

Subcontractor Side Deed

Northern Beaches Hospital

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

[] (**Engaging Entity**)

[] (**Subcontractor**)

[] (**Subcontractor Guarantor**)

MinterEllison

LAWYERS

LEVEL 19 AURORA PLACE 88 PHILLIP STREET SYDNEY NSW 2000
AUSTRALIA DX 117 SYDNEY
T +61 2 9921 8888 F +61 2 9921 8123
www.minterellison.com

Subcontractor Side Deed

Details	190
Agreed terms	191
1. Defined terms & interpretation	191
1.1 Defined terms	191
1.2 Definitions in Project Deed	193
1.3 Interpretation	193
1.4 Exclusion of Civil Liability Act 2002 (NSW)	193
1.5 Multiple parties	193
1.6 Client Representative	193
1.7 Project Documents	193
1.8 No liability	194
1.9 Approvals and consents	194
1.10 Novation to State Nominee	194
1.11 Relations between Operator B and Operator	195
2. Undertakings	195
2.1 [Project Security	195
2.2 Subcontractor Guarantor acknowledgments and consents	195
2.3 Subcontractor Undertakings	196
2.4 Reliance on representations and warranties	197
2.5 Engaging Entity's Undertaking	197
3. Subcontract	197
3.1 Information	197
3.2 Variations to the [Project Works/Services]	198
3.3 Termination by law or third party	198
3.4 No changes to the Subcontract	198
4. Other agreements	198
4.1 [Project Deed	198
4.2 Access	198
4.3 Terms of access	198
4.4 Subcontractor's obligations	198
4.5 Artefacts	199
5. Subcontract Event of Default and Step In rights	199
5.1 Notice of Subcontract Event of Default	199
5.2 Remedy of default	199
5.3 Assumption by Representative	200
5.4 Step in period	200
5.5 Novation	201
5.6 Step out	202
5.7 Subcontractor	202
6. Representations and Warranties	203
6.1 The State representations and warranties	203
6.2 General representations and warranties	203

6.3	Representations and warranties regarding the Subcontract	204
6.4	Representations and warranties regarding the Subcontract Guarantee	204
6.5	Representations and warranties by the Subcontractor	204
6.6	Further assurances	205
6.7	Reliance on representations and warranties	205
7.	Undertakings	205
8.	Indemnities	206
8.1	Subcontractor indemnity	206
8.2	Engaging Entity indemnity	206
9.	Confidentiality	206
9.1	Keep confidential	206
9.2	Permitted Disclosure	206
9.3	Obligations Preserved	207
9.4	Disclosure by the State	207
10.	Termination of the Project Deed or Assignment/Novation of the Engaging Entity's Rights and Obligations	208
11.	Amendment and Assignment	208
11.1	Amendment	208
11.2	Assignment	208
12.	GST	209
13.	General	210
13.1	Notices	210
13.2	The State as a Public Authority	211
13.3	Certification	211
13.4	Cost of performing obligations	211
13.5	Governing Law	211
13.6	Amendments	211
13.7	Taxes	212
13.8	Waiver	212
13.9	Survival of certain provisions; no merger	212
13.10	Further acts and documents	212
13.11	Consents	212
13.12	No representation or reliance	213
13.13	Reading down	213
13.14	Severance	213
13.15	Remedies cumulative	213
13.16	Moratorium legislation	213
13.17	Entire agreement	213
13.18	Indemnities	213
13.19	Counterparts	213
13.20	Attorneys	214
13.21	Order of precedence	214
13.22	Aggregate Liability	214
	Schedule 1 - Commercially Sensitive Information	215
	Signing page	216

Details

Date

Parties

Name **Health Administration Corporation**, a corporation sole constituted under section 9 of the *Health Administration Act 1982* (NSW)
ABN 45 100 538 161
Short form name **HAC** and, together with the NSLHD, the **State**
Notice details [•]

Name **Northern Sydney Local Health District**
ABN 63 834 171 987
Short form name **NSLHD** and, together with HAC, the **State**
Notice details [•]

Name [•] ACN [•]
Short form name **Engaging Entity**
Notice details [•]

Name [•] ACN [•]
Short form name **Subcontractor**
Notice details [•]

Name [•] ACN [•]
Short form name **Subcontractor Guarantor**
Notice details [•]

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 Engaging Entity and the Subcontractor have entered, or will enter, into the Subcontract for, amongst other things, the *[insert purpose of Subcontract]*.
- C The Subcontractor has agreed to provide the State with the warranties set out in this document.
- D The parties have agreed to regulate the exercise of their various rights and obligations in connection with the Subcontract on the terms of this document.

Agreed terms

1. Defined terms & interpretation

1.1 Defined terms

The following definitions apply in this document:

Commercially Sensitive Information means:

- (a) any information relating to the Financing Facilities;
- (b) any information relating to the Engaging Entity, the Subcontractor or the Subcontractor Guarantor's cost structure or profit margins;
- (c) any information relating to any of the Engaging Entity, the Subcontractor or the Subcontractor Guarantor'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 Engaging Entity, the Subcontractor or the Subcontractor Guarantor or the Engaging Entity, Subcontractor or Subcontractor Guarantor's shareholders, financiers or subcontractors,

described in Schedule 1.

Controller means, in relation to a person's property:

- (a) a receiver or receiver and manager of that property; or
- (b) anyone else who (whether or not as agent for the person) is in possession, or has control, of that property to enforce an Encumbrance.

Encumbrance means a mortgage, charge, pledge, lien, hypothecation or title retention arrangement, a right of set-off or right to withhold payment of a deposit or other money, a notice under section 255 of the *Income Tax Assessment Act 1936* (Cth), subdivision 260-A in schedule 1 to the *Taxation Administration Act 1953* (Cth) or any similar Legislation, or an easement, restrictive covenant, caveat or similar restriction over property, or an agreement to create any of them or to allow any of them to exist.

Financiers Step In Period means the step in period under the Financiers Tripartite Deed.

Minor Change means an amendment, modification, variation, change or replacement of a minor or minor technical nature that does not increase or change the profile of the rights or liabilities of the State under the Project Deed.

Operator means NBH Operator Co Pty Ltd (ACN 169 029 181) in its capacity as trustee of the NBH Operating Trust.

Operator B means NBH Operator B Pty Ltd (ACN 602 943 911).

Permitted Change means:

- (a) a Minor Change;
- (b) Change or Additional Work directed or required by the State in accordance with the Project Deed; or
- (c) any amendment, modification, variation, change or replacement otherwise expressly permitted under the Project Deed (including an amendment determined under clause 87 (*Dispute Resolution*) of the Project Deed).

Prohibited Entity means any person or entity which:

- (a) is a 'terrorist organisation' as defined in Part 5.3 of the *Criminal Code Act 1995* (Cth); or
- (b) is listed by the Minister for Foreign Affairs in the Government Gazette pursuant to Part 4 of the *Charter of the United Nations Act 1945* (Cth) which list, as at the date of this document, is available from the website of the Australian Department of Foreign Affairs and Trade; or
- (c) is listed on any other list of terrorist or terrorist organisations maintained pursuant to the rules and regulations of the Australian Department of Foreign Affairs and Trade or pursuant to any other Legislation.

Project Breach means a breach by the Operator of any of its obligations under the Project Deed.

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

Required Period means the period starting on the date of a Subcontract Termination Notice and ending 60 days later, provided that where the Security Trustee has exercised its rights to step in under the Financiers Tripartite Deed and is, during that Financiers Step In Period, observing and performing the Engaging Entity's obligations under (among other things) the Subcontract (including the payment of any and all amounts to be paid to the Subcontractor for performance by the Subcontractor of the Subcontract during the Financiers Step In Period), the Required Period shall be suspended during any Financiers Step In Period, and the unexpired part of the Required Period will start to run again from the day after the last day of such Financiers Step In Period, if the event which was the subject of the Subcontract Termination Notice is still subsisting.

Step In Date means the date on which the State takes any action under clause 5.3(a).

Step In Period means the period from the Step In Date up to and including the earlier of:

- (a) the Step Out Date;
- (b) the date of any novation under clause 5.5;
- (c) the date of any termination for breach under clause 5.4(b);
- (d) the later of the date of expiry of the Subcontract and the date of expiry of the Subcontract Guarantee.

Step Out Date means the date nominated in the notice given under clause 5.6(a).

Subcontract means the document entitled [*Subcontract*] dated on or about the date of this document between the Engaging Entity and the Subcontractor.

Subcontract Document means each of the Subcontracts, the Subcontract Guarantee, each Subcontract Security and this document.

Subcontract Event of Default means a breach or default by the Engaging Entity under the Subcontract.

Subcontract Guarantee means each guarantee granted by the Subcontractor Guarantor in favour of the Engaging Entity .

Subcontract Security means each bank guarantee, insurance bond or other bonding or security issued in favour of the Engaging Entity to secure the Subcontractor's obligations under the Subcontract.

Subcontract Termination Notice has the meaning given to that term in clause 5.1.

Suitable Substitute Operator means a person nominated by the Client Representative and approved by the Subcontractor (such approval not to be unreasonably withheld or delayed) as:

- (a) having the legal capacity, power and authority to become a party to and perform the obligations of the Operator under the Subcontract; and
- (b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub contracts) which are sufficient to enable it to perform the obligations of the Operator under the Subcontract.

Surviving Clauses has the meaning given to that term in clause 13.9.

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, 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' or 'the Project Deed' 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 Engaging Entity, the Subcontractor and the Subcontractor Guarantor'.

1.4 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.

1.5 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.

1.6 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.

1.7 Project Documents

Each of the Subcontractor and the Subcontractor Guarantor acknowledges that it has received a copy of the Project Deed.

1.8 No liability

Subject only to the terms of the Project Deed in respect of the Operator, the State shall not be liable to the Engaging Entity, the Subcontractor or the Subcontractor Guarantor under this document or otherwise and neither the Engaging Entity, the Subcontractor or the Subcontractor Guarantor 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 Engaging Entity, an Engaging Entity Related Party, the Subcontractor or the Subcontractor Guarantor. Nothing in this clause derogates from the express rights conferred on the Subcontractor under this document.

1.9 Approvals and consents

- (a) For the avoidance of doubt, in respect of 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 the conditions 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.

1.10 Novation to State Nominee

The parties acknowledge that:

- (a) each of HAC and the NSLHD may separately, at any time, elect to assign or novate its rights and obligations under this document to any nominee being an agency of the State (**State Nominee**); and
- (b) if HAC or the NSLHD elects to assign or novate its rights and obligations under this document to a State Nominee:
- (i) each of the parties consents to that assignment or 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), the State Nominee, the Subcontractor and the Subcontractor Guarantor) to give effect to that assignment or novation;

- (iii) the State Nominee's rights and liabilities under this document will be supported by a guarantee from the NSW Government on terms no less favourable than those contained in the PAFA Act Guarantee; and
- (iv) from the date of such assignment or novation to the State Nominee:
 - (A) this clause 1.10 will be deleted; and
 - (B) 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).

1.11 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. Undertakings

2.1 [Project Security

The Subcontractor:

- (a) acknowledges and consents to the grant of, subject to the Financiers Tripartite Deed, security over all of the Operator's right, title and interest in and to the Subcontract pursuant to the Project Security;
- (b) acknowledges, subject to the Financiers Tripartite Deed, the rights created under the Project Security in favour of the State, including the appointment by the Operator of the State as the lawful attorney of the Operator to do, perform and exercise all things, acts and rights under the Subcontract on behalf and for the account of the Operator, pursuant to the Project Security;
- (c) acknowledges and agrees that the State is not subject to any duty or obligation under the Subcontract as a result of the Project Security or this document; and
- (d) acknowledges and agrees that the grant of the Project Security is not, and the exercise by the State of its rights under the Project Security will not be, a Subcontract Event of Default.

2.2 Subcontractor Guarantor acknowledgments and consents

The Subcontractor Guarantor:

- (a) acknowledges and consents to the grant of a security over all of the Operator's right, title and interest in and to the Subcontract Guarantee pursuant to the Project Security;
- (b) acknowledges the rights created under the Project Security in favour of the State, including the appointment by the Operator of the State as the lawful attorney of the Operator to do, perform and exercise all things, acts and rights under the Subcontract Guarantee on behalf and for the account of the Operator, pursuant to the Project Security;
- (c) acknowledges and agrees that the State is not subject to any duty or obligation under the Subcontract Guarantee as a result of the Project Security or this document; and
- (d) acknowledges that the grant of the Project Security is not, and the exercise by the State of its rights under the Project Security will not, give rise to any rights by the Subcontractor Guarantor to revoke or terminate the Subcontract Guarantee.] *[Note: These clauses are only applicable if the Operator is the Engaging Entity]*

2.3 Subcontractor Undertakings

The Subcontractor undertakes and warrants for the benefit of the State as follows:

- (a) it will fully comply with all of its obligations under the Subcontract and this document;
- (b) it is reputable and has, or has access to, sufficient experience, expertise and ability to perform its obligations to the standards required by the Project Deed;
- (c) it has exercised and will continue to exercise, in accordance with Good Industry Practice, the level of skill, care and diligence in performing its duties under the Subcontract which may reasonably be expected of a contractor experienced in the performance of the same or similar [*works/services*] to the [*Project Works/Services*] provided that, other than as expressly set out in this document, the Subcontractor will have no greater obligations to the State by virtue of this document than it would have had if the State had been named as the Engaging Entity under the Subcontract;
- (d) the [*Project Works/Services*] will be carried out and completed:
 - (i) in accordance with the Subcontract and this document;
 - (ii) in accordance with the Consents and applicable Law;
 - (iii) in a good and workmanlike manner;
 - (iv) using (including installing) materials, equipment and goods that will be of the quality and standard specified in the Subcontract, but if no standard is specified, new and of merchantable quality and which are and will remain at all relevant times fit for their purpose; and
 - (v) so that the [*Project Works/Services*], when completed, will be and will remain at all relevant times Fit for Intended Purpose;
- (e) it has exercised and will continue to exercise reasonable skill, care and diligence in connection with the selection and supervision of its employees, agents, subcontractors and suppliers;
- (f) if at any time it is called upon to do so by the State, it must:
 - (i) extend to the State any guarantee of performance by the Subcontractor or any warranty provided to the Engaging Entity; and
 - (ii) allow the State, or any person authorised by the State, on reasonable notice, to inspect the [*Project Works/Services*] as the State may reasonably require in accordance with clause 4.2;
- (g) the Subcontractor will:
 - (i) take out and maintain all insurances as are required under the Subcontract;
 - (ii) otherwise comply with all of its obligations in relation to insurance in the Subcontract;
 - (iii) ensure that it does not do or omit to do anything and does not permit anything to be done or omitted to be done whereby any insurance policy taken out and maintained under the Subcontract may be prejudiced;
 - (iv) ensure that the insurances required to be taken out and maintained under the Subcontract are valid and that the premiums for the current periods of insurance have been duly paid;

- (v) if required by the Project Deed ensure, to the extent permitted by Law, that the State is specified as a person to whom the insurance cover provided by an insurance policy taken out and maintained under the Subcontract extends;
 - (vi) keep the State informed in relation to any claims made in connection with an insurance policy taken out and maintained under the Subcontract;
 - (vii) do all things necessary and provide all documents, evidence and information necessary to enable the State to collect or recover any moneys due or to become due in respect of any insurance policy taken out and maintained under the Subcontract at the cost of the Subcontractor;
 - (viii) not cause or take any steps to bring about the cancellation, lapse, material change, reduction or any rescinding of any insurance policy taken out and maintained under the Subcontract unless it has first obtained the written consent of the State after giving 60 days prior written notice to the State; and
 - (ix) immediately notify the State of any cancellation, lapse, material change, reduction or any rescinding of an insurance policy taken out and maintained under the Subcontract and of the occurrence of any event giving rise to any claim under any such insurance policy in respect of the Project;
- (h) not do anything that may invalidate any insurance policy held by the State or the NSW Government in relation to the Project Works, the Site, the Extra Land or the Facility, or any indemnity to which the State or the NSW Government may be entitled from the New South Wales Treasury Managed Fund; and
 - (i) promptly inform the State of any material default by the Engaging Entity under the Subcontract.

2.4 Reliance on representations and warranties

The Subcontractor acknowledges and agrees that the State entered into this document in reliance on the undertakings and warranties made in clause 2.1 and 2.3.

2.5 Engaging Entity's Undertaking

The Engaging Entity agrees not to take any action or omit to do anything which may cause the Subcontractor to breach this document.

3. Subcontract

3.1 Information

Without limiting the rights and obligations of the Subcontractor and the State in clause 5.1, each of the Engaging Entity and the Subcontractor must:

- (a) notify the State of any Subcontract Event of Default promptly after the Subcontractor gives notice of that Subcontract Event of Default pursuant to clause [*insert*] of the Subcontract; and
- (b) provide copies of each of the following to the State at the same time as it has been furnished or received by it under the Subcontract:
 - (i) any notice given under the Subcontract to the Engaging Entity in connection with any Subcontract Event of Default; and
 - (ii) all other documents issued by the Subcontractor to the Engaging Entity in relation to any Subcontract Event of Default.

3.2 Variations to the [Project Works/Services]

The Engaging Entity and the Subcontractor acknowledge that the [Project Works/Services] may only be varied in accordance with a Permitted Change.

3.3 Termination by law or third party

The Engaging Entity and the Subcontractor each respectively agree to promptly notify the State if, by operation of law or for any other reason including an act or omission by any person, the Subcontract is terminated.

3.4 No changes to the Subcontract

Subject only to a Permitted Change, the Engaging Entity and the Subcontractor may not vary, amend or replace the Subcontract.

4. Other agreements

4.1 [Project Deed]

The parties acknowledge and agree that the rights granted to the State under and by virtue of this document are in addition to the rights of the State against the Operator under and by virtue of the Project Deed.] [Note: This clause is only applicable if the Operator is the Engaging Entity]

4.2 Access

The Engaging Entity and the Subcontractor must at all times permit the State (including its nominees, employees, agents, consultants and contractors) full and free access to, subject to the Project Deed, inspect the [Site, and the Project Works and/or the Facilities] and any place where the [Project Works/Services] are being carried out and any materials or equipment intended to be used in the [Project Works/Services] which are not [on the Site/in the Facilities].

4.3 Terms of access

If the State (including its nominees, employees, agents, consultants and contractors) accesses the [Site/Facilities], it must first liaise with the [site foreman or Engaging Entity representative] or the Subcontractor in order to minimise disruption to the [Project Works/Services].

4.4 Subcontractor's obligations

The Subcontractor must:

- (a) comply with its obligations under the Subcontract as and when they fall due;
- (b) not take any Security Interest over the Site or the Operator's rights under the Project Deed;
- (c) not lodge a caveat against the Site;
- (d) not repudiate, release, surrender or discharge (except by performance) the Subcontract;
- (e) not do anything which would or would be likely to render the Subcontract invalid or unenforceable; and
- (f) to the extent each of the following relates to, connects with or touches upon the [Project Works/Services]:
 - (i) subject to the confidentiality obligations in the Project Deed, consult with the State and provide such relevant information regarding the [Project Works/Services] and the Subcontract from time to time as the State reasonably requests provided such information is not Commercially Sensitive Information, unless the State is entitled to such Commercially Sensitive Information under the Project Deed;
 - (ii) grant to the State an irrevocable licence to use all manuals, plans, documents, data or processes brought into existence by or on behalf of the Subcontractor in the

performance of the [*Project Works/Services*] to enable the Operator, the State and any other person nominated by the State to provide the [*Project Works/Services*]and operate the Facilities; and]

- (iii) ensure that the terms of the Subcontract include a provision entitling the Subcontractor to novate the Subcontract to the State, should the Subcontract be terminated.

4.5 Artefacts

The parties acknowledge and agree that:

- (a) Artefacts may be found on, in or under the surface of the Site;
- (b) upon the discovery of an Artefact, the Subcontractor and the Engaging Entity must (but without limiting the Subcontractor's obligations, rights and entitlements under the Subcontract):
 - (i) promptly notify the State of the discovery;
 - (ii) take all practical steps to prevent the Artefact being disturbed, damaged, removed or lost;
 - (iii) take all practicable precautions necessary to prevent Loss, removal of or damage to the Artefact; and
 - (iv) comply with all Laws; and
- (c) as between the State, the Subcontractor and the Operator, any Artefacts discovered on, in or under the surface of the Site are and will remain the property of the State.

5. Subcontract Event of Default and Step In rights

5.1 Notice of Subcontract Event of Default

The Subcontractor shall not terminate or give notice terminating the Subcontract without giving to the State at least 60 days' prior written notice (the **Subcontract Termination Notice**) stating:

- (a) the proposed termination date;
- (b) the grounds for termination in reasonable detail; and
- (c) details of any amount owed by the Engaging Entity to the Subcontractor:
 - (i) at the time of the Subcontract Termination Notice; and/or
 - (ii) which will fall due on or prior to the end of the Required Period, under the Subcontract.

5.2 Remedy of default

- (a) The Subcontractor undertakes, despite any provision of the Subcontract, to provide to the State, no less frequently than once a week, full details as to whether a Subcontract Event of Default which is the subject of a Subcontract Termination Notice has been remedied.
- (b) If a Subcontract Event of Default referred to in paragraph (a) is subsisting and has not been remedied, the State may (in its sole discretion) at any time during the Required Period make arrangements to remedy the breach. If it elects to make such arrangements, it must notify the Subcontractor within a reasonable period of that election and, in any event, within the Required Period. If notified, the Subcontractor agrees:
 - (i) to use its best endeavours to reach an agreement with the State in respect of the arrangements to remedy the breach; and

- (ii) not to terminate the Subcontract, except, if an agreement is not reached within the Required Period, the Subcontractor may exercise such right of termination subject to clauses 5.3 and clause 5.4.
- (c) The Subcontractor acknowledges and agrees that any action taken by the State under this clause 5.2 will not be construed as an assumption by the State of the liabilities or obligations of the Engaging Entity under the Subcontract.

5.3 Assumption by Representative

- (a) Subject to clause 5.3(c), without prejudice to the State's other rights under the Project Security, at any time:
 - (i) when the State may exercise its Step-In Rights under the Project Deed;
 - (ii) during which an Operator Termination Event is subsisting (whether or not a Subcontract Termination Notice has been served); or
 - (iii) during the Required Period,
 the State may assume, or step in to, all of the Engaging Entity's rights under the Subcontract and the Subcontract Guarantee.
- (b) The State must give the Subcontractor and/or the Subcontractor Guarantor 2 days' prior written notice of any action to be taken by it referred to in this clause 5.3, including, where relevant, reasonable details of the event which gave rise to the Step In Rights or the Operator Termination Event.
- (c) The State's rights to step in under this clause 5.3 will be postponed to the rights of the Security Trustee under the Financiers Tripartite Deed and the State will take no action under this clause 5.3 for so long as the Financiers Step In Period continues.

5.4 Step in period

- (a) Without prejudice to clause 5.1, but subject to clause 5.4(b), the Subcontractor must not terminate the Subcontract and the Subcontractor Guarantor must not terminate the Subcontract Guarantee during the Step In Period on grounds:
 - (i) that the State has taken any action referred to in clause 5.3 or otherwise enforced the Project Security; or
 - (ii) arising prior to the Step In Date.
- (b) The Subcontractor will be entitled to terminate the Subcontract by written notice to the Engaging Entity and the State:
 - (i) if any amount:
 - (A) referred to in clause 5.1(c)(i) has not been paid to the Subcontractor on or before the Step In Date;
 - (B) referred to in clause 5.1(c)(ii) arising after the Step In Date has not been paid on or before the date falling 30 days after the date on which the liability for these amounts is notified to the State; and
 - (C) of which the Subcontractor was not aware (having made proper enquiry) at the time of the Subcontract Termination Notice, subsequently becomes payable and is not discharged on or before the date falling 30 days after the date on which the liability for the amount is notified to the State,
 provided that such amounts have been independently certified to the reasonable satisfaction of the State; or

- (ii) on grounds arising after the Step In Date in accordance with the terms of the Subcontract.
- (c) Each of the Subcontractor and the Subcontractor Guarantor must deal with the State in place of the Engaging Entity during the Step In Period.
- (d) During the Step In Period, the Subcontract and the Subcontract Guarantee shall remain in full force and effect and the Subcontractor shall continue diligently to perform all of its obligations and procure the completion of [*the Project Works/the Services*] in accordance with the Subcontract as though the State were directly party to the Subcontract in place of the Engaging Entity.
- (e) During the Step In Period, the State shall be entitled to enforce all of the rights of the Engaging Entity under the Subcontract and the Subcontract Guarantee in place of the Engaging Entity.

5.5 Novation

- (a) Subject to clause 5.5(b), at any time:
 - (i) during which an Operator Termination Event is subsisting; or
 - (ii) during the Step In Period,

the State may, where it has terminated the Project Deed, with 30 days' prior written notice to the Subcontractor, procure the novation of the Engaging Entity's rights and liabilities under the Subcontract and the Subcontract Guarantee to a Suitable Substitute Operator.
- (b) The Subcontractor must notify the State as to whether any person to whom the State proposes to novate the Engaging Entity's rights and liabilities under the Subcontract is a Suitable Substitute Operator, on or before the date falling 30 days after the date of receipt of all information reasonably required by the Subcontractor to decide whether the proposed operator is a Suitable Substitute Operator.
- (c) The Subcontractor must not unreasonably withhold or delay its decision on whether the proposed operator is a Suitable Substitute Operator.
- (d) On any novation referred to in clause 5.5(a) becoming effective:
 - (i) the Engaging Entity and (if applicable) the State will be released from any obligations arising under or in connection with the Subcontract and the Subcontract Guarantee from that date (except for accrued liabilities and obligations) and the Suitable Substitute Operator will become liable for obligations arising on or after that date;
 - (ii) any then subsisting ground for termination of the Subcontract by the Subcontractor will be deemed to have no effect and any subsisting Subcontract Termination Notice will be automatically revoked;
 - (iii) the Subcontractor must enter into a side deed with the State and the Suitable Substitute Operator on substantially the same terms as this document; and
 - (iv) as between the Engaging Entity, the Subcontractor and the Subcontractor Guarantor, the Subcontractor and the Subcontractor Guarantor will be released from any liabilities or obligations arising under or in connection with the Subcontract and the Subcontract Guarantee from that date (except for any accrued liabilities or obligations).

5.6 Step out

- (a) The State may, at any time during the Step In Period, with at least 30 days' prior written notice to the Subcontractor and the Subcontractor Guarantor, terminate the Step In Period with effect from the date specified in that notice.
- (b) With effect from the Step Out Date nominated in the notice referred to in clause 5.6(a), the State will be released from any and all obligations and liabilities to the Subcontractor and the Subcontractor Guarantor:
 - (i) under the Subcontract;
 - (ii) under the Subcontract Guarantee; and
 - (iii) under this document,provided that the State will be liable for any and all amounts referred to in clause 5.4(b)(i).
- (c) The release under clause 5.6(b) will not affect or prejudice the continuation of the Engaging Entity's obligations to the Subcontractor under the Subcontract.

5.7 Subcontractor

- (a) Except in accordance with the terms of this document, each of the Subcontractor and the Subcontractor Guarantor acknowledges and agrees that:
 - (i) the State is not responsible for, and has no liability (actual or contingent); and
 - (ii) the Subcontractor has no cause of action against the State,in relation to a Subcontract Event of Default, or any other event, act or omission of the Engaging Entity or any other party, in relation to the Subcontract or the Subcontract Guarantee.
- (b) Each of the Subcontractor and the Subcontractor Guarantor will, at the Engaging Entity's expense, take whatever action the State or a Suitable Substitute Operator taking a novation in accordance with clause 5.5(a) may require for perfecting any step in, novation or release under clauses 5.3, 5.5 or 5.6, including the execution of any novation or assignment, the transfer of any Subcontract Security and the giving of any notice, order or direction and the making of any registration which, in each case, the State or Suitable Substitute Operator reasonably requires.
- (c) Each of the Subcontractor and the Subcontractor Guarantor undertakes that it will not take any action to wind up, appoint an administrator or sanction a voluntary arrangement (or similar) in relation to the Engaging Entity during any Required Period or Step In Period.
- (d) The Engaging Entity joins in this document to acknowledge and consent to the arrangements set out and agrees not to knowingly do or omit to do anything that may prevent any party from enforcing its rights under this document.

6. Representations and Warranties

6.1 The State representations and warranties

The State represents and warrants that:

- (a) **(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;
- (b) **(document effective)** this document constitutes the State's valid, legal and binding obligations enforceable against the State in accordance with their terms subject to equitable remedies and Laws in respect of the enforcement of creditors' rights; and
- (c) **(no contravention)** the execution, delivery and performance of this document by the State will not contravene any Law to which the State is subject.

6.2 General representations and warranties

Each of the Engaging Entity, Subcontractor and the Subcontractor Guarantor represents and warrants that:

- (a) **(status)** it is a company limited by shares under the Corporations Act;
- (b) **(power)** it has full legal capacity and power to:
 - (i) own its property and to carry on its business; and
 - (ii) enter into the Subcontract Documents, supply agreements, consultancy agreements and any other document entered into in respect of the Project to which it is expressed to be a party and to carry out the transactions contemplated by any one or more of them;
- (c) **(corporate authority)** it has taken all corporate action that is necessary or desirable to authorise its entry into the Subcontract Documents to which it is a party and its carrying out the transactions that they contemplate;
- (d) **(Consents)** it holds each Consent that is necessary or desirable to:
 - (i) enable it to properly execute the Subcontract Documents to which it is a party and to carry out the transactions that they contemplate;
 - (ii) ensure that the Subcontract Documents to which it is a party are legal, valid, binding and admissible in evidence; or
 - (iii) enable it to properly carry on its business,and it is complying with any conditions to which any of these Consents is subject;
- (e) **(documents effective)** the Subcontract Documents to which it is a party constitute its legal, valid and binding obligations, enforceable against it in accordance with their terms (except to the extent limited by equitable principles and laws affecting creditors' rights generally) subject to any necessary stamping or registration;
- (f) **(no contravention)** neither its execution of the Subcontract Documents to which it is a party nor the carrying out by it of the transactions that they contemplate, does or will:
 - (i) contravene any Law to which it or any of its property is subject or any order of any Authority that is binding on it or any of its property;
 - (ii) contravene any Consent;
 - (iii) contravene any undertaking or instrument binding on it or any of its property; or

- (iv) contravene its constitution;
- (g) **(information)** the information and reports (if any) that it has given to the State in connection with any Subcontract Documents to which it is a party are true and accurate in all material respects and not misleading in any material respect (including by omission);
- (h) **(no Controller)** no Controller is currently appointed in relation to any of its property; and
- (i) **(no trust)** it is not entering into any Subcontract Documents to which it is a party as trustee of any trust or settlement.

6.3 Representations and warranties regarding the Subcontract

Each of the Subcontractor and the Engaging Entity represents and warrants that:

- (a) **(termination)** it has no right to:
 - (i) terminate, rescind, repudiate or vary the Subcontract; or
 - (ii) refuse to perform or observe any of its obligations under the Subcontract;
- (b) **(Subcontract not void)** the Subcontract is not void, voidable by the Subcontractor or unenforceable by the Engaging Entity;
- (c) **(entire agreement)** the Subcontract Documents set out all of the agreements, arrangements and understandings between the Engaging Entity, the Subcontractor and the Subcontractor Guarantor relating to the Project;
- (d) **(Subcontract Event of Default)** no Subcontract Event of Default has occurred;
- (e) **(skill of Subcontractor)** (for the benefit of the State only), the Subcontractor has sufficient skill, experience, expertise and ability to perform its obligations to the standards required by the Project Deed;
- (f) **(Security Interest)** the Engaging Entity has not granted the Subcontractor a Security Interest over the Site or any of the Engaging Entity's other assets; and
- (g) **(solvent)** it is solvent and there are reasonable grounds to expect that it will continue to be able to pay its debts as and when they fall due.

6.4 Representations and warranties regarding the Subcontract Guarantee

Each of the Subcontractor Guarantor and the Engaging Entity represents and warrants that:

- (a) **(absolute and unconditional)** the Subcontract Guarantee is an absolute and unconditional obligation of the Subcontractor Guarantor and nothing contemplated by this document (including the enforcement of the Project Security and step in under clause 5.3) might operate to exonerate the Subcontractor Guarantor from its obligations under the Subcontract Guarantee or reduce, release or prejudice the Subcontract Guarantee;
- (b) **(termination)** it has no right to:
 - (i) terminate, rescind, repudiate or vary the Subcontract Guarantee; or
 - (ii) refuse to perform or observe any of its obligations under the Subcontract Guarantee; and
- (c) **(entire agreement)** the Subcontract Documents set out all of the agreements, arrangements and understandings between the Engaging Entity, the Subcontractor and the Subcontractor Guarantor relating to the Project.

6.5 Representations and warranties by the Subcontractor

The Subcontractor represents and warrants to the State that:

- (a) it has not entered into this document in reliance on, or as a result of, any statement or conduct of any kind of or on behalf of the State (including any advice, warranty, representation or undertaking);
- (b) it is not a Prohibited Entity and is not owned or controlled by, or acts on behalf of, any Prohibited Entity; and
- (c) it will ensure that it complies with all anti-terrorism legislation in Australia including, without limitation, Part 4 of the *Charter of the United Nations Act 1945* (Cth) and Part 5.3 of the *Criminal Code Act 1995* (Cth).

6.6 Further assurances

Each party will take all steps, execute all deeds and do everything reasonably required by any other party to give effect to any of the actions contemplated by this document.

6.7 Reliance on representations and warranties

Each party acknowledges that each other party executed this document and agreed to take part in the transactions that this document contemplates in reliance on the representations and warranties that are made or repeated in this clause 6.

7. Undertakings

Each of the Subcontractor and the Subcontractor Guarantor must:

- (a) **(hold Consents)** obtain and maintain each Consent that is necessary or desirable to:
 - (i) execute the Subcontract Documents to which it is a party and to carry out the transactions that they contemplate;
 - (ii) ensure that the Subcontract Documents to which it is a party are legal, valid, binding and admissible in evidence; and
 - (iii) enable it to properly carry on its business,and must comply with any conditions to which any such Consent is subject;
- (b) **(representations and warranties untrue)** notify the State upon becoming aware of any occurrence, event or circumstance which causes, or may reasonably be expected to cause, any of its representations or warranties to be incorrect or misleading in any material respect;
- (c) **(no administrator)** not appoint an administrator without notice to the State;
- (d) **(information)** promptly on request (and in any event within 5 Business Days) provide to the Client Representative any information relating to the financial condition, business, property, and affairs of itself and its related bodies corporate, the Subcontract Documents and the Project, that the Client Representative reasonably requests;
- (e) **(no amendments)** other than a Permitted Change, not amend, waive, suspend (except to the extent it is entitled to under the Subcontract), terminate, revoke or otherwise vary the terms of the Subcontract Documents, [*the Project Works/the Services*] or the Project, or enter into other agreements or arrangements with a party or parties to the Subcontract Documents which relate to the subject matter of the Subcontract Documents; and
- (f) **(no assignment)** not dispose of, declare a trust over or otherwise create an interest in its right, title or interest to or under any Subcontract Document to which it is a party, or any part of a Subcontract Document to which it is a party, without the prior written consent of the State.

8. Indemnities

8.1 Subcontractor indemnity

The Subcontractor indemnifies and holds harmless the State, and their respective officers, employees, agents and representatives from and against all Claims and Losses arising out of, or in connection with, a breach by the Subcontractor of any of the representations and warranties given by it under clause 2.1 or a failure by the Subcontractor to comply with any of its other obligations under this document or the Subcontract.

8.2 Engaging Entity indemnity

The Engaging Entity indemnifies the State against, and must pay the State on demand the amount of, all costs, losses, liabilities, claims, expenses and Taxes incurred in connection with the administration, and any actual or attempted preservation or enforcement, of any rights under this document.

9. Confidentiality

9.1 Keep confidential

- (a) Subject to clause 9.2, 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, including without limitation to any information provided under clause 7(d), and will be received, supplied and communicated in circumstances of confidence and on a commercial-in-confidence basis.

9.2 Permitted Disclosure

Clause 9.1 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 to this document;
- (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 9.1;
- (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 or prospective investors in, or prospective shareholders or prospective debt financiers of, the Operator or the Borrower, 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 design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise to:
 - (i) any proposed new or replacement contractor, its advisers and lenders should the State decide to re-tender the Project Deed; or

- (ii) any person in connection with a Benchmarking Exercise,
provided that the exclusion in this clause 9.2(g) does not apply to:
- (iii) the Parent Company's Proprietary Material; or
- (iv) any information which is commercially sensitive in that it has a unique characteristic to the Operator or the Parent Company, unless the State procures that the recipient of that information is subject to the same obligation of confidentiality as that contained in this document;
- (h) any disclosure of information by the Client Representative to any other department, office or agency of the NSW Government;
- (i) any disclosure by the Client Representative of any document relating to this document and which the Engaging Entity or the Subcontractor, as the case may be, (acting reasonably) has agreed with the Client Representative contains no Commercially Sensitive Information;
- (j) any disclosure of information by the Client Representative or the Engaging Entity to the Debt Financiers; or
- (k) any disclosure of information required by a stock exchange or a New South Wales or Commonwealth regulator.

9.3 Obligations Preserved

Where disclosure is permitted under clause 9.2, other than clauses 9.2(a), 9.2(c), 9.2(d), 9.2(g), 9.2(h) and 9.2(k), 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.

9.4 Disclosure by the State

- (a) Notwithstanding the other provisions of this clause 9, 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 will 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 Engaging Entity, the Subcontractor and the Subcontractor Guarantor 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 the parties have confirmed to the State that this document does not contain Commercially Sensitive Information;
 - (ii) the State will notify the Engaging Entity, the Subcontractor and the Subcontractor Guarantor 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 9.4(b)(ii), the State will take reasonable steps to consult with the Engaging Entity, the Subcontractor and the Subcontractor Guarantor before disclosing the Commercially Sensitive Information, including under the GIPA Act;
- (iv) if, following:
 - (D) notification by the State in accordance with clause 9.4(b)(ii); or
 - (E) consultation between the State, the Engaging Entity, the Subcontractor and the Subcontractor Guarantor in accordance with clause 9.4(b)(iii),

the Engaging Entity, the Subcontractor or the Subcontractor Guarantor objects to disclosure of some or all of the Commercially Sensitive Information, the Engaging Entity, the Subcontractor or the Subcontractor Guarantor (as relevant) must provide details of any such objection within 5 Business Days of the date the Engaging Entity, the Subcontractor or the Subcontractor Guarantor 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 Engaging Entity, the Subcontractor or the Subcontractor Guarantor pursuant to clause 9.4(b)(iv) in determining whether the Commercially Sensitive Information identified by the Engaging Entity, the Subcontractor or the Subcontractor Guarantor should be disclosed; and
- (vi) nothing in this clause 9.4(b) will limit or otherwise affect the discharge of the State's obligations under the GIPA Act.

10. Termination of the Project Deed or Assignment/Novation of the Engaging Entity's Rights and Obligations

If the Project Deed is terminated or the rights and obligations of the Engaging Entity are assigned or novated pursuant to the terms of any of the Project Documents, if required by the State:

- (a) the Engaging Entity must transfer, assign, novate or otherwise convey its respective interest in the Subcontract to the State or any State Nominee at the State's election;
- (b) subject to clause 5.5, the Subcontractor agrees to perform the Subcontract for the benefit of the State or the relevant assignee or novatee; and
- (c) the Subcontractor will enter into any document with the State or the relevant assignee or novatee and the Engaging Entity to formalise this arrangement.

11. Amendment and Assignment

11.1 Amendment

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

11.2 Assignment

- (a) The Subcontractor, the Subcontractor Guarantor and the Engaging Entity may only dispose of, declare a trust over or otherwise create an interest (other than the Project Security or the Finance Security) 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.

12. GST

(a) **(Interpretation):**

- (i) Except where the context suggests otherwise, terms used in this clause 12 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 12.
- (iii) Unless otherwise expressly stated, all consideration to be provided under this document (other than under this clause 12) 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 12.
- (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 12:
- (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 12, 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 12(c)(i).

(d) **(Variation of GST):**

- (i) If the GST Amount recovered by the Supplier from the Recipient under clause 12(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.

13. General

13.1 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 Engaging Entity

Name:

Address:

Fax No:

For the attention of:

The Subcontractor

Name:

Address:

Fax No:

For the attention of:

The Subcontractor Guarantor

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 13.1(b); and
- (e) is taken to be received by the addressee:
 - (i) (in the case of prepaid post sent to an address in the same country) on the third day after the date of posting;
 - (ii) (in the case of prepaid post sent to an address in another country) on the fifth day after the date of posting by airmail;
 - (iii) (in the case of fax) at the time in the place to which it is sent equivalent to the time shown on the transmission confirmation report produced by the fax machine from which it was sent; and
 - (iv) (in the case of delivery by hand) on delivery,
 - (v) but if the communication is taken to be received on a day that is not a Business Day, or after 5.00pm, it is taken to be received at 9.00am on the next Business Day.

13.2 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 Engaging Entity, the Subcontractor and the Subcontractor Guarantor acknowledge and agree that, without limiting clause 13.2(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 Engaging Entity, the Subcontractor or the Subcontractor Guarantor to make any Claim against the State.
- (c) The parties agree that clauses 13.2(a) and 13.2(b) are taken not to limit any liability which the State would have had to the Engaging Entity, the Subcontractor or the Subcontractor Guarantor under this document as a result of a breach by the State of a term of this document but for clauses 13.2(a) and 13.2(b) of this document.

13.3 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.

13.4 Cost of performing obligations

Each party must perform its obligations under this document at its own cost, unless expressly provided otherwise.

13.5 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.

13.6 Amendments

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

13.7 Taxes

Subject to clause 97 of the Project Deed, the Engaging Entity:

- (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 13.7(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 13.7.

13.8 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.

13.9 Survival of certain provisions; no merger

- (a) Without limiting clause 13.18(a):
 - (i) clauses 8, 9, 13.1, 13.5 and 13.18, 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:
 - (F) under the Surviving Clauses; or
 - (G) 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 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.

13.10 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.

13.11 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.

13.12 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.

13.13 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.

13.14 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.

13.15 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.

13.16 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.

13.17 Entire agreement

This document 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.

13.18 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.

13.19 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.

13.20 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.

13.21 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.

13.22 Aggregate Liability

Despite any other provision of the Subcontract or this document:

- (a) the maximum aggregate liability of the:
 - (i) Subcontractor under this document and the Subcontract [*and any other relevant Project Documents (including the Collateral Warranty)*]; and
 - (ii) the Subcontractor Guarantor under this document and the Subcontract Guarantee [*and any other relevant Project Documents (including the Collateral Warranty)*],is no greater than the maximum liability of the Subcontractor under the Subcontract and for the avoidance of doubt the State is not permitted to recover, and neither the Subcontractor or the Subcontractor Guarantor will be liable to the State for, any loss that is not permitted to be recovered against the Subcontractor under the Subcontract; and
- (b) if there is a breach of the Subcontract by the Subcontractor, payment by or on behalf of the Subcontractor:
 - (i) to the Engaging Entity of an amount in respect of the Subcontractor liability for that breach of the Subcontract also satisfies, to the same extent, any claim by the State against the Subcontractor for breach of this document; and
 - (ii) to the State for an amount in respect of the Subcontractor's liability for that breach of this document also satisfies, to the same extent, any claim by the Engaging Entity under the Subcontract in respect of the same breach.

Schedule 1 - Commercially Sensitive Information

Signing page

EXECUTED as a deed.

[Execution clauses to be inserted]