

# Royal North Shore Hospital and Community Health Services

## Construction Side Deed

**Thiess Pty Limited**

ABN 87 010 221 486

Construction Contractor

**Leighton Holdings Limited**

ABN 57 004 482 982

Construction Contractor Guarantor

**InfraShore Pty Limited**

ACN 124 557 008

Project Company

**Health Administration Corporation**

NSW Health

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**Construction Side Deed made at** SYDNEY **on** 23 OCTOBER 2008

- Parties**
- Thiess Pty Ltd ABN 87 010 221 486** of 179 Grey Street, South Bank, QLD 4101  
("Construction Contractor")
- Leighton Holdings Limited ABN 57 004 482 982** of 472 Pacific Highway, St Leonards, NSW  
("Construction Contractor Guarantor")
- InfraShore Pty Ltd ACN 124 557 008** of Level 22, ABN AMRO Tower, 88 Phillip Street, Sydney, NSW, 2000  
("Project Company")
- Health Administration Corporation** a corporation sole constituted under section 9 of the Health Administration Act 1982 (NSW)  
("NSW Health")

## Background

- A. NSW Health and the Project Company have entered, or will enter, into the Project Deed for the provision of certain health facilities and related facilities and services.
- B. The Project Company and the Construction Contractor have entered, or will enter, into the Construction Contract for, amongst other things, the [*insert purpose of subcontract*].
- C. NSW Health are entering into this document so that they may exercise certain rights upon a default occurring under the Project Deed and/or the Construction Contract.

## Operative provisions

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### 1. Interpretation

#### 1.1 Definitions

The following definitions apply in this document.

"**Appointed Representative**" means a Representative that has assumed the Project Company's rights under the Construction Contract pursuant to clause 3.3(a) of this document.

"**Authorisation**" means:

- (a) an authorisation, consent, declaration, exemption, notarisation or waiver, however it is described; and
- (b) in relation to anything that could be prohibited or restricted by law if a Government Agency acts in any way within a specified period, the expiry of that period without that action being taken,

including any renewal or amendment.

**"Construction Contract"** means the document entitled [*Construction Contract*] dated on or about the date of this document between the Project Company and the Construction Contractor.

**"Construction Contract Document"** means each of the Construction Contracts, the Construction Contract Guarantee, each Construction Contract Security and this document.

**"Construction Contract Event of Default"** means a breach or default by the Project Company under the Construction Contract.

**"Construction Contract Guarantee"** means each guarantee granted by the Construction Contractor Guarantor in favour of the Project Company.

**"Construction Contract Security"** means each bank guarantee, insurance bond or other bonding or security issued in favour of the Project Company to secure the Construction Contractor's obligations under the Construction Contract.

**"Construction Contract Termination Notice"** means a notice given by the Construction Contractor to NSW Health under clause 3.1.

**"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.

**"Excluded Tax"** means a Tax on net income in any jurisdiction, other than:

- (a) a Tax that is calculated on or by reference to the gross amount of any payment derived by a party under this document or the transactions that this document contemplates (unless the Tax is imposed because the party has not given its tax file number to the person who made the payment); or
- (b) a Tax that is imposed because a party is regarded as being subject to tax in a jurisdiction solely because it is a party to this document or because it is participating in the transactions that this document contemplates.

**"Financiers Step In Period"** means the Step In Period under the Financiers Tripartite Deed.

**"Financiers Tripartite Deed"** means the agreement entered into or to be entered into between the Security Trustee, NSW Health and the Project Company.

**"Government Agency"** means:

- (a) a government or government department or other body;
- (b) a governmental, semi-governmental or judicial person; or
- (c) a person (whether autonomous or not) who is charged with the administration of a Law.

**"Permitted Variation"** means a variation to the Construction Contract permitted or required to facilitate the Project Company's compliance with the provisions of the Project Deed, including variations permitted in accordance with the provisions of clause 20, clause 21, clause 22 or clause 23 of the Project Deed.

**"Project Breach"** means a breach by the Project Company of any of its obligations under the Project Deed.

**"Project Deed"** means the deed entitled "Royal North Shore Hospital and Community Health Services PPP Project Deed" dated on or about the date of this document between NSW Health and the Project Company.

**"Representative"** means each of:

- (a) NSW Health; and
- (b) an agent, manager, receiver, receiver and manager, administrator or analogous person appointed by NSW Health under the Project Security.

**"Required Period"** means the period starting on the date of a Construction Contract Termination Notice and ending 60 days later, provided that where the Financiers have exercised their rights to step in under the Financiers Tripartite Deed, 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 Construction Contract Termination Notice is still subsisting.

**"Step In Date"** means the date on which NSW Health takes any action under clause 3.3(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 3.5;
- (c) the date of any termination for breach under clause 3.4(b); and
- (d) the later of the date of expiry of the Construction Contract and the date of expiry of the Construction Contract Guarantee.

**"Step Out Date"** means the date nominated in the notice given under clause 3.6(a).

**"Suitable Substitute Project Company"** means a person nominated by the Project Director and approved by the Construction Contractor (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 Project Company under the Construction Contract; and
- (b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and subcontracts) which are sufficient to enable it to perform the obligations of the Project Company under the Construction Contract.

**"Tax"** means a tax, levy, duty, charge, deduction or withholding, however it is described, that is imposed by a Government Agency, 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 Rules for interpreting this document

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

- (a) A reference to:
  - (i) Legislation is to that Legislation as amended, re-enacted or replaced;
  - (ii) a document or agreement, or a provision of a document or agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated;
  - (iii) a party to this document or to any other document or agreement includes a permitted substitute or a permitted assign of that party;
  - (iv) a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person; and
  - (v) anything (including a right, obligation or concept) includes each part of it.
- (b) A singular word includes the plural, and vice versa.
- (c) A word which suggests one gender includes the other genders.
- (d) If a word is defined, another part of speech has a corresponding meaning.
- (e) If an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing.
- (f) The word **agreement** includes an undertaking or other binding arrangement or understanding, whether or not in writing.

## 1.4 Business Days

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

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

## 1.5 Multiple parties

If a party to this 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 Contra proferentum**

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

## **1.7 Approvals and consents**

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

and regardless of whether the requirement of the approval, consent, decision or exercise of discretion is express or implied, NSW Health or the Project Director (as the case may be), has or have the right to give or make its approval, consent or decision or exercise its discretion conditionally or unconditionally or to withhold its approval, consent, decision or exercise of discretion but in giving or withholding its approval, consent, decision or exercise of discretion, or in imposing any conditions, NSW Health or the Project Director (as the case may be) must act reasonably.

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

## **1.8 Project Director**

- (a) NSW Health must procure that the parties to this document are notified, within 5 Business Days after the date of the appointment of the Project Director, of the identity and address of the Project Director, and, as soon as practicable, of any changes in the identity or address of the Project Director.
- (b) Clause 4.4 of the Project Deed applies to this document as if it were set out in full in this document.

## **1.9 Project Deed and Financiers Tripartite Deed**

Each of the Construction Contractor and the Construction Contractor Guarantor acknowledges that it has received a copy of the Project Deed and the Financiers Tripartite Deed.

## **1.10 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.

## **1.11 Liability of Construction Contractor to NSW Health**

For the avoidance of doubt, and notwithstanding any provision of this deed:

- (a) the Construction Contractor and/or the Construction Contractor Guarantor will have no greater obligations or liabilities to NSW Health under, arising out of, or in connection with this deed than it would have had if NSW Health had been named as principal under the Construction Contract, to the extent that those obligations or liabilities relate to a Construction Contract; and
- (b) the liability of the Construction Contractor and/or the Construction Contractor Guarantor under, arising out of, or in connection with this deed will not exceed the difference between the maximum liability of the Construction Contractor under the Construction Contract and the liability incurred (from time to time) by the Construction Contractor to the Project Company under the Construction Contract.

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## **2. Securities**

### **2.1 Construction Contractor acknowledgments and consents**

The Construction Contractor:

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

### **2.2 Construction Contractor Guarantor acknowledgments and consents**

The Construction Contractor Guarantor:

- (a) acknowledges and consents to the grant of a security over all of the Project Company's right, title and interest in and to the Construction Contract Guarantee pursuant to Project Security;
- (b) acknowledges the rights created under Project Security in favour of NSW Health, including the appointment by the Project Company of NSW Health as the lawful attorney of the Project Company to do, perform and exercise all things, acts and rights

under the Construction Contract Guarantee on behalf and for the account of the Project Company, pursuant to Project Security;

- (c) acknowledges and agrees that NSW Health is not subject to any duty or obligation under the Construction Contract Guarantee as a result of Project Security or this document; and
- (d) acknowledges that the grant of Project Security is not, and the exercise by NSW Health of its rights under Project Security will not give rise to any rights by the Construction Contractor Guarantor to revoke or terminate the Construction Contract Guarantee.

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### **3. Construction Contract Default and Step In rights**

#### **3.1 Notice of Construction Contract Event of Default**

The Construction Contractor shall not terminate or give notice terminating the Construction Contract without giving to NSW Health at least 60 days' prior written notice (the "**Construction Contract 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 Project Company to the Construction Contractor:
  - (i) at the time of the Construction Contract Termination Notice; and/or
  - (ii) which will fall due on or prior to the end of the Required Period, under the Construction Contract.

#### **3.2 Remedy of default**

- (a) The Construction Contractor undertakes, despite any provision of the Construction Contract, to provide to NSW Health, no less frequently than once a week, full details as to whether a Construction Contract Event of Default which is the subject of a Construction Contract Termination Notice has been remedied.
- (b) If a Construction Contract Event of Default is subsisting and has not been remedied, NSW Health 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 Construction Contractor within a reasonable period of that election and, in any event, within the Required Period. If notified, the Construction Contractor agrees:
  - (i) to use its best endeavours to reach an agreement with NSW Health in respect of the arrangements to remedy the breach; and
  - (ii) not to exercise any of its rights in relation to the Construction Contract Event of Default, including any right to terminate the Construction Contract, except, if an agreement is not reached within the Required Period, the Construction Contractor may exercise such rights subject to clause 3.3 and clause 3.4.
- (c) The Construction Contractor acknowledges and agrees that any action taken by NSW Health under this clause 3.2 will not be construed as an assumption by NSW Health

of the liabilities or obligations of the Project Company under the Construction Contract.

### **3.3 Assumption by Representative**

- (a) Subject to clause 3.3(c), without prejudice to NSW Health's other rights under Project Security, at any time:
  - (i) when NSW Health may exercise its Step In Rights under the Project Deed;
  - (ii) during which a Project Company Termination Event is subsisting (whether or not a Construction Contract Termination Notice has been served); or
  - (iii) during the Required Period,

NSW Health may procure that a Representative assumes, or steps in to, all of the Project Company's rights under the Construction Contract and the Construction Contract Guarantee.

- (b) NSW Health must give the Construction Contractor and/or the Construction Contractor Guarantor two days' prior written notice of any action to be taken by it referred to in this clause 3.3, including, where relevant, reasonable details of the event which gave rise to the Step In Rights or the Project Company Termination Event.
- (c) NSW Health's rights to step in under this clause 3.3 shall be postponed to the rights of the Financiers under the Financiers Tripartite Deed and NSW Health shall take no action under this clause 3.3 for so long as the Financiers Step In Period continues.

### **3.4 Step in period**

- (a) Without prejudice to clause 3.1, but subject to clause 3.4(b), the Construction Contractor shall not terminate the Construction Contract and the Construction Contractor Guarantor shall not terminate the Construction Contract Guarantee during the Step In Period on grounds:
  - (i) that NSW Health has taken any action referred to in clause 3.3 or otherwise enforced Project Security; or
  - (ii) arising prior to the Step In Date.
- (b) The Construction Contractor shall be entitled to terminate the Construction Contract by written notice to the Project Company and the Appointed Representative:
  - (i) if any amount:
    - A. referred to in clause 3.1(c)(i) has not been paid to the Construction Contractor on or before the Step In Date;
    - B. referred to in clause 3.1(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 NSW Health; and
    - C. of which the Construction Contractor was not aware (having made proper enquiry) at the time of the Construction Contract 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 NSW Health,

provided that such amounts have been independently certified to the reasonable satisfaction of NSW Health and the Appointed Representative;  
or

- (ii) on grounds arising after the Step In Date in accordance with the terms of the Construction Contract.
- (c) Each of the Construction Contractor and the Construction Contractor Guarantor shall deal with the Appointed Representative in place of the Project Company during the Step In Period.
- (d) During the Step In Period, the Construction Contract and the Construction Contract Guarantee shall remain in full force and effect and the Construction Contractor shall continue diligently to perform all of its obligations and procure the completion of the Works in accordance with the Construction Contract as though NSW Health were directly party to the Construction Contract in place of the Project Company.
- (e) During the Step In Period, NSW Health shall be entitled to enforce all of the rights of the Project Company under the Construction Contract and the Construction Contract Guarantee in place of the Project Company.

### **3.5 Novation**

- (a) Subject to clause 3.5(b), at any time:
  - (i) during which a Project Company Termination Event is subsisting; or
  - (ii) during the Step In Period,

NSW Health may where it has terminated the Project Deed, with 30 days' prior written notice to the Construction Contractor, procure the novation of the Project Company's rights and liabilities under the Construction Contract and the Construction Contract Guarantee to a Suitable Substitute Project Company.
- (b) The Construction Contractor shall notify NSW Health as to whether any person to whom NSW Health proposes to novate the Project Company's rights and liabilities under the Construction Contract is a Suitable Substitute Project Company, on or before the date falling 30 days after the date of receipt of all information reasonably required by the Construction Contractor to decide whether the proposed project company is a Suitable Substitute Project Company.
- (c) The Construction Contractor shall not unreasonably withhold or delay its decision on whether the proposed project company is a Suitable Substitute Project Company.
- (d) On any novation referred to in clause 3.5(a) becoming effective:
  - (i) the Project Company and (if applicable) NSW Health and the Appointed Representative shall be released from any obligations arising under or in connection with the Construction Contract and the Construction Contract Guarantee from that date and the Suitable Substitute Project Company shall become liable for obligations arising on or after that date;
  - (ii) any then subsisting ground for termination of the Construction Contract by the Construction Contractor shall be deemed to have no effect and any

subsisting Construction Contract Termination Notice shall be automatically revoked;

- (iii) the Construction Contractor shall enter into a side deed with NSW Health and the Suitable Substitute Project Company on substantially the same terms as this document; and
- (iv) as between the Project Company, the Construction Contractor and the Construction Contractor Guarantor, the Construction Contractor and the Construction Contractor Guarantor will be released from any liabilities or obligations arising under or in connection with the Construction Contract and the Construction Contract Guarantee from that date (except for any accrued liabilities or obligations).

### **3.6 Step out**

- (a) The Appointed Representative may, at any time during the Step In Period, with at least 30 days' prior written notice to the Construction Contractor and the Construction Contractor 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 3.6(a) above, NSW Health and any Appointed Representative will be released from any and all obligations and liabilities to the Construction Contractor and the Construction Contractor Guarantor:
  - (i) under the Construction Contract;
  - (ii) under the Construction Contract Guarantee; and
  - (iii) under this document.provided that NSW Health will be liable for any and all amounts referred to in clause 3.4(b)(i).
- (c) The release under clause 3.6(b) will not affect or prejudice the continuation of the Project Company's obligations to the Construction Contractor under the Construction Contract.

### **3.7 Construction Contractor**

- (a) Except in accordance with the terms of this document, each of the Construction Contractor and the Construction Contractor Guarantor acknowledges and agrees that:
  - (i) NSW Health and (if applicable) the Appointed Representative are not responsible for, and have no liability (actual or contingent); and
  - (ii) the Construction Contractor has no cause of action against NSW Health or (if applicable) the Appointed Representative,in relation to a Construction Contract Event of Default, or any other event, act or omission of the Project Company or any other party, in relation to the Construction Contractor the Construction Contract Guarantee.
- (b) Each of the Construction Contractor and the Construction Contractor Guarantor shall at the Project Company's expense, take whatever action NSW Health, an Appointed Representative or a Suitable Substitute Project Company taking a novation in

accordance with clause 3.5(a) may require for perfecting any step in, novation or release under clauses 3.3, 3.5 or 3.6, including the execution of any novation or assignment, the transfer of any Construction Contract Security and the giving of any notice, order or direction and the making of any registration which, in each case, NSW Health, Appointed Representative, Representative or Suitable Substitute Project Company reasonably requires.

- (c) Each of the Construction Contractor and the Construction Contractor Guarantor undertakes that it shall not take any action to wind up, appoint an administrator or sanction a voluntary arrangement (or similar) in relation to the Project Company during any Required Period or Step In Period.
- (d) The Project Company 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.

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## 4. Representations and Warranties

### 4.1 NSW Health representations and warranties

NSW Health 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 NSW Health's valid, legal and binding obligations enforceable against NSW Health 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 NSW Health will not contravene any Law to which NSW Health is subject.

### 4.2 General representations and warranties

Each of the Construction Contractor and the Construction Contractor 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 Construction Contract Documents to which it is a party and to carry out the transactions that they contemplate;
- (c) **(corporate authority)** it has taken all corporate action that is necessary or desirable to authorise its entry into the Construction Contract Documents to which it is a party and its carrying out the transactions that they contemplate;
- (d) **(Authorisations)** it holds each Authorisation that is necessary or desirable to:
  - (i) enable it to properly execute the Construction Contract Documents to which it is a party and to carry out the transactions that they contemplate;

- (ii) ensure that the Construction Contract 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 Authorisations is subject;
- (e) **(documents effective)** the Construction Contract 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 Construction Contract 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 Government Agency that is binding on it or any of its property;
    - (ii) contravene any Authorisation;
    - (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 NSW Health in connection with any Construction Contract 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 Construction Contract Documents to which it is a party as trustee of any trust or settlement.

#### 4.3 Representations and warranties regarding the Construction Contract

Each of the Construction Contractor and the Project Company represents and warrants that:

- (a) **(termination)** it has no right to:
  - (i) terminate, rescind, repudiate or vary the Construction Contract; or
  - (ii) refuse to perform or observe any of its obligations under the Construction Contract;
- (b) **(entire agreement)** the Construction Contract Documents set out all of the agreements, arrangements and understandings between the Project Company, the Construction Contractor and the Construction Contractor Guarantor relating to the Project;
- (c) **(Construction Contract Event of Default)** no Construction Contract Event of Default has occurred; and

- (d) **(skill of Construction Contractor)** (for the benefit of NSW Health only), the Construction Contractor has sufficient skill, experience, expertise and ability to perform its obligations to the standards required by the Project Deed.

#### **4.4 Representations and warranties regarding the Construction Contract Guarantee**

Each of the Construction Contractor Guarantor and the Project Company represents and warrants that:

- (a) **(absolute and unconditional)** the Construction Contract Guarantee is an absolute and unconditional obligation of the Construction Contractor Guarantor and nothing contemplated by this document (including, the enforcement of Project Security and step in under clause 3.3) might operate to exonerate the Construction Contractor Guarantor from its obligations under the Construction Contract Guarantee or reduce, release or prejudice the Construction Contract Guarantee;
- (b) **(termination)** it has no right to:
  - (i) terminate, rescind, repudiate or vary the Construction Contract Guarantee; or
  - (ii) refuse to perform or observe any of its obligations under the Construction Contract Guarantee; and
- (c) **(entire agreement)** the Construction Contract Documents set out all of the agreements, arrangements and understandings between the Project Company, the Construction Contractor and the Construction Contractor Guarantor relating to the Project.

#### **4.5 Repetition of representations and warranties**

The representations and warranties in this clause 4 are taken to be repeated immediately before Financial Close, on the basis of the facts and circumstances as at that date.

#### **4.6 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 4.

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## **5. Undertakings**

### **5.1 Each of the Construction Contractor and the Construction Contractor Guarantor must:**

- (a) **(hold Authorisations)** obtain and maintain each Authorisation that is necessary or desirable to:
  - (i) execute the Construction Contract Documents to which it is a party and to carry out the transactions that they contemplate;
  - (ii) ensure that the Construction Contract Documents to which it is a party are legal, valid, binding and admissible in evidence;
  - (iii) enable it to properly carry on its business; and

- (iv) must comply with any conditions to which any of these Authorisations is subject;
- (b) (**representations and warranties untrue**) notify NSW Health 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) (**comply with obligations**) fully comply with all of its obligations under the Construction Contract, the Construction Contract Guarantee and this deed;
- (d) (**performance of obligations**) in the case of the Construction Contractor, continue to exercise, in accordance with Good Industry Practice, the level of skill, care and diligence in performing its duties under the Construction Contract which may reasonably be expected of a contractor experienced in the performance of the same or similar works to the Works, provided that the Construction Contractor will have no greater obligations to NSW Health by virtue of this deed than it would have had if NSW Health had been named as the Project Company under the Construction Contract;
- (e) (**standard of work**) in the case of the Construction Contractor, ensure that the Works will be carried out and completed:
  - (i) in accordance with the Construction Contract and this deed;
  - (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 to the quality and standard specified in the Construction Contract, but if no standard is specified, new and of merchantable quality and which are and will remain at all relevant times during the Term fit for their purpose; and
  - (v) so that the Works, when completed, will be and will remain at all relevant times during the Term Fit for Intended Purpose;
- (f) (**Security/Access**) in the case of the Construction Contractor, and if at any time called upon to do so by NSW Health:
  - (i) extend to NSW Health any guarantee of the performance by a subcontractor or any warranty provided to the Project Company;
  - (ii) provide NSW Health, or any person authorised by NSW Health, with such information related to the Works as NSW Health may reasonably require; and
  - (iii) allow NSW Health, or any person authorised by NSW Health, on reasonable notice, to inspect the Works as NSW Health may reasonably require;
- (g) (**insurance**) in relation to any policies the details of which have been provided to the Construction Contractor, not do anything that may invalidate any insurance policy held by NSW Health or the State in relation to the Health Facilities or the Construction Sites, or any indemnity to which NSW Health or the State may be entitled from the New South Wales Treasury Managed Fund but will have no liability

to NSW Health if compliance with this obligation requires a change to the Works unless and to the extent a Contract Variation is agreed or determined under Part 13 of Schedule 14 of the Construction Contract;

- (h) **(no administrator)** not appoint an administrator without notice to NSW Health;
- (i) **(information)** promptly on request (and in any event within five Business Days) provide to the Project Director any information relating to the financial condition, business, property, and affairs of itself and its related bodies corporate, and the Construction Contract Documents and the Project, that the Project Director reasonably requests;
- (j) **(no amendments)** other than with respect to a Permitted Variation or as otherwise permitted under the Project Documents, not amend, waive, suspend (except to the extent it is entitled to under the Construction Contract), terminate, revoke or otherwise vary the terms of the Construction Contract Documents, the Works or the Project, or enter into other agreements or arrangements with a party or parties to the Construction Contract Documents which relate to the subject matter of the Construction Contract Documents, without the prior written consent of NSW Health;
- (k) **(no assignment)** subject to clause 9.2(a), not dispose of, declare a trust over or otherwise create an interest in its right, title or interest to or under any Construction Contract Document to which it is a party, or any part of a Construction Contract Document to which it is a party, other than pursuant to Project Security and the Financing Agreements, without the prior written consent of NSW Health; and
- (l) **(notices)** in the case of the Construction Contractor, give NSW Health a copy of any document that is issued to it or issued by it under the Construction Contract in relation to suspension, default or termination within 2 Business Days of the issue of the notice.

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## 6. Indemnity

The Project Company must indemnify NSW Health against, and must pay NSW Health 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.

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## 7. Confidentiality

### 7.1 Keep confidential

Subject to clause 7.2, 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.

### 7.2 Permitted Disclosure

Clause 7.1 will not apply to:

- (a) any disclosure of information that is reasonably required by persons engaged in the performance of the obligations of a party to this document;
- (b) any matter which a party can demonstrate is already generally available and in the public domain otherwise than as a result of breach of clause 7.1;

- (c) any disclosure which is required by any Law (including any order of a court of competent jurisdiction);
- (d) any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- (e) any disclosure of information to any prospective permitted assigns or prospective investors in or unitholders or shareholders of the Project Company, ISAM Trust or FinCo, in each case to the extent reasonably necessary to enable a decision to be taken on the proposal;
- (f) any disclosure by the Project Director, of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise to:
  - (i) any proposed new or replacement contractor, its advisers and lenders should NSW Health decide to re-tender the Project Deed; or
  - (ii) any person in connection with a Benchmarking Exercise;
- (g) any disclosure of information by the Project Director to any other department, office or agency of the government of New South Wales;
- (h) any disclosure by the Project Director of any document relating to this document and which the Project Company or the Construction Contractor, as the case may be, (acting reasonably) has agreed with the Project Director contains no Commercially Sensitive Information; and
- (i) any disclosure of information by the Project Director or the Project Company to the Financiers.

### **7.3 Obligations Preserved**

Where disclosure is permitted under clause 7.2, other than paragraphs (b), (c), (f) or (g), 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.

### **7.4 Auditor-General**

Notwithstanding the other provisions of this clause 7, the parties acknowledge that the Project Documents will be made available to the Auditor-General in accordance with the *Public Finance and Audit Act 1983* (NSW), and information concerning the Project Documents will be tabled in Parliament by or on behalf of NSW Health and will be published in accordance with the Guidelines, and NSW Health and the Project Director may make the Project Documents (other than the Subcontracts) or any of them available to any person, subject to the deletion of Commercially Sensitive Information.

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## **8. Notices**

### **8.1 How to give a notice**

A notice, consent or other communication under this document is only effective if it is:

- (a) in writing, signed by or on behalf of the person giving it;
- (b) addressed to the person to whom it is to be given; and

- (c) either:
  - (i) delivered or sent by pre-paid mail (by airmail, if the addressee is overseas) to that person's address; or
  - (ii) sent by fax to that person's fax number and the machine from which it is sent produces a report that states that it was sent in full.

## 8.2 When a notice is given

A notice, consent or other communication that complies with this clause 8 is regarded as given and received:

- (a) if it is delivered or sent by fax:
  - (i) by 5.00 pm (local time in the place of receipt) on a Business Day - on that day; or
  - (ii) after 5.00 pm (local time in the place of receipt) on a Business Day, or on a day that is not a Business Day, on the next Business Day; and
- (b) if it is sent by mail within Australia, 3 Business Days after posting.

## 8.3 Address for notices

A person's address and fax number are those set out below, or as the person notifies the sender:

### **Construction Contractor**

Address: Level 5, 26 College Street, Sydney, NSW, 2000

Fax number: (02) 9331 4264

Attention: General Manager NSW/ACT

### **Construction Contractor Guarantor**

Address: 472 Pacific Highway, St Leonards, NSW, 2065

Fax number: (02) 9925 6005

Attention: Company Secretary

### **Project Company**

Address: Level 22, ABN AMRO Tower, 88 Phillip Street, Sydney, NSW, 2000

Fax number: (02) 8259 5425

Attention: Director, InfraShore

**with a copy to: ABN AMRO**

Address: Level 22, ABN AMRO Tower, 88 Phillip Street, Sydney 2000

Fax number: (02) 8259 5425

Attention: Director, Project Management, Structured Finance

## **NSW Health**

Address: Level 16, Tower A, Zenith Centre, 821 Pacific Highway, Chatswood, NSW, 2057

Fax number: (02) 8644 2240

Attention: Chief Executive, Health Infrastructure

with a copy to:

Address: Royal North Shore Hospital Redevelopment Office, Royal North Shore Hospital,  
Pacific Highway, St Leonards, NSW, 2065

Fax number: (02) 9926 5935

Attention: Project Director, Royal North Shore Hospital Redevelopment

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## **9. Amendment and Assignment**

### **9.1 Amendment**

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

### **9.2 Assignment**

- (a) The Construction Contractor, the Construction Contractor Guarantor and the Project Company may only dispose of, declare a trust over or otherwise create an interest in its rights under this document with the consent of NSW Health except:
  - (i) as contemplated or permitted by the Project Deed or the Financiers Tripartite Deed; or
  - (ii) in the case of the Construction Contractor and the Construction Contractor Guarantor, assignments by way of the grant of security in the normal course of business.
- (b) NSW Health may not, without the prior written consent of the Construction Contractor, the Construction Contractor Guarantor and the Project Company, assign, grant a Security Interest over or otherwise dispose of all or any benefit, right or interest under this document, provided always that an assignment by NSW Health of its interest to any other governmental body, agency or department (in each case constituting the State or supported by a guarantee from the State on terms no less favourable than those contained in the PAFA Act Guarantee) will not require the prior written consent of the Construction Contractor, the Construction Contractor Guarantor or the Project Company.

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## **10. General**

### **10.1 Governing law**

- (a) This document is governed by the Law in force in New South Wales.
- (b) Each party submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in New South Wales, and any court that may hear appeals from any of

those courts, for any proceedings in connection with this document, and waives any right it might have to claim that those courts are an inconvenient forum.

## **10.2 Liability for expenses**

The Project Company must indemnify each other party against, and must pay each other party on demand the amount of, all Taxes (other than Excluded Taxes) and expenses incurred in connection with:

- (a) the negotiation, preparation, execution, stamping and registration of this document;
- (b) the transactions that this document contemplates; and
- (c) any amendment to, or any consent, approval, waiver, release or discharge of or under, this document,

including legal expenses on a full indemnity basis and expenses incurred in engaging consultants.

## **10.3 Giving effect to this document**

Each party must do anything (including execute any document), and must ensure that its employees and agents do anything (including execute any document), that any other party may reasonably require to give full effect to this document.

## **10.4 Waivers in writing**

- (a) The non-exercise of or a delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. Any waiver or consent given by a party will only be effective if given or confirmed in writing.
- (b) Nothing in clause 10.4(a) prevents the partial waiver of a power or right, but clause 10.4(a) applies equally to such partial waiver.

## **10.5 Operation of this document**

- (a) This document contains the entire agreement between the parties about its subject matter. Any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by this document and has no further effect.
- (b) Any right that a person may have under this document is in addition to, and does not replace or limit, any other right that the person may have.

## **10.6 Operation of indemnities**

- (a) No indemnity in this document limits the effect or operation of any other indemnity in this document.
- (b) Unless expressly provided otherwise, each indemnity in this document is a continuing obligation, separate and independent from the other obligations of the parties.
- (c) Each indemnity in this document survives the expiry or termination of this document.
- (d) A party may recover a payment under an indemnity in this document before it makes the payment in respect of which the indemnity is given.

## **10.7 Severance**

If at any time any provision of this document is or becomes illegal, invalid or unenforceable in any respect under applicable Law, that provision is to be severed to the extent necessary to make this document enforceable, and it will not affect or impair the legality, validity or enforceability of any other provision of this document.

## **10.8 Inconsistency with other documents**

If this document is inconsistent with any other document or agreement between any of the parties, including, for the avoidance of doubt, the Construction Contract and the Construction Contract Guarantee, this document prevails to the extent of the inconsistency.

## **10.9 Counterparts**

This document may be executed in counterparts.

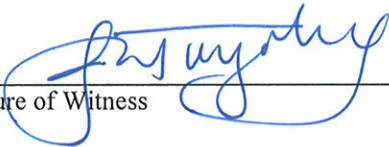
## **10.10 Attorneys**

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

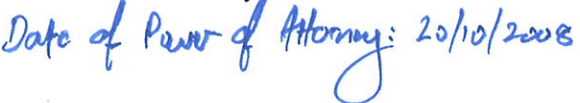
**Executed** as a deed.

**Signed sealed and delivered** for and on behalf of **Thiess Pty Limited** under Power of Attorney, in the presence of:

  
\_\_\_\_\_  
Signature of Attorney

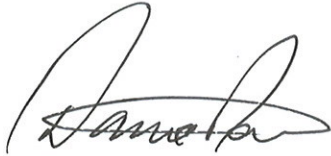
  
\_\_\_\_\_  
Signature of Witness

  
\_\_\_\_\_  
Name of Attorney in full



  
\_\_\_\_\_  
Name of Witness in full

**Signed sealed and delivered** by two attorneys for and on behalf of **Leighton Holdings Limited** under Power of Attorney, in the presence of:



Signature of Witness

Dana Paul

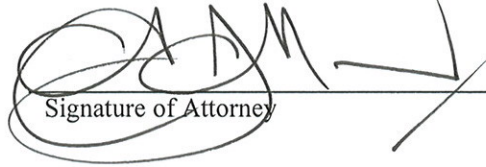
Name of Witness in full



Signature of Witness

Dana Paul

Name of Witness in full



Signature of Attorney

Ashley John Moir

Name of Attorney in full

Date of Power of Attorney: 01/04/2008




Signature of Attorney

Louis Scott Charlton

Name of Attorney in full

Date of Power of Attorney: 01/04/2008

**Signed sealed and delivered** for and on behalf of **InfraShore Pty Limited** under Power of Attorney, in the presence of:

  
\_\_\_\_\_  
Signature of Witness

**Rebecca Finkelstein**

\_\_\_\_\_  
Name of Witness in full

**Signed sealed and delivered by the Chief Executive of Health Infrastructure**, as delegate of the **Health Administration Corporation** pursuant to section 21 of the Health Administration Act 1982 (NSW) under delegation dated 23/10/2008 and the delegate hereby certifies that it has no notice of the revocation of such delegation:

  
\_\_\_\_\_  
Signature of Witness

**Stuart Michael Cosgriff**

\_\_\_\_\_  
Name of Witness in full

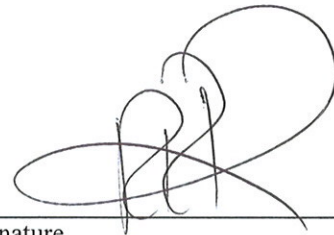


\_\_\_\_\_  
Signature of Attorney

**Simon Hunter**

\_\_\_\_\_  
Name of Attorney in full

*Date of Power of Attorney: 22/10/08*



\_\_\_\_\_  
Signature

**Robert Rust**  
**Chief Executive**  
**Health Infrastructure**

\_\_\_\_\_  
Name of delegate