

CLAYTON UTZ

EXECUTION VERSION

Royal North Shore Hospital and Community  
Health Services

Independent Certifier Deed

**Health Administration Corporation**

NSW Health

**InfraShore Pty Ltd**

ACN 124 557 008

Project Company

**WT Partnership Aust Pty Ltd**

ACN 006 040 768

Independent Certifier

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Our reference 117/2652/80046668

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Independent Certifier Deed made at *SYDNEY* on *23 OCTOBER 2008*

**Parties**

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

("NSW Health")

**InfraShore Pty Ltd ACN 124 557 008** of Level 22 ABN AMRO Tower, 88 Phillip Street Sydney 2000

("Project Company")

**WT Partnership Aust Pty Ltd** of Level 24 Northpoint, 100 Miller Street, North Sydney, NSW 2059

("Independent Certifier")

**Background**

- A. The parties have entered into this deed to appoint the Independent Certifier as the independent certifier for the purposes of the Project.
- B. By entering into this deed the Independent Certifier accepts its appointment under this deed and agrees to carry out its obligations and fulfil its functions under this deed and under the Project Deed.

**Operative provisions****1. Interpretation****1.1 Definitions**

The following definitions apply in this deed.

"**Fee**" means the fee as set out in the Payment Schedule.

"**Independent Certifier Sub-Deed**" means the deed entitled "Royal North Shore Hospital and Community Health Services Independent Certifier Sub-Deed" dated on or around the date of this deed between the Independent Certifier, the Construction Contractor and NSW Health.

"**Obligations**" means each obligation, function, task, duty or service contemplated to be performed by the Independent Certifier under this deed and under the Project Deed, including the obligation to perform each of the Services.

"**Payment Schedule**" means schedule 2 of this 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 deed between NSW Health and the Project Company.

"**Representative**" means an officer, employee or agent of the Independent Certifier, who is appointed by the Independent Certifier to perform any of the Obligations.

"Services" means those services listed in schedule 1.

## 1.2 Definitions in Project Deed

Subject to clause 1.1, terms used in this deed that are defined in the Project Deed have the same meanings in this deed.

## 1.3 Rules for interpreting this deed

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

- (a) A reference to:
  - (i) specific Legislation is to that Legislation as amended, re-enacted or replaced;
  - (ii) (except where the consent of NSW Health and/or Project Director is required, and then only to the extent of such consent) a document or deed, or a provision of a document or deed, is to that document, deed or provision as amended, supplemented, replaced or novated;
  - (iii) a party to this deed or to any other document or deed includes a permitted substitute or a permitted assign of that party;
  - (iv) a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person;
  - (v) anything (including a right, obligation or concept) includes each part of it;
  - (vi) a schedule, annexure or exhibit are references to schedules, annexures or exhibits to this deed and a reference to a Project Document includes any schedule, annexure or exhibit to that Project Document;
  - (vii) a reference to the Corporations Act is a reference to the *Corporations Act 2001(Cth)*; and
  - (viii) a reference to day or month means a reference to a calendar day or calendar month respectively.
- (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) A reference to **dollars** or **\$** is to the lawful currency of Australia and a reference to **GBP** is to the lawful currency of England.

- (g) The words **subsidiary, holding company and related body corporate** have the same meanings as in the Corporations Act.

#### **1.4 No joint venture**

Nothing in this deed constitutes a joint venture, partnership, agency or fiduciary relationship between any of NSW Health, the Project Company and the Independent Certifier.

#### **1.5 Business Days**

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

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

#### **1.6 Multiple parties**

If a party to this deed is made up of more than one person, or a term is used in this deed to refer to more than one party:

- (a) an obligation of those persons is joint and several;
- (b) a right of those persons is held by each of them severally; and
- (c) any other reference to that party or term is a reference to each of those persons separately, so that (for example) a representation, warranty or undertaking is given by each of them separately.

#### **1.7 Contra proferentum**

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

#### **1.8 Approvals and consents**

- (a) Unless expressly stated otherwise, all approvals or consents required to be given by the Independent Certifier under this deed must not be unreasonably withheld or delayed.
- (b) For the avoidance of doubt, all approvals, consents, decisions or exercises of discretion required to be given or made by NSW Health or the Project Director:
- (i) relating to, or arising under or in connection with this deed;
- (ii) relating to the satisfaction of a condition precedent pursuant to the terms of this deed; or
- (iii) sought in relation to or in connection with, or referable to, or determinative of, the occurrence of, any Project 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.

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

## **1.9 Discontinuance of bodies or associations**

- (a) If an authority, institution, association or body referred to in this deed is reconstituted, renamed or replaced, or if its powers or functions are transferred to another organisation, this deed refers to that new organisation.
- (b) If an authority, institution, association or body referred to in this deed ceases to exist, this deed refers to the organisation which serves the same purpose or object as that authority, institution, association or body.

## **1.10 Project Director**

- (a) NSW Health must procure that the parties to this deed 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 deed as if it were set out in full in this deed.

## **1.11 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 deed howsoever such rights, obligations or liabilities are sought to be enforced.

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## **2. Appointment of Independent Certifier**

### **2.1 Appointment of Independent Certifier**

- (a) NSW Health and the Project Company appoint the Independent Certifier under this deed to perform the Services.
- (b) The Independent Certifier confirms its acceptance of the appointment referred to in clause 2.1(a).
- (c) The parties acknowledge and agree that, without derogating from the obligations of the Independent Certifier or the Project Company under this deed, the Project Company, the Independent Certifier and the Construction Contractor shall enter into the Independent Certifier Sub-Deed.

## **2.2 Payment**

NSW Health and the Project Company must pay to the Independent Certifier the Fee in accordance with the Payment Schedule in the following proportions:

- (a) 50% of the Fee to be paid by NSW Health; and
- (b) 50% of the Fee to be paid by the Project Company.

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## **3. Independent Certifier's Obligations**

### **3.1 Acknowledgments by Independent Certifier**

The Independent Certifier acknowledges and agrees that:

- (a) it has received a copy of the Project Deed and that it has read, and is familiar with the terms of that document;
- (b) the Obligations extend to and include the obligations, functions, duties and services of the "Independent Certifier" as described in the Project Deed; and
- (c) subject to this clause 3, for the purpose of, and in the course of, discharging the Obligations and performing the Services, it will:
  - (i) attend at the Hospital Campus when appropriate or necessary to do so, or when its attendance at the Hospital Campus is reasonably requested by NSW Health or the Project Company; and
  - (ii) conduct all appropriate or necessary physical inspections of the Works and the Hospital Campus.

### **3.2 Acknowledgements regarding the Independent Certifier certifying Completion**

- (a) In respect of establishing whether the Works have achieved Completion the parties acknowledge and agree that, without in any way limiting the Independent Certifier's obligations under clauses 4 and 5 of this deed, the Independent Certifier:
  - (i) will carry out inspections when appropriate or necessary to do so, and when reasonably requested by NSW Health or the Project Company and by visual means only;
  - (ii) subject to clause 3.2(b), acting reasonably, is entitled to rely upon reports produced by suitably qualified and experienced experts, consultants, contractors and the Construction Contractor but only to the extent the subject matter of such reports is within the field of the expertise of the relevant expert, consultant, contractor or Construction Contractor; and
  - (iii) subject to clause 3.2(b), acting reasonably, is entitled to rely upon certificates produced by suitably qualified and experienced experts but only to the extent that the subject matter of such certificates is within the field of such expert's expertise.
- (b) In respect of establishing whether the Works have achieved Completion, and without in any way limiting the Independent Certifier's obligations under clauses 4

and 5 of this deed, the Independent Certifier may rely on reports or certificates issued to it pursuant to the Construction Contract unless within 10 Business Days of receiving advice as to the identity of the issuer of the relevant report or certificate the Project Company or NSW Health object in writing to the Independent Certifier relying on such report or certificate.

- (c) If under paragraph (b) above NSW Health or the Project Company does object to the Independent Certifier relying on a report or certificate or if the Independent Certifier deems it necessary for it to establish whether the Works have achieved Completion the Independent Certifier may engage an independent expert, consultant or contractor acceptable to both NSW Health and the Project Company to assist certifying Completion. Before engaging such expert, consultant or contractor they will agree with the Independent Certifier a Fee for such expert, consultant or contractor to be allocated between NSW Health and the Project Company in accordance with clause 2.2 (*Payment*).
- (d) If under paragraph (b) above NSW Health or the Project Company does object to the Independent Certifier relying on a report or certificate and an expert, consultant or contractor is engaged in accordance with paragraph (c) above and that expert, consultant or contractor makes materially the same findings as the relevant report or certificate issued under the Construction Contract the proportion of the Fee payable for such independent expert, consultant or contractor payable by the Project Company will be refunded by NSW Health to the Project Company.

### 3.3 Key personnel

- (a) The Independent Certifier must provide experienced and skilled personnel to perform the Obligations and must within 10 Business Days of the date of this deed give written notice to the Project Company and the Project Director of the identity and contact details of such personnel.
- (b) The Independent Certifier must ensure that all of its Representatives:
- (i) perform the services required of their respective positions;
  - (ii) are not removed without the prior written consent of the Project Director and the Project Company (which consent must not be unreasonably withheld or delayed, and will be deemed to have been given in relation to a party if no response has been received from that party within 14 days of the request for removal), and if any such Representative is removed, they must be replaced by a person of at least equivalent skill and experience; and
  - (iii) are available for consultation as the Project Director or the Project Company may reasonably require from time to time.

### 3.4 Subcontracting

The Independent Certifier:

- (a) may not subcontract the performance of any of the Services without the prior written consent of the Project Director and the Project Company (which consent must not be unreasonably withheld or delayed, and will be deemed to have been given in relation to a party if no response has been received from that party within

14 days of the request to subcontract) other than as permitted under clause 3.2 (*Acknowledgements regarding the Independent Certifier certifying Completion*);

- (b) remains responsible for the performance of the Services in accordance with this deed, notwithstanding any such subcontracting; and
- (c) must ensure that any subcontract includes a provision to the effect that, 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 the subcontract howsoever such rights, obligations or liabilities are sought to be enforced.

### **3.5 Quality assurance**

- (a) The Independent Certifier must implement a quality system in accordance with ISO9000, and otherwise in a form reasonably acceptable to the Project Director and the Project Company to ensure compliance of the Services with the requirements of this deed.
- (b) The Independent Certifier will not be relieved of any requirement to perform any Obligation as a result of:
  - (i) compliance with the quality assurance requirements of this deed; or
  - (ii) any acts or omissions of the other parties with respect to the quality assurance requirements of this deed, including any audit under clause 3.5 of this deed.

### **3.6 Audit**

- (a) The Independent Certifier must:
  - (i) allow any audit of its quality assurance system under this deed by a third party, at the request of the Project Director or the Project Company; and
  - (ii) fully co-operate with that third party in respect of the carrying out of the quality assurance audit.
- (b) Without limiting the foregoing, the Independent Certifier must, at all times:
  - (i) give to the third party access to premises occupied by the Independent Certifier where the Services are being undertaken; and
  - (ii) permit the third party to inspect applicable information relevant to the quality assurance audit.

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## **4. Benefit of Independent Certifier's Obligations**

The Independent Certifier:

- (a) acknowledges and agrees that:
  - (i) each of NSW Health and the Project Company:

- A. is relying upon its skill and experience in the performance of the Obligations; and
  - B. may suffer Loss if it does not perform the Obligations in accordance with the requirements of this deed; and
- (ii) it has no authority to give directions to NSW Health or the Project Company other than may (if at all) be expressly set out in this deed or any of the documents referred to in schedule I;
- (b) warrants to NSW Health and the Project Company that, in performing the Services, it will comply with all Law;
  - (c) warrants to NSW Health and the Project Company that, at all times, it will act within the time requirements for the performance of the Obligations;
  - (d) warrants to NSW Health and the Project Company that, in performing the Services, it will attend the Hospital Campus and conduct all physical inspections of the Works and the Hospital Campus necessary or appropriate to the performance of the Services; and
  - (e) in carrying out the Services, must do so in a manner which will not prevent, hinder, disrupt, delay or otherwise interfere with any work or services performed by any person (including the Project Company and the Construction Contractor), except where it is the unavoidable consequence of performing the Services.

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## 5. Independent Certifier to be Independent

The Independent Certifier warrants to each of NSW Health and the Project Company that in performing the Services and that in respect of any obligation which requires the Independent Certifier to independently certify or determine (as applicable) any matter, it will:

- (a) act independently of each of NSW Health and the Project Company;
- (b) act honestly, reasonably and with the degree of professional care, knowledge, experience, skill and diligence which may reasonably be expected of a firm experienced in the performance of the same or similar services to the Services;
- (c) act within the time prescribed under each of the Project Deed, and this deed, or, where no time is prescribed, within a reasonable time;
- (d) arrive at a reasonable measure or value of work, quantities or time (if applicable); and
- (e) immediately notify the Project Director and the Project Company in writing upon becoming aware of the existence or possibility of a conflict of interest.

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## 6. State and Project Company to have no Liability

Each of NSW Health, the Project Company and the Independent Certifier acknowledges and agrees that neither NSW Health nor the Project Company is, nor will they be taken to have a liability, or to have assumed or become (on enforcement of any of its powers or otherwise), liable:

- (a) to any party to this deed by reason alone of that party being a party to this deed; or
- (b) for the performance of any obligation of any other party under this deed or the Project Deed.

This clause 6 does not apply to relieve any party from any obligation under this deed.

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## **7. Change to Services, Suspension of Services and Appointment of Substitute Certifier**

- (a) NSW Health and the Project Company may, by written notice to the Independent Certifier jointly signed by them, direct the Independent Certifier to carry out a change to the Services (including an addition or omission) which is within the general scope of this deed, and the Independent Certifier must comply with that direction.
- (b) The Fee to be paid to the Independent Certifier in relation to a change to the Services referred to in clause 7(a) will be determined in accordance with the schedule of rates set out in the Payment Schedule. If an amount for the change to the Services cannot be determined by reference to the schedule of rates, the amount will be a reasonable amount determined by the Project Company and NSW Health.
- (c) NSW Health and the Project Company may, by written notice to the Independent Certifier jointly signed by them, direct the Independent Certifier to suspend any or all of the Services for the period of time specified in that notice.
- (d) The Independent Certifier acknowledges and agrees that the parties may appoint another certifier ("**Substitute Certifier**") to carry out those Services which are omitted as a result of a change to the Services as directed under clause 7(a), and any decision of a Substitute Certifier appointed shall be treated (between NSW Health and the Project Company but not as between NSW Health, the Project Company and the Independent Certifier) as if it is a decision of the Independent Certifier, and the Substitute Certifier shall have all of the rights and powers of the Independent Certifier under the Project Deed in connection with those Services.
- (e) Notwithstanding a change to the Services or the appointment of a Substitute Certifier, the Independent Certifier must continue to perform the Services, as varied in accordance with this clause 7, in accordance with this deed. Without prejudice to any claim in respect of the performance of the Independent Certifier, the Independent Certifier is not responsible for the performance of the Substitute Certifier.

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## **8. Obligations of NSW Health and the Project Company**

### **8.1 No interference or influence**

- (a) Subject to paragraph (b), the Project Director and the Project Company must not interfere or attempt to influence the Independent Certifier in the performance of the Services.
- (b) Paragraph (a) will not prevent either the Project Director or the Project Company from providing information or written submissions to the Independent Certifier setting out that party's opinion on a particular matter relating to this deed or the Services, provided that nothing in this paragraph (b) itself will require the

Independent Certifier to act in accordance with that information or written submission. If a party provides any information or written submissions to the Independent Certifier then that party must, at the same time, provide a copy of such information and submissions to each other party.

## 8.2 Cooperation

Without limiting their obligations under clause 8.1, each of the Project Director and the Project Company must:

- (a) co-operate with the Independent Certifier;
- (b) provide all necessary information and documents within its possession, custody or control to the Independent Certifier; and
- (c) procure for the Independent Certifier access to such premises owned, leased or licensed to it as may be reasonably necessary,

to enable the Independent Certifier to perform the Services.

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## 9. General Representations and Warranties of Independent Certifier

- (a) The Independent Certifier represents and warrants that:
  - (i) it is a company duly incorporated and existing under Australian Law and has the power to execute, deliver and perform the Obligations and that all necessary corporate and other action has been taken to authorise that execution, delivery and performance;
  - (ii) the information provided by it in connection with this deed is true, accurate and complete in all material respects and not misleading in any material respect (including by omission);
  - (iii) the Obligations are valid, legal and binding obligations enforceable against it in accordance with its terms, subject to equitable remedies and Laws in respect of the enforcement of creditors' rights;
  - (iv) the execution, delivery and performance of this deed by it will not contravene any Law to which it is subject or any deed or arrangement binding on it;
  - (v) it does not (in any capacity) have immunity from the jurisdiction of a court or from legal process (whether through service of notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise);
  - (vi) no litigation, arbitration, tax claim, dispute or administrative or other proceeding has been commenced or threatened against it which is likely to have a material adverse effect upon its ability to perform its Obligations.
- (b) Except as otherwise provided, each representation and warranty contained in this deed:

- (i) is made on the date of this deed; and
- (ii) will be deemed to be repeated immediately before each notice or certificate is issued by the Independent Certifier under this deed or the Project Deed,

with reference to the facts and circumstances then subsisting.

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## 10. Security Interests

The Independent Certifier must not create or allow to exist any Security Interest over or assign its rights under this deed.

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## 11. Insurance and Indemnity

### 11.1 Liability

- (a) Subject to paragraph (b), the Independent Certifier's liability under this deed and from all Claims shall be limited in aggregate
- (b) The limitation of liability in paragraph (a) does not apply to any Claims arising out of or in connection with any of the following on the part of the Independent Certifier or anyone for whom it is responsible:
  - (i) fraud;
  - (ii) wilful misconduct, being any conduct, act or omission done or to be done which results from conscious or intentional indifference to any provision of this deed or the rights or welfare of those who are or may be affected by that conduct, act or omission; or
  - (iii) gross negligence.

### 11.2 Insurances

- (a) The Independent Certifier must from Financial Close hold and maintain:
  - (i) professional indemnity insurance with:
    - A. a limit of indemnity of not less than [redacted] for any single claim and [redacted] in the aggregate for any period of insurance in respect of legal liability arising from a breach of professional duty, whether owed in contract or otherwise, by reason of any negligent act, error or omission by the Independent Certifier or its employees, agents or consultants; and
    - B. a deductible of not more than [redacted]
  - (ii) workers compensation insurance in accordance with all applicable statutory requirements;
  - (iii) public liability insurance;

- A. endorsed to include NSW Health and the Project Company as named insureds;
  - B. covering, without limitation, the Independent Certifier's liability under clauses 11.3 and 11.4;
  - C. with a limit of indemnity of not less than \$10 million for any single claim; and
- (iv) such other insurance as may be reasonably required by NSW Health and the Project Company.
- (b) The Independent Certifier must notify the Project Director and the Project Company of any event which could affect its insurance cover and immediately notify them if any policy is cancelled, avoided or allowed to lapse.
- (c) The Independent Certifier must provide to the Project Director and the Project Company certified copies of the insurance policies apart from the professional indemnity insurance and certificates of currency of the insurances effected and maintained by the Independent Certifier for the purposes of this clause 11, at any time and from time to time on request and on renewal of each policy.
- (d) The Independent Certifier must keep the:
- (i) professional indemnity insurance current for a period commencing on Financial Close and ending on the seventh anniversary of Completion of the last Health Facility;
  - (ii) the workers compensation insurance current until it ceases to perform the Services;
  - (iii) the public liability insurance current until it ceases to perform the Services; and
  - (iv) any other insurances current for such time as may reasonably be required by the Project Director or the Project Company.
- (e) The requirement to effect and maintain insurance in this clause 11 does not limit the liability or Obligations of the Independent Certifier under this deed.

### 11.3 Indemnity in relation to property/persons

The Independent Certifier is liable for and indemnifies each of NSW Health and the Project Company against any Claim or Loss which they or their respective related parties may pay, suffer or incur in respect of:

- (a) any damage to or loss of, or loss of use of, property; or
- (b) death or illness of, or injury to, any person,

insofar as the Claim or Loss arises out of, or is connected with, the negligent act, error or omission of the Independent Certifier, its employees, agents or consultants.

## **11.4 Indemnity in relation to breach**

The Independent Certifier is liable for and must indemnify each of NSW Health and the Project Company against any Claim or Loss which they or their respective related parties may pay, suffer or incur in respect of any breach of this deed by the Independent Certifier (including any Claim or Loss NSW Health or the Project Company may have to another party arising from such breach).

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## **12. Termination of Appointment and Novation**

### **12.1 Termination by the other parties**

- (a) Each of NSW Health and the Project Company may terminate the appointment of the Independent Certifier by notice in writing served on the Independent Certifier and the other party:
- (i) if the Independent Certifier is in breach of this deed and the breach is not remediable in the reasonable opinion of the Project Director or the Project Company;
  - (ii) if the Independent Certifier is in breach of this deed and the breach, being remediable in the reasonable opinion of the Project Director and the Project Company has not been remedied within 10 Business Days of the service by the Project Director or the Project Company of a notice requiring the breach to be remedied;
  - (iii) if an Insolvency Event occurs in relation to the Independent Certifier;
  - (iv) for the convenience of NSW Health and the Project Company at any time and for any reason, upon 10 Business Days' written notice to the Independent Certifier by the Project Director or the Project Company; or
  - (v) if there is a Change in Control of the Independent Certifier.
- (b) Notwithstanding paragraph (a) and unless NSW Health and the Project Company otherwise agree, NSW Health or the Project Company may only terminate the appointment of the Independent Certifier if NSW Health and the Project Company first agree to the appointment of another person to perform the Services on such terms and conditions as NSW Health and the Project Company reasonably propose, including, as to payment of the appointee's remuneration.

### **12.2 Termination of the Project Deed**

The parties acknowledge and agree that if the Project Deed is terminated then, unless a novation is required as contemplated under clause 12.7, this deed is terminated with effect from the date of termination of the Project Deed and without necessity of notice, but without prejudice to any rights or liabilities which may have accrued prior to that date.

### **12.3 Time of termination**

Unless NSW Health and the Project Company otherwise agree, the termination of appointment of the Independent Certifier under clause 12.1 shall take effect upon receipt of notice from the Project Director and the Project Company confirming the appointment of a replacement to the Independent Certifier under clause 12.1(b).

## 12.4 Obligations following termination

- (a) Upon the date of termination of its appointment, the Independent Certifier:
- (i) must deliver up to the Project Director and the Project Company all books, records, drawings, specifications and other documents in the possession, custody or control of the Independent Certifier relating to the Services; and
  - (ii) acknowledges and agrees that NSW Health and the Project Company have the right to use the documents referred to in paragraph (a)(i) for the purposes of the Project and any other related project.
- (b) Where a notice is given under clause 12.1 of the termination of the appointment of the Independent Certifier, or this deed is terminated under clause 12.2, the Independent Certifier must provide full assistance to the Project Director and the Project Company, and any successor to the Independent Certifier appointed in order to enable such successor to be in a position to perform the Services under this deed with effect from the appointment of such successor.
- (c) Nothing in this clause 12.4 will prevent the Independent Certifier from retaining for its records one copy of the books, records, drawings, specifications and other documents referred to in paragraph (a)(i), provided however that nothing contained in this clause 12.4 will relieve the Independent Certifier of its obligations under clause 17.5.

## 12.5 Compensation

Where the appointment of the Independent Certifier is terminated under clause 12.1(a)(iv) or this deed is terminated under clause 12.2, the Independent Certifier is only entitled to be paid by the Project Company and NSW Health the proportion of the Fee for Services performed up to the date of the termination and the Independent Certifier agrees that its only right against the Project Company and/or NSW Health arising from such a termination is to claim for payment under this clause 12.5.

## 12.6 Termination without prejudice

Termination of the appointment of the Independent Certifier will be without prejudice to any Claim which NSW Health or the Project Company may have in respect of any breach of the terms of this deed which occurred prior to the date of termination.

## 12.7 Novation

- (a) The Independent Certifier agrees with NSW Health and the Project Company that upon:
- (i) the termination of the Project Deed; and
  - (ii) NSW Health giving to the Independent Certifier written notice stating that NSW Health has exercised its rights under the Project Deed to transfer responsibility for the Project to a replacement project company,
- then, subject to this clause, as from the date of service of that notice:

- (iii) subject to paragraph (b) below this deed between the parties will be at an end;
  - (iv) a new contract will be deemed to have been entered into, on the same terms as this deed, except that the Project Company will be replaced by the replacement project company under the new contract;
  - (v) the terms of the new contract will be in the form of this deed subject only to such amendments reasonably required for the purpose of ensuring that the new contract is on terms consistent with this deed and the fact of novation;
  - (vi) the new contract will thereafter be known as this deed; and
  - (vii) the replacement project company shall be responsible for the payment of 50% of the Fee from the date of novation.
- (b) The parties undertake that upon request from any receiver, receiver and manager or attorney of the Project Company that they will promptly enter into documentation with the replacement project company to give effect to this clause 12.7.
  - (c) Nothing in this deed will affect the rights and obligations of the parties prior to the novation under paragraph (a).

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## **13. Expenses, Stamp Duties and GST**

### **13.1 Expenses**

Each party must pay its own costs and expenses in connection with the negotiation, preparation, execution and performance of this deed.

### **13.2 Stamp duties**

The Project Company must pay all stamp duty (apart from financial institutions duties or bank account debit taxes which will lie between the parties as they fall) and any related fines and penalties in respect of this deed, the performance of this deed and each transaction effected by or made under or pursuant to this deed.

### **13.3 GST**

- (a) Words defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) have the same meaning in this clause.
- (b) If a party makes a supply to another party under or in connection with this deed, then (unless the consideration is expressly stated to be inclusive of GST) the consideration for that supply is exclusive of GST, and in addition to paying or providing that consideration the recipient must:
  - (i) pay to the supplier an amount equal to any GST for which the supplier is liable on that supply, without deduction or set-off of any other amount; and
  - (ii) make that payment as and when the consideration or part of it must be paid or provided, except that the recipient need not pay unless the

supplier has issued to the recipient a tax invoice (or an adjustment note) for that supply.

- (c) The supplier must refund to the recipient any overpayment by the recipient for GST, but the supplier need not refund to the recipient any amount for GST paid to the Commissioner of Taxation unless the supplier is entitled to a refund or credit of that amount.
- (d) If a party provides a payment for or in satisfaction of a Claim or a right to make a Claim under or in connection with this deed that gives rise to a liability for GST, the provider must pay, and indemnify the recipient on demand against, the amount of that GST.
- (e) If a party has a Claim under or in connection with this deed for a cost on which that party must pay an amount for GST, the Claim is for the cost plus the amount for GST (except any amount for GST for which that party is entitled to an input tax credit).
- (f) If a party has a Claim under or in connection with this deed whose amount depends on actual or estimated revenue or which is for a loss of revenue, revenue must be calculated without including any amount received or receivable as reimbursement for GST (whether that amount is separate or included as part of a larger amount).

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## 14. Choice of Law and Submission to Jurisdiction

- (a) This deed is governed by the Law in force in New South Wales.
- (b) Each party submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in New South Wales, and any court that may hear appeals from any of those courts, for any proceedings in connection with this deed, and waives any right it might have to claim that those courts are an inconvenient forum.

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## 15. Notices

### 15.1 How to give a notice

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

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

### 15.2 When a notice is given

A notice, consent or other communication that complies with this clause 15 is regarded as given and received:

- (a) if it is delivered or sent by fax:
- (i) by 5.00 pm (local time in the place of receipt) on a Business Day - on that day; or
  - (ii) after 5.00 pm (local time in the place of receipt) on a Business Day, or on a day that is not a Business Day - on the next Business Day; and
- (b) if it is sent by mail:
- (i) within Australia – 2 Business Days after posting; or
  - (ii) to or from a place outside Australia – 5 Business Days after posting.

### 15.3 Address for notices

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

#### NSW Health

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

Fax number: (02) 8844 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

#### The 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 NSW 2000

Fax number: (02) 8259 5425

Attention: Director, Project Management, Structured Finance

**The Independent Certifier:**

Address: Level 24, Northpoint  
100 Miller Street  
NORTH SYDNEY, NSW 2059  
Fax number: (02) 9957 3161  
Attention: Director

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**16. Dispute Resolution****16.1 Procedure for resolving disputes**

- (a) The parties agree that they will attempt to resolve all disputes in accordance with the procedures set out in this clause 16.
- (b) It is a condition precedent to the referral of a dispute to litigation that a party first exhausts the procedures referred to in clause 16.2.

**16.2 Negotiation**

- (a) If a dispute arises, then a party may give notice to the other parties to the dispute, requesting that the dispute be referred for resolution to the respective chief executive officers of those parties.
- (b) A notice under paragraph (a) must:
  - (i) be in writing;
  - (ii) state that it is a notice under this clause 16.2; and
  - (iii) include, or be accompanied by, reasonable particulars of the matters in dispute.
- (c) If a dispute is referred to the persons referred to in paragraph (a) (**Representatives**), then the Representatives (or the persons for the time being acting in those positions) must meet and use reasonable endeavours acting in good faith to resolve the dispute (in whole or in part) within 10 Business Days of the date on which the notice under paragraph (a) is received. The joint decisions (if any) of the Representatives must be reduced to writing within the 10 Business Days referred to in this paragraph (c) and will be contractually binding on the parties to the dispute.
- (d) The 10 Business Days referred to in paragraph (c) may be extended by agreement of the parties in writing.

**16.3 Continue to perform**

Notwithstanding the existence of a dispute, the Independent Certifier must continue to perform the Obligations.

**16.4 Final and binding**

NSW Health and the Project Company agree that, in the absence of manifest error or fraud, NSW Health and the Project Company can not overturn any decision of the Independent Certifier in respect of any of the Services referred to in schedule 1 which are expressed to be final and binding in nature.

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## **17. Information and Confidentiality**

### **17.1 Keep confidential**

The parties must keep confidential all matters relating to this deed and must use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any matters relating to this deed.

### **17.2 Permitted disclosure**

Clause 17.1 will not apply to:

- (a) any disclosure of information that is reasonably required by persons engaged in the performance of the obligations of a party to this deed;
- (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 17.1;
- (c) any disclosure which is required by any Law (including any order of a court of competent jurisdiction) or in accordance with clause 16;
- (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;
- (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 any proposed new project company, its advisers and lenders should NSW Health decide to re-tender this deed pursuant to the terms of the Project Deed;
- (g) any disclosure of information by the Project Director to any department, office or agency of the government of New South Wales; and
- (h) any disclosure by the Project Director of any document relating to this deed and which the Project Company (acting reasonably) has agreed with the Project Director contains no Commercially Sensitive Information.

### **17.3 Obligations preserved**

Where disclosure is permitted under clause 17.2, 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 deed.

### **17.4 Auditor-General**

Notwithstanding the other provisions of this clause 17, 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 Material Subcontracts) or any of them available to any person, subject to the deletion of Commercially Sensitive Information.

**17.5 Exploitation of information**

Except with the written consent of the Project Director, the Independent Certifier must not make use of this deed or any information issued or provided by or on behalf of NSW Health in connection with this deed otherwise than for the purposes of this deed.

**17.6 Expiry**

On or before the expiration or earlier termination of this deed the Independent Certifier must ensure that all documents or computer records in its possession, custody or control are delivered up to the Project Director.

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**18. General****18.1 Variation and waivers in writing**

- (a) This deed may only be varied, in writing by the parties.
- (b) The non-exercise of, or a delay in exercising, any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. A power or right of a party may only be waived in writing by that party.
- (c) Nothing in paragraph (b) prevents the partial waiver of a power or right, but paragraph (b) applies equally to such partial waiver.

**18.2 Operation of indemnities**

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

**18.3 Liability for expenses**

- (a) Each party must pay its own expenses incurred in the negotiation, preparation and execution of this deed.
- (b) A party which requests any consent, waiver, amendment, supplement, replacement, novation or assignment under this deed shall pay all costs associated with such consent, waiver, amendment, supplement, replacement, novation or assignment.

**18.4 Giving effect to this deed**

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

**18.5 Counterparts**

This deed may be executed in counterparts.

**18.6 Attorney**

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.

## Schedule 1 - Services

### Project Deed functions

The Independent Certifier must discharge the functions which the Project Deed contemplates will be discharged by the Independent Certifier including the following:

1. Clause 11.4(c)(ii): The Independent Certifier must take receipt of and review the Commissioning and Decanting Plan provided to it by the Project Company following development, amendment or review of the Commissioning and Decanting Plan.
2. Clause 11.4(e): The Independent Certifier must take receipt of and review the drafts of the Commissioning and Decanting Plan provided to it by the Project Company.
3. Clause 13.2(a): The Independent Certifier must take receipt of the Notice of Completion served on it by the Project Company upon the Project Company forming the view that it has achieved Completion of a Stage.
4. Clause 13.2(b)(i): Following receipt of the Notice of Completion under clause 13.2(a), the Independent Certifier must:
  - (a) consult with the Project Company about the tasks necessary to achieve Completion; and
  - (b) attend the relevant Construction Site to form a view as to whether Completion has occurred.
5. Clause 13.2(b)(ii): The Independent Certifier must take receipt of the information provided to it by the Project Company to determine whether Completion has occurred.
6. Clause 13.2(b)(iii): The Independent Certifier must take receipt of copies of any tests derived from the Commissioning Works and copies of test certificates provided to it by the Project Company.
7. Clause 13.2(c): The Independent Certifier must agree to the minor works defects rectification program and must satisfy itself that all minor omissions and defects listed in the list attached to a Notice of Completion have been completed or made good within 20 Business Days of Completion.
8. Clause 13.2(d): The Independent Certifier must, if it is of the opinion that Completion of a Stage has been achieved in accordance with the requirements of the Project Deed, issue a certificate to the Project Director and the Project Company certifying that Completion of the Stage has been achieved.
9. Clause 13.2(e): The Independent Certifier must, if it is of the opinion that Completion of a Stage has not been achieved in accordance with the requirements of the Project Deed, notify the Project Director and the Project Company and take receipt of any new Notice of Completion issued to it by the Project Company.
10. Clause 13.2(f): The Independent Certifier must, if satisfied following inspection of a Stage that Completion of the Stage has been achieved in accordance with the requirements of the Project Deed, notify the Project Director that Completion has been achieved.
11. Clause 13.6(b): The Independent certifier must take receipt of copies of the Final Contamination Assessment and the Final Site Audit Statement provided to it.

12. Additionally the Independent Certifier must:
- (a) review and comment on the reports and recommendations issued by the Building Code consultant appointed by the Project Company;
  - (b) within a timeframe agreed between NSW Health, the Project Company and the Independent Certifier engage a separate consultant, acceptable to NSW Health and the Project Company, to review and comment on all issues relating to the Works and the Health Facilities fire services, and Building Code compliance;
  - (c) liaise with the fire consultant, appointed under paragraph (b) above, regarding their review of the Works and the Health Facilities fire services and Building Code compliance and as part of this process carry out on-site inspections to determine whether the Works are being constructed in accordance with the design documents and all relevant requirements; and
  - (d) if required in accordance with clause 3.2 (*Acknowledgements regarding the Independent Certifier certifying Completion*), engage (on the terms set out in clause 3.2) appropriately qualified experts, consultants or contractors acceptable to both the Project Director and the Project Company to assist the Independent Certifier establishing whether the Works have achieved Completion.

**Schedule 2 - Payment Schedule****1. Payment claim**

The Independent Certifier must submit to the Project Company and NSW Health an account for payment on account of the Fee:

- (a) for the Services performed in accordance with this deed during a month at the end of that month; and
- (b) calculated in accordance with this Payment Schedule.

**2. Payment and notification of disputed amounts**

Within 30 Business Days after receipt of the Independent Certifier's account for the month, the Project Company and NSW Health must pay the Independent Certifier any amount included in the account which is not disputed and must notify the Independent Certifier in writing of the reasons for any amount which is disputed.

**3. The Fee**

The Fee will be as follows:

	\$
Stage 1	/
Stage 2	Incl
Stage 3	/
Stage 4	/
Escalation (Provision to 2014)	/
Total Fee (excluding GST)	/
Provisional sum payable to the Independent Certifier and to experts, consultants or contractors engaged by the Independent Certifier in accordance with clause 3.2 (Acknowledgements regarding the Independent Certifier certifying Completion) and paragraph 12 of Schedule 1, provided that a budget for such costs is established and the costs are justified to the satisfaction of the parties.	/
Total (excluding GST)	/

**4. Disbursements**

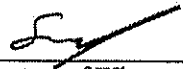
The Independent Certifier will:

- (a) only be entitled to reimbursement of disbursements incurred in the course of carrying out the Services for which the Independent Certifier is to be paid on a schedule of rates basis under this deed if those disbursements:

- (i) have been reasonably and properly incurred for the sole purpose of performing the part of the Services for which the Independent Certifier is to be paid on a schedule of rates basis in accordance with this deed;
  - (ii) where they exceed or are likely to exceed \$1,000, have the prior written approval of the Project Company and the Project Director; and
  - (iii) are supported by documentation provided to the Project Director and the Project Company which is satisfactory to the Project Director and the Project Company; and
- (b) not be entitled to make any Claim against NSW Health or the Project Company arising out of or in connection with disbursements or other costs incurred in connection with the performance of the Services other than in accordance with paragraph (a).
5. **GST**
- All lump sums, rates and amounts in this Payment Schedule do not include GST.
6. **Payment of amounts by NSW Health and Project Company**
- All amounts payable by the Project Company and NSW Health in this Payment Schedule are to be paid by the Project Company and NSW Health in the following proportions:
- (a) 50% of the relevant amount to be paid by the Project Company; and
  - (b) 50% of the relevant amount to be paid by NSW Health.


**Executed as a deed.**

**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 <sup>23 October</sup> ~~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

**Signed sealed and delivered** for and on behalf of **InfraShore Pty Ltd** by its Attorney under a Power of Attorney dated ~~22/10/2008~~, and the Attorney declares that the Attorney has not received any notice of the revocation of such Power of Attorney, in the presence of:

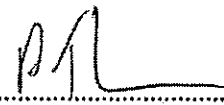
  
Signature of Witness  
**Rebecca Finkelstein**

Name of Witness in full

**Signed sealed and delivered by** )  
**WT Partnership Aust Pty Ltd** in )  
accordance with section 127(1) of the )  
Corporations Act 2001 (Cwlth) by )  
authority of its directors: )

  
Signature of director )

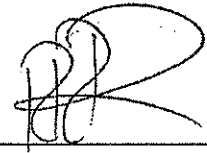
**JOHN FERRARIN** )  
Name of director (block letters) )

  
Signature of director/company secretary\*

\*delete whichever is not applicable


**PAUL ELPHICK** )  
Name of director/company secretary\* (block letters)

\*delete whichever is not applicable

  
Signature

**Robert Rust**  
Chief Executive  
Health Infrastructure

Name of delegate

  
Signature **SIMON HUNTER**