

# Schedule 31 – Expert Determination Agreement

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## Expert Determination Agreement dated

Parties                    **Health Administration Corporation (ABN 45 100 538 161)**, a corporation sole constituted under section 9 of the *Health Administration Act 1982* (NSW) (**HAC** and, together with the NSLHD, the **State**)

**Northern Sydney Local Health District (ABN 63 834 171 987)** (NSLHD and, together with HAC, the **State**)

**NBH Operator Co Pty Ltd (ACN 169 029 181)** in its capacity as trustee of the **NBH Operating Trust ABN 83 722 380 020** of Level 1, 312 St Kilda Road, Melbourne VIC 3004 (**Operator**)

**NBH Operator B Pty Ltd (ACN 602 943 911)** of Level 1, 312 St Kilda Road, Melbourne VIC 3004 (**Operator B**)

                              [*Insert name and address of Expert*] (**Expert**)

## Background

- A     The State, Operator B and the Operator are parties to the Project Deed.
- B     By written notice dated [*insert date*], [*insert State, Operator B or Operator as applicable*] requires that the Dispute is determined by an expert appointed under clause 87.5 of the Project Deed.
- C     The Expert has been appointed to determine the Dispute in accordance with the Expert Determination Process.

## Operative provisions

### 1. Definitions and Interpretation

#### 1.1 Definitions

In this document:

**Determination** means the determination of the Dispute in accordance with the Expert Determination Process.

**Dispute** means the dispute described in Schedule 1.

**Expert Determination Process** means the process for determining the Dispute as set out in the Project Deed, this document and the Rules.

**Expert's Fees and Disbursements** means the Expert's fees and disbursements calculated in accordance with Schedule 3.

**Party** means each of the State, Operator B and the Operator and Parties has a corresponding meaning.

**Project Deed** means the deed entitled 'Project Deed – Northern Beaches Hospital' dated [*insert date*] 2014 between the State, Operator B and the Operator.

**Rules** means the rules for the Expert Determination Process set out in Schedule 2.

## 1.2 Terms defined in Project Deed

Except as otherwise defined in clause 1.1, terms used in this document that are defined in the Project Deed will have the same meanings in this document.

## 1.3 Interpretation

- (a) In this document headings are for convenience only and do not affect interpretation; and unless the context indicates a contrary intention:
- (b) an obligation or a liability assumed by, or a right conferred on, 2 or more persons binds or benefits them jointly and severally;
- (c) **person** includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (d) a reference to a party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation and, in the case of a trustee, includes a substituted or an additional trustee;
- (e) a reference to a document (including this document) is to that document as varied, novated, ratified or replaced from time to time;
- (f) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re enactments and replacements;
- (g) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;
- (h) a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause, schedule, exhibit, attachment or annexure to or of this document, and a reference to this document includes all schedules, exhibits, attachments and annexures to it;
- (i) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (j) includes in any form is not a word of limitation; and
- (k) a reference to \$ or dollar is to Australian currency.

## 2. Appointment and Role of Expert

- (a) The Parties appoint the Expert to determine the Dispute in the manner and within the times set out in this document and the Rules, and the Expert accepts the appointment on the basis set out in this document.
- (b) The Parties and the Expert agree that:
  - (i) the Expert will act as an expert and not as an arbitrator;
  - (ii) neither the Determination, nor the Expert Determination Process is an arbitration and any conference conducted during the Expert Determination Process is not a hearing conducted under any legislation or rules relating to any form of arbitration;
  - (iii) the rules of evidence do not apply to the Expert Determination Process or to the Determination; and

- (iv) in making the Determination or conducting the Expert Determination Process the Expert must proceed in accordance with:
  - (A) the Law;
  - (B) the Project Deed;
  - (C) this document;
  - (D) the Rules; and
  - (E) the requirements of procedural fairness.
- (c) The Expert must take all reasonable steps to avoid any conflict of interest, potential conflict of interest or other circumstances that might reasonably be considered to adversely affect the Expert's capacity to act independently or impartially.
- (d) If, at any time during the Expert Determination Process, the Expert becomes aware of any circumstances that might reasonably be considered to adversely affect the Expert's capacity to act independently or impartially in relation to the Dispute, the Expert must inform the Parties immediately.
- (e) This document will terminate 7 days after the notice is provided by the Expert under clause 2(d), unless the Parties agree otherwise.

### 3. Confidentiality

All proceedings and submissions relating to the Expert Determination Process (including the fact that any step in the Expert Determination Process is occurring), and all documents prepared for the purposes of the Expert Determination Process (including the Determination), must be kept confidential between the Parties and the Expert. No such proceedings, submissions or documents, nor any other information relating to or arising out of the Expert Determination Process, may be divulged to any other person, except with the prior written consent of both Parties or as may be required by Law or to the extent necessary to give effect to or enforce the Determination.

### 4. Costs and fees

- (a) As between the Parties and the Expert, the Parties are jointly and severally liable for the payment of the Expert's Fees and Disbursements. The Parties agree to comply with any reasonable direction from the Expert as to the provision of security deposits in respect of the Expert's Fees and Disbursements.
- (b) The Parties agree as between themselves that:
  - (i) they will each pay one half of:
    - (A) the Expert's Fees and Disbursements; and
    - (B) any third party costs incurred in holding the conference referred to in clause 3 of the Rules, including any booking fee, room hire and transcript costs; and
  - (ii) they will each bear their own costs of and incidental to the preparation of this document and their participation in the Expert Determination Process, including their legal costs and the costs of any consultants they engage.

## 5. Exclusion of liability

Except in the case of fraud or wilful misconduct, the Expert will not be liable to either Party for any act or omission by the Expert in the performance or purported performance of this document.

## 6. Co-operation of the Parties

- (a) Each Party agrees to:
  - (i) do all things reasonably necessary for the proper, expeditious and cost effective conduct of the Expert Determination Process;
  - (ii) to comply with the reasonable requests and directions of the Expert in relation to the conduct of the Expert Determination Process; and
  - (iii) be represented at any conference convened by the Expert by a person or persons with authority to agree on procedural matters;
- (b) If a Party does not comply with the Expert's reasonable directions, the Expert may continue with the Expert Determination Process and determine the Dispute despite the non-compliance.

## 7. Subsequent Proceedings

The Expert will not accept an appointment as an arbitrator, advocate or adviser to a Party in any arbitral, judicial or adjudication proceedings relating to the Dispute or any part of it. Neither Party will take action to cause the Expert to breach this clause.

## 8. Governing law

This document is governed by and must be construed according to the Law applying in New South Wales.

## 9. Urgent relief

Nothing in this document or the Rules will prejudice the right of a party to seek urgent interlocutory relief in respect of the Dispute.

## 10. Jurisdiction

The Parties and the Expert irrevocably:

- (a) submit to the non-exclusive jurisdiction of the courts of the State of New South Wales and the courts competent to determine appeals from those courts, with respect to any proceedings that may be brought at any time relating to this document; and
- (b) waive any objection they may now or in the future have to the venue of any proceedings, and any claim they may now or in the future have that any proceeding has been brought in an inconvenient forum, if that venue falls within clause 10(a).

# 11. GST

## 11.1 GST payable

(a) **(Interpretation):**

- (i) Except where the context suggests otherwise, terms used in this clause 11.1 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 11.1.
- (iii) Unless otherwise expressly stated, all consideration to be provided under this document (other than under this clause 11.1) 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 11.1.
- (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 11.1:
  - (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 11.1, 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 11.1(c)(i).

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

- (i) If the GST Amount recovered by the Supplier from the Recipient under clause 11.1(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.

## 12. General

### 12.1 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**

Address:

Fax:

For the attention of:

#### **The Operator**

Address:

Fax:

For the attention of:

#### **Operator B**

Address:

Fax:

For the attention of:

#### **The Expert**

Address:

Fax:

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 12.1(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,

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.

## **12.2 Further acts and documents**

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

## **12.3 Counterparts**

This document may be executed in any number of counterparts and by each of the Parties and the Expert on separate counterparts. Each counterpart constitutes an original of this document, and all together constitute one document.

## Schedule 1 – The Dispute

*[Insert description of the Dispute]*



## Schedule 2 – Rules for Expert Determination Process

### 1. Commencement

The Expert Determination Process commences when the Parties and the Expert enter into this document to which these Rules form a part.

### 2. Written submissions

- (a) Within 7 days after the commencement of the Expert Determination Process, the Party that gave the Notice of Dispute under clause 87.3 of the Project Deed (**Claimant**) must give the other Party (**Respondent**) and the Expert:
  - (i) a written statement setting out the particulars of the Dispute referred for Determination;
  - (ii) any agreed statement of facts;
  - (iii) a written submission on the legal and factual issues of its claim; and
  - (iv) all documents and other evidentiary material on which it relies.

(together, the **Claimant's Submissions**).

- (b) Within 7 days after receiving the Claimant's Submissions, the Respondent must give the Claimant and the Expert a written response to the Claimant's Submissions including any cross-claim (**Respondent's Submissions**).
- (c) Within 7 days after receiving the Respondent's Submissions the Claimant must give the Respondent and the Expert a written response to the cross-claim and if the Expert considers it appropriate may reply to matters (other than the cross-claim (if any)) addressed in the Respondent's Submissions (**Claimant's Submissions in Reply**). The Claimant's Submissions in Reply must not raise new matters.
- (d) If the Expert considers it appropriate, within 7 days after receiving the Claimant's Submissions in Reply (if any) the Respondent may reply to the Claimant's Submissions in respect of the cross-claim (if any) and the other matters addressed in the Claimant's Submissions in Reply (if any) (**Respondent's Submissions in Reply**). The Respondent's Submissions in Reply must not raise new matters.
- (e) If the Expert decides further information or documentation (including submissions) is required for the Determination, the Expert may direct the Parties to provide such further information or documentation (including submissions) as the Expert may require.
- (f) The Expert must disclose to both Parties all information or documentation (including submissions) received by the Expert on a private and confidential basis.
- (g) Any times fixed pursuant to these Rules may be varied by agreement of the parties. In the absence of such agreement, or proper cause being shown by a party, the Expert may vary the times fixed on such terms as he or she considers reasonable in the circumstances.

### 3. Conference

- (a) The Expert may, if he or she thinks appropriate, call a conference of the Parties. Unless the Parties agree otherwise, the conference will be held at [# insert venue].
- (b) At least 14 days before the conference, the Expert must inform the Parties in writing of the date, venue and agenda for the conference.

- (c) The Parties must appear at the conference and may make submissions on the subject matter of the conference. If a Party fails to appear at a conference of which that Party had been notified under clause 3(b), the Expert and the other Party may nevertheless proceed with the conference.
- (d) The Parties:
  - (i) may be accompanied at a conference by legal or other advisers; and
  - (ii) will be bound by any procedural directions as may be given by the Expert in relation to the conference both before and during the course of the conference.
- (e) The conference must be held in private.
- (f) If required by either Party, transcripts of the conference proceedings must be taken and made available to the Expert and the Parties on a private and confidential basis.

#### 4. View

- (a) Upon the application of a Party or at the Expert's own volition, the Expert may direct that a view be conducted of any place or thing relevant to the Dispute by the Expert in the presence of the Parties.
- (b) The Expert may draw any reasonable inference from what the Expert sees, hears or otherwise observes during a view.
- (c) If a Party fails to attend a view, the Expert may nevertheless proceed with the view.

#### 5. Engagement of advisers and consultants by Expert

- (a) The Expert may engage his or her own advisers and consultants, including lawyers, accountants, bankers, engineers or other technical consultants, to provide information to assist the Expert in his or her Determination, unless both Parties object to the engagement, and subject to the following process:
  - (i) the Expert must notify the Parties of any proposed engagement;
  - (ii) the Parties may make submissions to the Expert on the selection of such a person, including any qualifications and expertise that may be required;
  - (iii) the Expert must obtain the Parties' prior written consent to provide any information relating to the Expert Determination to the persons to be engaged by the Expert;
  - (iv) before disclosure of any information relating to the Expert Determination to the persons engaged by the Expert under this clause, the Expert must obtain a confidentiality undertaking from those persons with respect to that information on the same terms as clause 3 of this document;
  - (v) the Expert must disclose to both Parties all advice received from any persons engaged by the Expert under this clause; and
  - (vi) the Parties may make submissions to the Expert, within the time prescribed by the Expert, on the weight (if any) to be given by the Expert to any advice such a person may give.
- (b) The Expert must:
  - (i) inform the Parties of:

- (A) any relationship or interest which the Expert has, or the persons engaged by the Expert under clause 5(a) have, with a Party or its officers, employees, consultants or agents;
- (B) any interest the Expert has, or the persons engaged by the Expert under clause 5(a) have, in the Dispute; and
- (C) any circumstance which might reasonably be considered to adversely affect the capacity of the Expert, or the persons engaged by the Expert under clause 5(a), to act independently or impartially in relation to the Dispute,

immediately upon becoming aware of any such circumstances.

- (c) This document will terminate 7 days after the notice is provided by the Expert under clause 5(b), unless the parties agree otherwise.

## 6. General

- (a) Except where otherwise required by these Rules, the Expert may receive information in any way the Expert thinks fit (including as inquisitor).
- (b) Any dispute arising between the parties in respect of any matter concerning these Rules or the Expert Determination Process, (including the Expert's jurisdiction) shall be submitted to and determined by the Expert.
- (c) Subject to clauses 3(c) and 4(c), meetings and discussions with the Expert in respect of the Dispute or the submissions of either Party must only take place in the presence of both Parties.
- (d) The Expert Determination Process will not terminate or discontinue because of the failure of a Party to:
  - (i) serve a written submission, statement or response within the prescribed time;
  - (ii) appear at a conference of which that Party had been notified under clause 3(b); or
  - (iii) attend a view.
- (e) The Expert Determination Process may be terminated at any time prior to the issue of the Determination by the Parties giving joint written notice to the Expert terminating the Expert Determination Process.

## 7. The Determination

- (a) As soon as possible after receipt of the submissions or after any conference and, in any event not later than 90 days after the commencement of the Expert Determination Process (or such other period as the Parties may agree), the Expert must:
  - (i) determine the Dispute between the Parties, and
  - (ii) notify the Parties of the Determination.
- (b) The Determination must:
  - (i) be in writing stating the Expert's determination and giving reasons;
  - (ii) be made in accordance with:
    - (A) the Law;

- (B) the Project Deed;
  - (C) this document (including these Rules);
  - (D) the Institute for Arbitrators and Mediators Australia Expert Determination Rules (to the extent that they are not inconsistent with these Rules); and
  - (E) the requirements of procedural fairness;
- (iii) be made on the basis of:
- (A) the submissions, statements and responses (if any) of the Parties (subject to clause 2(f));
  - (B) the further information and documentation (including submissions) received by the Expert under clause 2(e) (if any);
  - (C) the conference (if any);
  - (D) the view (if any);
  - (E) the Expert's own expertise (as supplemented by any advice which the Expert obtains from his or her own advisers and consultants); and
  - (F) the submissions received by the Expert under clause 5(a)(vi) (if any).
- (c) To the extent permitted by law, the Expert will have no power to apply or have regard to the provisions of Part 4 of the *Civil Liability Act 2002* (NSW) (and any equivalent statutory provision in any other state or territory).
- (d) Subject to clause 7(e), the Determination will be final and binding on the Parties unless a notice of appeal is given in accordance with clause 87.5(h) of the Project Deed. If such a notice is given, the Determination will be binding on the Parties unless and until it is overturned, reversed, varied or otherwise changed by an award of an arbitrator or court.
- (e) If the Determination contains a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation of figures, a material mistake in the description of any person, matter or thing, or a defect of form, then the Expert must correct the Determination.

## 8. Modification

These Rules may be modified only by agreement of the Parties and, if the Expert has been appointed, the Expert.

### **Schedule 3 – The Expert's Fees and Disbursements**

*[To be inserted. Disbursements should include fees paid to consultants and advisors engaged by the Expert pursuant to clause 5 of the Rules]*

**Signed** as an agreement.

*[Signature clauses to be inserted]*