

# Financiers tripartite deed

## Northern Beaches Hospital

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Health Administration Corporation and the Northern Sydney Local Health District (together the **State**)

NBH Operator Co Pty Ltd in its capacity as trustee of the NBH Operating Trust (**Operator**)

NBH Operator B Pty Ltd (**Operator B**)

[            ] (**Borrower**)

[            ] (**Security Trustee**)

MinterEllison

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# Details

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## Date

## Parties

Name	<b>Health Administration Corporation</b>
ABN	45 100 538 161
Registration	a corporation sole constituted under section 9 of the <i>Health Administration Act 1982</i> (NSW)
Short form name	<b>HAC</b> and, together with the NSLHD, the <b>State</b>
Notice details	[●] Facsimile: [●] Attention: [●]
Name	<b>Northern Sydney Local Health District</b>
ABN	63 834 171 987
Short form name	<b>NSLHD</b> and, together with HAC, the <b>State</b>
Notice details	[●] Facsimile: [●] Attention: [●]
Name	<b>NBH Operator Co Pty Ltd</b> (ACN 169 029 181) in its capacity as trustee of the NBH Operating Trust
Short form name	<b>Operator</b>
Notice details	[●] Facsimile: [●] Attention: [●]
Name	<b>NBH Operator B Pty Ltd</b>
ACN	602 943 911
Short form name	<b>Operator B</b>
Notice details	[●] Facsimile: [●] Attention: [●]
Name	<b>[Name]</b>
Short form name	<b>Borrower</b>
Notice details	[●] Facsimile: [●] Attention: [●]

Name [Name] ACN [No.]  
Short form name **Security Trustee**  
Notice details [●]  
Facsimile: [●]  
Attention: [●]

## Background

- A The State, Operator B and the Operator have entered, or will enter, into the Project Deed for the provision of the Project.
- B The Operator, the Security Trustee and others have entered, or will enter, into the Financing Agreements to finance the Project.
- C The Security Trustee is entering into this document so that it may exercise certain rights upon the Operator defaulting under the Project Deed and/or the Financing Agreements.

# Agreed terms

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## 1. Defined terms & interpretation

### 1.1 Defined terms

In this document:

**Appointed Representative** means a Representative that has stepped in under clause 4.6.

**Commercially Sensitive Information** means:

- (a) any pricing information relating to the Financing Facilities;
- (b) any information relating to the Project Obligor's, a Debt Financier's, the Borrower's, a Debt Financier's or the Security Trustee's cost structure or profit margins;
- (c) any information relating to any of the Project Obligor's, a Debt Financier's or the Security Trustee's Proprietary Material; or
- (d) any information which is commercially sensitive in that it provides a competitive advantage or has a unique characteristic to the Project Obligors, a Debt Financier or the Security Trustee or the Project Obligor's, a Debt Financier's or Security Trustee's shareholders, financiers or subcontractors,

including but not limited to the information described in Schedule 1 (if any).

**Derivative Document** means a document or agreement (including confirmation) establishing the terms of, or effecting the assignment or novation of, any Derivative Transaction directly or indirectly between a Project Obligor and any Debt Financier.

**Derivative Transaction** means any contract, agreement or arrangement that is a hedge, swap, option, cap, collar, floor, forward rate agreement, arbitrage transaction, futures contract (as defined in the Corporations Act), derivative production or other treasury transaction, in respect of interest rates (whether or not constituting a combination or variation of any of the foregoing).

**Enforcement Action** means:

- (a) the appointment of a Representative to a Project Obligor or any of its property;
- (b) any action by the State to enforce the Project Security; or
- (c) any action by the Security Trustee to enforce the Finance Security.

**Finance Default Notice** has the meaning given to that term in clause 3.2.

**Finance Event of Default** means an 'Event of Default' as defined in the Syndicated Facility Agreement.

**Financier Termination Notice** has the meaning given to that term in clause 3.1.

**Financiers Tripartite Agreement** means each of:

- (a) the Financiers Construction Contract Tripartite Deed; and
- (b) the Financiers Parent Company Tripartite Deed.

**Financiers Tripartite Rights** has the meaning given to that term in clause 9.2(a).

**Financiers' Sunset Date** means the date which is 22 months after the Date for Final Completion.

**Financing Security Trust** means the NBH Security Trust.

**Fit and Proper Person** means a person or entity who:

- (a) is solvent and reputable;
- (b) does not have an interest which conflicts in a material way with the interests of the State or is involved in a business or activity which is incompatible or inappropriate in relation to the Project or the use of the Facility; and
- (c) has a sufficient level of financial, managerial and technical capacity to deliver the Project, and provided that the novation of the Operator's rights and liabilities under the Project Documents or transfer to that person in accordance with clause 5.1 would not and would not likely:
  - (d) be against the public interest;
  - (e) lead to the occurrence of a Probity Event;
  - (f) have a Material Adverse Effect; or
  - (g) increase the level of risk or liabilities of the State or any State Related Party.

**General Security Deed** has the meaning given to that term in the Syndicated Facility Agreement.

**HAC** means Health Administration Corporation (ABN 45 100 538 161), a corporation sole constituted under section 9 of the *Health Administration Act 1982* (NSW).

**Novation Date** means the date any novation or transfer referred to in clause 5.1(a) becomes effective.

**NSLHD** means Northern Sydney Local Health District.

**Order of Priorities** means the order of priorities between the Project Security and the Finance Securities as set out in clause 9.3(a).

**President** has the meaning given to that term in clause 4.5(b).

**Pre-Step In Period** means, in respect of a Step In Notice, the period ending on the later of;

- (a) 20 Business Days after the date of the Step In Notice; and
- (b) if the Step-In Report is submitted within 20 Business Days after the date of the Step In Notice, the Step In Date,

(or such longer period as the Client Representative may agree with the Security Trustee in writing).

**Probity Event** means an event, matter or thing which:

- (a) has a material adverse effect upon the character, honesty or integrity of the Security Trustee, the Operator, a Subcontractor;
- (b) has a material adverse effect upon the public interest and public confidence in the Project; or
- (c) involves a material failure to achieve or maintain:
  - (i) reasonable standards of ethical behaviour;
  - (ii) the avoidance of conflicts of interest; or
  - (iii) standards of behaviour expected of a corporation engaged in a project with the NSW Government.



**Project Breach** means a breach by a Project Obligor of any of its obligations under the Project Documents (and includes an Operator Event of Default or an Operator Termination Event).

**Project Deed** means the deed entitled '*Project Deed – Northern Beaches Hospital*' dated on or about the date of this document between the State, Operator B and the Operator.

**Project Obligor** means the Operator, Operator B and the Borrower.

**Remedy** means, with respect to a breach, default or event (**Event**):

- (a) if the Event is capable of being cured or redressed, to cure or redress the Event;
- (b) if the Event is not capable of being cured or redressed, to:
  - (i) overcome, to the satisfaction of the State, the consequences of that Event so that there ceases to be any continuing detrimental effect of that Event and so that any prior detrimental effect is rectified so that the State and any State Related Party is in the position it would be in as if the Event had not taken place; and
  - (ii) take all steps to prevent the recurrence of the Event (to the satisfaction of the State (in its sole discretion)).

To 'Remedy' may involve making arrangements satisfactory to the State (in its sole discretion) including the replacement of a defaulting contractor, the assignment or novation of a Project Obligor's interests in the Project Documents and/or the payment of reasonable compensation.

**Representative** means, with respect to a Security Holder:

- (a) the Security Holder; and
- (b) an attorney, trustee, agent, manager, receiver, receiver and manager, administrator, liquidator, provisional liquidator or analogous person appointed under or in connection with the Security Holder's Security or pursuant to court order on application by a Security Holder.

**Secured Money** has the meaning given to that term in the Finance Securities.

**Secured Property** means all the property and assets the subject of both the Project Security and a Finance Security.

**Security** means the Project Security or the Finance Security or each of them as the case requires.

**Security Holder** means the State or the Security Trustee or each of them as the case requires.

**State** means HAC and the NSLHD.

**State Priority Amounts** means any amounts owed by the Operator to the State under the Project Documents (including by way of damages, indemnity or reimbursement) with respect to any Super Priority Obligation or with respect to the exercise, enforcement or attempted exercise or enforcement by the State or its Representatives of any Super Priority Obligation, provided that it does not include any Termination Payment under the Project Deed.

**State Secured Obligations** means has the meaning given to 'Obligations' in the Project Security.

**State Tripartite Rights** has the meaning given to that term in clause 9.1(a).

**Step In Date** means the date on which a step in is effected in accordance with clause 4.6.

**Step In Notice** has the meaning given to that term in clause 4.2(a).

**Step In Period** means, subject to clause 4.10, the period commencing on the Step In Date ending on and including the earlier of:

- (a) the date specified in a notice issued in accordance with clause 4.8(a);
- (b) the date specified in the relevant Step In Report;
- (c) the Novation Date;
- (d) the Early Handover Date;
- (e) the Public Patient Portion Expiration Date; and
- (f) the date falling 180 days after the Step In Date.

**Step In Report** means the report produced in accordance with clause 4.4, as updated in accordance with this deed.

**Step Out Date** means the date the Step In Period ends, expires or terminates.

**Subordination Deed** has the meaning given to that term in the Syndicated Facility Agreement.

**Suitable Substitute Operator** means a proposed contractor notified as approved by the State under clause 5.1(b).

**Suitable Transferee** means a proposed person to take a transfer of the interests in a Project Obligor, or the interests in any person who Controls a Project Obligor, which are subject to the Finance Securities, as approved by the State under clause 5.1.

**Super Priority Obligation** means a right of the State or an obligation of the Operator under:

- (a) clause 60 (Emergencies and State Step-in), 78.4 (State action following Operator Termination Event), 83 (State inspection) and Schedule 8 (Step-In Procedure) of the Project Deed; and
- (b) clauses 80 (Termination during the Development Phase), 81 (Termination during the Operating Term), 92 (Handover obligations) and 95 (Schedule 22 applies) (but only to the extent it relates to clause 92 (Handover obligations)) of the Project Deed,

or each of them as the case requires.

**Surviving Clauses** has the meaning given to that term in clause 18.10.

**Suspense Date** means the earliest of the dates on which any of the following have occurred and have not ceased to apply:

- (a) an Enforcement Action has been taken under a Security;
- (b) the State has:
  - (i) terminated the Project Deed;
  - (ii) exercised or enforced or given notice to the Security Trustee that it intends to exercise or enforce a Super Priority Obligation. Such a Suspense Date will cease to apply if the State has exercised or enforced none of the Super Priority Obligations for a continuous period of 40 Business Days; or
  - (iii) given the Security Trustee a Financier Termination Notice. Such a Suspense Date will cease to apply if the applicable Operator Termination Events have been Remedied and any Project Breaches have been cured, redressed or its consequences overcome;
- (c) the Security Trustee or a Debt Financier has accelerated the repayment of any Financial Indebtedness or derivative transactions under the Financing Agreements;

- (d) the Security Trustee has not given a Step In Notice within 20 Business Days of receiving a Financier Termination Notice; or
- (e) the Security Trustee has breached an obligation under this document. Such a Suspense Date will cease to apply when the breach has been remedied.

For the avoidance of doubt, a Suspense Date may occur more than once.

**Tax** means a tax, levy, duty, charge, deduction or withholding, however it is described, that is imposed by an Authority, together with any related interest, penalty, fine or other charge.

## **1.2 Definitions in Project Deed**

Subject to clause 1.1 and unless otherwise provided, terms used in this document that are defined in the Project Deed have the same meanings in this document.

## **1.3 Interpretation**

The parties agree to be bound by clause 1.2 of the Project Deed as if set out in its entirety in this clause 1.3, except that for the purposes of this document:

- (a) clause 1.2(c) of the Project Deed will be deemed to be omitted;
- (b) references in clause 1.2 of the Project Deed to 'this document' shall be read as references to 'this document'; and
- (c) references in clause 1.2 of the Project Deed to 'the Operator' shall be read as references to 'the Operator and the Security Trustee'.

## **1.4 Priority of interpretation**

If there is any inconsistency between the provisions of this document and:

- (a) any other Project Document, this document will prevail to the extent of any inconsistency; and
- (b) any other Financing Agreement, this document will prevail to the extent of any inconsistency (notwithstanding clause 1.8 (*Priority of interpretation*) of the Syndicated Facility Agreement).

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

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 document howsoever such rights, obligations or liabilities are sought to be enforced.

## **1.6 Multiple parties**

If a party to this document is made up of more than one person, or a term is used in this document 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.

## **1.7 Client Representative**

The State must procure that the parties to this document are notified, within 5 Business Days after the date of the appointment of the Client Representative, of the identity and address of the Client

Representative, and, as soon as practicable, of any changes in the identity or address of the Client Representative.

## **1.8 Project Documents**

The Security Trustee acknowledges that it has received a copy of the Project Deed and the Side Deeds.

## **1.9 No liability**

Subject only to the terms of the Project Deed in respect of the Project Obligors, notwithstanding the terms of this document, the State shall not be liable to a Project Obligor or the Security Trustee under this document or otherwise and neither a Project Obligor or the Security Trustee shall have any entitlement under this document or otherwise for an act or omission of the State or any State Related Party to the extent that the State's act or omission is caused by an act or omission of the Operator, an Operator Related Party or the Security Trustee.

## **1.10 Approvals and consents**

- (a) For the avoidance of doubt, all approvals, consents, decisions or exercises of discretion required to be given or made by the State or the Client Representative:
- (i) relating to, or arising under or in connection with this document;
  - (ii) relating to the satisfaction of a condition precedent pursuant to the terms of this document; or
  - (iii) sought in relation to or in connection with, or referable to, or determinative of, the occurrence of any Project Breach,

and regardless of whether the requirement of the approval, consent, decision or exercise of discretion is express or implied, the State or the Client Representative (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, the State or the Client Representative (as the case may be) must act reasonably.

- (b) Without limitation, the State or the Client Representative will not be acting unreasonably if, in giving or withholding any approval or consent, or in imposing any conditions, the State or the Client Representative:
- (i) acts in accordance with relevant government policies;
  - (ii) adopts a 'whole of government' approach; or
  - (iii) acts to protect its reputation.

## **1.11 Security Trustee**

- (a) The Security Trustee enters into this document only in its capacity as trustee of the Financing Security Trust and in no other capacity. A liability arising under or in connection with this document is limited to and can be enforced against the Security Trustee only to the extent to which it can be satisfied out of property of the Financing Security Trust out of which the Security Trustee is actually indemnified for the liability. This limitation of the Security Trustee's liability applies despite any other provision of this document and extends to all liabilities and obligations of the Security Trustee in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this document.

- (b) The parties other than the Security Trustee may not sue the Security Trustee in any capacity other than as trustee of the Financing Security Trust, including seeking the appointment of a receiver (except in relation to property of the Financing Security Trust), a liquidator, an administrator or any similar person to the Security Trustee or prove in any liquidation, administration or arrangement of or affecting the Security Trustee (except in relation to property of the Financing Security Trust).
- (c) The provisions of this clause 1.11 shall not apply to any obligation or liability of the Security Trustee to the extent that it is not satisfied because under the Security Trust Deed or by operation of Law there is a reduction in the extent of the Security Trustee's indemnification out of the assets of the Financing Security Trust, as a result of the Security Trustee's fraud, gross negligence or breach of trust.
- (d) No attorney, agent, receiver or receiver and manager appointed in accordance with this document has authority to act on behalf of the Security Trustee in a way which exposes the Security Trustee to any personal liability and no act or omission of any such person will be considered fraud, gross negligence or breach of trust of the Security Trustee for the purpose of clause 1.11(c).
- (e) The Security Trustee is not obliged to do or refrain from doing anything under this document (including incurring any liability) unless the Security Trustee's liability is limited in the same manner as set out in clauses 1.11(a) to 1.11(d).
- (f) The Security Trustee enters into this document as trustee for and on behalf of the Debt Financiers and may enforce this document on behalf of the Debt Financiers in accordance with the Security Trust Deed.

### 1.11A Replacement Security Trustee

If the Security Trustee is replaced as trustee under the Security Trust Deed, then the Security Trustee:

- (a) may assign, novate or otherwise transfer its rights and obligations under this deed to the replacement security trustee if it is:
  - (i) a Related Body Corporate of the Security Trustee; or
  - (ii) has all of the required qualifications, consents, authorisations and approvals necessary to carry on the business of a security trustee and is carrying on a business similar to that of the Security Trustee; and
- (b) will be released from its obligations under this deed when the replacement security trustee provides, in form and substance reasonably acceptable to the other parties to this deed:
  - (i) copies of a deed poll under which the replacement security trustee undertakes to be bound by this deed as the Security Trustee with effect from the date of that deed poll; and
  - (ii) evidence that it has undertaken to be bound by each other Project Document and each Financing Agreement to which the Security Trustee is a party.

### 1.12 Novation to State Nominee

The parties acknowledge that:

- (a) each of HAC and the NSLHD will novate its rights and obligations under this document to any person to whom it novates or otherwise transfers its rights and/or obligations under the Project Deed (**State Nominee**); and

- (b) if HAC or the NSLHD is required to novate its rights and obligations under this document to a State Nominee in accordance with paragraph (a):
  - (i) each of the parties consents to that novation;
  - (ii) the parties must promptly do all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to HAC or the NSLHD (as applicable) and the State Nominee) to give effect to that novation; and
  - (iii) from the date of such novation to the State Nominee, all references to 'the State' in this document will be deemed to include reference to the State Nominee in place of HAC or the NSLHD (as applicable).

### 1.13 Relations between Operator B and Operator

Clause 1.11 of the Project Deed applies to this document as if set out in full in this document, with any necessary amendments.

## 2. Acknowledgments and consents

### 2.1 Acknowledgments of the State

The State:

- (a) acknowledges and consents to the creation and execution of the Finance Securities;
- (b) acknowledges and agrees that the Security Trustee is not subject to any duty or obligation under the Project Documents as a result of the Finance Securities, except as specifically set out under this document;
- (c) acknowledges and agrees that the creation or existence of the Finance Securities is not, of itself, a Project Breach;
- (d) acknowledges and agrees that, without limiting the liability of the Project Obligors (which continues to be responsible for the performance of its obligations under the Project Documents), neither the Security Trustee nor any other Representative will be liable, or taken to have assumed liability, for any liability of a Project Obligor to make payment under or otherwise perform the Project Documents by reason only of the enforcement of any rights under the Finance Securities, the appointment of the Representative or the exercise of the Representative of any of the Project Obligor's rights or powers under the Project Documents.
- (e) acknowledges and agrees that the Security Trustee may attend meetings of the Project Co-ordination Group during the period and for so long as an Operator Event of Default or Operator Termination Event is subsisting.

### 2.2 No extension of rights

- (a) Unless expressly authorised under this document, nothing in this document, a Financing Agreement or any Security Interest in favour of the Security Trustee or a Debt Financier (**Finance Document**):
  - (i) authorises the Security Trustee or Representative of it to do anything which a Project Obligor may not do under the Project Deed;
  - (ii) operates to grant the Security Trustee rights greater than the rights of the Project Obligors under the Project Deed; or
  - (iii) authorises a Debt Financier or any Representative appointed by the Security Trustee or a Debt Financier to do any act or thing without the State's consent

where, under the Project Deed, a Project Obligor requires the State's consent to such act or thing.

- (b) The Security Trustee agrees with the State not to exercise any power or remedy under the Finance Documents in a manner which is inconsistent with this document or, unless expressly authorised under this document, which enables the Security Trustee to do anything in respect of the Project Deed, which a Project Obligor is not permitted to do under the Project Deed.

## 2.3 Acknowledgments of the Security Trustee

The Security Trustee:

- (a) acknowledges and consents to the creation and execution of the Project Security; and
- (b) acknowledges and agrees that the creation or existence of Project Security is not, of itself, a Finance Event of Default or breach of any Financing Agreement.

## 2.4 Nature of consent

Neither the Security Trustee nor the State, by their respective consents given in clauses 2.1 and 2.3, will be deemed to have:

- (a) approved the terms of any document;
- (b) agreed, affirmed, represented or warranted the validity or enforceability or binding nature of any document as against any other person; or
- (c) consented to any document granting or creating any interest in any right, title or property other than as set out in this document.

# 3. Termination Notices and Events of Default

## 3.1A Notices under Project Deed

The State agrees with the Security Trustee that it will give the Security Trustee a copy of any notice given by the State to a Project Obligor in respect of a Project Breach (including any relevant notice given under clause 60 (Emergencies and State Step-In), clause 77 (Operator Event of Default) or clause 78 (Termination of this document) of the Project Deed at the same time as the notice is given to the Project Obligor.

## 3.1 Notice of Operator Termination Event

The State shall not issue a Termination Notice unless it is entitled to do so under the Project Deed and without giving to the Security Trustee a prior written notice (**Financier Termination Notice**) setting out:

- (a) the proposed date of the Termination Notice (which must not be less than 20 Business Days from the date of the Financier Termination Notice);
- (b) the proposed date on which the Project Deed will terminate; and
- (c) details of the Operator Termination Event on which the Termination Notice is based.

The giving of a Financier Termination Notice does not oblige the State to terminate the Project Deed.

## 3.2 Notice of Finance Event of Default

- (a) The Security Trustee must, within 2 Business Days of giving notice to a Project Obligor that, a Finance Event of Default has occurred, give notice (**Finance Default Notice**) to the State setting out:

- (i) reasonable details of the Finance Event of Default; and
  - (ii) whether the Security Trustee or the Facility Agent intends to exercise its rights under the Financing Agreements and, if so, the proposed date for, and proposed method of, such exercise.
- (b) If at any time after a Finance Default Notice has been given, the intentions of the Security Trustee change from that set out in the Finance Default Notice or it is instructed pursuant to the Security Trust Deed to take action to enforce the Finance Security, the Security Trustee must promptly give a further notice to the State setting out the action it proposes to take and date on which it proposes to take that action.

## 4. Financiers cure and step in rights

### 4.1 Financiers cure rights

- (a) The State acknowledges and agrees that the Security Trustee will have rights under the Financing Agreements to take steps to Remedy, or procure the Remedy, of a Project Breach, in conjunction with the Project Obligors' rights to Remedy Project Breaches under the Project Deed.
- (b) The State acknowledges and agrees that all acts, matters or things done or effected by the Security Trustee which would satisfy (had they been done or effected by a Project Obligor) any of the obligations of a Project Obligor shall be effective, as between the State and the Project Obligor, to satisfy and discharge the obligations of the Project Obligor to the same extent as if it had been done or effected by the Project Obligor.
- (c) The Security Trustee acknowledges, agrees and undertakes to the State that the rights referred to in paragraph (a) and its rights under the Finance Securities will be exercised subject to and in accordance with this document.

### 4.2 Step In Notice and Termination Notice

- (a) At any time during the period commencing upon receipt by the Security Trustee of a Financier Termination Notice and ending one Business Day prior to the proposed date of issue of a Termination Notice (as specified in the Financier Termination Notice) the Security Trustee may (but is not obliged to) give notice to the State (**Step In Notice**) stating that a Representative intends to step in to the Project Obligors' rights and obligations under and interest in the Project Documents by a nominated date before expiry of the Pre-Step In Period.
- (b) The State must not issue a Termination Notice during the period from the issue of Financier Termination Notice unless and until permitted under clause 4.8.
- (c) The State will only be entitled to issue a Termination Notice in accordance with clause 4.8.

### 4.3 Consultation and proposed Representative

- (a) Prior to the Step In Date, the Security Trustee must provide details of the proposed Representative including reasonable particulars requested by the State.
- (b) Within 5 Business Days of the receipt by the State of the Step In Notice, the State and the Security Trustee must meet to settle a Step In Report in accordance with clause 4.4.

### 4.4 Step In Report

- (a) The State and the Security Trustee will jointly produce a report in relation to the Step In Period, which will include the following details:



- (i) any obligations which are or will become outstanding by the Project Obligors to the State under the Project Documents during the Step In Period;
  - (ii) a detailed program to Remedy any Project Breaches;
  - (iii) details of the proposal for performance of obligations which are or will become outstanding by the Project Obligors to the State under the Project Documents during the Step In Period;
  - (iv) a program to Remedy any Finance Events of Default;
  - (v) timing of the Step In Period and actions to be taken during the Step In Period (with such period to take into account particulars of the event or circumstance); and
  - (vi) details of the proposed insurance arrangements during the Step In Period.
- (b) The State may designate an auditor and/or technical adviser to verify any information provided in relation to the Step In Report. Each party to this document must provide access to and make copies of all records, documents, data and accounting and other information relating to the Project Works or otherwise to the Project in its possession which the auditor or technical adviser reasonably requires in order to make such verification or itself determine such information.
- (c) All costs incurred by any party in relation to the production or verification of the Step In Report will be paid or reimbursed on demand by the Operator.
- (d) The State and the Security Trustee will use all reasonable efforts for a period of 5 Business Days after the date of the first meeting pursuant to clause 4.3(a) to jointly produce and settle a report in relation to the Step In Period. If, at the end of that period, the State and the Security Trustee have not reached agreement on a Step In Report, either party may refer the matter for dispute resolution on an expedited basis in accordance with clause 4.12.

#### 4.5 Approval of Representative

- (a) The Security Trustee acknowledges that in order to exercise the rights set out in clause 4.6 the Representative must be, in the opinion of the Client Representative, a suitable and appropriate person to carry on the Project, and must demonstrate to the satisfaction of the Client Representative that it is, and will continue to be, able to carry out (or procure the carrying out of) the obligations of the Project Obligors under the Project Deed. The Representative may, with the Client Representative's prior written approval, engage additional skilled consultants to assist it in carrying out the obligations of the Project Obligors under the Project Deed.
- (b) At any time during the Step In Period, the Client Representative may notify the Security Trustee that it does not approve of the proposed Representative exercising the rights set out in clause 4.6 and the Security Trustee must nominate a substitute proposed Representative, accepted by the State, within 10 Business Days. If the substitute proposed Representative is not accepted by the State, either party may refer the selection of an appropriate Representative to the President for the time being of the Institute of Chartered Accountants (**President**) who must only select an appropriate Representative who, in the opinion of the President:
- (i) is a suitable and appropriate person to carry on the Project Works and otherwise the Project; and
  - (ii) is and will continue to be, able to carry out (or procure the carrying out of) the obligations of the Project Obligors under the Project Deed,

and the parties agree that the decision of the President on the identity of the Representative will be binding on both parties, provided the decision of the President is based on the criteria set out in clauses 4.5(b)(i) and 4.5(b)(ii).

#### 4.6 Step In

- (a) If within the Pre-Step In Period:
  - (i) a Step In Report has been agreed by the State and the Security Trustee; and
  - (ii) the Security Trustee has provided written notice to the State that a Representative has stepped in to the Operator's rights and obligations under and interest in the Project Documents, and has complied, and continues to comply, with its obligations under this clause 4,

and without limiting the other actions which the Security Trustee may elect to take following the occurrence of a Project Breach or a Finance Event of Default or otherwise, a Representative may before expiry of the Pre-Step In Period exercise its rights under the Financing Agreements to step in to possession and control of the Project Obligors' rights and obligations under and interest in the Project Documents (**Appointed Representative**) on the date nominated in the Step In Notice, or such later date as the Client Representative may agree (the **Step In Date** being the date on which the Representative takes such possession and control).

- (b) Each Project Obligor acknowledges that any action taken under this clause 4 will not affect any rights the Appointed Representative, the State, the Security Trustee and the Debt Financiers may have against the Project Obligor.
- (c) The Security Trustee agrees with the State not to knowingly exercise (and to procure that any Appointed Representative does not exercise) any rights (whether arising under a Finance Security or otherwise) in any manner which interferes with or restricts in any way the undertaking of the Public Patient Portion Works, the Private Patient Portion Works or otherwise the provision of the Project, or the proper and lawful exercise or enforcement or attempted exercise or enforcement by the State of its powers (including the Super Priority Obligations).

#### 4.7 Effects of Step In and Remedy

- (a) The Security Trustee must give written notice to the Client Representative of any further details, plans and reports regarding the status of the Project, the Project Works and the implementation of the Step In Report (and any consequential changes to the Step In Report) at least once in each month during the Step In Period. At the State's discretion, the Step In Report will be updated to take into consideration matters raised by the Security Trustee not contemplated in the original Step In Report.
- (b) The Security Trustee must (or must ensure that the Appointed Representative does):
  - (i) during a Step-in Period observe and perform the Operator's obligations and covenants under the relevant Project Documents in accordance with the agreed Step In Report; and
  - (ii) minimises any disruption to the Project Works or otherwise the Project (as applicable) under the Project Deed, as a result of it exercising its rights or carrying out its obligations under this document.
- (c) Without limiting clause 4.7(b) the Security Trustee acknowledges and agrees that neither it nor any Appointed Representative shall in any way interfere with the performance by each Subcontractor of its obligations under its Subcontract, including by limiting or

otherwise restricting its access to the Site or the Facility, except as expressly contemplated by the Step In Report, without obtaining the Client Representative's prior written consent.

- (d) The State acknowledges and agrees that:
- (i) any Remedy of any Project Beach or Operator Termination Event or performance of a Project Obligor's obligations under a Project Document effected by the Security Trustee or an Appointed Representative under this clause 4, will be effective, as between the State and the Project Obligor, to satisfy and discharge the relevant obligation of the Project Obligor or to Remedy the relevant Project Beach or the Operator Termination Event, as applicable, to the same extent as if it had been done or effected by the Operator;
  - (ii) subject to paragraphs (iv), (v), (vi), and (vii), a Project Obligor or the Appointed Representative will be taken to have remedied or overcome the effect of a Project Beach or an Operator Termination Event which cannot be remedied, if the Project Obligor or Appointed Representative has implemented a program approved by the State in writing to prevent the recurrence of the Project Beach or the Operator Termination Event, or has taken such other steps or made such other arrangements as are satisfactory to the State (in its absolute discretion) to overcome or mitigate the effects of the Operator Termination Event;
  - (iii) without derogating from any other rights the Security Trustee may have under this document or the Finance Securities, the State agrees that if the Security Trustee appoints a Representative under the Finance Securities and as permitted under this document, that appointment will not of itself constitute a Project Beach or an Operator Termination Event;
  - (iv) if the Security Trustee appoints a Representative under the Finance Securities then that appointment will be taken, for the duration of that appointment in accordance with this document, to Remedy any Project Beach or Operator Termination Event constituted by an Insolvency Event in relation to the Operator, the Parent Company or the Operator Holding Company or Operator Termination Event under clause 78.1(m), which occurred prior to the appointment or which subsists or occurs during the appointment, provided that the Security Trustee or the Representative is diligently performing the Operator's Activities;
  - (v) if the Security Trustee or a Representative can demonstrate to the satisfaction of the State (acting reasonably) that Final Completion can be achieved by the Financiers' Sunset Date, then that will be taken to Remedy any Operator Termination Event under clause 78.1(b), clause 78.1(c), clause 78.1(e) (and/or an Operator Event of Default under clause 77.1(j) or (k)), provided that the Security Trustee or the Representative is diligently pursuing Final Completion by the Financiers' Sunset Date; and
  - (vi) any Enforcement Action taken in accordance with this document will not, of itself, give rise to a right of termination of the Project Deed or a Project Beach.
- (e) The Security Trustee acknowledges and agrees that the State is not liable for any costs incurred or amounts paid by the Security Trustee, a Debt Financier or any Representative of them in Remediating or attempting to Remedy any Project Beach or Operator Termination Event.

## 4.8 Termination of Project Deed

- (a) The State will be entitled to terminate the Project Deed by written notice to the Operator, the Security Trustee and the Appointed Representative only where:
- (i) a Financier Termination Notice has been delivered by the State to the Security Trustee in accordance with this document and a Step In Notice has not been given by the Security Trustee on or before the latest date by which a Step In Notice may be given under clause 4.2(a);
  - (ii) where a Step In Notice has been given, the corresponding Step In Date does not occur by the end of the relevant Pre-Step In Period;
  - (iii) the Security Trustee or its Appointed Representative notify the State in writing that they do not intend to cure the breach which gave rise to the Operator Termination Event or a Step In Period is terminated under clause 4.9;
  - (iv) prior to the preparation of a Step In Report in accordance with clause 4.4, neither the Appointed Representative nor the Operator is, in the reasonable opinion of the Client Representative, using all reasonable endeavours to mitigate the impacts of any Project Breach that:
    - (A) arose prior to the Step In Date;
    - (B) is continuing; and
    - (C) would have or, with the passage of time or the giving of notice or both, would have entitled the State to terminate the Project Deed;
  - (v) after the preparation of the Step In Report in accordance with clause 4.4, or the update of a Step In Report in accordance with clause 4.7, the Appointed Representative does not Remedy the relevant Project Breaches or is not continuing the performance of any obligation in accordance with the Step In Report (as updated in accordance with clause 4.7) during the Step In Period; or
  - (vi) an Operator Termination Event occurs during the Step In Period, other than an Operator Termination Event which arises as a result of a Project Breach which is identified in the Step In Report (or the update of a Step In Report in accordance with clause 4.7(a)) and which is being Remedied in accordance with the Step In Report, and is not cured within 20 Business Days or such longer period as is agreed by the State (acting reasonably).
- (b) During the Step In Period, the Project Deed shall remain in full force and effect and the State's rights under the Project Deed will continue subject to this document.
- (c) The State will not be entitled to issue a Termination Notice in relation to any Project Breach or Operator Termination Event which has been remedied or cured by the Operator or the Appointed Representative in accordance with a Cure Plan adopted pursuant to clause 77.4 (Cure Plan) of the Project Deed or in accordance with a Step In Report. A Project Breach or Operator Termination Event which cannot be remedied will be considered to be no longer subsisting for the purposes of issuing a Termination Notice in relation to any Operator Termination Event if a Project Obligor or the Appointed Representative has implemented a program approved by the State in writing to prevent the recurrence of the Operator Termination Event including in accordance with a Prevention Plan adopted pursuant to clause 77.6 (Prevention Plan) of the Project Deed or in accordance with a Step In Report.

- (d) Each of the Operator and the State must notify the other as soon as it becomes aware of a Project Breach or Operator Termination Event which is subsisting as at the Step In Date, but is not identified in the Step In Report prepared in accordance with clause 4.4(a), and the Step In Report must be updated in accordance with clause 4.7(a) to take account of such event or circumstance.

#### **4.9 Step out**

- (a) The Appointed Representative may, at any time during the Step In Period, with 10 Business Days prior written notice to the State, terminate the Step In Period with effect from the date specified in that notice.
- (b) The giving of a notice under clause 4.9(a) by the Appointed Representative will not limit any of the rights (if any) of the State against the Appointed Representative where the Appointed Representative has expressly adopted or assumed an obligation or liability of the Operator under the Project Documents or has expressly assumed an obligation or liability of the Operator under this document.

#### **4.10 Extension of Step In Period**

- (a) The Security Trustee may, by written notice to the Client Representative, request that the Step In Period be extended. If the Security Trustee makes a request, it must provide to the Client Representative an updated Step In Report containing full details of all steps which the Security Trustee or Appointed Representative is taking, or proposes to take, during the Step In Period and any extension of it. Where the Security Trustee or its Appointed Representative is diligently pursuing the cure of any Project Breach and the performance of the requirements of the Step In Report, the Client Representative will not unreasonably refuse to extend the Step In Period for up to 120 days in aggregate (with such period to take into account particulars of the event or circumstance) by giving written notice to the Security Trustee and the Appointed Representative.
- (b) The Security Trustee may apply for (and the State must grant) any number of extensions to the Step In Period in respect of a Project Breach of the type described in clause 4.7(d)(v) if the Security Trustee of a representative can demonstrate to the satisfaction of the State that Final Completion can be achieved by the Financier's Sunset Date, and the Security Trustee or the Representative is diligently pursuing Final Completion by the Financier's Sunset Date.
- (c) In any other circumstances, the Client Representative may, in its absolute discretion, extend the Step In Period by written notice to the Security Trustee and the Appointed Representative. For the avoidance of doubt, the exercise of the Client Representative's discretion under this clause 4.10(b) is not subject to clause 1.10.
- (d) If a Compensation Event or Relief Event occurs or the State exercises its rights in respect of a Super Priority Obligation under clause 9.3(e), following a written request by the Security Trustee to the State, the Step In Period will be extended to the extent that it prevents the Security Trustee or the Appointed Representative from pursuing the Remedy of the relevant Project Breach. The Step In Period will be extended by an amount of time which is reasonably necessary to overcome the delays caused by those events and does not extend further than the period granted under the Project Deed.

#### **4.11 Acts and omissions of Appointed Representative**

- (a) The Operator is liable to the State for the acts and omissions of the Appointed Representative and any contractor or person engaged by the Appointed Representative in connection with this document and the Operator:

- (i) consents to the Appointed Representative exercising its rights under this clause 4; and
  - (ii) agrees that any act or omission of the Appointed Representative or any contractor or person engaged by the Appointed Representative in exercising the rights and powers of the Operator under the Project Documents is deemed to be an act or omission of the Operator under the Project Documents.
- (b) If the Appointed Representative takes any steps to Remedy a Project Breach, the Security Trustee must require that the Appointed Representative not, in doing so, do anything which, if it were done by the Operator, would be a breach of any Project Document.

#### **4.12 Dispute Resolution**

The Security Trustee and the State agree that if there is a dispute in relation to the production or contents of the Step In Report under clause 4.4 (Step In Report), either party may refer that dispute for resolution in accordance with clause 87.5(a) (Expert determination) of the Project Deed, as if that clause was set out in full in this deed and a reference to the Operator was a reference to the Security Trustee, and provided that any determination conducted in accordance with this clause will be final and binding.

### **5. Novation**

#### **5.1 Suitable Substitute Operator**

- (a) At any time during the Step In Period, the Security Trustee may notify the State that it wishes to:
- (i) procure the novation of a Project Obligor's rights, obligations and liabilities under the Project Deed and other relevant Project Documents to a Suitable Substitute Operator; or
  - (ii) transfer the interests in a Project Obligor, or the interests in any person who Controls a Project Obligor, which are subject to the Finance Securities, to a Suitable Transferee.
- (b) Subject to clause 5.1(c), the Client Representative must notify the Security Trustee as to whether any person to whom the Security Trustee proposes a novation of or transfer under clause 5.1(a) is acceptable on or before the date falling 30 days after the date of receipt of all information reasonably required by the State to decide whether the proposed novatee or transferee is acceptable. If the Client Representative notifies the Security Trustee that the subject person is unacceptable, the Operator may, within the Step In Period (as may be extended under clause 4.10(a)), propose an alternative Suitable Substitute Operator or Suitable Transferee, in which case, the provisions of clauses 5.1(b) and 5.1(c) will apply to that alternative person.
- (c) A person to whom the Security Trustee proposes a novation or transfer of the Operator's rights, obligations and liabilities (or the interests in a Project Obligor) under clause 5.1(a) will be acceptable to the State if the State is satisfied (acting reasonably) that that person:
- (i) is a Fit and Proper Person (and each person who Controls that person is a Fit and Proper Person); and
  - (ii) in the case of a novation of a Project Obligor's rights, obligations and liabilities under the Project Deed and other relevant Project Documents, will assume all of the obligations and liabilities of the Project Obligor under the Project Documents.

- (d) At any time after the approval of a Suitable Substitute Operator or Suitable Transferee by the Client Representative in accordance with clauses 5.1(b) and 5.1(c), the Security Trustee may, on 10 Business Days' prior written notice to the State procure the novation of the Operator's rights, obligations and liabilities under the Project Deed and other relevant Project Documents to the Suitable Substitute Operator proposed in the notice given to the State under clause 5.1(a) or, in the case of the approval of a Suitable Transferee, procure the transfer or other disposal proposed in the notice given to the State under clause 5.1(a).

## 5.2 Effect of Novation or Transfer

- (a) On and from the Novation Date:
- (i) any then subsisting ground for termination of the Project Deed by the State shall be deemed to have no effect provided the Suitable Substitute Operator Remedies any continuing Project Breach or Operator Termination Event (including, if such event is not capable of remedy, implements a prevention plan to prevent the recurrence of such Project Breach or Operator Termination Event) within the time periods specified in the Step In Report;
  - (ii) the Suitable Substitute Operator will become a party to the Project Deed and the other Project Documents in place of the relevant Project Obligor and the Suitable Substitute Operator will be treated as if it had originally been named as a party to the Project Deed in place of the relevant Project Obligor;
  - (iii) the Suitable Substitute Operator will assume and enjoy the rights and powers and perform and discharge the obligations and liabilities of the relevant Project Obligor under the Project Deed, whether such obligations and liabilities have arisen before, or will arise after, the Novation Date, and the relevant Project Obligor will be released from all such obligations and liabilities;
  - (iv) the State will owe the obligations and liabilities on the part of the State under the Project Deed to the Suitable Substitute Operator in place of (and will be released by) the Operator, including any undischarged liability in respect of any loss or damage suffered or incurred by the Operator or adjustment, rebate or other amounts due from the State to the Operator in respect of any period prior to the Novation Date;
  - (v) the Suitable Substitute Operator and its parent company must execute and deliver Security Interests and any other applicable documents in substantially the same terms as the Project Security; and
  - (vi) the Security Trustee (or new financiers if applicable) must enter into a tripartite deed with the State and the Suitable Substitute Operator on substantially the same terms as this document.
- (b) On and from the date of a transfer in accordance with clause 5.1(d), any then subsisting ground for termination of the Project Deed by the State shall be deemed to have no effect provided any continuing Project Breach or Operator Termination Event is remedied (including, if such event is not capable of remedy, implements a prevention plan to prevent the recurrence of such Project Breach or Operator Termination Event) in accordance with and within the time periods specified in the Step In Report.

### **5.3 Continuation of Step In Period**

If any proposed novation to a Suitable Substitute Operator or transfer to a Suitable Transferee under clause 5.1(a) is not effected in accordance with this clause 5 and if the Step In Period has not otherwise expired, the Step In Period will continue (subject to the terms of this document).

### **5.4 Novation of Financing Agreements**

The Security Trustee:

- (a) acknowledges the State's rights under clause 80.7 (Novation of liabilities to the State) of the Project Deed to assume some or all of the Operator's rights and liabilities under the Financing Agreements upon termination of the Project Deed; and
- (b) agrees that it will do all things reasonably necessary to assist the State to exercise the State's rights under clause 80.7 (Novation of liabilities to the State) of the Project Deed.

### **5.5 Replacement Subcontractor**

- (a) The Security Trustee and the Operator must ensure that no person is engaged to replace a Key Subcontractor by it without first:
  - (i) obtaining the prior consent of the State; and
  - (ii) disclosing to the State such details of the relevant person and of the proposed terms and conditions of that person's engagement as a replacement Key Subcontractor as may be reasonably necessary in order to enable the State to determine whether it will so consent.
- (b) If the State's consent is sought under clause 5.5(a), the State will not unreasonably withhold or delay giving that consent if:
  - (i) it has received all of the details referred to in clause 5.5(a)(ii);
  - (ii) were the same appointment made by the Operator, the appointment and the replacement Key Subcontractor would comply with the Project Deed; and
  - (iii) the proposed terms and conditions of that person's engagement are not materially less onerous from the perspective of the sub-contractor than those which apply to the current sub-contractor and include a requirement to perform such of the obligations of the current Key Subcontractor under the relevant Subcontract which remain unsatisfied.

## **6. Revival of termination rights**

Subject to the operation of clause 5, if a Financier Termination Notice has been issued and the Operator Termination Event specified in the Financier Termination Notice is continuing, the State will be entitled on and after the earlier of:

- (a) if no Step In Notice is issued in accordance with clause 4.2, the proposed date of issue of the applicable Termination Notice (as specified in the Financier Termination Notice); or
  - (b) if a Step In Notice has been issued but no corresponding Step In Date has occurred, expiry of the relevant Pre-Step In Period; or
  - (c) if a Step In Period has commenced, the relevant Step Out Date,
- to:
- (d) exercise any rights available to it in relation to that Operator Termination Event, including issuing a Termination Notice where it is entitled to do so under this deed. Such



Termination Notice will take effect immediately or at the time stated in the Termination Notice; and

- (e) pursue any claims and exercise any remedies, in addition to termination, which the State may have under the Project Documents or otherwise against the Operator.

## 7. Insurance proceeds

Notwithstanding clause 9.3, to the extent the insurance proceeds paid or payable in connection with the Project are received by the Security Trustee, the Security Trustee acknowledges and agrees with the State that:

- (a) the insurance proceeds paid or payable in connection with the Project must be applied in accordance with Project Deed; and
- (b) the Security Trustee will use reasonable endeavours to assist the Operator to comply with the relevant provisions of the Project Deed.

## 8. Acknowledgments of the Operator

The Operator joins in this document to acknowledge, consent and agree to the arrangements set out, and agrees not knowingly to do or omit to do anything that may prevent any party from enforcing its rights under this document.

## 9. Priority of Security and Tripartite Rights

### 9.1 State Side Deeds

- (a) The Security Trustee acknowledges the rights (**State Tripartite Rights**) of the State under each Side Deed and the Project Deed to, amongst other things, require an assignment or novation of the Key Subcontracts and Material Subcontracts.
- (b) Subject to clause 9.2, the Security Trustee will use its best endeavours to ensure that rights under the Financing Agreements are exercised in a way which facilitates the effective exercise by the State of the State Tripartite Rights.
- (c) To the extent the exercise of any of the State Tripartite Rights involves the assignment or novation of a Key Subcontract or Material Subcontract and/or a guarantee provided in respect of a Key Subcontract or Material Subcontract, the Security Trustee will release the relevant party, as the case may be, from the relevant Finance Security to facilitate the assignment or novation, as the case may be.

### 9.2 Tripartite Priority

- (a) The State acknowledges the rights (**Financiers Tripartite Rights**) of the Security Trustee under each Financiers Tripartite Agreement.
- (b) The State and the Security Trustee agree that:
  - (i) if the Security Trustee exercises its rights to step in accordance with clause 4, the Financiers Tripartite Rights will take precedence over the State Tripartite Rights for the duration of the Step In Period, provided that the State's prior written consent will be required to any substitution of, or the termination, assignment or novation of, a Key Subcontract except as set out in a Step In Report; and

- (ii) if the Security Trustee has not exercised, and until such time as it does exercise, its rights to step in accordance with clause 4 or if its Step In Period has ended, the State Tripartite Rights will take precedence over the Financiers Tripartite Rights.
- (c) The Security Trustee shall provide to each Key Subcontractor copies of any Step In Notice and shall advise each Key Subcontractor, at least two Business Days prior to the expiry of the Step In Period, of the Step Out Date.

### **9.3 Security Priority**

- (a) Subject to clause 9.3(e), the State and the Security Trustee agree that the Project Security and the Finance Securities rank in the following order of priority:
  - (i) first, the Project Security for payment and satisfaction of any State Priority Amounts;
  - (ii) second, after payment or satisfaction in full of all State Priority Amounts, the Finance Security for payment and satisfaction of the Secured Money; and
  - (iii) third, after payment and satisfaction in full of the Secured Money, the State Secured Obligations (other than the State Priority Amounts).
- (b) Subject to clause 9.3(e), the State agrees that it will not take any Enforcement Action under or in respect of Project Security (or make an application for the winding up of, or the appointment of a liquidator to, a Project Obligor) without first obtaining the consent of the Security Trustee (which consent must not be unreasonably delayed or withheld).
- (c) Subject to clause 9.3(e):
  - (i) any enforcement action under the Finance Securities will take precedence over any enforcement action under the Project Securities; and
  - (ii) if a Representative is appointed in relation to any property under any of the Finance Securities, that Representative may (if it notifies the State of its desire to do so) assume possession and control of that property from any Representative in possession and control of that property under the Project Security, and the Project Securities will not preclude or restrict the free dealing with the property by such a Representative appointed under the Finance Securities, notwithstanding the security created by or any provision of the Project Security to the contrary.
- (d) Without limiting clause 9.3(e), if the State appoints an Enforcing Party in the circumstances referred to in clause 9.3(e)(ii), then the Security Trustee must procure that any Representative appointed under the Finance Securities will promptly and fully cooperate with the Representative appointed by the State to the extent that the State reasonably requires and not do anything to prevent or hinder the Representative appointed by the State.
- (e) The State and the Security Trustee agree that:
  - (i) the Super Priority Obligations have priority over any rights granted to the Financier under the Financing Agreements (including under the Finance Security) and over any rights of the Security Trustee and Debt Financiers under any Security Interest with respect to any assets that have been leased, licensed, bailed or in respect of which possession or control has been otherwise delivered to the Operator; and
  - (ii) clauses 9.3(a) and 9.3(b) above do not prevent the State from:

- (A) exercising or enforcing, or enforcing the Project Security for the purpose of or to assist or facilitate exercising or enforcing, a Super Priority Obligation;
  - (B) enforcing the Project Security before or during the decision period (as defined section 9 of the Corporations Act) if an administrator has been appointed by any person under Part 5.3A of the Corporations Act; or
  - (C) enforcing the Project Security at any time after payment in full of the Secured Money.
- (f) Nothing in this document:
- (i) prevents the State from making a demand under a performance bond issued in its favour or the Parent Company Guarantee, or applying the proceeds of a performance bond issued in its favour or Parent Company Guarantee, to satisfy the State's Secured Obligations or otherwise as permitted under the Project Documents;
  - (ii) requires the State to share such proceeds with the Security Trustee or to make a demand or apply the proceeds before enforcing the Project Security;
  - (iii) limits the rights of the State in relation to any third party; or
  - (iv) affects the State's rights to set-off under clause 55.7 (Rights of Set-Off) of the Project Deed.
- (g) The Order of Priorities operates in respect of all amounts received by the Security Trustee or the State on a realisation of their respective Securities.
- (h) The provisions of this clause 9.3 will apply despite:
- (i) the respective dates of execution and registration of the Finance Securities and Project Security;
  - (ii) anything contained in the Finance Securities or Project Security;
  - (iii) the Security Trustee or the State having notice of any Security Interest held by the other or the date of any such notice;
  - (iv) the respective dates on which money may be or may have been, advanced or deemed to be advanced, or become owing or payable under the Finance Securities or Project Security;
  - (v) the payment in whole or in part from time to time of any money secured by the Finance Securities or Project Security;
  - (vi) the amounts secured by the Finance Securities or Project Security fluctuating from time to time and in particular being reduced and subsequently increased;
  - (vii) the re-lending or re-advance of money or the lending or advance of additional money or the furnishing of additional financial accommodation, secured by the Finance Securities or Project Security;
  - (viii) any amounts secured by the Finance Securities or Project Security being a contingent liability;
  - (ix) the Finance Securities or Project Security being or becoming at any time and for any reason wholly or partly invalid or unenforceable;
  - (x) any rule of law or equity to the contrary;

- (xi) any amendment or variation to the terms of any of the Finance Securities or Project Security; or
- (xii) notice of any matter specified in any of the other sub-clauses contained in this clause 9.3(h).

#### **9.4 Application of payments on enforcement**

To give effect to the Order of Priorities, the parties agree that any moneys received by a Security Holder or any Representative appointed under a Security on enforcement of a Security will (subject to any prior claim at Law) be applied in the following order of priority:

- (a) first, *pari passu* towards the reasonable costs, charges and expenses of a Security Holder or a Representative appointed under a Security, in each case incurred in the enforcement of a Security in accordance with this document;
- (b) secondly, towards the remuneration of any such Representative;
- (c) thirdly, to the Security Holders in accordance with the Order of Priorities; and
- (d) fourthly, any surplus amount is to be paid to an account in the name of the Operator with any bank nominated in writing by the Operator. That surplus will not carry interest while held by a Security Holder or Representative.

#### **9.5 Receipts**

If a Security Holder receives any payment in cash or in kind or recovers any amount (including by way of set off or combination of accounts) in relation to the Project other than as contemplated in clause 7 or clause 9.3(f)(i) (**Receipt**) after the Suspense Date, then that Security Holder will immediately pay the amount of the Receipt to the Representative whose appointment has priority, and the relevant Representative will:

- (a) retain the relevant amount in full in a suspense account to secure payment of the State Secured Obligations and the Secured Money until all obligations under the Project Deed have been performed in full or the State otherwise agrees in writing; and
- (b) then, distribute the relevant amount in accordance with clauses 9.3(a) and 9.4 as if it were proceeds of enforcement.

#### **9.6 Registration and notice**

Each Security Holder must cooperate with a view to reflecting the priorities set out in this Deed:

- (a) in any register with any filing or registration authority; and
- (b) in giving notice to insurers and debtors liable for obligations covered by a Security.

#### **9.7 Marshalling**

Neither the Security Trustee nor the State are obliged to marshal in favour of the other. If any of the Finance Securities or Project Security become enforceable, each of the Security Trustee and the State in their absolute discretion (subject to any express restriction in this document) may determine the extent (if any) to which it will have recourse to any of the Finance Securities or Project Security.

#### **9.8 Contingent liabilities**

If a Security secures contingent liabilities to the State or the Security Trustee then, until the State or the Security Trustee (as the case may be) is satisfied that the contingent liability has been extinguished, the State or the Security Trustee may retain from the proceeds of a realisation of the Security an amount consistent with the Order of Priorities which they reasonably estimate to be the amount of the contingent liability.

## 9.9 Right of set-off

- (a) The State agrees that it will not exercise any right of set off or combination of accounts in relation to a Project Obligor except as expressly permitted under the Project Documents.
- (b) The Security Trustee agrees that it will not exercise any right of set off or combination of accounts in relation to a Project Obligor except:
  - (i) as expressly permitted under the Financing Agreements; and
  - (ii) in accordance with and subject to the Order of Priorities, by application in reduction of the Financier's Secured Obligations.

## 9A. Title documents

For so long as there is Secured Money, the Security Trustee will be entitled to hold all documents of title, all certificates, scrip and other indicia of each Project Obligor's title or interest in any Marketable Securities (as defined in the Finance Securities), all negotiable instruments other than cheques, and all other documents of title to the whole or part of the collateral secured by the Finance Securities, and to the extent such documents of title have been lodged with the Security Trustee, the Project Obligors will be deemed not to be in breach of any obligation to hand over such documents of title to the State under the Project Securities.

## 10. Representations and warranties

### 10.1 Representations and warranties

- (a) The State represents and warrants that:
  - (i) **(power)** it has the power to execute, deliver and perform its obligations under this document and all necessary action has been taken to authorise that execution, delivery and performance;
  - (ii) **(binding obligations)** this document constitutes its valid, legal and binding obligations enforceable against it in accordance with their terms subject to equitable remedies and Laws in respect of the enforcement of creditors' rights; and
  - (iii) **(no contravention)** the execution, delivery and performance of this document by it will not contravene any Law to which it is subject.
- (b) The Operator represents and warrants that:
  - (i) **(status and power)** 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 this document and all necessary corporate and other action has been taken to authorise that execution, delivery and performance;
  - (ii) **(binding obligations)** this document constitutes the Operator's valid, legal and binding obligations enforceable against the Operator in accordance with their terms subject to equitable remedies and Laws in respect of the enforcement of creditors' rights;
  - (iii) **(no contravention)** the execution, delivery and performance of this document by the Operator will not contravene any Law to which the Operator is subject, or any deed or arrangement binding on the Operator; and
  - (iv) **(Financing Agreements)** the Financing Agreements to which it is a party set out all the terms, conditions and warranties of the agreements, arrangements and

understandings between it and the other parties to the Financing Agreements in respect of the subject matter of those Financing Agreements; and

- (v) **(Project Documents)** the Project Documents set out all of the terms, conditions and warranties of the agreements, arrangements and understandings between the Operator of the one part and the State of the other part in respect of the subject matter of the Project.
- (c) The Security Trustee (both in its own right and as trustee of the Financing Security Trust) represents and warrants that:
  - (i) **(power)** it has full legal capacity and power under the Security Trust Deed to enter into this document and to carry out the transactions that this document contemplates, as trustee of the Financing Security Trust;
  - (ii) **(trust authority)** all action that is necessary or desirable under the Security Trust Deed or at Law to:
    - (A) authorise its entry into this document and its carrying out the transactions that this document contemplates;
    - (B) ensure that this document is legal, valid and binding on it as trustee of the Financing Security Trust and admissible in evidence against it in that capacity; and
    - (C) enable it to properly carry on the business of the Financing Security Trust, has been taken;
  - (iii) **(binding obligations)** this document constitutes its valid, legal and binding obligations enforceable against it in accordance with their terms subject to equitable remedies and Laws in respect of the enforcement of creditors' rights;
  - (iv) **(no contravention)** the execution, delivery and performance of this document by it will not contravene any Law to which it is subject; and
  - (v) **(Financing Agreements)** before the date of this document, it has fully disclosed to the State the terms of the Financing Agreements and each Security Interest securing amounts owing under those Financing Agreements.

## 10.2 Survival of representations and indemnities

All representations and warranties in this document:

- (a) survive the execution and delivery of this document;
- (b) remain in full force and effect for the term of this document; and
- (c) are given with the intent that liability under this Deed will not be confined to breaches of those representations and warranties discovered prior to the date of this document.

## 11. Undertakings

### 11.1 Copies of Financing Agreements

The Security Trustee agrees to promptly give to the State a photocopy of each Financing Agreement once executed, certified by an authorised officer of the Security Trustee to be a true copy.

## 11.2 Amendment of Financing Agreements

Each of the Operator and the Security Trustee undertakes and agrees that:

- (a) no Refinancing may be effected except in accordance with clause 70 (Financing and Refinancing) of the Project Deed; and
- (b) without limiting clause 11.1 it may not otherwise terminate, amend, waive or vary the terms of the Financing Agreements to which it is a party or enter into other agreements or arrangements which relate to the subject matter of the Financing Agreements, without the prior written consent of the State, except to the extent:
  - (i) it is an assignment, transfer or other disposal permitted under clauses 1.11A or 11.5;
  - (ii) entry into and termination of any Derivative Document permitted by the Financing Agreements;
  - (iii) it is an amendment, novation, assignment or transfer under clause 16;
  - (iv) it is a waiver of a condition precedent to a drawing under a Financing Agreement;  
(each a "**Permitted Amendment**")

The Operator must give notice to the State of any Permitted Amendment within 5 Business Days after that Permitted Amendment is made, including details of the reasons for the Permitted Amendment and copies of any documents relevant to the Permitted Amendment.

## 11.3 Amendment of Project Documents

The State undertakes and agrees that it will not agree to or permit any material amendment to a Project Document to which it is a party (other than amendments which would not reasonably be expected to affect the interests of the Debt Financiers) without the Security Trustee's prior consent, which must not be unreasonably withheld or delayed.

## 11.4 Money secured under Finance Securities

- (a) The Operator and the Security Trustee each warrant to the State that the only obligations to the Security Trustee which form part of the Secured Money are the obligations of the Security Providers under as a defined in the Financing Agreements.
- (b) The warranty in clause 11.4(a) will be deemed to be repeated on each anniversary of the date of this document.

## 11.5 Assignment

- (a) The Security Trustee acknowledges and agrees that neither it, nor any Representative may assign, transfer or otherwise dispose of any of the property the subject of the Finance Securities other than in accordance with this document.
- (b) The Security Trustee acknowledges and agrees that it may not (and it must not permit any Debt Financier whose commitments are not fully drawn or utilised to) assign, transfer or otherwise dispose of all or any part of its (or that Debt Financier's) rights, benefits or obligations under any of the Financing Agreements unless the assignee:
  - (i) is an existing Debt Financier;
  - (ii) is a financier that has a Required Rating or is, in the State's opinion, suitably guaranteed by an entity which has a Required Rating or is on the list of entities

approved by the State on or before Financial Close (as updated with the approval of the State from time to time); or

- (iii) is a party acceptable to the State.

## **11.6 Release of Finance Securities**

Without limiting clause 11.7, the Security Trustee will release the Finance Securities on the payment and satisfaction in full of the Secured Money.

## **11.7 Release of Security**

- (a) If a Security Holder or Representative appointed by it, under any Enforcement Action taken under its Security as permitted under this document, sells, procures the transfer or novation of or otherwise disposes (in accordance with this document) of any asset subject to a Security of the other Security Holder (**Disposal**) or notifies the other Security Holder that it will do so, the other Security Holder must:
  - (i) unconditionally and irrevocably release the relevant asset from its Security as soon as possible and in any event within 5 Business Days of receipt of a written notice from the Security Holder requiring it to do so, so long as the proceeds of sale from the Disposal are distributed in accordance with clause 9.5; and
  - (ii) do all things including registering documents as the Security Holder or Representative may reasonably require or as may be necessary or desirable to give effect to that release.
- (b) Notwithstanding anything else in this document, the Security Trustee has no obligation to release the Operator's rights to any Termination Payment from a Finance Security.

## **11.8 Project Deed Notices**

The State consents to the Operator giving the Security Trustee copies of notices under the Project Deed.

## **11.9 Financing Agreement Notices**

The Security Trustee must give the State a copy of any document issued by the Security Trustee (or, in the case of the Syndicated Facility Agreement, the Facility Agent) under Clause 16.2 (*Consequences of an Event of Default*), Clause 16.5 (*Review Events*) or Clause 17.2 (*Enforcement of Security*) of the Syndicated Facility Agreement, Clause 6.5 (*Exercise of enforcement and other powers*) and Clause 7.1 (*Termination of Appointment*) of the Security Trust Deed, Clause 1A (*Each Grantor must pay the Secured Money*) or Clause 7.1 (*Enforcement*) of the General Security Deed, or Clause 3.3 (*Liquidation of a Subordinated Creditor*) of any Subordination Deed within 2 Business Days of the issue of the notice. The Operator consents to the Security Trustee giving the State copies of those documents.

## **11.10 No caveats**

The Security Trustee (and any person on its behalf) must not lodge a caveat on the title to the Site except in circumstances permitted by the Project Deed.

## **12. Restriction on Security Trustee's rights**

### **12.1 Payment on termination of Project Deed**

The Operator and the Security Trustee acknowledge and agree that no amount will be payable to any of them under this document, the Project Deed or any other Project Document, and it will have no rights against the State in respect of the termination of the Project Deed or any other



Project Document in accordance with this document and the Project Deed or other Project Document, except the Termination Payment (if any) payable to the Operator under and in accordance with Schedule 12 (Termination Payments) of the Project Deed.

## 12.2 Recognition of certain rights under Project Documents

- (a) Subject to the express provisions in this document in relation to the Operator / HAC Security, the Security Trustee agrees not to exercise (and to procure that any Representative appointed under the Finance Security shall not exercise) any rights (whether arising under the Finance Security or otherwise) in any manner that prevents, frustrates, hinders, interferes with or restricts in any way, the exercise by the State of its rights under the Project Documents.
- (b) Without limiting clause 12.2(a), the Security Trustee recognises and acknowledges the Super Priority Obligations available to the State under the Project Documents and agrees that the Super Priority Obligations may be exercised by the State or other Representative of it even if the Financier has appointed a Representative or otherwise taken Enforcement Action under the Finance Security (whether or not with the State's consent).

## 12.3 Appointment of Representatives

- (a) The Security Trustee acknowledges and agrees that it:
  - (i) will not appoint a Representative under the Finance Security unless the proposed Representative is a person of good character, has appropriate financial and technical capacity and in accordance with clause 4.5 (**Proper Person**); and
  - (ii) will replace the Representative if the Representative (and each person who Controls that person) is not a Proper Person and the State, within ten Business Days of receiving notice of appointment, reasonably requires the Security Trustee to replace that Representative, in which case the Security Trustee agrees to replace the Representative promptly with another Representative who is a Proper Person.

## 12.4 Restriction on right to dispose of property

- (a) The Security Trustee acknowledges and agrees that neither it nor any Representative may exercise its rights under the Finance Security to assign, transfer or otherwise dispose of any Secured Property (including to lease or licence to access, use or occupy any part of the Site) or agree to do so unless:
  - (i) the disposal is in accordance with clause 5;
  - (ii) if the Project Deed and the other Project Documents have been terminated and the Operator has performed in full its obligations under the Project Documents; or
  - (iii) it has obtained the prior consent of the State.

## 13. Indemnity

The Operator indemnifies each of the State and the Security Trustee against, and must pay them on demand the amount of, all losses, liabilities, expenses and Taxes incurred in connection with the administration, and any actual or attempted preservation or enforcement, of any rights under this document.

## 14. Confidentiality

### 14.1 Keep confidential

- (a) Subject to clause 14.2, the parties must keep confidential all matters relating to this document 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 document.
- (b) The parties acknowledge and agree that the Commercially Sensitive Information is of a confidential nature and will be received, supplied and communicated in circumstances of confidence and on a commercial-in-confidence basis.
- (c) The Security Trustee must not, and must ensure that its employees and agents do not, disclose any personal, confidentiality or other information of Patients (including Medical Records) or the Consumers.

### 14.2 Permitted Disclosure

Clause 14.1 will not apply to:

- (a) the disclosure by the State of any information that is not Commercially Sensitive Information;
- (b) any disclosure of information that is reasonably required by persons engaged in the performance of the obligations of a party;
- (c) 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 14.1;
- (d) any disclosure which is required by any Law (including any order of a court of competent jurisdiction, including in accordance with the GIPA Act);
- (e) any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- (f) any disclosure of information to any prospective permitted assigns of any party to this deed or any Debt Financier or prospective investors in or shareholders of the Operator, in each case to the extent reasonably necessary to enable a decision to be taken on the proposal;
- (g) any disclosure by the Client Representative, of information relating to the provision of 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 any proposed new or replacement contractor, its advisers and lenders should the State decide to re-tender the Project Deed or replace the Operator in accordance with the Project Deed;
- (h) any disclosure of information by the Client Representative to any other department, office or agency of the NSW Government;
- (i) any disclosure of information in connection with the Project by the State (including Commercially Sensitive Information), provided the information is marked as confidential and the State uses reasonable endeavours to inform the recipient that the relevant information is confidential, and such disclosure is:
  - (i) as authorised in writing by the Operator;
  - (ii) to any Minister;
  - (iii) in accordance with all Laws;

- (iv) by the Minister of Health, the Premier of New South Wales, the Treasurer, the Department of Health and Ageing of New South Wales (including the Secretary of Health or any chief executive of the Department of Health and Ageing of New South Wales) or NSW Treasury in the performance of their functions or the discharge of their duties, including in responding to any questions, making a public statement, or releasing information in relation to a matter of public interest;
- (v) to satisfy the requirements of parliamentary accountability or any other reporting or recognised public obligations of the State; and
- (vi) in accordance with the *Ombudsman Act 1976* (Cth);
- (j) any disclosure by the Client Representative of any document relating to this document and which the Operator (acting reasonably) has agreed with the Client Representative contains no Commercially Sensitive Information;
- (k) any disclosure of information by the Client Representative or the Operator to the Debt Financiers; or
- (l) any disclosure of information required by a stock exchange or a New South Wales or Commonwealth regulator.

### 14.3 Obligations Preserved

Where disclosure is permitted under clause 14.2, other than clauses 14.2(a), 14.2(c), 14.2(d), 14.2(g) and 14.2(h), 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 document.

### 14.4 Disclosure by the State

- (a) Notwithstanding the other provisions of this clause 14, the parties acknowledge that:
  - (i) the Project Documents will be made available to the Auditor-General in accordance with the *Public Finance and Audit Act 1983* (NSW);
  - (ii) information concerning the Project Documents may be tabled in Parliament by or on behalf of the State and will be published in accordance with the Guidelines;
  - (iii) information concerning the Project Documents will be published on the State's contracts register in accordance with the GIPA Act; and
  - (iv) the State and the Client Representative may make the Project Documents (other than the Subcontracts) or any of them available to any person.
- (b) The parties acknowledge that:
  - (i) by entering into this document, the State has consulted with the Operator and the Security Trustee in relation to the disclosure of all information concerning the Project Documents that is required to be disclosed by the State pursuant to Division 5 of Part 3 of the GIPA Act and that is not Commercially Sensitive Information;
  - (ii) the State will notify the Operator and the Security Trustee of any proposed disclosure of Commercially Sensitive Information by the State under the GIPA Act no later than 20 Business Days before the proposed date of disclosure;
  - (iii) following notification by the State in accordance with clause 14.4(b)(ii), the State will take reasonable steps to consult with the Operator and the Security Trustee

before disclosing Commercially Sensitive Information, including under the GIPA Act;

(iv) if, following:

- (A) notification by the State in accordance with clause 14.4(b)(ii); or
- (B) consultation between the State, the Operator and the Security Trustee in accordance with clause 14.4(b)(iii),

the Operator or the Security Trustee objects to disclosure of some or all of the Commercially Sensitive Information, the Operator or the Security Trustee (as relevant) must provide details of any such objection within 5 Business Days of the date the Operator or the Security Trustee received notification from the State or the date on which the consultation process concluded (as relevant);

- (v) the State may take into account any objection received from the Operator or the Security Trustee pursuant to clause 14.4(b)(iv) in determining whether the Commercially Sensitive Information identified by the Operator or the Security Trustee should be disclosed; and
- (vi) nothing in this clause 14.4(b) will limit or otherwise affect the discharge of the State's obligations under the GIPA Act.

## 15. Termination of this document

The parties agree and acknowledge that this document shall terminate on the date on which each Finance Security has been unconditionally and irrevocably released in full.

## 16. Amendment and assignment

### 16.1 Amendment

This document can only be amended, supplemented, replaced or novated by another deed signed by the parties.

### 16.2 Assignment

- (a) Without limiting clause 11.5(b), the Security Trustee and the Operator may only dispose of, declare a trust over or otherwise create an interest in its rights under this document with the consent of the State.
- (b) The State may dispose of, declare a trust over or otherwise create an interest in its rights under this document without the consent of any other party provided it complies with the terms of clause 86 (Assignment or Change of Control) of the Project Deed.
- (c) Subject to any express provision of this document, the parties may not, without the prior written consent of the others, assign, grant a Security Interest over, or otherwise dispose of all or any benefit, right or interest under this document, provided always that an assignment by HAC or the NSLHD of its interest to any other governmental body, agency or department (in each case constituting NSW Government or guaranteed by the NSW Government) will not require the Operator nor the Security Trustee's prior written consent.
- (d) The provisions of this clause 16.2 do not apply to the granting of Security Interests under the Financing Agreements.

## 17. GST

- (a) **(Interpretation):**
- (i) Except where the context suggests otherwise, terms used in this clause 17 have the meanings given to those terms by the GST Law (as amended from time to time).
  - (ii) Any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause 17.
  - (iii) Unless otherwise expressly stated, all consideration to be provided under this document (other than under this clause 17) is exclusive of GST. Any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purpose of this clause 17.
  - (iv) A reference to something done (including a supply made) by a party includes a reference to something done by any entity through which that party acts.
  - (v) For the purposes of this clause 17:
    - (A) references to the 'State' means the Health Administration Corporation ('HAC') or Northern Sydney Local Health District ('NSLHD') as the case may be; and
    - (B) to the extent HAC or NSLHD makes a supply or acquisition on behalf of the other in accordance with this document, it is authorised to do so as agent of the other and may issue or obtain a tax invoice in that capacity.
- (b) **(Reimbursements)** Any payment or reimbursement required to be made under this document that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.
- (c) **(Additional amount of GST payable)** Subject to the remainder of this clause 17, if GST becomes payable on any supply made by a party (**Supplier**) under or in connection with this document (except where it is expressly stated to be inclusive of GST):
- (i) any party (**Recipient**) that is required to provide consideration for that supply must pay an additional amount to the Supplier equal to the amount of the GST payable on that supply (**GST Amount**), at the same time as any other consideration is to be first provided for that supply; and
  - (ii) the Supplier must provide a Tax Invoice to the Recipient for that supply, no later than the time at which the GST Amount for that supply is to be paid in accordance with clause 17(c)(i).
- (d) **(Variation of GST):**
- (i) If the GST Amount recovered by the Supplier from the Recipient under clause 17(c) for a supply varies from the amount of GST paid or payable by the Supplier on that supply, then the Supplier will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, the Recipient.

- (ii) The Supplier must issue an Adjustment Note to the Recipient in respect of any adjustment event occurring in relation to a supply made under or in connection with this document within seven days after the Supplier becomes aware of the adjustment event.
- (e) **(Exclusion of GST from calculations)** If a payment is calculated by reference to or as a specified percentage of another amount or revenue stream, that payment shall be calculated by reference to or as a specified percentage of that other amount or revenue stream net of GST.
- (f) **(No merger)** This clause will not merge on completion or termination of this document.

## 18. General

### 18.1 Notices

Each communication (including each notice, consent, approval, request and demand) under or in connection with this document:

- (a) must be in writing;
- (b) must be addressed as follows (or as otherwise notified by that party to each other party from time to time):

#### **The State**

Name:

Address:

Fax No:

For the attention of:

#### **The Operator**

Name:

Address:

Fax No:

For the attention of:

#### **The Security Trustee**

Name:

Address:

Fax No:

For the attention of:

- (c) must be signed by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised agent of, that party;
- (d) must be delivered by hand or posted by prepaid post to the address, or sent by fax to the number, of the addressee, in accordance with clause 18.1(b); and
- (e) is taken to be received by the addressee:

- (i) if it is delivered or sent by fax:
  - (A) by 5.00pm (local time in the place of receipt) on a Business Day, on that day; or
  - (B) after 5.00pm (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;
- (ii) if it is sent by mail:
  - (A) within Australia, two Business Days after posting; or
  - (B) to or from a place outside Australia, five Business Days after posting; and
- (iii) if it is sent by email:
  - (A) by 5.00pm (local time in the place of receipt) on a Business Day, at the time in the place to which it is sent equivalent to the time shown on the automatic receipt notification received by the party sending the email from the recipient; or
  - (B) after 5.00pm (local time in the place of receipt) on a Business Day, or a day that is not a Business Day, on the Business Day following the date on which it is sent equivalent to the date shown on the automatic receipt notification received by the party sending the email from the recipient.

## **18.2 The State as a Public Authority**

- (a) This document will not in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of the State to exercise any of its functions and powers pursuant to any Law.
- (b) The Operator and the Security Trustee acknowledge and agree that, without limiting clause 18.2(a), anything which the State does, fails to do or purports to do pursuant to its functions and powers under any Law will be deemed not to be an act or omission by the State under this document and will not entitle the Operator or the Security Trustee to make any Claim against the State.
- (c) The parties agree that clauses 18.2(a) and 18.2(b) are taken not to limit any liability which the State would have had to the Operator or the Security Trustee under this document as a result of a breach by the State of a term of this document but for clauses 18.2(a) and 18.2(b) of this document.

## **18.3 Certification**

For the purposes of this document, a copy of a document will be regarded as duly certified by a party if it is certified as a true copy by a director, secretary or general manager of that party.

## **18.4 Cost of performing obligations**

Without limiting clause 98.4(b) of the Project Deed, each party must perform its obligations under this document at its own cost, unless expressly provided otherwise.

## **18.5 Governing Law**

This document is governed by and must be construed according to the Law applying in New South Wales and the parties irrevocably submit to the non-exclusive jurisdiction of the courts of New South Wales and the courts competent to determine appeals from those courts.

## **18.6 Amendments**

This document may only be varied by a deed executed by or on behalf of each party.

## 18.7 Taxes

Subject to clause 97 (Taxes) of the Project Deed, the Operator:

- (a) must pay all taxes in respect of this document, the performance of this document and each transaction effected by or made under this document;
- (b) indemnifies each other party against liability arising from failure to comply with clause 18.7(a); and
- (c) is authorised to apply for and retain the proceeds of any refund due in respect of any taxes paid under this clause 18.7.

## 18.8 Waiver

- (a) Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by Law or under this document by a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided by Law or under this document.
- (b) A waiver or consent given by a party under this document is only effective and binding on that party if it is given or confirmed in writing by that party.
- (c) No waiver of a breach of a term of this document operates as a waiver of another breach of that term or of a breach of any other term of this document.

## 18.9 Relationship between the State and the Security Trustee

Nothing in, or contemplated by, this document or any other Project Document will be construed or interpreted as:

- (a) constituting a relationship between the State and the Security Trustee, or any other person, of partners, joint venturers, fiduciaries, employer and employee or principal and agent; or
- (b) imposing any general duty of good faith on the State to the Security Trustee or the Debt Financiers in relation to or arising out of this document, other than to comply with the obligations (if any) expressly stated to be assumed by the State under this document or any other Project Document.

## 18.10 Survival of certain provisions; no merger

- (a) Without limiting clause 18.19:
  - (i) clauses 14, 18.1, 18.5 and 18.19, any indemnities given under this document and any other provisions which are expressed to survive termination (together, the **Surviving Clauses**) will survive rescission, termination or expiration of this document; and
  - (ii) if this document is rescinded or terminated, no party will be liable to any other party except:
    - (A) under the Surviving Clauses; or
    - (B) in respect of any breach of this document occurring before such rescission or termination.
- (b) No right or obligation of any party will merge on completion of any transaction under or thing done under or in connection with this document. All rights and obligations under this document survive the execution and delivery of any transfer or other document which implements any transaction under this document.



### **18.11 Further acts and documents**

Each party must promptly do all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to that party) required by Law or reasonably requested by another party to give effect to this document.

### **18.12 Consents**

A consent required under this document from the State, a State Related Party or the Client Representative may be given or withheld, or may be given subject to any conditions, as that party (in its absolute discretion) thinks fit, unless this document expressly provides otherwise.

### **18.13 No representation or reliance**

- (a) Each party acknowledges that no party (nor any person acting on a party's behalf) has made any representation or other inducement to it to enter into this document, except for representations or inducements expressly set out in this document.
- (b) Each party acknowledges and confirms that it does not enter into this document in reliance on any representation or other inducement by or on behalf of any other party, except for representations or inducements expressly set out in this document.

### **18.14 Reading down**

If a word, phrase, sentence, clause or other provision of this document would otherwise be unenforceable, illegal or invalid the effect of that provision will so far as possible be limited and read down so that it is not unenforceable, illegal or invalid.

### **18.15 Severance**

Any provision of this document which is illegal or unenforceable in any jurisdiction will, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions of this document or affecting the validity or unenforceability of such provision in any other jurisdiction.

### **18.16 Remedies cumulative**

The rights and remedies provided in this document are cumulative and are not exclusive of any rights or remedies provided by Law or any other agreement, except to the extent expressly provided in this document.

### **18.17 Moratorium legislation**

Unless application is mandatory by Law, any present or future Law will not apply to this document so as to abrogate or otherwise prejudicially affect any rights, powers, remedies or discretions given or accruing to the State.

### **18.18 Entire agreement**

As between the State and the Security Trustee, and the State and the Operator, this document and the other Project Documents contains the entire agreement of the parties with respect to the transactions contemplated by it. There are no understanding, agreements, warranties or representations (express or implied) with respect to the transactions contemplated by this document except for those referred to in it.

### **18.19 Indemnities**

- (a) Each indemnity in this document is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this document.
- (b) It is not necessary for a party to incur expense or to make any payment before enforcing a right of indemnity conferred by this document.

- (c) A party must pay on demand any amount it must pay under an indemnity in this document.
- (d) Where a party gives any indemnity or release to the State under this document, it gives an equivalent indemnity and release to the NSW Government. The State holds for itself and on trust for the NSW Government the benefit of each such indemnity and release in this document.

## 18.20 Counterparts

This document may be executed in any number of counterparts and by the parties on separate counterparts. All such counterparts taken together will be deemed to constitute one and the same instrument.

## 18.21 Attorneys

Each person who executes this document 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 and that he or she has, at the time of executing this document, no notice of the revocation of the power of attorney under which he or she executes this document.

## 18.22 Order of precedence

To the extent of any inconsistency between this document and any other document or agreement between the parties, this document will prevail.

# 19. PPSA

## 19.1 Definitions

In this clause 19:

- (a) **PPSA** means the *Personal Property Securities Act 2009* (Cth); and
- (b) **Personal Property** means all Secured Property which is 'personal property' (as defined in the PPSA).

## 19.2 Section 61

In respect of the Personal Property, this Deed is an agreement to subordinate security interests for the purposes of section 61 of the PPSA.

## 19.3 Financing change statement

If requested by a Security Holder, the other Security Holder will register a financing change statement (as defined in the PPSA) reflecting the priority arrangements contemplated by this Deed.

## 19.4 Retention of Charged Property

Neither Security Holder may exercise any right to retain any Secured Property under Division 4 of Part 4.3 of the PPSA without the other Security Holder's prior written consent.

## 19.5 Notices under Chapter 4

Each Security Holder (**First Security Holder**) contracts out of the other Security Holder's right to receive any notice from the First Security Holder under Chapter 4 of the PPSA.

## 19.6 Amounts under section 127(6)

The Security Holders contract out of each Security Holder's right to receive any amount from the other Security Holder under section 127(6) of the PPSA.

# Schedule 1 – Commercially Sensitive Information

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# Signing page

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**EXECUTED** as a deed.

*[Execution clauses to be inserted]*