities excluding the Construction Health Facilities.

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 Site.

Expanded Bloodbank Unit means the additional buildings and infrastructure provided or to be provided in accordance with the Facility Specification on the New Orange Hospital Site to increase the capacity of the primary health care department, and its associated facilities, including plant, fixtures, fittings, furniture, equipment, electrical goods, grounds, paths and gardens, (but excluding NSW Health Provided Items until such time as a NSW Health Provided Item is deemed to become part of the Expanded Bloodbank Unit under clauses 11.10(e), 11.11(e), 11.12(d) or 11.13(f)).

Expanded Dental Unit means the additional buildings and infrastructure provided or to be provided in accordance with the Facility Specification on the New Orange Hospital Site to increase the capacity of the oral health department, and its associated facilities, including plant, fixtures, fittings, furniture, equipment, electrical goods, grounds, paths and gardens, (but excluding NSW Health Provided Items until such time as a NSW Health Provided Item is deemed to become part of the Expanded Dental Unit under clauses 11.10(e), 11.11(e), 11.12(d) or 11.13(f)).

Expansion Works means Works to be carried out in accordance with the Facility Specification in respect of the Expanded Dental Unit, the Expanded Bloodbank Unit and the Radiotherapy Unit.

Expansion Works Construction Price means, in respect of the Works relating to the:

- (a) Radiotherapy Unit to be undertaken by the Project Company in accordance with section 14.6 of the Facility Specification, \$9,957,000;
- (b) Expanded Dental Unit to be undertaken by the Project Company in accordance with section 17.8 of the Facility Specification, \$1,015,000; and
- (c) Expanded Bloodbank Unit to be undertaken by the Project Company in accordance with section 22.8 of the Facility Specification, \$590,000.

Expansion Works Construction Program means, in respect of the Works relating to the:

- (a) Radiotherapy Unit to be undertaken by the Project Company in accordance with section 14.6 of the Facility Specification, the payment schedule set out in Annexure D;

- (b) Expanded Dental Unit to be undertaken by the Project Company in accordance with section 17.8 of the Facility Specification, the payment schedule set out in Annexure D; and
- (c) Expanded Bloodbank Unit to be undertaken by the Project Company in accordance with section 22.8 of the Facility Specification, the payment schedule set out in Annexure D.

Expansion Works Payment Claim means a claim for payment on account of part of the Expansion Works Construction Price which is submitted and otherwise complies with the requirements of clause 11.14.

Expansion Works Payment Event means each payment event set out in Annexure D.

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

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

Facilities Manager means Spotless P&F Pty Limited (ABN 83 072 293 880) or such other replacement contractor 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 Spotless Group Limited (ABN 77 004 376 514) or such other party as may be substituted for the Facilities Manager Guarantor in accordance with the Project Documents.

Facilities Management Side Deed means the 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, 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 28.3(b)(ii) or any NSW Health Variation Request which results in a Health Facility ceasing to be subject to this deed.

Facility Specification means each of the requirements set out in Part A of schedule 4.

FF&FE has the meaning given to that term in the ~~Support~~ ^{Support} Services Specification.

Final Expansion Works Payment Event means Completion of the Post Completion Expansion Works.

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

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

Finance Security means each of the Security Interests granted in favour of the Financiers to secure the obligations of the Project Company or Ancora under the Financing Facilities.

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.

Financial Guarantor means Assured Guaranty Corp. or such other or replacement financial guarantors as may be substituted or appointed in accordance with the Project Documents and Financing Agreements from time to time.

Financiers means each provider of, and each credit enhancer (including the Financial Guarantor) for, Financing Facilities from time to time and may, where the context permits, include any agent or trustee of such Financiers.

Financiers Construction Contract Tripartite Deed means the document to be entered into between the Construction Contractor, 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 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 following documents in the agreed form, and any additions to or replacements of such agreements, in accordance with clause 9.1:

- (a) each Finance Document as defined in the Deed of Common Provisions;
- (b) each Finance Security;
- (c) Security Trust Deed;
- (d) Financiers Facilities Management Tripartite Deed;
- (e) Financiers Construction Contract Tripartite Deed;
- (f) the letter dated on or about the date of Financial Close entitled 'Fixed Deposit Side Letter' between the Project Company, Mizuho Corporate Bank, Ltd., Sydney Branch ACN 099 031 106, Westpac Banking Corporation and the Security Trustee;
- (g) the document dated on or about the date of Financial Close entitled 'GST Facility Agreement' between the Project Company and Dexia Credit Local Asia Pacific Pty Limited ABN 46 108 121 553;
- (h) the document dated on or about the date of Financial Close entitled 'Ancora (OAHS) Loan Agreement' between Ancora (as lender), the Project Company (as borrower) and the Security Trustee;

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- (i) the document dated on or about the date of Financial Close entitled 'Pinnacle Trustee Interest Free Loan Agreement' between Ancora (as lender) and the Project Company (as borrower);
 - (j) the document dated on or about the date of Financial Close entitled 'Equity Underwriting and Subscription Agreement' between Pinnacle Infrastructure Pty Limited ACN 118 051 826, Pinnacle Healthcare (OAHS) Holdings Pty Limited ACN 120 746 894, the Project Company, Ancora and Babcock & Brown Australia Pty Limited ABN 49 002 348 521;
 - (k) the letter dated on or about the date of Financial Close entitled 'Equity Subscription Side Letter' between Pinnacle Infrastructure Pty Limited ACN 118 051 826, Pinnacle Healthcare (OAHS) Holdings Pty Limited ACN 120 746 894, the Project Company, Ancora and Babcock & Brown Australia Pty Limited ABN 49 002 348 521;
 - (l) the letter dated on or about the date of Financial Close entitled 'Security Trustee Fee Letter' between the Project Company and the Security Trustee;
 - (m) the letter dated on or about the date of Financial Close entitled 'GST Facility Fee Letter' between the Project Company and Dexia Credit Local Asia Pacific Pty Limited (ABN 46 108 121 553);
 - (n) the letter dated on or about the date of Financial Close entitled 'Tax Sharing Agreement' between the Project Company and Pinnacle Healthcare (OAHS) Holdings Pty Limited ACN 120 746 894;
 - (o) the letter dated on or about the date of Financial Close entitled 'Tax Funding Agreement' between the Project Company and Pinnacle Healthcare (OAHS) Holdings Pty Limited ACN 120 746 894; and
 - (p) the agreement dated on or about the date of Financial Close entitled 'Accounts Agreement' between the Project Company, Westpac Banking Corporation, Mizuho Corporate Bank Ltd., Sydney Branch ACN 099 031 106 and the Security Trustee.

Financing Facilities means the facilities, financial arrangements or accommodation provided, or to be provided in accordance with the Financing Agreements, to the Project Company or Ancora for the purpose of carrying out the Project.

Fit for Intended Purpose means:

- (a) for the Construction Health Facilities, being fit for the purpose of the provision of the Services and the Health Functions in respect of that Health Facility; and
- (b) for the Existing Health Facilities, meeting the requirements of the 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.

Fortnight End means the date:

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- (a) within the first fourteen days after the Start Date specified by NSW Health; and
- (b) every fourteen days thereafter.

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

Full Service Commencement Date means the date on which the Commencement Date for all Construction Health Facilities has occurred.

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.

Greater Bloomfield Site means the land comprising the Orange Health Campus Site and Bloomfield Site.

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 2 Equipment means the equipment described as "Group 2" in the Facility Specification to be provided by NSW Health to the Project Company from time to time in accordance with clause 11.10 and, for the avoidance of doubt, may include Clinical Equipment.

Group 2A Equipment means Group 2 Equipment which is described as "Classification A" or "Class A" in the Facility Specification.

Group 2T Equipment means the equipment described as "Group 2T" in the Facility Specification to be notified to the Project Company prior to the date of this deed and provided by NSW Health to the Project Company in accordance with clause 11.11 and, for the avoidance of doubt, may include Clinical Equipment.

Group 2TA Equipment means Group 2T Equipment which is described as "Classification A" or "Class A" in the Facility Specification.

Group 2TB Equipment means Group 2T Equipment which is described as "Classification B" or "Class B" in the Facility Specification.

Group 3 Equipment means the equipment described as "Group 3" in the Facility Specification to be provided to the Project Company from time to time in accordance with clause 11.12 and, for the avoidance of doubt, may include Clinical Equipment.

Group 3A Equipment means Group 3 Equipment which is described as "Classification A" or "Class A" in the Facility Specification.

Group 3 Equipment Notification Date has the meaning given to that term in clause 11.13(c)(i).

Group 3B Equipment means Group 3 Equipment which is described as "Classification B" or "Class B" in the Facility Specification.

Group 3T Equipment means the equipment described as "Group 3T" in the Facility Specification to be notified to the Project Company prior to the date of this deed and provided to the Project Company in accordance with clause 11.13 and, for the avoidance of doubt, may include Clinical Equipment.

Group 3TA Equipment means Group 3T Equipment which is described as "Classification A" or "Class A" in the Facility Specification.

Group 3TB Equipment means Group 3T Equipment which is described as "Classification B" or "Class B" in the Facility Specification.

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 means the same as 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 5 November 2001, each as amended, augmented or replaced from time to time.

GWAHS means Greater Western Area Health Service and, where the context requires, includes bodies or instrumentalities for which the Greater Western Area Health Service has administrative or management responsibility.

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

Handover Condition means the required condition of the Health Facilities, the Project Company Facilities, the Support Services Equipment and the Sites 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 Specification.

Hard FM Start Date means the later to occur of:

- (a) 4 April 2008; and
- (b) the New Bathurst Hospital (Stage 1) Completion Date.

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 each of:

- (a) New Bathurst Hospital;
- (b) Orange Base Hospital;
- (c) New Orange Hospital;
- (d) New Orange Acute Mental Health Facility;
- (e) New Orange Forensic Mental Health Facility;
- (f) Ward 18 (Bloomfield);
- (g) Ward 19 (Bloomfield);
- (h) the Amaroo Building (Bloomfield);
- (i) the Canobolas Building (Bloomfield);
- (j) the Bloomfield Facilities;
- (k) the Residences; and
- (l) the Community Health Facilities,

but excluding:

- (m) Orange Base Hospital from the Cessation Date; and
- (n) the Project Company Facilities.

Health Functions means all clinical, clinical support, non-clinical support and administration functions (other than the 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 NSW Health who is managed under a Labour Services Agreement.

Health Staff Member Costs has the same 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.

Helpdesk means the Helpdesk Service as defined in the Support Services Specification.

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 or is claimed to be invalid, void or voidable in any material respect, and, the event is not remedied within 30 days of the relevant event occurring or, in the event of a claim, is shown, within 30 days, to the satisfaction of the Project Director, to be frivolous, vexatious or without proper legal basis; or
- (c) it is or becomes unlawful for the Project Company or a Key Subcontractor to perform any of its obligations under the Project Documents, provided that where such event occurs as a direct result of a General Change in Law, the relevant 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, substantially in the form set out in schedule 9.

Industrial Action means strikes, bans, go slows, work to rule, stop work meetings, rolling stoppages, picket lines and secondary boycotts.

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; and
- (d) information provided by existing or prospective Health Staff Members.

Initial Hard FM Services means defects rectification, planned and preventative maintenance and reactive maintenance services performed or to be performed by the New Bathurst Hospital Construction Contractor, GWAHS and/or their respective officers, employees, agents or contractors at the New Bathurst Hospital (Stage 1) between the New Bathurst Hospital (Stage 1) Completion Date and the Hard FM Start Date.

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 Financial Close and each third, or multiple thereof, anniversary 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 under paragraphs 7(a) and/or 7(b) of schedule 14 will be increased.

Insurance Component means the insurance component of the Service Payment set out in clause 1 of part A of schedule 5 as amended in accordance with clause 30.5.

Insurance Percentage for Fees and Charges means a percentage calculated at Financial Close in accordance with the Financial Close Protocol, based on the proportion that brokers fees, taxes and levies comprise of the cost of insurances that the Project Company is required to have in place on Financial Close in accordance with paragraphs 7, 7A and 9 of schedule 14.

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 Deed means the document so entitled dated on or about the date of this deed between NSW Health, the Project Company and John Holland Pty Ltd relating to, amongst other things, interface issues arising in respect of the New Bathurst Hospital (Stage 2) Works and the Project.

Interim Hard FM Services means the services described in or to be provided at New Bathurst Hospital (Stage 1) to meet the requirements set out in Section 5.3 of the Support Services Specification.

Interim Hard FM Services Plan has the meaning given to that term in the Support Services Specification.

Interim Services means the services described in section 5 of the Support Services Specification or required to be provided to satisfy that part of the Support Services Specification.

Interim Services Phase means the period from Financial Close up to but excluding the date falling 11 months from Financial Close.

Interim Services Plan has the meaning given to that term in the Support Services Specification.

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

Key Subcontractor means each Facilities Manager and each Construction Contractor.

Key Subcontractor Guarantor means each Facilities Manager Guarantor.

KPI means Key Performance Indicator as defined in the Support Services Specification.

Labour Services Agreement means an agreement between NSW Health, the Director-General of the New South Wales Department of 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* and the *Land Tax Management Act 1956*.

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, or Policy; and
- (c) guidelines and codes of practice of NSW Health, GWAHS or local councils and authorities with which the Project Company is legally required to comply.

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

Licence means each licence granted in accordance with clause 5.1.

Licence Fee Amount means the licence fee determined in accordance with the formula set out in schedule 2 of the Master Licence Agreement, as adjusted by clause 3.1 of the Master Licence Agreement.

Longstop Date means, in respect of a Construction Health Facility, the date described as its longstop date in part F of schedule 3, as extended under the terms of this deed.

Loss includes any cost, expense (including legal expenses on an indemnity basis), loss, charges, fees, payments (including payments made under indemnities), damage or liability whether direct, indirect or consequential (including pure economic loss), present or future, fixed or unascertained, actual or contingent.

Major Hard FM Services means Hard FM Services that are not Minor Hard FM Services..

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 Site, the management plans required pursuant to the 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 agreement between NSW Health and the Project Company pursuant to which the parties agree the Licence Fee Amount payable in respect of the Licences.

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 paragraph 9 of schedule 14.

Material Subcontract means a Subcontract:

- (a) the term of which exceeds five years; or

- (b) relating to any part of the Works or the Services which are nominated by the Project Director as being critical works or services; or
- (c) in respect of which the total amount payable to the relevant Subcontractor, and its related bodies corporate, under that Subcontract and other Subcontracts exceeds:
 - (i) in respect of a Construction Phase, \$1,000,000; and
 - (ii) in respect of an Operations Phase, \$500,000 per annum (indexed by reference to the CPI).

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

Milestone means each milestone or critical path activity within a Health Facility nominated in schedule 3.

Minor Change means any variation or addition to the Works or the 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).

Minor Hard FM Services means works to be carried out on or to the New Bathurst Hospital (Stage 1) Site:

- (a) that will be undertaken by GWAHS and/or its officers or employees; and
- (b) the cost of which is likely to be less than or equal to \$5,000.

Mobilisation Activities means the activities described as mobilisation activities in section 4 of the Support Services Specification, or required to be provided to satisfy that part of the Support Services Specification.

Mobilisation Activities Plan has the meaning given to that term in the Support Services Specification.

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

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 Bathurst Hospital means the New Bathurst Hospital (Stage 1) and the New Bathurst Hospital (Stage 2).

New Bathurst Hospital Completion Information means all operating and maintenance manuals, licences, work as executed drawings, warranties and guarantees and other drawings, plans, specifications and services documents to be provided by the New Bathurst Hospital Construction Contractor in respect of New Bathurst Hospital (Stage 1) in accordance with the New Bathurst Hospital Construction Contract.

New Bathurst Hospital Completion Program means the completion program for New Bathurst Hospital (Stage 1) provided by the New Bathurst Hospital Construction Contractor.

New Bathurst Hospital Construction Contract means the design and construction contract for the redevelopment of the New Bathurst Hospital (Contract number 0501798) dated 2 June 2006 between the NSW Minister for Health and the New Bathurst Hospital Construction Contractor as contained in Part C of Schedule 4 including all Contract Documents (as defined in the New Bathurst Hospital Construction Contract) as amended from time to time.

New Bathurst Hospital Construction Contractor means John Holland Pty Ltd ABN 11 004 282 268.

New Bathurst Hospital (Stage 1) Pre-Completion Services Plan has the meaning given to the term "Pre-Completion Services Plan" in the Early Services Deed.

New Bathurst Hospital Site means:

- (a) the New Bathurst Hospital (Stage 1) Site; and
- (b) the New Bathurst Hospital (Stage 2) Site.

New Bathurst Hospital (Stage 1) means the new main hospital building, Daffodil House, Poole House, the Dental Building, the Doctor's Residence and associated parking (but excluding the existing main hospital building and the Methadone Building) as outlined on the Bathurst Site Plan, and their associated facilities, including plant, fixtures, fittings, furniture, equipment, electrical goods, grounds, paths and gardens (but excluding NSW Health Provided Items until such time as a NSW Health Provided Item is deemed to become part of New Bathurst Hospital (Stage 1) under clauses 11.10(e), 11.11(e), 11.12(d) or 11.13(f)), provided or to be provided in accordance with the Facility Specification.

New Bathurst Hospital (Stage 1) Completion Date means the date on which NSW Health notifies the Project Company that Completion (as defined in the New Bathurst Hospital Construction Contract) of milestone 2 (as described in item 13 of the section entitled "Contract Information" of the New Bathurst Hospital Construction Contract) has been achieved.

New Bathurst Hospital (Stage 1) Site means the land so designated on the Bathurst Site Plan.

New Bathurst Hospital (Stage 2) means the heritage building as outlined on the Bathurst Site Plan, and its facilities, including plant, fixtures, fittings, furniture, equipment, electrical goods, grounds, paths and gardens (but excluding NSW Health Provided Items until such time as a NSW Health Provided Item is deemed to become part of the New

Bathurst Hospital (Stage 2) Site under clauses 11.10(e), 11.11(e), 11.12(d) or 11.13(f), provided or to be provided in accordance with the Facility Specification.

New Bathurst Hospital (Stage 2) Completion Date means the date on which NSW Health notifies the Project Company that Completion (as defined in the New Bathurst Hospital Construction Contract) of the Works (as defined in the New Bathurst Hospital Construction Contract) has been achieved.

New Bathurst Hospital (Stage 2) Site means the land so designated on the Bathurst Site Plan.

New Bathurst Hospital (Stage 2) Works means the works and services described in milestones 4 to 12, each as described in item 13 of the section entitled "Contract Information" of the New Bathurst Hospital Construction Contract.

New Orange Acute Mental Health Facility means the acute mental health buildings, infrastructure and related fittings, fixtures and equipment to be provided, maintained or replaced by the Project Company in accordance with the terms of this deed and the Specifications, to be used for the delivery of the Health Functions at the New Orange Acute Mental Health Facility Site and, in respect of each, its associated facilities, including buildings, plant, fixtures, fittings, equipment, electrical goods and furniture, and including grounds, paths and gardens on the relevant Site, (but excluding NSW Health Provided Items until such time as a NSW Health Provided Item is deemed to become part of the New Orange Acute Mental Health Facility under clauses 11.10(e), 11.11(e), 11.12(d) or 11.13(f)) provided or to be provided in accordance with the Facility Specification relevant to that health facility.

New Orange Acute Mental Health Facility Site means the land so designated on the relevant Site Plan.

New Orange Forensic Mental Health Facility means the forensic mental health buildings and infrastructure provided or to be provided in accordance with the Facility Specification on the New Orange Forensic Mental Health Facility Site and their associated facilities, including plant, fixtures, fittings, furniture, equipment, electrical goods, grounds, paths and gardens (but excluding NSW Health Provided Items until such time as a NSW Health Provided Item is deemed to become part of the New Orange Forensic Mental Health Facility under clauses 11.10(e), 11.11(e), 11.12(d) or 11.13(f)).

New Orange Forensic Mental Health Facility Site means the land so designated on the relevant Site Plan.

New Orange Hospital means the hospital buildings and infrastructure provided or to be provided in accordance with the Facility Specification on the New Orange Hospital Site including, for the avoidance of doubt, the Radiotherapy Unit, the Expanded Dental Unit and the Expanded Bloodbank Unit, and its associated facilities, including plant, fixtures, fittings, furniture, equipment, electrical goods, grounds, paths and gardens, (but excluding NSW Health Provided Items until such time as a NSW Health Provided Item is deemed to become part of the New Orange Hospital under clauses 11.10(e), 11.11(e), 11.12(d) or 11.13(f)).

New Orange Hospital Site means the land so designated on the relevant Site Plan.

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 Annex A of the notice.

NSW Health Decanting Process means the relocation from:

- (a) the Orange Base Hospital to the Construction Health Facilities; and
- (b) a Refurbishment Area to another Construction Health Facility prior to the Construction Phase for that Refurbishment Area,

of personal effects of NSW Health Staff and Patients, medical records, pharmaceuticals, Patients and any other items nominated by the Project Director as being an item to be subject to the NSW Health Decanting Process.

NSW Health Default means each of the following events:

- (a) an expropriation, sequestration or requisition of a material part of the assets and/or shares of the Project Company 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 Ancora 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 development consent given under Part 3A of the EPA Act in relation to the Project.

NSW Health Provided Items means Group 2 Equipment, Group 2T Equipment, Group 3 Equipment and Group 3T Equipment.

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

NSW Health Related Party means:

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- (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) GWAHS 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 visiting that Health Facility at the invitation (whether express or implied) of NSW Health; and
 - (d) any NSW Health Tenant,

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, GWAHS 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 whose appointment has been procured by the Project Company to be the NSW Health Surveyor for the purposes of this deed.

NSW Health Tenant means each of:

- (a) Lyndon Withdrawal Unit;
- (b) Centre for Rural and Remote Mental Health;
- (c) Women's Health Centre;
- (d) Sydney University;
- (e) Red Cross;
- (f) Newcastle University;
- (g) BreastScreen NSW;
- (h) O'Brien Centre; and
- (i) other entities who carry out or perform Health Functions from time to time.

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. For the avoidance of doubt, 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.

Operations Manual means, for Health Facilities, a manual which is developed, maintained and updated in accordance with clause 15.3 and the Support Services Specification:

Operations Phase means, in respect of a Health Facility, the period from and including a Commencement Date for that Health Facility until the earlier of:

- (a) in respect of the Orange Base Hospital, the Cessation Date;
- (b) in respect of a Refurbishment Area, the commencement of Works relating to the refurbishment as required in accordance with the Facilities Specification; and
- (c) 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 arising after the Full Service Commencement Date where the Project Company has agreed to an increase in the Licence Fee Amount payable under the Licences, 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.

Orange Base Hospital means the buildings and infrastructure on the Orange Base Hospital Site and their associated facilities, including plant, fixtures, fittings, furniture, equipment, electrical goods, grounds, paths and gardens (but excluding NSW Health Provided Items until such time as a NSW Health Provided Item is deemed to become part of Orange Base Hospital under clauses 11.10(e), 11.11(e), 11.12(d) or 11.13(f)), provided or to be provided in accordance with the Facility Specification.

Orange Base Hospital Site means the land described in column 2 of Part A of schedule 3.

Orange Health Campus Site means, in aggregate:

- (a) the New Orange Hospital Site;
- (b) the New Orange Forensic Mental Health Facility Site;
- (c) the New Orange Acute Mental Health Facility Site
- (d) the Ward 18 (Bloomfield) Site;
- (e) the Ward 19 (Bloomfield) Site;
- (f) the Canobolas Building (Bloomfield) Site; and
- (g) the Amaroo Building (Bloomfield) Site.

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

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

Partnering Protocol means the protocol contained in Annexure B.

Patient means a patient being treated or to be treated in a Health Facility.

Payment Certificate means a certificate issued or to be issued by the Project Director, in accordance with clause 11.14(e)(ii), in respect of an Expansion Works Payment Claim, which, amongst other things, certifies achievement of Expansion Works Payment Events and the applicable portion of the Expansion Works Construction Price which, subject to any set-off under clause 29.8, is then payable in accordance with clause 11.14.

Payment Directions Deed means the document so entitled dated on or about the date of Financial Close between NSW Health, the Project Company and Ancora in relation to the payment of the Securitisation Payment.

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 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 Services, as may be and published by the Commonwealth of Australia, the State, GWAHS or NSW Health from time to time.

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

Post Completion Expansion Works means the offices, treatment areas, planning areas, laboratories, plant rooms and stores used exclusively in the treatment and care of patients receiving radiotherapy (excluding, for the avoidance of doubt, the entry, waiting and reception areas).

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 C 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 Specification.

Project means:

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- (a) the financing, design, construction and commissioning of the New Orange Hospital, the New Orange Forensic Mental Health Facility and the New Orange Acute Mental Health Facility;
 - (b) the refurbishment of Ward 18 (Bloomfield), Ward 19 (Bloomfield), the Canobolas Building (Bloomfield) and the Amaroo Building (Bloomfield);
 - (c) facilities management of the Health Facilities, including maintenance and repair;
 - (d) the provision of the other Services; and
 - (e) handover of the Health Facilities, the Sites, the Support Services Equipment and the Project Company Facilities on the Termination Date,

each in accordance with this deed.

Project Approval means the approval entitled No MP 06_0111 'Orange Bloomfield Hospital Redevelopment' granted on 9 December 2006 by the Minister for Planning pursuant to Part 3A of the EPA Act.

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 or replacement to the NSW Health Development Approval.

Project Company Facility means that part of Ward 18 identified in Annexure C.

Project Company Facility Site means the land so designated at the site for the Project Company Facility as set out in Annexure C.

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 or a change permitted under clause 39.2(c)(ii) or (iii).

Project Company Proposals means the proposals set out in schedule 22.

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 or agent of such a person;
- (b) any Subcontractor and any of their respective officers, employees acting in the course of his or her 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 Sites, the Works, the Health Facilities or the Project Company 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 Third Party Use or Additional Commercial Development.

Project Company Representative means the person from time to time appointed in accordance with clause 4.6.

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 4.7.

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 Side Deed;
- (c) the Facilities Management Side Deed;
- (d) each Co-ordination Agreement;
- (e) the Independent Certifier Deed;
- (f) the Financiers Tripartite Deed;
- (g) the Labour Services Agreement;
- (h) each Licence;
- (i) each Material Subcontract and any guarantee given in connection with it;
- (j) each Collateral Warranty;
- (k) the Project Security;
- (l) the Securitisation Deed;
- (m) the Master Licence Agreement;
- (n) the Design Development Independent Expert Deed;
- (o) the Payment Directions Deed; and
- (p) the letter dated on or about the date of Financial Close entitled "Master Licence Side Letter" between the Project Company and NSW Health.

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.

Proprietary Help Desk Software means software developed from time to time and owned exclusively by the Facilities Manager in respect of the conduct of its facilities management business which is not available for purchase by third parties, but excluding any software developed solely in respect of the Project.

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 or Moral Right,

but excluding, in respect of the Facilities Manager, any Proprietary Help Desk Software.

Qualifying Change in Law means any General Change in Law, other than a General Change in Law with respect to Tax, 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 Quarterly Service Payment through indexation of relevant parts of the Quarterly Service Payment.

Quality Standard (Works) Plan means the quality assurance plans for the Works, developed in accordance with the Facilities Specification.

Quality Standards (Services) Plan means the quality assurance plans for the Services developed in accordance with the Support Services Specification.

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

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

Radiotherapy Unit means the buildings and infrastructure provided or to be provided in accordance with the Facility Specification on the New Orange Hospital Site to accommodate patient management, treatment and associated assessment planning for the delivery of a radiation therapy service, and its associated facilities, including plant, fixtures, fittings, furniture, equipment, electrical goods, grounds, paths and gardens, (but excluding NSW Health Provided Items until such time as a NSW Health Provided Item is deemed to become part of the Radiotherapy Unit under clauses 11.10(e), 11.11(e), 11.12(d) or 11.13(f)).

Rates means all rates, taxes or charges or other amounts which any Relevant Authority levies by reference to the Health Facilities, Project Company Facilities or the Sites, but excluding head works costs or other contributions levied by reference to the Works or the Services and excluding any Land Tax levied by reference to a Health Facility, a Project Company Facility or a Site.

Reactive Maintenance has the meaning given to that term in the Support Services Specification.

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 Financial Close, which is likely to:

- (e) give rise to a Refinancing Gain;
- (f) increase or change the profile of the liabilities of NSW Health under a Project Agreement; 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 Agreement.

Refinancing Base Case means 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 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.

Refurbishment Areas means each of:

- (a) Ward 18 (Bloomfield);
- (b) Ward 19 (Bloomfield);
- (c) the Canobolas Building (Bloomfield); and
- (d) the Amaroo Building (Bloomfield).

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 corporatised 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 power, fuel, transport or Utilities;

- (e) any event or occurrence which causes loss or damage to the Works, a 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 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 a Site or a Health Facility 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;
- (i) an Approval Delay Event;
- (j) a NSW Health Tenant not listed in paragraphs (a) to (h) (inclusive) of the definition of that term as at the date of this deed substantially frustrates or renders it impossible for the Project Company to perform any of its obligations under this deed, but only to the extent the Project Company has complied with its obligations under this deed with respect to NSW Health Tenants; and
- (k) a risk required to be insured under paragraph 7 of schedule 14 becomes Uninsurable during an Operations Phase and prudent, competent and experienced providers in Australia of services similar to the Services are not generally providing such services due to that insurance being Uninsurable,

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:

- (l) the Project Company;
- (m) any Project Company Related Party; or
- (n) the Early Services Contractor under the Early Services Deed.

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, including the fact that part of the Bloomfield Site known as building 63 (transport shed) is subject to a licence in favour of NSW Health only.

Residences means each of the health facilities described in part E of schedule 3 and **Residence** means any one of them, and, in respect of each Residence, its associated facilities, including plant, fixtures, fittings, furniture, equipment, electrical goods, grounds, paths and gardens (but excluding NSW Health Provided Items until such time as a NSW

Health Provided Item is deemed to become part of a Residence under clauses 11.10(e), 11.11(e), 11.12(d) or 11.13(f)), provided or to be provided in accordance with the Facility Specification.

Residence Sites means, in respect of a Residence, the land described against that Residence in column 2 in part E of schedule 3.

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.

Response means, to the reasonable satisfaction of the Project Director, to:

- (a) establish the nature, location and cause of the problem and attend the site if necessary;
- (b) appoint a suitably qualified, experienced and accountable person(s) to assess the situation who, within reasonable limits, are empowered to take or to authorise any required action; and
- (c) do the minimum necessary to make the affected area safe and secure in order to meet the requirements of applicable Laws.

Schedule of Rates means the schedule of rates in section 3.4 of Part B of schedule 5 which sets out the rates applicable for each item of works as described in that schedule.

Schedules of Accommodation means the schedules of accommodation contained in Part C of schedule 4

Securitisation Deed means the document dated on or about the date of Financial Close between NSW Health and Ancora under which NSW Health agrees to assign to Ancora the Licence Fee Amount payable under each Licence, as determined in accordance with the Master Licence Agreement and any Early Payout Amount (GST exclusive) payable under clause 5 of each Licence and clause 3.3 of the Master Licence Agreement.

Securitisation Payment means the amount payable by Ancora to NSW Health under the Securitisation Deed as calculated in accordance with schedule 3 of the Securitisation Deed.

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, Ancora, the Financiers and the Project Company.

Security Trustee means BNY Trust (Australia) Registry Limited (ACN 000 334 636) as trustee of each of the Project Trust Fund and the Issuer Trust Fund (in each case as defined in the Security Trust Deed), and any replacement security trustee appointed in accordance with the Project Documents and Financing Agreements.

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

Services means the service or services described in or required to be provided to satisfy the Specifications and, when the context requires, includes the Works.

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

Site means:

- (a) the New Bathurst Hospital (Stage 1) Site;
- (b) the New Bathurst Hospital (Stage 2) Site;
- (c) the New Orange Hospital Site;
- (d) the New Orange Forensic Mental Health Facility Site;
- (e) the New Orange Acute Mental Health Facility Site
- (f) the Ward 18 (Bloomfield) Site;
- (g) the Ward 19 (Bloomfield) Site;
- (h) the Canobolas Building (Bloomfield) Site;
- (i) the Amaroo Building (Bloomfield) Site;
- (j) the Orange Base Hospital Site;
- (k) the Bloomfield Site;
- (l) each Community Health Facility Site;
- (m) each Residence Site; and
- (n) each Project Company Facility Site,

each as outlined on the Site Plans but excluding any area which ceases to be part of a Site in accordance with clause 5.1(c)(i).

Site Access Date means:

- (a) for a Site other than the Project Company Facility Site, the date set out as the site access date for that Site in the Site Access Schedule; and

- (b) for each Project Company Facility Site, 4 April 2008, with the exception of Ward 18 (Bloomfield) which will be the date occurring 5 Business Days following Completion of Ward 18 (Bloomfield) as set out in the Site Access Schedule.

Site Access Schedule means the site access schedule set out in schedule 3.

Site Auditor means a person who is accredited as a site auditor under the *Contaminated Land Management Act 1997* (NSW) and who is jointly appointed by NSW Health and the Project Company to act as the site auditor for the purposes of this deed.

Site Conditions means the conditions of each 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 Site, conditions of roads, Utility services and other structures and infrastructure and vegetation on the Site.

Site Plan means each of the site plans, as set out in Annexure A.

Soft FM Services has the meaning given to that term in the Support Services Specification.

Soft FM Start Date means, in respect of an Existing Health Facility, the date on which the Soft FM Services commence to the provided in respect of that Existing Health Facility

Specifications means the requirements of NSW Health in respect of the Project as set out in the Facility Specification and the Support Services Specification in schedule 4, as amended in accordance with the Change Procedure.

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 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 Services or any part of the Works or the Services, and includes any cafeteria lease, 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 Services.

Support Services has the meaning given to that term in the Support Services Specification.

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 Specification means each of the requirements set out in Part B of schedule 4.

Target Completion Date means, in respect of each Milestone and Health Facility (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, in respect of a Construction Health Facility, the date described as its target DA approval date in part F of schedule 3, as may be extended under the terms of this deed.

Target Financial Close Date means 31 January 2008.

Target Full Service Commencement Date means the last occurring Target Completion Date specified in part F of schedule 3, as may be extended under the terms of this deed.

Target New Bathurst Hospital (Stage 1) Completion Date means the date indicated as the target completion date for New Bathurst Hospital (Stage 1) in schedule 3.

Target New Bathurst Hospital (Stage 2) Completion Date means the date indicated as the target completion date for New Bathurst Hospital (Stage 2) in schedule 3.

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 Health Facilities.

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 Site, including, but not limited to:

- (a) Ronald MacDonald House; and
- (b) supported accommodation to be provided by the Rotary Club of Orange.

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

Third Party Use means use (whether or not commercial use) of a Health Facility (or any part of it), other than use:

- (a) by NSW Health or NSW Health Related Parties for the provision of the Health Functions; or
- (b) for the provision of the Services.

Trust means the trust known as the Pinnacle Healthcare (OAHS) Trust constituted by the Trust Deed.

Trust Deed means the deed poll declared by Pinnacle Healthcare (OAHS) Pty Ltd on 13 August 2007.

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 in respect of the Sites (except the Project Company Facility Site) which is not expressly identified in the Environmental Assessment or in the Environmental Reports or contemplated by or foreshadowed in the Environmental Assessment, 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 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 Services at the time at which the insurance was sought to be obtained.

Utility means any utility service, including 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.

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

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- (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, Health Facility or Site;
 - (ii) the design, construction and Completion of the Works;
 - (iii) the ability of the Project Company to deliver the Health Facilities or provide the 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) a Health Facility, a Project Company Facility, a Site or a Project Company Facility Site (including maintenance and lifecycle requirements and forecast costs thereof) and delivery of the Services after the Expiration Date; and
 - (vi) the delivery of the 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 of areas within that Health Facility;
- (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 Quarterly Service Payment as a result of any consequential operating costs or savings; or
 - (C) any increase or decrease to the Quarterly Service Payment to cover the relevant capital cost or savings and operating costs or savings (including any changes to the Construction Payment, the Operations Variation Payment or the Securitisation Payment and any increase or decrease in the Licence Fee Amounts payable under the Licences, as determined in accordance with the Master Licence Agreement); and
 - (D) details of the way in which the Project Company proposes to fund the proposed Contract Variation; and

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- (e) 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 19 of schedule 19.

Ward 18 (Bloomfield) means the buildings and infrastructure on the Ward 18 (Bloomfield) Site and its associated facilities, including plant, fixtures, fittings, furniture, equipment, electrical goods, grounds, paths and gardens (but excluding NSW Health Provided Items until such time as a NSW Health Provided Item is deemed to become part of Ward 18 (Bloomfield) under clauses 11.10(e), 11.11(e), 11.12(d) or 11.13(f)), provided or to be provided in accordance with the Facility Specification.

Ward 18 (Bloomfield) Site means the land so designated on the relevant Site Plan.

Ward 19 (Bloomfield) means the buildings and infrastructure on the Ward 19 (Bloomfield) Site and its associated facilities, including plant, fixtures, fittings, furniture, equipment, electrical goods, grounds, paths and gardens (but excluding NSW Health Provided Items until such time as a NSW Health Provided Item is deemed to become part of Ward 19 (Bloomfield) under clauses 11.10(e), 11.11(e), 11.12(d) or 11.13(f)), provided or to be provided in accordance with the Facility Specification.

Ward 19 (Bloomfield) Site means the land so designated on the relevant Site Plan.

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

Waste has the same meaning as in the dictionary 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 29.10(a)(iv)(I) as a result of a funded Variation or Compensation Event.

Works means in respect of a Construction Health Facility, the development, design, demolition and remediation works (if necessary), refurbishment, construction and Commissioning Works for that Health Facility, 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, and in the case of the Orange Base Hospital, means decommissioning and decanting of that Health Facility in accordance with the Facility Specification.

Works Program means, for each Construction Health Facility, the detailed program of Works for that Construction Health Facility, based on the Detailed Design for that Construction Health Facility, 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 11.2.

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) 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 2007
 - n = the number of Quarters from the Quarter ending 30 June 2007
- (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.

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- (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.

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) For the avoidance of doubt, 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 function

- (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.

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- (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 Capacity of the Project Company

- (a) The Project Company enters into this deed in its capacity as trustee of the Trust.
- (b) A liability arising under or in connection with this deed (whether that liability arises under a specific provision of this deed, for breach of contract or otherwise) can be enforced against the Project Company only to the extent to which it can be satisfied by the property of the Trust out of which the Project Company is entitled to be indemnified for the liability.
- (c) The limitation of the Project Company's liability under this clause 1.10 applies despite any other provision of this deed (other than clause 1.10(d)) and extends to all liabilities and obligations of the Project Company in relation to any representation warranty, conduct, omission, agreement or transaction related to this deed.
- (d) The provisions of this clause 1.10 will not apply to any obligation or liability of the Project Company to the extent that it is not satisfied because there is a reduction in the extent, or an extinguishment, of the Project Company's indemnification out of the assets of the Trust, as a result of the Project Company's fraud, negligence or breach of trust.

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 Payment to the Project Company in accordance with this deed, the Project Company will finance, design, construct and commission the Construction Health Facilities in accordance with this deed;

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- (b) NSW Health and/or GWAHS and/or NSW Health Tenants may provide the Health Functions in connection with the Health Facilities;
 - (c) the design, construction and commissioning of the Construction Health Facilities, and the provision of the Health Facilities and the 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 Services, in accordance with this deed;
 - (e) the Project Company will pay a Licence Fee Amount to NSW Health under each Licence, as determined in accordance with the Master Licence Agreement, to occupy and use the relevant Site;
 - (f) the Health Facilities and the Project Company Facilities will be owned by NSW Health at all times;
 - (g) the Project Company will transfer possession of and facilities management responsibility for the Health Facilities, the Project Company Facilities and Support Services Equipment 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 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 Services and the Works with the Health Functions, 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 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 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) GWAHS is a statutory health corporation under the *Health Services Act 1997* (NSW), which, amongst other things, provides health services in western New South Wales and as at the date of this deed, at the Health Facilities.
- (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 Services and the Works with the Health Functions, the Project Company will communicate, coordinate and cooperate with GWAHS and NSW Health Tenants, as well as NSW Health, notwithstanding the fact that neither GWAHS nor any NSW Health Tenant is a party to this deed, and such interface will be specifically acknowledged in 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.
- (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 in the Information Documents 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 Sites, 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 Specification or the other provisions of this deed, and that there is no defect or omission in the Specifications which may prevent the Health 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 Services in accordance with the Project Documents;

- (v) informed itself of all matters relevant to the employment of labour at each Site, the Works and each Health Facility and all industrial matters relevant to each Site, the Works, each Health Facility and the 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 Sites 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 responsibility for performing the Works and the Services to satisfy the Specifications and for the performance of its obligations under the Project Documents and confirms that the

Specifications do not contain any defects, omissions or inconsistencies which would prevent the performance of the Works or the Services from satisfying the Specifications 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 Specification and the other provisions of this deed; or
 - (C) the existence of a defect or omission in the Specifications which may prevent the Health 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 and commissioning the Construction Health Facilities and providing the Services to the Health Facilities or providing the Project Company Facilities,

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

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.

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- (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 Early Services Deed Acknowledgments

- (a) The Project Company acknowledges that certain services have been provided to NSW Health by the Early Services Contractor under the Early Services Deed.
- (b) The Project Company, to the full extent permitted by Law, releases NSW Health, GWAHS, and 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 any delay or any other Loss caused to it by the entry into the Early

Services Deed or the performance (or non-performance) of the Early Services Contractor's obligations under it.

- (c) The Project Company must not hinder, prevent or delay the Early Services Contractor in providing services under the Early Services Deed and must use best endeavours to coordinate and integrate the Services with the services provided under the Early Services Deed.

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 *Public Authorities (Financial Arrangements) Act* (NSW); 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 5pm 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) subject to the Reserved Matters, NSW Health has or will, in accordance with the Site Access Schedule, have full and proper right to use and licence each of the Sites 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 39.3 and changes permitted under clause 39.2(c)(ii) or (iii);
 - (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;

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- (v) 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);
 - (vi) 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;
 - (vii) no Project Company Termination Event has occurred and is continuing;
 - (viii) 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;
 - (ix) 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;
 - (x) 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;
 - (xi) it is empowered by the Trust Deed:
 - (A) to enter into and perform the Project Documents to which it is expressed to be a party and to carry on the transactions contemplated by those documents; and
 - (B) to carry on the business of the Trust as now conducted or contemplated and to own the assets of the Trust (including any asset purported to be charged or mortgaged by it),in its capacity as trustee of the Trust and there is no restriction on or condition of its doing so;
 - (xii) all necessary resolutions have been duly passed and all consents, approvals and other procedural matters have been obtained or attended to as required by the Trust Deed for it to enter into and perform the Project Documents to which it is expressed to be a party;
 - (xiii) it is the sole trustee of the Trust;
 - (xiv) no property of the Trust has been re-settled or set aside or transferred to any other trust;
 - (xv) the Trust is duly constituted in accordance with the Trust Deed, has not been terminated, nor has any event for the vesting of the assets of the Trust occurred;

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- (xvi) it has the right to be fully indemnified out of the assets of the Trust, that right of indemnity out of, and its lien over, the assets of the Trust have not been limited or released in any way and the assets of the Trust are sufficient to satisfy that right in full;
 - (xvii) it has complied with its obligations and duties under the Trust Deed and at law in all material respects; and
 - (xviii) the copy of the Trust Deed provided to NSW Health prior to the date of this deed is a true and complete copy of the original and has been neither amended nor superseded.
- (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)(ix) and (x), will be deemed to be repeated on 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 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 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;
- (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;
- (h) provide a binding tax ruling from the Australian Taxation office to NSW Health with respect to the application of Division 250 of the Income Tax Assessment Act 1997 to the Construction Health Facilities the subject of the Project Documents in form and substance satisfactory to the Project Director and consistent with the tax opinion provided to NSW Health pursuant to paragraph 9 of schedule 1 by 30 June 2008.
- (i) without the prior written consent of NSW Health, amend or revoke the Trust Deed;
- (j) to the extent it is able to do so, ensure that there is no resettlement, setting aside or transfer of any asset of the Trust other than a transfer which complies with both the Trust Deed, the Project Documents and the Financing Agreements;
- (k) comply fully with its obligations under the Trust Deed and at law;
- (l) ensure that no other person is appointed trustee of the Trust to the extent it is able to do so;
- (m) not do anything which would cause or enable its removal, nor will it retire, as trustee of the Trust except in favour of a new trustee approved by NSW Health (acting reasonably);
- (n) not alter, shorten or fix the vesting date under clause 21.2(a) of the Trust Deed and will not exercise its rights under clause 21.2(b) of the Trust Deed; and
- (o) ensure that:
 - (A) there is no restriction or limitation on or derogation from its right of subrogation or indemnity (whether or not arising under the Trust Deed); and
 - (B) its lien over the assets of the Trust will have priority over the rights of the beneficiaries of the Trust.

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.

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- (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 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 42.10, 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 GWAHS;
 - (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 for the Orange Health Campus Site, 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;
 - (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(b).
- (d) During the Operations Phase for each of the Health Facilities 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 relevant Health Facilities, including:
- (i) the provision of the Services;
 - (ii) preparation of and compliance with the Operations Manual for the relevant Health Facility;
 - (iii) issues arising from the reports or documents provided by the Project Company to NSW Health, including the Monthly Performance Report and other notices and reports given under clause 18 and clause 29.6;
 - (iv) coordination, management and scheduling of maintenance, refurbishment, and cleaning services;
 - (v) facilities management and maintenance issues generally; and

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- (vi) 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 GWAHS 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 (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, either party may by notice to the other party 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:
- (i) a dispute in respect of a matter referred to the Project Co-ordination Group under clause 10.4(i) to the Design Development Independent Expert for resolution in accordance with the Design Development Independent Expert Deed; and
 - (ii) any other dispute to the Representatives in accordance with clause 40.1(a).

5. SITES

5.1 Site Licences

- (a) NSW Health must grant:
- (i) by the Site Access Date for all Sites other than the Project Company Facility Site, to the Project Company, its relevant Subcontractors and any officer, adviser, employee or agent of any of them, and in accordance with and subject to any restrictions in the Specifications, a licence substantially on the terms set out in Part A of schedule 11 to enter, occupy and use that Site, as may be reasonably necessary for, or in anticipation of, the performance of the Works and the Services; and

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- (ii) for each Project Company Facility Site, to the Project Company, its relevant Subcontractors and any officer, adviser, employee or agent of any of them, and in accordance with and subject to any restrictions in the Specifications, a licence substantially on the terms set out in Part B of schedule 11 to enter, occupy and use each Project Company Facility Site, as may be reasonably necessary for, or in contemplation of, the Project Company managing the performance of the Works and the Services.
- (b) The licences granted in accordance with:
- (i) clause 5.1(a)(i) are subject to:
- (A) the statutory right of any Relevant Authority or provider of Utilities to have access to the Sites, the Works and the Health Facilities;
- (B) the rights of NSW Health to enter, occupy and use the Sites, the Works and the Health Facilities to carry out the Health Functions and to exercise its rights under this deed;
- (C) the rights of NSW Health to grant rights to enter, occupy and use the Sites and the Health Facilities to NSW Health Related Parties and NSW Health Tenants pursuant to clause 5.1(c);
- (D) the right of NSW Health to require the Project Company to surrender any part of a Site under that licence pursuant to clause 5.1(c);
- (E) Adverse Rights; and
- (ii) clause 5.1(a)(ii) are subject to:
- (A) the statutory right of any Relevant Authority or provider of Utilities to have access to the Sites, the Works, the Health Facilities and the Project Company Facilities;
- (B) the right of NSW Health to require the Project Company to surrender any part of a Site under that licence pursuant to clause 5.1(c); and
- (C) Adverse Rights.
- (c) NSW Health may, at any time during the term of a Licence:
- (i) notify the Project Company that the Licence will no longer apply to any part of a Site, provided that such action will not adversely affect the ability of the Project Company to perform its obligations under the Project Documents. Five Business Days after receipt of the notice referred to in this clause, the Project Company must surrender the relevant part of the Site to NSW Health at which time the relevant part of the Site will cease to be part of a 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 relevant Site or Health Facility to a NSW Health Tenant for the purpose of providing Health Functions.

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- (d) The Project Company acknowledges and agrees that, except to the extent a Compensation 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 or relief 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 Sites, 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 land other than the Sites.

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 Site in its current location, state and physical condition (including latent and patent defects in any Site); and
- (b) Site Conditions, including any existing Contamination or Artefacts, Existing Infrastructure and other things on or adjacent to the Sites, including the existence, location, condition and availability of Utilities, and the suitability or otherwise of any Existing Infrastructure on or in the Sites for use in the Project.

5.3 Security

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

5.4 Environmental obligations

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

- (a) comply with all Environmental Laws and all relevant industry standards and codes of practice;
- (b) not Contaminate or Pollute the Sites, the Health Facilities, the Project Company Facilities or Adjoining Property, or any part of them;
- (c) not bring any Waste on to a Site, a Project Company Facility or Health Facility;

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- (d) keep the Sites, the Project Company Facilities 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 or a risk of harm to the Environment;
 - (e) ensure, in accordance with Good Industry Practice, the safety of people and the protection of the Environment from harm;
 - (f) notify the Project Director immediately if, in the course of the Works or the provision of the Services:
 - (i) an incident occurs which could be a breach of an Environmental Law; or
 - (ii) the Project Company becomes aware that a complaint has been made in relation to Contamination of or Pollution of or from a Site, a Project Company Facility or Health Facility;
 - (g) 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 Sites, a Project Company Facility or the Health Facilities;
 - (h) undertake all necessary remediation work so that each Site does not present a risk of harm to the Environment and is suitable for the proposed use as a Health Facility or Project Company Facility;
 - (i) promptly comply with any Environmental Notice served on the Project Company or NSW Health:
 - (i) during the Term; and
 - (ii) after the Term, if relating to Contamination of, Pollution of or from or the disposal of Waste to a Site, a Project Company Facility or a Health Facility at any time during the Term; and
 - (j) 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.

For the avoidance of doubt, the Project Company will not be in breach of clause 5.4(b) or clause 5.4(c) by virtue of bringing onto, or storing on, a Site, a Project Company Facility 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.

5.5 Artefacts

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

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- (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 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 Site, or any part of it, 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 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's and any other person authorised by NSW Health, access to the relevant Site or that part of the 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) Subject to clauses 5.7(e) and (f), the Project Company must arrange for extension, relocation, adjustment, connection, obtaining and provision 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) On and from the Commencement Date for each Health Facility, the Project Company must ensure the continuous supply of Utilities to that Health Facility at all times, and in accordance with the Specifications.

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- (c) Subject to clause 5.7(e)(ii) and the provisions of schedule 5, on and from the Commencement Date in respect of each Health Facility, NSW Health must pay for usage of Utilities in respect of that Health Facility.
- (d) NSW Health must pay for Rates and Land Tax, if any, in respect of each Site until the Termination Date, provided that if a Site or part of a Site becomes subject to Rates or Land Tax as a result of Additional Commercial Development, Third Party Use or due to its use as a Project Company Facility, the Project Company must pay for such Rates and/or Land Tax and must, as soon as is practicable after written request from the Project Director, arrange for the relevant Rates and Land Tax to be invoiced to the Project Company or relevant user and paid direct to the Relevant Authority by the Project Company or relevant user.
- (e) The Project Company must:
- (i) arrange for separate metering of:
 - (A) all Utilities (except sewerage and drainage) for all or any part of a Health Facility that is occupied by a NSW Health Tenant; and
 - (B) electricity and gas Utilities for each Construction Health Facility (excluding the Refurbishment Areas) for the purposes of calculating the Energy Payment under schedule 5; and
 - (C) telecommunications and electronic communications (including voice and data) usage by Project Company Related Parties in respect of each Project Company Facility; and
 - (ii) pay for telecommunications and electronic communications (including voice and data) usage:
 - (A) attributable to provision of the Services; and
 - (B) by Project Company Related Parties in respect of each Project Company Facility.
- (f) The Project Company is not obliged under clause 5.7(a), nor is it permitted by this deed, to provide for the supply to the Sites and the Health Facilities of Utilities of a type not specifically included in the Specifications or the Project Company Proposals (other than, in the case of water, gas and electricity, any utility which functionally replaces them), unless NSW Health issues a NSW Health Variation Request requiring the same.

5.8 Ownership of Certain Property

- (a) Without limiting clause 5.5, if the Project Company removes any material (excluding Disposables) from the Sites (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, in all such material remains the property of NSW Health.

- (b) Disposables transfer to the Project Company immediately upon the relevant material leaving the Site.
- (c) As between the Project Company and NSW Health, all chattels and non-fixtures comprising the Health Facilities, will be and remain the property of NSW Health.
- (d) The Project Company must ensure that legal title to Support Services Equipment remains with a Subcontractor who has entered into an appropriate Side Deed until the end of the Term, unless the Project Director otherwise consents in writing.

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; and
 - (ii) where a Project Company Development Approval application can only be lodged with the consent of a third party as owner of the relevant Site, procure that such consent is obtained within sufficient time to enable the Project Company to meet its obligations under clause 6.1(b).
- (b) The Project Company must:
 - (i) apply for, and obtain by the Target DA Approval Date for a Health Facility, all Project Company Development Approvals for that Health Facility;
 - (ii) apply for and obtain any Development Approvals with respect to any subdivision required for the Project; and
 - (iii) ensure that all Project Company Development Approvals:
 - (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;
 - (D) are consistent with the Health Facilities 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) 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

Project Company Development Approval applications, in such form as the Project Director may reasonably request.

- (e) Subject to the draft Project Company Development Approval application documentation complying with this clause 6.1, and the Project Company having complied with any reasonable requests of the Project Director, within 10 Business Days after receiving the draft Project Company Development Approval application and any additional information requested by the Project Director under clause 6.1(d), the Project Director may 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. For the avoidance of doubt, if no requests for further information are received by the Project Company in accordance with clause 6.1(d) during the 10 Business Day period referred to in this clause 6.1(c), the 10 Business Day period will be taken to have commenced upon receipt by the Project Director of the Project Company Development Approval application.
- (f) If the Project Director gives the Project Company comments, recommendations and representations 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 clause 6.1(e) in respect of submitted draft documentation and/or 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:

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- (i) The Project Company is solely responsible for ensuring that each 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 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 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, excluding the payment of or allowance of any money or satisfaction of other conditions (other than conditions and those parts of conditions that can only be performed by the owner, such as the transfer or dedication of land or conditions relating to the provision of Health Functions at the relevant Site), to the Project Company to obtain the Project Company Development Approvals.

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) Subject to clause 6.4(g), 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 that can only be performed by the owner, such as the transfer or dedication of land or conditions relating to the provision of Health Functions at the relevant Site.

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- (b) Where a Relevant Authority provides, or indicates that it will provide, a Consent (other than a NSW Health Development 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.
- (c) 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.
- (d) 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.
- (e) 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.
- (f) 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.
- (g) NSW Health is responsible for compliance with the following conditions of the Project Approval:
- (i) conditions B1(a) and B1(b) concerning further plans and project applications;
 - (ii) condition B2(c) insofar as the relevant heritage management strategy concerns areas outside the Orange Health Campus Site;
 - (iii) condition B3(a) concerning a contribution of \$350,000 towards improvement of recreation facilities;

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- (iv) condition B5(a) insofar as it requires monitoring of the intersection of Forest Road and Huntley Road and possible upgrading of that intersection;
 - (v) condition B5(g) concerning liaising with the Roads and Traffic Authority on the preferred route for emergency vehicles through Orange and signposting on classified roads. The provision of signage on classified roads shall be at full cost to NSW Health; and
 - (vi) condition C5(c) insofar as the interpretation strategy, plan and oral history programme relate to Health Functions that were or are carried out on the Orange Health Campus Site.
- (h) The Project Company must provide all reasonable assistance and support to NSW Health in connection with the implementation of the heritage management strategy referred to in clause 6.4(g)(ii) above.

7. SUBCONTRACTS

7.1 Subcontracting

- (a) The Project Company must not subcontract the performance of the Works and/or the 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 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 Services.
- (b) The Project Company must ensure that no Material Subcontractor (other than each Key Subcontractor) is engaged in connection with the Works or the Services without 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 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 and a duly executed Co-ordination Agreement to which all of the Key Subcontractors are party.

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;

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- (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) a certification of each formal dispute with a Subcontractor arising in connection with the Works or the 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;
 - (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 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 Services is engaged by it (either directly or indirectly) without the relevant Subcontractor having taken out workers compensation insurance, and being insured for public liability insurance and professional indemnity insurance as required under schedule

14, to the extent, and for insured amounts, as is appropriate given the relevant Works or 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 or a Co-ordination Agreement 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 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) during:
 - (i) a Construction Phase, make an investigation of each prospective employee as required under the Facility Specification; and
 - (ii) an Operations Phase, make an investigation of each prospective employee, who have been or will be working on a Site 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 if the background investigation reveals information indicating that that person would not be an appropriate employee at a Site or a Health Facility. The Project Director may require the Project Company to undertake further investigations before confirming whether an offer of employment 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.

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- (d) Subject to clauses 8.1(e) and (f), 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) A reference to employees of the Project Company in clause 8.6 does not include Health Staff Members.
 - (f) The obligations set out in clauses 8.1(b) and (c) shall not apply in respect of staff members in the GWAHS Division of the NSW Health Division who are directed by the Director-General of the New South Wales Department of Health to provide his/her services to and be under the supervision, direction and management of the Project Company in accordance with clause 2(b) of the Labour Services Agreement.
 - (g) 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 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 Services or the Works assigned to that person.

8.3 Conduct of Staff

- (a) Whilst engaged in the provision of the Works or Services on or at the Sites, 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 Services so as to ensure the timely and economical completion of the Works and the Services; and
- (b) ensure that all persons employed or engaged in the Works and/or the 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 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, and at all times holds NSW Health fully and effectively indemnified 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) Subject to clause 29.11 and the terms of the Labour Services Agreement, 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.

8.7 Occupational health and safety obligations

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

- (a) keep each of the Sites, the Project Company Facilities 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, the Health Facilities, the Project Company Facilities and the 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 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 Specification 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 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
- (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.

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:
 - (i) not effect any Refinancing without the prior written consent of the Project Director; and
 - (ii) submit to the Project Director a report in respect of any proposed Refinancing (a **Refinancing Report**),

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:

- (iii) to cure an actual or potential event of default under the Financing Agreements;
- (iv) to enable the Security Trustee to exercise its rights under the Financiers Tripartite Deed; or
- (v) to enable the Financiers to waive a cash lock up or funding restriction under the Financing Agreements in order to make payments as they fall due to NSW Health or to a Key Subcontractor,

provided that to the extent that additional funding is raised as a consequence of a Refinancing pursuant to clauses 9.3(a)(iii), (iv) or (v), such additional funding must not be taken into account in any determination of the Senior Debt under schedule 21.

- (b) A Refinancing Report must include:

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- (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) the liabilities of NSW Health (whether actual or contingent) under the Project Documents; and
 - (B) the Licence Fee Amount;
 - (iv) information on the actual cash flow (including actual revenues and costs) of the Project Company from 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 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 (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 (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 (vii) above.
- (c) 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 the recalculation of the Licence Fee Amount (if applicable).

9.4 Payment to NSW Health of Refinancing Gain

- (a) The Project Company must (or must procure that the Equity Investors) 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 Quarterly Service 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 Quarterly Service Payment in accordance with clauses 9.4(d) to (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 Quarterly Service 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 Quarterly Service Payment shall be calculated as the quarterly reduction in the Quarterly Service 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 Quarterly Service Payment, will not be contingent on the performance by the Project Company of its obligations under this deed.
- (g) The Project Company must ensure that the benefit arising from a reduction in Ancora's debt service obligations under the terms of the Financing Agreements as a result of a Refinancing is passed through to the Project Company.

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 Construction Health Facilities:
 - (i) in accordance with the Project Company Proposals;
 - (ii) in accordance with the Facility Specification;

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- (iii) by the dates specified in part A of schedule 12 and in accordance with the Detailed Design Program;
 - (iv) in accordance with clause 10.4;
 - (v) without limitation to any other obligation of the Project Company, in accordance with Good Industry Practice, and in compliance with the applicable Quality Standards (Works) Plan;
 - (vi) so that the Construction Health Facilities and the Services are in accordance with or exceed the Support Services Specifications;
 - (vii) so that the Construction Health Facilities and the Services comply with all applicable Consents and Law; and
 - (viii) so that the Construction Health Facilities (as constructed) are, and will remain at all times, 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.

10.2 The Project Company's Works Program obligations

The Project Company must develop and complete the Works Program for each of the Construction Health Facilities:

- (a) in accordance with the Project Company Proposals;
- (b) by the date and in accordance with the requirements set out in part B of schedule 12;
- (c) in accordance with clause 10.4;
- (d) without limitation to any other obligation of the Project Company, in accordance with Good Industry Practice, and in compliance with the applicable Quality Standards (Works) Plan and Quality Standards (Services) Plan;
- (e) so that the Constructions Health Facilities and the Services are in accordance with or exceed the Specification;
- (f) so that the Construction Health Facilities and the Works comply with all applicable Consents and Law; and
- (g) so that the Construction Health Facilities (as constructed) are, and will remain at all times, Fit for Intended Purpose.

10.3 The Project Company's Management Plans obligations

The Project Company must develop and complete the Management Plans for each of the Construction Health Facilities:

- (a) in accordance with the Project Company Proposals;
- (b) by the date set out in part D of schedule 12;
- (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 Standards (Works) Plan and Quality Standards (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, 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 Construction Health Facility and 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 10.1(a)(iii);
 - (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 Construction Health Facility and Site to which it relates;
 - (ii) in the case of a draft Management Plan, the specific Management Plan to which it relates;

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- (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, the a critical path time line, including milestones and interdependencies; and
 - (v) any other information required by the Specification.
- (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. For the avoidance of doubt, 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 Construction Health Facility 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 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 clauses 4.6(h) and 4.6(j).
- (j) For the avoidance of doubt, any amendment requested by the Project Director to the functional adjacencies, functional brief, departmental locations and blocking and stacking aspects of the designs incorporated in the Project Company Proposals, other than an amendment required for compliance of the relevant designs with the requirements of the Project Deed, must be initiated by way of a NSW Health Variation Request.

10.5 Proprietary Materials

- (a) The Project Company represents and warrants that:
- (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, Moral 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

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- 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 (including in respect of Moral Rights) 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 or Moral 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 or Moral 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 Works, the Sites or the Health Facilities.
- (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-licence 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 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 (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 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 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

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- (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.

10.6 Design Development Independent Expert

- (a) The Project Company acknowledges that:
 - (i) prior to the date of this deed, it nominated in writing at least three persons (each a **Design Development Independent Expert Candidate**) to be the Design Development Independent Expert for the purposes of the Project; and
 - (ii) each Design Development Independent Expert Candidate nominated by it:
 - (A) has the appropriate qualifications and experience to act as an independent design development expert;
 - (B) has no interest or duty which conflicts with its role as Design Development Independent Expert in respect of the Project; and
 - (C) is able and prepared to act in accordance with the terms of the Design Development Independent Expert Deed.
- (b) Prior to Financial Close, the Project Company and the Project Director must agree on the identity of the Design Development Independent Expert and appoint the Design Development Independent Expert in accordance with the terms of the Design Development Independent Expert 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 Design Development Independent Expert who meets the requirements set out in clause 10.6(a)(ii) and such Design Development Independent Expert will be appointed as soon as practicable in accordance with the Design Development Independent Expert Deed.
- (c) The costs and expenses of the Design Development Independent Expert (including the professional fees of the Design Development Independent Expert) will be paid in the following proportions:
 - (i) 50% by the Project Company; and
 - (ii) 50% by NSW Health.
- (d) If the Design Development Independent Expert Deed is terminated before its scheduled expiry, or if any incumbent Design Development Independent Expert ceases to act as Design Development Independent Expert 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 Design Development Independent Expert Deed or cessation, whichever is applicable, appoint another person to act as Design Development Independent Expert.

- (c) The replacement Design Development Independent Expert must meet the requirements set out in clause 10.6(a)(ii).
- (f) If the Project Director and the Project Company cannot agree on the identity of a replacement Design Development Independent Expert, the parties will request that the President of the Royal Australian Institute of Architects (or its replacement or equivalent) nominate a replacement Design Development Independent Expert who meets the requirements set out in clause 10.6(a)(ii) and such Design Development Independent Expert will be appointed as soon as practicable in accordance with the Design Development Independent Expert Deed.

11. HEALTH FACILITIES CONSTRUCTION

11.1 New Bathurst Hospital

- (a) NSW Health must:
 - (i) provide to the Project Company, in a timely manner, copies of the New Bathurst Hospital Construction Contract and all variations, amendments, design documents and notices under the New Bathurst Hospital Construction Contract which are relevant to provision of the Services, including amendments to and updates of the New Bathurst Hospital Completion Program;
 - (ii) use its best endeavours to procure the completion of:
 - (A) the New Bathurst Hospital (Stage 1) by the Target New Bathurst Hospital (Stage 1) Completion Date; and
 - (B) the New Bathurst Hospital (Stage 2) by the Target New Bathurst Hospital (Stage 2) Completion Date;and in accordance with the terms of the New Bathurst Hospital Construction Contract, all applicable Laws and all relevant Consents;
 - (iii) ensure that the Project Company is entitled to, at the Project Company's option, accompany NSW Health to attend completion inspections and commissioning and testing that NSW Health is entitled to make on the works, plant and equipment comprising the New Bathurst Hospital prior to their Completion (as defined in the New Bathurst Hospital Construction Contract).
 - (iv) procure the provision to the Project Company, as and when received by NSW Health, of all relevant New Bathurst Hospital Completion Information, which are reasonably required to enable the Project Company to carry out the Services at the New Bathurst Hospital and to perform its obligations under this deed;
 - (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 New Bathurst Hospital Construction Contract in respect of the plant, equipment, machinery and

facilities at the New Bathurst Hospital, to the extent reasonably required to enable the Project Company to carry out the Services at the New Bathurst Hospital and to perform its obligations under this deed; and

- (vi) without prejudice to clause 2.4, use reasonable endeavours to grant or procure the grant to the Project Company of a licence to use the New Bathurst Hospital as-built drawings that are contained in the New Bathurst Hospital Completion Information for the purposes of providing the Services and on such terms as NSW Health is itself entitled to under the terms of the New Bathurst Hospital Construction Contract.
- (b) If, in the carrying out the review of New Bathurst Hospital Completion Information, or participating in completion inspections, commissioning, testing or training at New Bathurst Hospital (Stage 1), the Project Company identifies defects, deficiencies or inconsistencies between the New Bathurst Hospital (Stage 1) or the New Bathurst Hospital Completion Information and the requirements of the New Bathurst Hospital Construction Contract, the Project Company must within 5 Business Days of the provision of the New Bathurst Hospital Completion Information, or the carrying out of the relevant completion inspections, commissioning, testing or training, whichever is applicable, give notice to the Project Director, in writing, of details of the relevant defects, deficiencies or inconsistencies, and provide a suggested course of action to the Project Director to appropriately rectify or deal with the relevant defects, deficiencies or inconsistencies.
- (c) The Project Director must determine, acting reasonably, and notify the Project Company within 10 Business Days of receipt of the notice referred to in clause 11.1(b) what, if any, course of action will be taken by the New Bathurst Hospital Construction Contractor to rectify or deal with the relevant defects, deficiencies or inconsistencies (provided that NSW Health may not take any action, or require the New Bathurst Hospital Construction Contractor to take, any action not required under the New Bathurst Hospital Construction Contract), and the Project Company will be provided with the opportunity to review any revised New Bathurst Hospital Completion Information or participate in any further completion inspections, commissioning, testing or training as may be required in accordance with the New Bathurst Hospital Completion Program.
- (d) If the Project Company and NSW Health are unable to agree what, if any, course of action will or may be taken to rectify or deal with issues notified by the Project Company in accordance with clause 11.1(b), such dispute will be dealt with in accordance with clause 4.6(h) and/or clause 40.
- (e) The Project Company must update the New Bathurst Hospital (Stage 1) Pre-Completion Services Plan, to the extent required, to respond to updates to the New Bathurst Hospital Completion Program, and must provide a copy of such updated New Bathurst Hospital (Stage 1) Pre-Completion Services Plan within two Business Days of receipt of each update to the New Bathurst Hospital Completion Program.
- (f) To the extent not expressly contemplated by the New Bathurst Hospital (Stage 1) Pre-Completion Services Plan, the Project Company must give to the Project Director at least 2 Business Days' notice of any attendance at or participation in

inspection, commissioning, testing, or training activities to be carried out in accordance with the New Bathurst Hospital Completion Program.

- (g) 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 New Bathurst Hospital, NSW Health must give the Project Company a notice setting out detailed particulars of the delay or acceleration as soon as reasonably practicable, provided that:
 - (i) any delay will not give rise to any compensation or adjustment to the relevant Quarterly Service Payment; and
 - (ii) the payment of the relevant Quarterly Service Payment will be accelerated or delayed (as appropriate) for a period commensurate with the relevant delay or acceleration in carrying out the works comprising the New Bathurst Hospital.
- (h) NSW Health must notify the Project Company when the works in respect of the New Bathurst Hospital are complete and comply with the requirements of the New Bathurst Hospital Construction Contract.
- (i) The Project Company must not hinder, prevent or delay the Bathurst Hospital Construction Contractor in completing works associated with the New Bathurst Hospital (Stage 2) and otherwise comply with its obligations under the Interface Deed.
- (j) NSW Health must, to the extent contemplated by the Interface Deed, appoint the Project Company as its agent for the purpose of managing certain milestones under the New Bathurst Hospital Construction Contract in relation to operational maintenance periods for mechanical plant, electrical plant, security systems, and certain clinical equipment.
- (k) NSW Health will provide all reasonable assistance to the Project Company to facilitate the entry of the New Bathurst Hospital Construction Contractor into the Interface Deed.

11.2 The Project Company's obligation to construct

The Project Company must carry out all of the Works:

- (a) in accordance with the Project Company Proposals;
- (b) by the dates and in accordance with the requirements specified in the Works Program, the Specifications and this deed;
- (c) 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 Construction Health Facilities;
- (d) so that the Works do not cause an Health Functions Disruption, damage the Site, Adjoining Property or Existing Infrastructure;

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- (e) so that the Construction Health Facilities and the Services are able to comply with or exceed the Specifications;
 - (f) so that the Construction Health Facilities comply with all applicable Consents and Law;
 - (g) so that the Construction Health Facilities (as constructed) are, and will remain at all times, Fit for Intended Purpose; and
 - (h) in accordance with:
 - (i) the Detailed Design;
 - (ii) the Management Plans;
 - (iii) the Quality Standards (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 Construction Health Facility; and
 - (ii) for each Construction Health Facility, 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:

- (i) further amend the Works Program as directed by the Project Director, and
 - (ii) 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) 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:
- (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.
- (g) Each of the Project Company and NSW Health undertakes to comply with the provisions of the Partnering Protocol.

11.4 Commissioning Plan

- (a) The Project Company must develop and complete a Commissioning Plan for each of the Construction Health Facilities:
- (i) by the date set out in part E of schedule 12;
 - (ii) in accordance with the Quality Standards (Works) Plan and the other requirements set out in the Specifications;
 - (iii) so that the Construction Health Facilities are in compliance with the Specifications;
 - (iv) so that the Construction Health Facilities comply with all applicable Consents and Law; and
 - (v) so as to ensure that the Construction Health Facilities (as constructed) will be, and will remain at all times, Fit for Intended Purpose.
- (b) The Project Company acknowledges and agrees that:

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- (i) each Commissioning Plan is intended to provide a detailed description of how the Project Company intends to comply with its obligation to ensure that the Construction Health Facilities comply with the Specifications and this deed;
 - (ii) each Commissioning Plan will provide for training, demonstrations, testing education, support and familiarisation of and with relevant Construction Health Facilities for the benefit of relevant NSW Health Staff, in accordance with the Specifications;
 - (iii) each Commissioning 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 the relevant Construction 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 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 each Commissioning Plan to take into account the occurrence of the events and circumstances referred to in clause 11.4(b)(iii); and
 - (ii) promptly submit each Commissioning 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 Plan has ceased to comply with the requirements of this deed;
 - (ii) the Commissioning 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 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 Plan specifying:

 - (iv) the reasons why such development, updating or amending is required; and

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- (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 Plan as directed by the Project Director; and
- (vii) submit the further developed, updated or amended Commissioning 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 Plan in accordance with the Specifications and this clause 11.4.
- (f) The draft Commissioning Plan documentation submitted in accordance with this clause 11.4 must identify the Construction Health Facility or part of the Construction Health Facility 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 Construction Health Facility.
- (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 Plan, in such form as the Project Director may reasonably require.
- (h) Subject to the draft Commissioning 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 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 Plan documentation and give the Project Company comments, recommendations and representations regarding the draft Commissioning Plan documentation, provided that such comments shall be limited to matters impacting upon the compliance of the draft Commissioning Plan documentation with the requirements of this deed. For the avoidance of doubt, 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 Plan documentation.
- (i) If the Project Director gives the Project Company comments, recommendations and representations regarding the draft Commissioning Plan documentation, the Project Company must amend the draft Commissioning Plan documentation to reflect the Project Director's comments, recommendations or representations and the draft Commissioning Plan documentation must be re-submitted in accordance with this clause 11.4. Each relevant part of the draft Commissioning 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 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 Plan development process, and will not, in reviewing the draft Commissioning 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 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 Construction 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 Plan development process will be taken to constitute acceptance that the Commissioning 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 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 appropriate amendments to reflect the comments, recommendations or representations made to the Project Company by the Project Director in accordance with this clause 11.4, 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 Construction Health Facility, a report which includes:

- (a) details of the progress of that Construction Health Facility, with a comparison to the progress projected in the Works Program for that Construction Health Facility;
- (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 Construction Health Facility.

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 Site and inspect the Works on that 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 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, 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 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 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;
 - (iii) the impact, if any, of the delay on achieving Completion of the Works for a Construction Health Facility to which the Milestone relates, by the Target Completion Date for that Construction Health Facility; and
 - (iv) the impact, if any, of the delay on achieving Completion of the Works for all Construction Health Facilities by the Target Full Service Commencement Date.

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- (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 Construction Health Facility by the Target Completion Date for that Construction 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 of 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 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 Standards (Works) Plan

- (a) The Project Company must develop and complete a Quality Standards (Works) Plan for each of the Construction Health Facilities:
- (i) by the date set out in part C of schedule 12; and
 - (ii) in accordance with the Specifications.
- (b) The Project Company must:
- (i) audit its own compliance with the Quality Standards (Works) Plan at intervals not exceeding three months and in accordance with the audit

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- program which has been agreed to by the Project Director at the date of this deed;
- (ii) have its compliance with the Quality Standards (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 Construction Health Facility, to audit, at its own cost:
- (i) the Project Company's compliance with the Quality Standards (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(h)(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 Standards (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 2 Equipment

- (a) NSW Health must:
 - (i) ensure that Group 2 Equipment is:
 - (A) specified by NSW Health; and

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- (B) where applicable, delivered to the relevant Health Facility; and
 - (ii) give the Project Company at least 5 Business Days' notice of delivery of Group 2 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) inspect:
 - (A) each item of Group 2 Equipment, other than those referred to in clause 11.10(b)(ii)(B), for physical damage and any defects or deficiencies which impact on, or are likely to impact on the provision of any of the Services by the Project Company; and
 - (B) and test all items 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 such Group 2A Equipment or the provision of any of the Services by the Project Company;
 - (iii) report in writing to the Project Director within 10 Business Days of delivery of Group 2 Equipment any physical damage, defects or deficiencies in Group 2 Equipment;
 - (iv) not install or otherwise work with or use Group 2 Equipment that has been found on inspection to be damaged, defective or deficient; and
 - (v) as soon as reasonably practicable, return unused, damaged, deficient or defective Group 2 Equipment to NSW Health to a location nominated by the Project Director at the relevant time.
- (c) The Project Company may, but is not obliged to install, commission and utilise the Group 2A Equipment to satisfy the requirements of the Specifications.
- (d) 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 Group 2 Equipment;
 - (ii) the Project Company releases and indemnifies NSW Health, the State and their respective officers, agents and employees in respect of any Claims or Losses which the Project Company may suffer in connection with Group 2 Equipment unless such Claim or Loss is due to negligent or unlawful acts or omissions or wilful misconduct of NSW Health or a NSW Health Related Party; and
 - (iii) 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 Group 2 Equipment or the impact Group 2 Equipment may have on performance of the Services.

- (e) For the avoidance of doubt, any Group 2A Equipment that is made available to the Project Company in accordance with clause 11.10(a) and installed, worked with or used by the Project Company shall be deemed to become part of the Health Facility or Project Company Facility into which it is installed, worked with or used.

11.11 Group 2T Equipment

- (a) NSW Health must:
- (i) maintain the Group 2T Equipment in the condition as at the date of this deed, subject to fair wear and tear, until the date on which it is made available pursuant to clauses 11.11(a)(ii) and (iii) below;
 - (ii) make the Group 2TA Equipment available to the Project Company on the date nominated in the Works Program for the relevant Health Facility and based on the Services to which the Group 2TA Equipment relates; and
 - (iii) make the Group 2TB Equipment available to the Project Company on the relevant date nominated in the Works Program so that it can be installed and commissioned by the Project Company at the relevant Health Facility in the Works Program.
- (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 2T Equipment, within 1 Business Day of delivery;
 - (ii) inspect:
 - (A) each item of Group 2T Equipment, other than those referred to in clause 11.11(b)(ii)(B), for physical damage and any defects or deficiencies which impact on, or are likely to impact on, the provision of any of the Services by the Project Company; and
 - (B) and test each item of Group 2TA 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 such Group 2TA Equipment or the provision of any of the Services by the Project Company;
 - (iii) report in writing to the Project Director within 10 Business Days of delivery of Group 2T Equipment any physical damage, defects or deficiencies in Group 2T Equipment; and
 - (iv) not install or otherwise work with or use Group 2T Equipment that has been found on inspection to be damaged, defective or deficient.
- (c) The Project Company may, but is not obliged to install, commission and utilise the Group 2TA Equipment to satisfy the requirements of the Specifications.

- (d) 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 Group 2T Equipment;
 - (ii) 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 2T Equipment; and
 - (iii) 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 2T Equipment or the impact Group 2T Equipment may have on performance of the Services.
- (e) For the avoidance of doubt, any Group 2TA Equipment that is made available to the Project Company in accordance with clause 11.11(a) and installed, worked with or used by the Project Company shall be deemed to become part of the Health Facility or Project Company Facility into which it is installed, worked with or used.

11.12 Group 3 Equipment

- (a) NSW Health:
- (i) must ensure that Group 3 Equipment is:
 - (A) specified by NSW Health; and
 - (B) where applicable, delivered to, installed and commissioned at the relevant Health Facility by NSW Health; and
 - (ii) must give the Project Company at least 5 Business Days' notice of delivery and installation of Group 3 Equipment,

and, if requested by NSW Health, the Project Company must provide all reasonable assistance to NSW Health by managing the installation, commissioning and maintenance by relevant specialist contractors of Group 3 Equipment which is procured by NSW Health or GWAHS under leasing arrangements or equipment management contracts as at the date of this deed.

- (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 3A Equipment and Group 3B Equipment, within 1 Business Day of delivery;
 - (ii) inspect:
 - (A) and test each item of Group 3A 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 3A Equipment or the provision of any of the Services by the Project Company; and

- (B) each item of Group 3B Equipment for physical damage and any defects or deficiencies which impact on, or are likely to impact on, the provision of any of the Services by the Project Company;
 - (iii) report in writing to the Project Director within 10 Business Days of delivery of Group 3A Equipment and Group 3B Equipment any damage, defects or deficiencies in such Group 3A Equipment and Group 3B Equipment;
 - (iv) not work with or use Group 3A Equipment and Group 3B Equipment that has been found on inspection to be damaged, defective or deficient.
- (c) 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 Group 3A Equipment or Group 3B Equipment;
 - (ii) 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 3A Equipment or Group 3B Equipment; and
 - (iii) 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 3A Equipment or Group 3B Equipment or the impact Group 3A Equipment or Group 3B Equipment may have on performance of the Services.
- (d) For the avoidance of doubt:
- (i) any Group 3A Equipment that is provided in accordance with clause 11.12(a) and worked with or used by the Project Company shall be deemed to become part of the Health Facility or Project Company Facility into which it is installed, worked with or used;
 - (ii) the Project Company does not bear replacement risk for equipment which is described as "classification B" or "class B" or "classification C" or "class C" in the Specifications; and
 - (iii) to the extent the Specifications contain requirements in relation to the equipment listed in the Equipment Obsolescence Schedule, such equipment will be deemed to be in accordance with this deed if it meets the requirements of the relevant Specifications.

11.13 Group 3T Equipment

- (a) NSW Health must maintain the Group 3T Equipment in the condition as at the date of this deed, subject to fair wear and tear, until the date on which it is either relocated to, installed and commissioned by:

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- (i) NSW Health at a Health Facility; or
 - (ii) relevant specialist contractors at a Health Facility.
- (b) The Project Company, if requested by NSW Health, must provide all reasonable assistance to NSW Health by managing the installation, commissioning and maintenance by relevant specialist contractors of Group 3T Equipment which is procured by NSW Health or GWAHS under leasing arrangements or equipment management contracts as at the date of this deed.
- (c) Without limiting the other provisions of this deed, the Project Company must:
- (i) acknowledge in writing to the Project Director each item of Group 3TA Equipment and Group 3TB Equipment which has been installed and commissioned by NSW Health, within 1 Business Day of receipt of notification from NSW Health that the relevant item of Group 3TA Equipment and Group 3TB Equipment has been commissioned (**Group 3 Equipment Notification Date**);
 - (ii) inspect:
 - (A) and test each item of Group 3TA 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 3TA Equipment or the provision of any of the Services by the Project Company; and
 - (B) each item of Group 3TB Equipment for physical damage and any defects or deficiencies which impact on, or are likely to impact on, the provision of any of the Services by the Project Company;
 - (iii) report in writing to the Project Director within 10 Business Days of the Group 3 Equipment Notification Date any physical damage, defects or deficiencies in the relevant Group 3TA Equipment and Group 3TB Equipment;
 - (iv) confirm to the Project Director within 10 Business Days of the Group 3 Equipment Notification Date all of the Group 3TA Equipment and Group 3TB Equipment that has not been found by the Project Company on inspection under clause 11.13(c)(ii) to be damaged, defective or deficient; and
 - (v) not work with or use Group 3TA Equipment and Group 3TB Equipment that has been found on inspection to be damaged, defective or deficient.
- (d) NSW Health must:
- (i) make all Group 3TA Equipment that has not been found by the Project Company on inspection under clause 11.13(c) to be damaged, defective or deficient (**Acceptable Group 3TA Equipment**) available to the Project Company as soon as possible after the date on which the Project Company issues the confirmation under clause 11.13(c)(iv) above;

- (ii) repair or replace all defective, deficient or damaged Group 3TA Equipment and Group 3TB Equipment identified by the Project Company under clause 11.3(c)(iii) above as soon as is reasonably possible; and
 - (iii) make any repaired or replaced Group 3TA Equipment and Group 3TB Equipment available to the Project Company for further inspection and testing (as applicable) in accordance with clause 11.3(c)(ii) above.
- (e) 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 Group 3TA Equipment;
 - (ii) 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 3TA Equipment; and
 - (iii) 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 3TA Equipment or the impact Group 3TA Equipment may have on performance of the Services.
- (f) For the avoidance of doubt, any Group 3TA Equipment that is provided in accordance with clause 11.13(a) and worked with or used by the Project Company shall be deemed to become part of the Health Facility or Project Company Facility into which it is installed, worked with or used.

11.14 Payment of Expansion Works Construction Price

- (a) NSW Health must pay the Project Company the Expansion Works Construction Price in accordance with this clause 11.14.
- (b) The Project Company may only serve an Expansion Works Payment Claim on the Project Director and the Independent Certifier:
 - (i) within 10 Business Days of the end of each month specified in the Expansion Works Construction Program; and
 - (ii) after all of the following have occurred:
 - (A) the Project Company has provided the Independent Certifier and the Project Director with each of the following:
 - (I) a statutory declaration, together with any supporting evidence which may be reasonably required by the Independent Certifier, duly signed by an authorised officer of the Project Company, that all Subcontractors have been paid all moneys due and payable to them (other than any amounts subject to bona fide dispute) in respect of the Works relating to the Radiotherapy Unit, Expanded Bloodbank Unit or the Expanded Dental Unit (as applicable); and

- (II) a written statement for the purposes of, and which complies with, section 127 of the Industrial Relations Act 1996 (NSW), section 175B of the Workers Compensation Act 1987 (NSW) and section 31H of the Pay-Roll Tax Act 1971 (NSW), which is in a form approved by the Independent Certifier, each of which cover the applicable Works and period covered by the relevant Expansion Works Payment Claim;
- (B) the Expansion Works Payment Claim:
 - (I) specifies the Expansion Works Payment Events fully completed up to the date of the Expansion Works Payment Claim, showing separately:
 - (1) the Expansion Works Payment Events completed since commencement of the Expansion Works Construction Program;
 - (2) the Expansion Works Payment Events completed since the last Expansion Works Payment Claim submitted by the Project Company; and
 - (3) the payments previously made on account of the Expansion Works Construction Price;
 - (II) is in the format as the Independent Certifier reasonably requires, and includes evidence reasonably required by the Independent Certifier of the amount claimed; and
 - (III) constitutes a valid tax invoice for any taxable supplies (as those terms are defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth)) to which the Expansion Works Payment Claim relates;
- (C) in the case of the final Expansion Works Payment Claim, the Project Company has consulted with the Independent Certifier and the Project Director about the tasks necessary to achieve Completion of the Post Completion Expansion Works and allowed the Independent Certifier and Project Director to attend the relevant Site and take input from appropriately qualified persons regarding specialist activities necessary to achieve Completion of the Post Completion Expansion Works,

provided that the aggregate of amounts paid on account of the Expansion Works Construction Price up to the date of an Expansion Works Payment Claim cannot exceed the forecast aggregate payments in respect of the Expansion Works Construction Price up to that date, as forecast under the Expansion Works Construction Program.

- (c) For the avoidance of doubt, an Expansion Works Payment Claim may only be issued in respect of Expansion Works which have been carried out up to the value

of the relevant Expansion Works Payment Event, or, in the case of the Final Expansion Works Payment Event, once that Final Expansion Works Payment Event has occurred.

- (d) If the Project Company serves an Expansion Works Payment Claim that is not in accordance with clause 11.14(b) then NSW Health will not be obliged to make any payment in respect of that purported Expansion Works Payment Claim.
- (e) The Independent Certifier must, within 10 Business Days of receipt of an Expansion Works Payment Claim provided by the Project Company in accordance with clause 11.14(b),:
 - (i) determine (acting reasonably) the amount payable to the Project Company in respect of the Expansion Works Payment Claim;
 - (ii) issue a Payment Certificate to the Project Company; and
 - (iii) if the amount the Independent Certifier has determined as being payable to the Project Company is less than the claimed amount, provide NSW Health with an explanation for why the amount that the Independent Certifier has determined to be payable is less than the claimed amount.
- (f) Subject to the provisions of this clause, NSW Health must, within 20 Business Days of the issue of a Payment Certificate by the Independent Certifier under clause 11.14(e)(ii), pay to the Project Company the amount certified in the Payment Certificate together with, if the amount the Independent Certifier has certified as being payable to the Project Company is less than the claimed amount, an explanation for why the amount proposed to be paid is less than the claimed amount.
- (g) Any payment of moneys by NSW Health to the Project Company under this clause is not:
 - (i) evidence of the value of relevant works or services, or that any works or services have been satisfactorily carried out;
 - (ii) an admission of liability; or
 - (iii) approval by NSW Health of the Project Company's performance of its obligations under this deed or evidence that the Radiotherapy Unit, Expanded Bloodbank Unit or the Expanded Dental Unit (as applicable) or any relevant part of them is Complete or satisfies, or is capable of satisfying, the Specifications or the other provisions of this deed,but is only taken to be payment on account.
- (h) The Project Company represents and warrants that title to any goods and materials to which an Expansion Works Payment Claim relates will pass to NSW Health upon payment being made in respect of that Expansion Works Payment Claim, free from any Security Interest.
- (i) The Project Company and NSW Health agree that:

- (i) if the Project Company fails to achieve Completion of the Post Completion Expansion Works by the date which is four weeks after the Commencement Date for the New Orange Hospital, NSW Health will suffer loss and damage, and all such loss and damage will, having regard to the public interest, governmental and non-commercial nature of the operation of the New Orange Hospital, be impossible, complex or expensive to quantify accurately in financial terms, and the loss and damage arising from such failure may not be able to be precisely calculated or proved;
- (ii) the amount of liquidated damages referred to in clause 11.14(i)(iii) is a genuine pre-estimate of the damage which would be suffered by NSW Health if the Project Company fails to achieve Completion of the Post Completion Expansion Works by the date which is four weeks after the Commencement Date for the New Orange Hospital; and
- (iii) if the Project Company fails to achieve Completion of the Post Completion Expansion Works by the date which is four weeks after the Commencement Date for the New Orange Hospital, or any later due date for Completion of the Post Completion Expansion Works applying as a result of the occurrence of a Compensation Event or a Relief Event and the application of the relevant provisions of this deed, NSW Health will be entitled to recover, on demand, from the Project Company as liquidated damages, the amount of \$ [REDACTED] per day from the date which is four weeks after the Commencement Date for the New Orange Hospital (or any later due date for Completion of the Post Completion Expansion Works applying as a result of the occurrence of a Compensation Event or a Relief Event and the application of the relevant provisions of this deed) until Completion of the Post Completion Expansion Works is achieved.

12. VARIATIONS

The Project Company must not make or implement any alteration, addition or modification to a Detailed Design 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;
- (b) achieve Completion of each Construction Health Facility by the Target Completion Date for that Construction Health Facility; and
- (c) complete the Works in respect of the Orange Base Hospital to the satisfaction of the Project Director by the date falling 8 weeks after the Commencement Date for the New Orange Hospital; and

- (d) achieve Completion of the Post Completion Expansion Works by the date which is four weeks after the Commencement Date for the New Orange Hospital.

13.2 Construction Health Facilities Completion

- (a) Once the Project Company considers it has achieved Completion of the Works for a Construction Health Facility, 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 Construction Health Facility will not be deemed to have occurred until the date nominated by the Project Director in accordance with clause 13.4.
- (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 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 the Works for that Construction Health Facility 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 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 onto the relevant Site and into the relevant Construction Health Facility, 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) provide all reasonable assistance to NSW Health to facilitate achievement of Accreditation of each Construction Health Facility.
- (c) Any minor omissions or defects which, individually or in aggregate, do not have an adverse effect on the occupation of the relevant Construction Health Facility 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 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 Works for the relevant Construction Health Facility in accordance with this clause 13.2.

- (d) If, upon inspection of the Works for the relevant Construction Health Facility, the Independent Certifier is of the opinion that Completion of the Works for that Construction Health Facility 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 Works for that Construction Health Facility has been achieved.
- (e) If, upon inspection of the Works for the relevant Construction Health Facility, the Independent Certifier is of the opinion that Completion of the Works for that Construction Health Facility 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 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 Construction Health Facility, the Independent Certifier is satisfied that Completion of the Works has been achieved for that Construction Health Facility, the Project Company will ensure that the Independent Certifier notifies the Project Director in writing that Completion has been achieved.

13.3 Commencement

- (a) The Project Director must, within 2 Business Days of receiving certification from the Independent Certifier that the Project Company has demonstrated to the Independent Certifier that Completion of the Works for a Construction Health Facility has been achieved in accordance with the requirements of this deed, issue a Commencement Certificate to the Project Company in respect of that Construction Health Facility.
- (b) The issue of a Commencement Certificate to the Project Company in respect of a Construction Health Facility 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 Construction Health Facility satisfies or is capable of satisfying the Specifications.

13.4 Commencement Date

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

- (a) the date of the Commencement Certificate; and

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- (b) the Target Completion Date for that Construction Health Facility.

13.5 Environmental Audit

- (a) The Project Company must, prior to the issue of a Notice of Completion for a Construction Health Facility:
- (i) undertake the Final Contamination Assessment. The Final Contamination Assessment must confirm:
 - (A) that Contamination on the relevant Site does not present a risk of harm to the Environment and is suitable for the proposed use as a health facility; or
 - (B) that specified remediation work is required in order to confirm that the relevant Site does not present a risk of harm to the Environment and is suitable for the proposed use as a health facility, in which case the Project Company must undertake that remediation work before issuing the Notice of Completion; and
 - (ii) obtain the Final Site Audit Statement, which must confirm that the Site does not present a significant risk of harm to the Environment and is suitable for the proposed use as a health facility, with no material qualifications which restrict the use of the relevant Health Facility as a health facility or require further monitoring or investigations.
- (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.

13.6 Drawings and Survey

- (a) No later than 28 days after Completion of each Milestone in respect of a Construction Health Facility, the Project Company must give the Project Director a complete set of "work as executed" engineering drawings of that Construction Health Facility in hard copy and manipulable electronic format, which comply with the requirements of the field data capture specification, as detailed in the Specifications.
- (b) Prior to the Commencement Date for a Construction Health Facility, the Project Company must provide the Project Director with a detailed survey from the NSW Health Surveyor which:
- (i) will comply with NSW Health's required form of survey;
 - (ii) shows the location of the completed Construction Health Facility on the relevant Site (as the case maybe); and
 - (iii) certifies that the completed work is located in accordance with the Detailed Design.

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 two 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 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).

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- (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

14A.1 Payment

- (a) In consideration of the execution of the Works, NSW Health agrees to pay to the Project Company the Construction Payment on the Full Service Commencement Date.
- (b) NSW Health has no obligation to pay the Construction Payment unless and to the extent that it receives the corresponding Securitisation Payment from Ancora under the Securitisation Deed (and no adjustment to the Construction Payment or Securitisation Payment will affect this limitation).
- (c) The amount of the Construction Payment and the corresponding Securitisation Payment may only be adjusted:
- (i) to reflect a Contract Variation prior to the Full Service Commencement Date agreed in accordance with clause 22 and calculated in accordance with schedule 19;
 - (ii) to reflect any other matters where the Estimated Cost Effect is agreed to apply prior to the Full Service Commencement Date and calculated in accordance with the schedule 19; and
 - (iii) otherwise by agreement in writing between the parties prior to the Full Service Commencement Date.
- (d) No adjustment to the Construction Payment or the corresponding Securitisation Payment will affect the limitation referred to in clause 14A.1(b) above.
- (e) NSW Health may not set off any amount due and payable by the Project Company to NSW Health under the Project Documents against the Construction Payment.
- (f) NSW Health must pay an additional amount on account of GST in relation to the Construction Payment in accordance with clause 42.3, but it is only obliged to make that payment when it has been provided with a tax invoice in respect of the Construction Payment and only to the extent that it has received the benefit of an input tax credit in respect of that amount. NSW Health must use reasonable endeavours to receive the benefit of an input tax credit without delay having regard to when such amount becomes due and receivable from the Australian Taxation Office.
- (g) In the event that a full input tax credit is subsequently denied by the Australian Tax Office, the amount of the Construction Payment is taken to be GST inclusive to that extent.

NSW Health will provide such cooperation as is reasonable to the Project Company to discuss any such denial with the Australian Tax Office and will take reasonable steps to dispute such assessment (provided that the obligation to dispute is not a condition precedent for refunding the GST component if the input tax credit is denied and the Project Company indemnifies NSW Health for any costs incurred in disputing such assessment).

- (h) To the extent it has not already passed, all right, title and interest of the Project Company in each Construction Health Facility passes to NSW Health on the Full Service Commencement Date on payment by NSW Health of the Construction Payment under clause 14A.1(a).
- (i) If the Construction Payment is adjusted in accordance with clause 14A.1(c), NSW Health and the Project Company must adjust the Licence Fee Amount payable under the Master Licence Agreement in respect of the Licences in accordance with paragraph 15(b)(i)(B) of schedule 19.

14A.2 Operations Variation Payment

- (a) If a Contract Variation or Compensation Event occurs after the Full Service Commencement Date and paragraph 15(b) of schedule 19 applies, NSW Health must pay the Operations Variation Payment to the Project Company in consideration of the execution of the Contract Variation or implementation of the works in relation to the Compensation Event, on the date of completion of the Contract Variation or the works in relation to the Compensation Event.
- (b) NSW Health has no obligation to pay the Operations Variation Payment unless and to the extent that it receives the corresponding Securitisation Payment from Ancora under the Securitisation Deed in relation to that Contract Variation or Compensation Event.
- (c) NSW Health may not set off any amount due and payable by the Project Company to NSW Health under the Project Documents against the Operations Variation Payment.
- (d) NSW Health must pay an additional amount on account of GST in relation to the Operations Variation Payment in accordance with clause 42.3, but it is only obliged to make that payment when it has been provided with a tax invoice in respect of the Operations Variation Payment and only to the extent that it has received the benefit of an input tax credit in respect of that amount. NSW Health must use reasonable endeavours to receive the benefit of an input tax credit without delay having regard to when such amount becomes due and receivable from the Australian Tax Office.
- (e) In the event that a full input tax credit is subsequently denied by the Australian Tax Office, the amount of the Operations Variation Payment is taken to be GST inclusive to that extent.

NSW Health will provide such cooperation as is reasonable to the Project Company to discuss any such denial with the Australian Tax Office and will take reasonable steps to dispute such assessment (provided that the obligation to

dispute is not a condition precedent for refunding the GST component if the input tax credit is denied and the Project Company indemnifies NSW Health for any costs incurred in disputing such assessment).

- (f) To the extent it has not already passed, all right, title and interest of the Project Company in each Construction Health Facility to which the Operations Variation Payment applies passes to NSW Health on payment by NSW Health under clause 14A.2(a).
- (g) If NSW Health is required to pay an Operations Variation Payment to the Project Company in accordance with clause 14A.2(a), NSW Health and the Project Company must adjust the Licence Fee Amount payable under the Master Licence Agreement in respect of the Licences in accordance with paragraph 15(b)(ii)(B) of schedule 19.

PART D – OPERATION OBLIGATIONS

15. SERVICES

15.1 Interim Services Phase

- (a) During the Interim Services Phase, the Project Company must:
 - (i) provide the Interim Services, Mobilisation Activities and the Interim Hard FM Services at all times in accordance with, and duly and punctually perform its obligations arising in or under:
 - (A) the Support Services Specification;
 - (B) Good Industry Practice, and in an appropriate, effective and efficient, dependable and cooperative manner;
 - (C) all applicable Consents and Law;
 - (D) an Interim Services Plan, Mobilisation Activities Plan and the Interim Hard FM Services Plan;
 - (E) the Labour Services Agreement;
 - (F) any other plans prepared pursuant to the Project Company's obligations under the Support Services Specification; 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;
 - (iii) obtain and maintain all Consents which it is necessary to have for the provision of the Interim Services, the Mobilisation Activities and the Interim Hard FM Services.

- (b) During the Interim Services Phase, NSW Health must, to the extent contemplated by the Interim Services Plan, Mobilisation Activities Plan and the Interim Hard FM Services Plan, provide to the Project Company access to NSW Health's facilities, records, information systems and resources required to enable the Project Company to provide the Interim Services, Mobilisation Activities and Interim Hard FM Services, 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 Interim Services Phase and has a material adverse effect on the Project Company's ability to commence provision of the:
- (i) Soft FM Services at the Existing Health Facilities at the end of the Interim Services Phase;
 - (ii) the Hard FM Services at the Existing Health Facilities (other than New Bathurst Hospital (Stage 2)) on the Hard FM Start Date; or
 - (iii) the Hard FM Services at New Bathurst Hospital (Stage 2) from the New Bathurst Hospital (Stage 2) Completion Date,
- will entitle the Project Company to an extension of the Bedding-In Period in accordance with paragraph 5 of Part A of schedule 5 but will not give rise to any compensation or adjustment to the relevant Quarterly Service Payment.
- (c) NSW Health must, to the extent contemplated by the Interim Hard FM Services Plan, provide to the Project Company access to NSW Health's facilities, records, information systems and resources required to enable the Project Company to provide the Interim Hard FM Services.
- (d) NSW Health must ensure that the New Bathurst Hospital Construction Contractor, GWAHS and/or their respective officers, employees, agents or contractors carry out the Initial Hard FM Services so as not to cause the Project Company to be in breach of its obligations under clause 15.1(a) and in accordance with Appendix A of the Support Services Specification and with the care, prudence, foresight, practice and skill reasonably and ordinarily expected of skilled, professional, qualified and competent personnel, experienced in providing services of a similar size, scope and complexity to the Initial Hard FM Services.
- (e) The Project Company and NSW Health acknowledge and agree that it is the parties' intention that the Interim Hard FM Services will provide to the Project Company an opportunity to oversee and have input in relation to the provision of the Initial Hard FM Services by the New Bathurst Hospital Construction Contractor, GWAHS and/or their respective officers, employees, agents or contractors, so as to facilitate transition to the Project Company on the Hard FM Start Date of risks and services in relation to the New Bathurst Hospital (Stage 1).
- (f) The Project Company must:
- (i) perform the Interim Hard FM Services with the aim of satisfying the intentions set out in clause 15.1(e); and

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- (ii) ensure that the Interim Hard FM Services commence on the New Bathurst Hospital (Stage 1) Completion Date.
 - (g) NSW Health must, no later than 5 Business Days prior to the commencement of any Major Hard FM Service, notify the Project Company of the following details of such Major Hard FM Service:
 - (i) planned scope of the relevant Major Hard FM Service;
 - (ii) the personnel who will carry out the relevant Major Hard FM Service;
 - (iii) the dates and times for the relevant Major Hard FM Service to be carried out and completed; and
 - (iv) where relevant for Reactive Maintenance, work orders and methodology statements.
 - (h) NSW Health must, at least 1 Business Day prior to the completion of any Minor Hard FM Service, notify the Project Company of the scope and repair methodology of such Minor Hard FM Service, and provide to the Project Company the opportunity to review and inspect the completed Minor Hard FM Service.
 - (i) The Project Company must, within 2 Business Days of receipt of the notice referred to in clause 15.1(g) in respect of a Major Hard FM Service, notify NSW Health of whether and, if so, the extent to which the Project Company plans to provide inspection, review and any other Interim Hard FM Service activities in respect of the relevant Major Hard FM Service.
 - (j) The Project Company must give notice to NSW Health, in writing, of details of any Initial Hard FM Services not being performed or completed in accordance with clause 15.1(d) of which it is aware, and provide a suggested course of action to the Project Director to appropriately rectify those works within 5 Business Days of:
 - (i) the Project Company identifying that the Initial Hard FM Services are not being performed or completed in accordance with clause 15.1(d); and
 - (ii) completion of the relevant Initial Hard FM Service,whichever is the earlier.
 - (k) NSW Health must determine, acting reasonably, and notify the Project Company within 10 Business Days of receipt of the notice referred to in clause 15.1(j) what, if any, further works are required to procure the rectification of such Initial Hard FM Services, and such rectification works shall be undertaken by NSW Health, GWAHS or their respective officers, employees, agents or contractors and reviewed by the Project Company, in accordance with clauses 15.1(h) or 15.1(i), whichever is applicable.
 - (l) If the Project Company and NSW Health are unable to agree whether:
 - (i) Initial Hard FM Services are being or have been performed or completed in accordance with clause 15.1(d);

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- (ii) whether relevant Initial Hard FM Services constitute Major Hard FM Services or Minor Hard FM Services; or
 - (iii) an appropriate course of action to procure the rectification of such Initial Hard FM Services,

such dispute will be dealt with in accordance with clause 4.6(h) and/or clause 40.

15.2 Provision of Services

The Project Company must:

- (a) provide the Services relevant to each:
 - (i) Health Facility at all times in accordance with, and duly and punctually perform its obligations arising in or under:
 - (A) the Support Services Specification;
 - (B) the Operations Manual;
 - (C) Good Industry Practice, and in an appropriate, effective and efficient, dependable and cooperative manner;
 - (D) all applicable Consents and Law;
 - (E) the Labour Services Agreement;
 - (F) any other plans prepared pursuant to the Project Company's obligations under the Support Services Specification; and
 - (G) each other Project Document;
 - (ii) Project Company Facility at all times in accordance with, and duly and punctually perform its obligations arising in or under:
 - (A) the Support Services Specification;
 - (B) Good Industry Practice, and in an appropriate, effective and efficient, dependable and cooperative manner;
 - (C) all applicable Consents and Law;
 - (D) any other plans prepared pursuant to the Project Company's obligations under the Support Services Specification; and
 - (E) each other Project Document;
- (b) allocate such resources and staff as is necessary to enable the due and proper performance of this deed;
- (c) obtain and maintain all Consents which it is necessary to have for the provision of the Services;

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- (d) provide the Services such that each Health Facility is and remains, at all times, Fit for Intended Purpose;
 - (e) subject to the express terms of this deed subject to any planned maintenance identified in a Programmed Maintenance Plan, ensure that each Health Facility is available at all times to NSW Health, NSW Health Staff, NSW Health Tenants, Patients, and visitors of and to that Health Facility for the purposes of provision of the Health Functions; and
 - (f) ensure that:
 - (i) the date for the commencement of provision of the Hard FM Services for the Existing Health Facilities (other than New Bathurst Hospital (Stage 2)) is the Hard FM Start Date;
 - (ii) the date for the commencement of provision of the Hard FM Services for the New Bathurst Hospital (Stage 2) is the New Bathurst Hospital (Stage 2) Completion Date; and
 - (iii) the Soft FM Start Date for the Existing Health Facilities occurs by the last day of the Interim Services Phase.

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 F of Schedule 12;
 - (iii) in accordance with the Specifications;
 - (iv) so that the Health Facilities and the Services are in compliance with the Specifications;
 - (v) so that the Health Facilities and the Services comply with all applicable Consents and Law; and
 - (vi) so that the Health Facilities (as constructed) will be, and will remain at all times, 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;

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- (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) continuous improvement obligations under the Support Services Specification;
 - (G) changes to work practices;
 - (H) changes in Good Industry Practice; and
 - (I) the requirements of the Support Services Specification.
- (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 twelve 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

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- (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; 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 F of schedule 12.
 - (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. For the avoidance of doubt, 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, 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 Services 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 Operations Manual development process will be taken to constitute acceptance that the Operations Manual or compliance with 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 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 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.

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- (o) The Project Company must procure that current copies of the Operations Manual for each Health Facility are provided to the general manager of that Health Facility, and that relevant NSW Health Related Parties, including relevant NSW Health Staff, are made aware of applicable provisions of the relevant Operations Manual and are given adequate training regarding the practices and procedures applicable to the Services provided by the Project Company, including operation of the Helpdesk.
 - (p) The Project Company acknowledges that, notwithstanding the preparation of schedules and programs for provision of Services in accordance with the Support Services Specification, at any time during the Operations Phase for a Health Facility:
 - (i) the Project Director or the general manager of that Health Facility may direct rescheduling of Services set out in the relevant monthly program or schedule within the relevant month in which the relevant Services were to be provided except to the extent such direction prevents the Project Company from complying with any statutory requirements;
 - (ii) it must amend any relevant program or plan to reflect the directed rescheduling under clause 15.3(p)(i) and re-submit the relevant program, schedule or plan to the Project Director and the general manager of that Health Facility; and
 - (iii) any such required amendment will not constitute a NSW Health Variation Request and must be complied with by the Project Company.
 - (q) To the extent the preparation of the Operations Manual in respect of a Health Facility is dependent on provision of certain documents or materials by the New Bathurst Hospital Construction Contractor under the New Bathurst Hospital Construction Contract, and completion of the Operations Manual is delayed due to those documents or materials not being provided in accordance with the requirements of the New Bathurst Hospital Construction Contract, the Commencement Date for the relevant Health Facility will be deemed not to have been delayed due to the delay in provision of the relevant Operations Manual, and the Project Company will be deemed not to be in breach of clause 11.2(b) or 13.1, provided that those parts of the Operations Manual that are not dependent on provision of certain documents or materials by the New Bathurst Hospital Construction Contractor under the New Bathurst Hospital Construction Contract must still be completed.

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 for each Health Facility, 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 for each Health Facility 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 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 Specification for that KPI will apply, but otherwise, without limiting its other obligations under this deed, 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 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 Bathurst Defect Rectification Period:
 - (i) notify the Project Director as soon as it becomes aware of a Defect at the New Bathurst Hospital and advise the Project Director of the impact of the Defect on the provision of the Services or the Health Functions;
 - (ii) implement a Response in respect of a Defect as soon as is reasonable given the nature of the Defect and the impact of the Defect on the provision of the Services or the Health Functions;

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- (iii) if requested by the Project Director, complete any defects notice required to be served under the New Bathurst Hospital Construction Contract;
 - (iv) permit and facilitate the access of the New Bathurst Hospital Construction Contractor to the New Bathurst Hospital to address the Defect in accordance with the Interface Deed;
 - (v) perform a temporary fix or rectification (each as defined in schedule 5) of the Defect if so requested by the Project Director at NSW Health's cost, which request will be a deemed NSW Health Variation Request; and
 - (vi) if it wishes to request relief from abatement, as a direct result of a Defect or rectification of a Defect, pursuant to paragraph (d) of the definition of Service Failure in Schedule 5, then it must notify the Project Director and provide reasonable details of its claim.
- (c) NSW Health must during the Bathurst Defect Rectification Period promptly either:
- (i) procure that the New Bathurst Hospital Construction Contractor promptly rectifies any Defects at the New Bathurst Hospital notified by the Project Company to NSW Health under clause 15.5(b)(i); or
 - (ii) give a direction to the Project Company under clause 15.5(b)(v).
- (d) If NSW Health exercises its right under clause 51 or 71 of the New Bathurst Hospital Construction Contract to not have a Defect (as defined in the New Bathurst Hospital Construction Contract) made good and the exercise of that right has an adverse impact on the Project Company's ability to provide the Services, the exercise of that right will be a deemed NSW Health Variation Request.
- (e) If, at any time after the Bathurst Defect Rectification Period, the Project Company becomes aware of a Defect at the New Bathurst Hospital which the Project Company believes NSW Health is entitled to take action against under a subcontractor warranty provided pursuant to clause 33 of the New Bathurst Hospital Construction Contract (together the **Bathurst Subcontractor Warranties**), the Project Company may:
- (i) notify the Project Director of the Defect; and
 - (ii) request that NSW Health takes action under the Bathurst Subcontractor Warranties to seek rectification of the Defect.
- (f) Without limiting any other rights NSW Health may have, if NSW Health, following receipt of the request provided under clause 15.5(e)(ii), agrees (acting reasonably) that NSW Health has a valid claim under the Bathurst Subcontractor Warranties, NSW Health will:
- (i) reasonably facilitate the Project Company's ability to enforce any rights which NSW Health has at that time under the Bathurst Subcontractor Warranties in respect of the Defect;

- (ii) reasonably assist the Project Company with any action which the Project Company proposes to take under the Bathurst Subcontractor Warranties in respect of the Defect;
- (iii) ensure that all proceeds received under the Bathurst Subcontractor Warranties are paid to the Project Company provided the Project Company has complied with all of its obligations under the Project Documents.
- (g) Any costs incurred by the Project Company in connection with any action taken by the Project Company under clause 15.5(f)(i) will be borne by the Project Company.
- (h) The Project Company releases and indemnifies NSW Health in respect of any Claims or Losses which NSW Health incurs in connection with any action taken by the Project Company pursuant to clause 15.5(f)(i).
- (i) Any dispute as to whether a defect in a Health Facility constitutes a Defect for the purposes of this deed must be referred for dispute resolution in accordance with clause 4.6(h) and/or clause 40.

15.6 NSW Health Decanting Process

- (a) NSW Health must provide to the Project Company a copy of the plan for the NSW Health Decanting Process, any other information and assistance reasonably requested by the Project Company relating to the NSW Health Decanting Process, and any amendments or updates to any plan for the NSW Health Decanting Process, in each case, in a timely fashion. As between NSW Health and the Project Company, NSW Health will procure the NSW Health Decanting Process, provided that the Project Company must, in cooperation with NSW Health, provide support and assistance to NSW Health with the NSW Health Decanting Process.
- (b) 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 NSW Health Decanting Process; and
 - (ii) the Project Company will not be entitled to any relief from obligations, nor any compensation in respect of the NSW Health Decanting Process.

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), a Health Facility or the Services, other than in accordance with clause 20, clause 21 or clause 22.

17. USE OF SITES, HEALTH FACILITIES AND PROJECT COMPANY FACILITIES

17.1 Priority and Use of Sites

- (a) The Sites and the Health Facilities must be made available for use in the following order of priority:

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- (i) provision of Health Functions;
 - (ii) provision of the Services; and
 - (iii) Third Party Use.
- (b) Subject to clauses 17.1(c), 17.2 and 17.6, the Project Company will use the Sites solely for the purposes of performance of the Works and Services.
- (c) Notwithstanding the other provision of this clause 17.1, the Project Company is entitled to use, refurbish and maintain the Project Company Facilities at its own cost and risk in connection with the performance of the Works and Services in accordance with the Project Company Proposals.
- (d) Subject to the express provisions of this deed:
- (i) 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 the state and physical condition of each Project Company Facility (including latent and patent defects in any Project Company Facility);
 - (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 its use of the Project Company Facilities; and
 - (iii) the Project Company will not be entitled to any relief from its obligations, nor any compensation in respect of the location, condition, fitness for purpose of the Project Company Facilities or the impact that the Project Company Facilities may have on its ability to perform the Works and Services.

17.2 Third Party Use

The Project Company or a Subcontractor may enter into arrangements for Third Party Use of a Health Facility or any part of a Health Facility provided that:

- (a) the Third Party Use is not, or does not involve, an Excluded Purpose;
- (b) the Third Party Use cannot reasonably be expected to impair the ability of the Project Company to provide the Services or of NSW Health to provide Health Functions;
- (c) prior to such Third Party Use the Project Company has submitted the proposed Third Party Use to the Project Director and the Project Director has given its prior written consent to the relevant Third Party Use;
- (d) the Project Company must notify the Project Director of any termination or suspension or amendment of any Third Party Use; and

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- (e) any party that enters into a Third Party Use arrangement with the Project Company must not allow any other party to use the Health Facilities without the Project Director's prior written consent.

17.3 Use Prohibited

Notwithstanding any other provision of this deed, the Project Director may, by reasonable notice to the Project Company, prohibit the use of the Health Facilities or any Health Facility by any person or on any occasion, if the Project Director reasonably believes that such use:

- (a) is not in accordance with relevant Policies;
 - (b) is not being provided in an appropriate manner;
 - (c) may cause NSW Health loss or embarrassment or interfere with the Health Functions or the provision of the Project; or
 - (d) is incompatible with the use of the Health Facilities or conflicts with the Health Functions requirements as determined by the Project Director,
- (e) or the Third Party Use otherwise ceases to comply with clause 17.2.

17.4 Fees for Third Party Use

The Project Company or a Subcontractor may charge, and be paid a fee, in an amount determined by the Project Company or the relevant Subcontractor, for the Third Party Use made of the Health Facilities. Such fee must be a reasonable, commercial, arms length fee for the relevant Third Party Use.

17.5 Income From Third Party Use

- (a) All income received by the Project Company in connection with Third Party Use (**Gross Income**) after deducting the aggregate of the direct costs incurred by the Project Company, so far as they are additional to the costs which the Project Company would have incurred in connection with the provision of the Services, in making available any part of the Health Facilities to such third party (**Costs**) is referred to below as the Net Income and will be divided between NSW Health and the Project Company in equal shares.
- (b) The Project Company must notify the Project Director in respect of the six months ending on each 30 June and 31 December, within one month of the end of each such period, of the Gross Income and the amount and nature of all Costs which the Project Company considers are eligible to be deducted from the Gross Income in accordance with this clause 17.5 (**Income Notice**).
- (c) One half of the Net Income will be deemed to have been paid by NSW Health on account of the Monthly Service Payment; and the Monthly Service Payment payable for the Payment Period following the final determination of the amount of Net Income in accordance with this clause 17.5 will be reduced accordingly and the Project Company will be entitled to retain for itself the remaining half of the Net Income and NSW Health will have no further entitlement to any part of it.

- (d) If the date of such final determination is after the Termination Date, one half of the amount of such Net Income will be paid by the Project Company to NSW Health.
- (e) The Project Director is entitled to dispute the amount of the Gross Income and the Costs by written notice to the Project Company within 10 Business Days of the issue of the Income Notice (**Dispute Notice**). For the avoidance of doubt, income earned by related parties to the Project Company in connection with Third Party Use must be included in any calculation of Gross Income for the purposes of this clause. If the Project Director does not serve a Dispute Notice, the Income Notice will be conclusive evidence of the Gross Income and the Costs. If the Project Director does serve a Dispute Notice, the matter must be dealt with in accordance with clause 4.6(h) and/or clause 40.
- (f) Where the Third Party Use arrangement is entered into by a Subcontractor, the Project Director may apply the above provisions to the income received by the Subcontractor in connection with Third Party Use, provided that there is no double counting, and the Project Company must facilitate payment of one half of the amount of such Net Income to NSW Health.
- (g) The provisions of this clause 17.5 do not apply to any use in accordance with clause 17.6.

17.6 Additional Commercial Development

- (a) If the Project Company identifies an area of a Site 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 Health Facilities; and
 - (ii) not disrupt the provision of the Health Functions or 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 17.6(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

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- (iii) this clause 17.6 in no way limits the rights of NSW Health or NSW Health Tenants to undertake any additional development of any Health Facility or a Site, 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 Services which may give rise to health and safety risks for NSW Health Staff, Health Staff Members, the Project Company's officers, 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 Site, a Project Company Facility or a Health Facility as a result of or in connection with the Project Company performing the Services;
- (b) in the case of the matters referred to in sub-paragraph (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 sub-paragraph (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 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 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 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 Site, a Project Company Facility or a Health Facility during a Construction Phase; and
 - (ii) material Defects, damage or repairs affecting the Works, a Site, a Project Company Facility or a Health Facility during an Operations Phase,of which the Project Company is aware, and the action the Project Company proposes to take to correct that material damage, defect or disrepair (as applicable), and the estimated time that correction will require.
- (b) For the purposes of this clause 18.4, material Defects, damage or repairs mean any Defects 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 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 Specification.
- (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 Health Facilities, the Project Company Facilities 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 for each Health Facility, have its compliance with the programs, plans, procedures, standards, policies, systems, records and manuals prepared and maintained in accordance with the Support Services Specification, audited as required by the Support Services Specification 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 Specification, 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 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 for each Health Facility, 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 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 Site, a Project Company Facility or a Health Facility 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 Site, Project Company Facility 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 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 Services by the Project Company, and must comply with the reasonable Site safety and 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 Health Facility, the Project Company Facility or 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 six months after the Termination Date, and 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 Services, perform any Services 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 relevant Health Facility, Project Company Facility and 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; or
- (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; or
- (c) the Project Director reasonably believes that the Project Company must suspend provision of the 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,

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 Completion of the Works for a Construction Health Facility by the relevant Target Completion Date for that Milestone or Construction Health Facility; or
 - (iii) achieving Completion of the Works for a Construction Health Facility by the Longstop Date for that Construction Health Facility;
 - (iv) achieving:
 - (A) the commencement of provision of the Hard FM Services for the Existing Health Facilities (other than New Bathurst Hospital (Stage 2)) by the Hard FM Start Date;

- (B) the commencement of provision of the Hard FM Services for the New Bathurst Hospital (Stage 2) by the New Bathurst Hospital (Stage 2) Completion Date; or
 - (C) the Soft FM Start Date for the Existing Health Facilities by the last day of the Interim Services Phase;
- (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; 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:
 - (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 Completion of the Works for a Construction Health Facility by the relevant Target Completion Date for that Milestone or Construction Health Facility;
 - (C) achieving Completion of the Works for a Construction Health Facility by the Longstop Date for that Construction Health Facility; or
 - (D) achieving:
 - (I) the commencement of provision of the Hard FM Services for the Existing Health Facilities (other than New Bathurst Hospital (Stage 2)) by the Hard FM Start Date;
 - (II) the commencement of provision of the Hard FM Services for the New Bathurst Hospital (Stage 2) by the New Bathurst Hospital (Stage 2) Completion Date; or
 - (III) the Soft FM Start Date for the Existing Health Facilities by the last day of the Interim Services Phase;
 - (ii) affects the ability of the Project Company to perform any of its other obligations under this deed,

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 2 of schedule 16.

22.3 NSW Health Change

- (a) 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 a Project Company Variation Proposal is made pursuant to the obligations of the Project Company under paragraph 1 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.
- (b) If the Project Company believes that a direction given by or an action of NSW Health constitutes a request for a Contract Variation, the Project Company must as soon as reasonable practicable thereafter notify the Project Director of its belief. Within 3 Business Days of receipt of such notification from the Project Company, the Project Director shall confirm whether such direction or action constitutes a request for a Contract Variation. If the Project Director confirms that such direction

or action constitutes a request for a Contract Variation, the Change Procedure shall apply and a NSW Health Variation Request shall be deemed to be issued on the date that the Project Director provides such confirmation to the Project Company.

22.4 Deemed NSW Health Variation Requests

Any Contract Variation proposed by the Project Company:

- (a) as a direct result of a Compensation Event; or
- (b) under clause 23.9;
- (c) under paragraph 8 of schedule 16;
- (d) as a direct result of the provision or carrying out of, or proposed provision of or carrying out of, an Unforeseeable Health Function;
- (e) as a direct result of a request made by NSW Health to the Project Company under clause 15.5(b)(v);
- (f) as a direct result of a sustained change in Operating Hours of at least 3 months duration pursuant to paragraph 3.2(h) of Part A of schedule 5;
- (g) as a direct result of NSW Health exercising its right under clause 51 or 71 of the New Bathurst Hospital Construction Contract to not have a Defect (as defined in the New Bathurst Hospital Construction Contract) made good and the exercise of that right has an adverse impact on the Project Company's ability to provide the Services;
- (h) under clause 22.3(b); or
- (i) under clause 28.3(b)(ii),

will be deemed to be a NSW Health Variation Request, provided that the Project Company must, at the time it issues the relevant request for Contract Variation, notify the Project Director that it considers that such request is being made in respect of one or more of the scenarios described in paragraphs (a) to (i) above and is therefore a deemed NSW Health Variation Request.

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) Where a NSW Health Variation Request involving Additional Work occurs during the Operations Phase for a Health Facility, and the Project Company and the Project Director, having invoked the Change Procedure, are unable to agree on the terms of the relevant Contract Variation, NSW Health may undertake, or appoint an Additional Work Contractor to undertake, the Additional Work, provided that, in

respect of the hydrotherapy pool at New Bathurst Hospital, NSW Health may undertake such works by way of a variation to the New Bathurst Hospital Construction Contract, and any consequential amendment to the Services will be effected in accordance with schedule 16.

- (b) 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.
- (c) Unless otherwise determined by the Project Director, the Project Company will be responsible for all aspects of the Services as they relate to such Additional Work, after completion or installation of the Additional Work. The resultant changes to the 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.

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 perform work on or in the vicinity of any Site at any time during the Term.
- (b) The Project Company must not hinder, prevent or delay any Third Party Contractor in carrying out their activities.

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 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.

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- (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 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 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 for a Construction Health Facility, from the Target Completion Date for that Construction Health Facility except that any extension of time to the Target Completion Date for that Construction Health Facility 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 Services then required to be provided under this deed were being fully provided; and
- (b) 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 Sites (other than the Project Company Facility Site) 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 Site (other than the Project Company Facility Site) or Health Facility, as the case may be, ceases 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) 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.

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

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- (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 Construction Health Facility, the Project Company bears the risk of loss or damage to Works relating to that Construction Health Facility and to the 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 the Site on or in which that Health Facility is located.
- (c) Except as expressly provided in this deed, the Project Company bears the risk of loss or damage to a Project Company Facility and to the Site in or on which that Project Company Facility is located.
- (d) The Project Company must, in accordance with clause 27, promptly make good any loss or damage to the Works, the Sites, the Project Company Facilities 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 clause 25.3, be responsible for, and must release and indemnify NSW Health, GWAHS, 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 Sites, the Works, the Project Company Facilities or the Health Facilities by the Project Company or any Project Company Related Party, including any Contamination of or Pollution occurring on or from any Site; and

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- (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.

25.3 Project Company not obliged to indemnify and limitation on liability

The Project Company will not be obliged to release or indemnify NSW Health, GWAHS, the State and their respective officers, employees and agents under clause 25.2 for any:

- (a) 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 Services;
 - (ii) a breach by 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 applicable Industrial Law or Industrial Instruments regarding the entitlements and benefits of Health Staff Members;
- (b) Loss to the extent only that NSW Health or the Director-General of the New South Wales Department of Health is expressly obliged to pay or bear such Loss under the Labour Services Agreement; or
- (c) Loss which is unforeseeable, indirect or consequential and which is incurred by NSW Health, GWAHS or the State or their respective employees and agents on their own behalf and not in respect of any third party Loss or Claim, provided that this clause 25.3(c) does not apply to any Loss which would otherwise be recoverable under clause 25.2(b) or in accordance with principles of general law.

25.4 Damage by NSW Health or NSW Health Related Parties

Loss of or damage to a Health Facility, a Project Company Facility or a Site or any part of a Health Facility, a Project Company Facility or a 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.

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 Works, the Sites, the Project Company Facilities or the Health Facilities or used or expected to be used to discharge any insured legal liability to third parties.

27. REINSTATEMENT**27.1 Project Company's Obligation to Reinstate**

If any loss or damage occurs to any part of the Works, a Project Company Facility or a Health Facility (except loss of damage arising in relation to a Defect to which clause 15.5(b) applies), the Project Company must (without limiting its other obligations under this document):

- (a) 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;
- (b) 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;
- (c) 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;
- (d) consult with the Project Director as to the programming of the works needed to effect the relevant replacement, reinstatement or remedy;
- (e) in carrying out the relevant replacement, reinstatement or remedy activities, minimise the impact on the Works, the Health Facilities and the Health Functions and keep the Project Director fully informed of the progress of the repair and replacement activities; and
- (f) apply all insurance proceeds and amounts paid to the Project Company under clause 28.3 received in respect of such loss or damage (other than the proceeds of delay in start-up insurance or business interruption insurance) towards the cost of the relevant replacement, reinstatement or remedy.

27.2 Direction Not to Replace or Reinstate

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;

- (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;
- (c) the Project Company will be relieved of its obligations to perform the Works or provide the 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 Proposal in relation to changes to obligations of the Project Company to perform the Works or provide the Services.

27.3 NSW Health May Repair or Reinstate

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 reinstate 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

- (a) 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:

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- (i) the Project Company must notify the Project Director within 5 Business Days of the risk becoming Uninsurable; and
 - (ii) 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 Quarterly Service 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 profit component of the business interruption insurances and clause 27.2 will apply; or
 - (ii) only in respect of a Material Risk required to be insured under paragraph 9 of schedule 14, if some, but not all of the Sites or Health Facilities are affected, make a NSW Health Variation Request pursuant to the relevant provisions of the Change Procedure, under which the affected Site or Health Facility, as the case may be, ceases to be subject to this deed.

For the avoidance of doubt, 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 this clause 28.3(b)(ii) will be undertaken on the basis that the Quarterly Service 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.

For clarity and without limitation, any Contract Variation (and the calculation of the associated Estimated Cost Effect) resulting from the application of this clause 28.3(b)(ii) is intended to have the effect that:

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- (A) 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
 - (B) 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; and
- (iii) only in respect of a Material Risk required to be insured under paragraph 9 of schedule 14, if all Sites or Health Facilities are 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.

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 reputable insurance companies in the commercial insurance market (or as otherwise agreed by NSW Health acting reasonably) and provide those 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

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- (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 Quarterly Service 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 Service Payment

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.

29.2 Invoices

On or about the fifteenth day of each Operating Month and on or about the date that is fifteen days following the Termination Date, the Project Company must submit to the Project Director an invoice in the form of the Pro Forma Invoice. 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 29.7.
- (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:

- (a) 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; or
- (b) Project Company disputes, in good faith, any amount due and payable by the Project Company to NSW Health under any Project Document which is retained or set off by NSW Health, NSW Health will be entitled to retain or set off 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 in accordance with the requirements of the Support Services Specification (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 Service 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;

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- (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 15(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 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 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 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 within 3 Business Days of each Fortnight End, 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 5 Business Days after the Fortnight End.

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 Services 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 Financial Close, the Project Company must provide to the Project Director, in respect of the Services which are subject to the Benchmarking Exercise, the rates for key inputs to those 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 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 (on the basis that premiums are paid quarterly) of obtaining the Benchmarked Insurances.
- (b) On each Insurance Benchmark Date, if the annual insurance premiums (uplifted by the Insurance Percentage for Fees and Charges) for the Benchmarked Insurances is greater or less than the insurance premiums (indexed by reference to the CPI and uplifted by the Insurance Percentage for Fees and Charges) for the Benchmarked Insurances at the first Commencement Date or the last Insurance Benchmark Date on which an adjustment to the Insurance Component of the Service Payment occurred under this clause, the Insurance Component of the Service Payment will be adjusted by the amount by which the insurance premium for the Benchmarked Insurance:
 - (i) exceeds the Insurance Component; or
 - (ii) is less than the 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 material 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 elsewhere in clause 33 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 due to the application of the breach, event of default or drawstop (or analogous) provisions under the Financing Agreements;

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- (vi) if a direction under section 14 of the *Australian Securities and Investments Commission Act 2001* (Cth), or an investigation under, or taken to be under, the *Australian Securities and Investments Commission Act 2001* (Cth) in relation to the Project Company or a Material Subcontractor results in ASIC forming an opinion, and publishing either an interim or final report to the effect that:
- (A) a serious contravention of the Corporations Act relating to the Project Company or a Material Subcontractor has occurred;
 - (B) a breach of applicable Law involving management, fraud or dishonesty relating to the relevant Project Company or Material Subcontractor has occurred; or
 - (C) action should be taken or proceedings commenced in relation to the issue of financial products, fraud or other serious misconduct to which the investigation related;
- (vii) during the Operations Phase for any Health Facility, 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,

(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, 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), 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); and
 - (iii) if the Breach is not capable of being remedied, fails to provide or implement a Prevention Plan in accordance with paragraph (b)(iii),

it will be deemed to be a **Project Default** and this deed may be terminated by NSW Health in accordance with clause 34.

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, GWAHS 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

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- (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 on the Project Company (a **Frequent Breach Notice**):

- (i) specifying that the notice is a formal Frequent Breach Notice;
 - (ii) giving reasonable details of the relevant Frequent Breaches; and
 - (iii) 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 or have 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 or have 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 the Works for a Construction Health Facility has not occurred, or NSW Health reasonably forms the view that Completion of the Works for a Construction Health Facility will not occur, in each case, by the Longstop Date for that Construction Health Facility;
- (b) the Project Company Abandons the Project;
- (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 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 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) the Project Company incurs Deductions in relation to:
- (i) more than 10 Level A Area Failure events in any one Operating Month, provided that where multiple Level A Area Failures in any one Operating Month are attributable to the same systemic 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 systemic event or failure, and that it is diligently implementing a remedy or rectification of such systemic event or failure, such Level A Area Failures will, for the purposes of this clause only, be treated as one Level A Area Failure for that Operating Month only; or
 - (ii) more than 20 Level A Area Failures over a period of three consecutive Operating Months, provided that Level A Area Failures attributable to the same systemic event or failure will be aggregated for the first Operating Month only in which they occur during any such period of three consecutive Operating Months for the purposes of determining whether the requirements of this paragraph (g)(ii) have been met,
- but, for the avoidance of doubt, aggregation of multiple Level A Area Failures under paragraph (g)(i) above is permitted for one Operating Month only, and does not prevent the occurrence of a Project Company Termination Event under this clause 34.1(g) as a result of subsequent or additional Level A Area Failures of the same kind, whether attributable to the same systemic event or failure or not, in subsequent Operating Months;
- (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:

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- (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 Site, a Project Company Facility or a Health Facility, 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 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, any Project Company 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 payment);
- (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 Health Facilities, the Project Company Facilities, the Support Services Equipment and the Sites 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 Health Facilities, the Project Company Facilities, the Support Services Equipment and the Sites 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 twelve 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.

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- (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 using its best endeavours, the Project Company is unable to obtain a bank guarantee which complies with the terms of clause 36.2(a), then NSW Health will deduct from each payment of the Gross Monthly Service Payment payable after such date 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 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 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, the Project Company

Facilities and the Support Services Equipment 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 clauses 14A.1(e) 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 NSW HEALTH 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 Services (or any of the Services) to NSW Health or any new contractor of such services the same or similar to the Services (**New Project Company**), including:

- (a) transfer or procure the transfer of all title, interest and rights in and to the Project, the Health Facilities, the Project Company Facilities, the Support Services Equipment (including a twelve month supply of maintenance spare parts and consumables for such Support Services Equipment), the Sites, 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 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 each Health Facility, Project Company Facility or Site, but not so as to interfere with or impede the provision of the 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 Sites, the Works, the Health Facilities, the Project Company Facilities and

the 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 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 Project Company Facilities; and
- (d) licence to use a copy of all software applications necessary to perform the Services to meet the requirements of this deed but excluding 'off the shelf' software.

37.3 Transfer of Responsibility

The Project Company must facilitate the smooth transfer of responsibility for the 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) 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;

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- (e) any provision of information to the Financiers or the Financiers' professional advisers or insurance advisers or any re-insurer of a monoline insurer 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 or Ancora 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 shareholders of the Project Company, 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 Benchmarking;
 - (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*, 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 schedule 2 until the Commencement Date for the New Orange Hospital.

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- (b) Subject to clause 39.2(c), the Project Company must not permit any 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 beneficial or legal ownership of any equity interests (including shares or units) that are listed on a prescribed financial market;
 - (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 Babcock & Brown Australia Pty Limited, 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 Babcock & Brown Australia Pty Limited or in which more than 50% of the equity interests are directly or indirectly owned by a related body corporate of Babcock & Brown Australia Pty Limited ACN 112 480 145,

will be disregarded.

For the purposes of this clause 39.2(c)(iii), each reference to "related body corporate of Babcock & Brown Australia Pty Limited" shall include a reference to "Everest Babcock & Brown".

- (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 accept the Change in Control or reject 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 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)(i) or (ii) then:

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- (i) the Project Company must at its own cost, terminate any Material Subcontract with that Material Subcontractor and re-tender those Works or 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
 - (iv) 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 (d) will not relieve the Project Company of any of its obligations under this deed including the provision of the Works and Services in accordance with this deed.

40. DISPUTE RESOLUTION

40.1 Dispute Resolution Procedure

- (a) If any dispute arises between NSW 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 the other party 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:

(i) select the process for resolution of the dispute; and

(ii) 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:

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- (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:
- (iv) initiate such enquiries and investigations as it considers necessary or desirable for the purposes of performing its functions; and
 - (v) 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: 73 Miller Street
North Sydney, NSW 2000
Fax number: (02) 9391 9831
Attention: Director, Asset Services

with a copy to:

Address: 73 Miller Street
North Sydney, NSW 2000
Fax number: (02) 9391 9831

Attention: NSW Health Representative (Orange and Associated Health Services PPP Project)

The Project Company

Address: Level 23, The Chifley Tower
2 Chifley Square
Sydney NSW 2000
Fax number: 02 9223 2907
Attention: The Company Secretary

with a copy to:

Address:

Fax number:
Attention:

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 other than in respect of Project Company Facilities) 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 Deed, the Master Licence Agreement, the Project Security, the Licences 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 makes a supply to another party under or in connection with this deed, then (unless the consideration is expressly stated to be inclusive of GST) the consideration for that supply is exclusive of GST, and in addition to paying or providing that 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 the 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.
- (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) If a party provides a payment 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, the provider must pay, and indemnify the recipient on demand against, the amount of that GST.
- (e) If any party is required under this deed to reimburse, indemnify or pay to another party an amount paid or incurred by that party, the amount of the reimbursement, indemnity or payment will be reduced by the amount of any input tax credits or reduced input tax credits to which that party is entitled in respect of any acquisition relating to that cost, expense or other amount.

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- (f) 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).
 - (g) 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.
 - (h) 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.

42.4 Liability for Expenses

- (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) 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.

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- (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 Priority of Interpretation

- (a) Subject to paragraphs (b) and (c) below, 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 the Project Company Proposals) and each document provided or agreed in accordance with this deed;
 - (iii) the Specifications; and
 - (iv) the Project Company Proposals.
- (b) To the extent that there is an inconsistency between the Facility Specification and the Support Services Specification, the Support Services Specification will prevail unless the Project Director otherwise directs.
- (c) 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, the Project Company must satisfy and meet the obligations and liabilities in the Project Company Proposals.

42.10 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.

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- (c) Nothing in paragraph (b) prevents the partial waiver of a power or right, but paragraph (b) applies equally to such partial waiver.

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

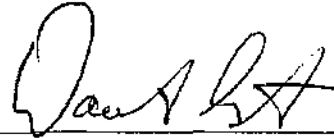
This deed may be executed in counterparts.

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.

EXECUTED as a deed.

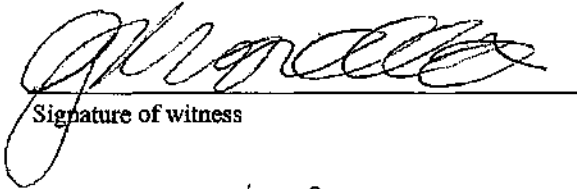
SIGNED, SEALED and DELIVERED by
as delegate of the **HEALTH
ADMINISTRATION CORPORATION**
pursuant to section 21 of the Health
Administration Act 1982 (NSW) in the
presence of:



Signature of Delegate

David Gates

Name of Delegate

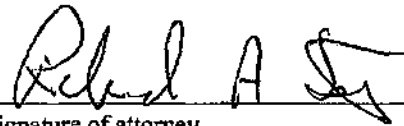


Signature of witness

GUERN MONCLOT

Name


SIGNED, SEALED and DELIVERED for
Pinnacle Healthcare (OAHS) Pty Ltd as
Trustee of the Pinnacle Healthcare (OAHS)
Trust under power of attorney in the
presence of:



Signature of attorney

RICHARD A SMITH

Name



Signature of witness

JENNIFER TYLER

Name

13/12/07

Date of power of attorney