



# M2 Upgrade

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## M2 Upgrade "In Principle" Agreement

October 2009





## M2 Upgrade "In Principle" Agreement

This Agreement is made on 12 October 2009

Between:

The Hills Motorway Limited (ABN 28 062 329 828) of Level 3, 505 Little Collins Street, Melbourne Victoria 3000 ("**Hills**") and Hills Motorway Management Limited (in its capacity as trustee for the Hills Motorway Trust ("**Trust**")) (ABN 89 064 687 645) of Level 3, 505 Little Collins Street, Melbourne, Victoria 3000 ("**HMML**") – (together "**Hills Motorway**")

and

The Roads & Traffic Authority of New South Wales of 101 Miller Street, North Sydney, New South Wales 2060 ("**RTA**")

### Recitals:

- A In December 2007 an unsolicited proposal to upgrade the M2 Motorway ("**Proposal**") was received from Hills Motorway's owners following the interim conversion of a section of the westbound carriageway of the M2 Motorway to three lanes of general traffic.
- B In July 2008 the NSW Government ("**Government**") approved the RTA entering into negotiations with Hills Motorway to attempt to develop the Proposal into a form which would be acceptable to Government, and upon which the Government would give approval to the parties to enter into binding legal agreements for the procurement and implementation of the upgrade of the M2 Motorway ("**M2 Upgrade**").
- C An initial agreement ("**Letter of Intent**") was signed on or about 4 September 2008 ("**Letter of Intent Date**") pursuant to which Hills Motorway undertook 'preliminary activities' including "development of the concept design for the M2 Motorway Upgrade and preparation of environmental documents" ("**Preliminary Activities**"). The Letter of Intent established a target date for the RTA and Hills Motorway to reach in principle agreement on financial/commercial arrangements by the end of 2008. By an amended Letter of Intent the target date for in-principle agreement was extended to mid April 2009 and the arrangements under the Letter of Intent were extended until end June 2009.
- D The Letter of Intent included the RTA's undertaking, subject to certain conditions, to underwrite 50% of the development costs of the M2 Upgrade up to the end of December 2008, with a limit to the RTA contribution of \$3.0 million if the Proposal did not proceed due to a change in Government commitment. The limit to the RTA contribution was later increased to \$5.5 million pursuant to an amended Letter of Intent.
- E On 24 February 2009 the Planning Minister declared the M2 Upgrade to be a development to which Part 3A of the Environmental Planning and Assessment Act 1979 applies. On the same date the Planning Minister declared the M2 Upgrade to be a "critical infrastructure project".
- F Hills Motorway and the RTA wish to proceed further with the development of the Proposal to a point where, on completion by Hills Motorway of the key deliverables set out in Attachment F ("**Key Deliverables**") in accordance with this Agreement, the Proposal will be in a position where it is in order to be considered by Government and the RTA under the NSW Working with Government Guidelines and the ICAC Guidelines for Managing Risks in Direct Negotiations, and thus to submit the final Proposal and business case to Government for approval.
- G The RTA must obtain further Government approval before it is able to enter into final contractual arrangements for the Proposal. Hills Motorway also needs to obtain its Board's approval before it can enter into final contractual arrangements for the Proposal. Government approval and Hills Motorway Board approval cannot be sought until the Key Deliverables are satisfactorily completed.



H The Government's objectives for the Proposal are set out in section 2 of the Negotiation and Governance Protocol.

I The parties intend that this Agreement supersedes the Letter of Intent, except to the extent otherwise stated in this Agreement.

1. **Purpose**

The parties have entered into this Agreement:

- (a) to record the matters on which the parties have agreed "in principle" (at the date of this Agreement) to include in the Proposal for the purpose of seeking their respective final approvals to the procurement and implementation of an M2 Upgrade project ("**M2 Upgrade Project**");
- (b) to record in Attachment F the Key Deliverables which must be completed, and Negotiation and Governance Protocol which is Attachment D which must be adhered to, in order to resolve those matters on which the parties have not reached "in principle" agreement and for each party to seek final approval for execution of an M2 Upgrade Project Deed, which shall (without limitation) include:
  - (i) an agreed form of Project Deed for implementation of the Proposal;
  - (ii) an agreed form of Project Scope of Work and Technical Criteria;
  - (iii) an agreed form of M2 Financial Model post completion of the Proposal in accordance with this Agreement;
  - (iv) Environmental Assessment Report and approval by the Department of Planning; and
  - (v) documentation of Hills Motorway's financing arrangements for the Proposal;
- (c) to allocate primary (and if appropriate secondary) responsibility for completing the Key Deliverables;
- (d) to facilitate focussed negotiation by identifying, where appropriate, the respective positions of the parties on those parts of the commercial terms yet to be agreed;
- (e) to provide Hills Motorway with the requisite level of confidence that the RTA:
  - (i) is committed to work with Hills Motorway to complete the Key Deliverables and achieve the project outcomes provided that the RTA's objectives for the M2 Upgrade Project are met; and
  - (ii) will reimburse Hills Motorway's costs in accordance with clause 11.1 in the event that Government withdraws its support for the Proposal other than for the reasons set out in clause 11.1(a)(i) to (iv) (inclusive); or
  - (iii) once the Key Deliverables have been completed to the satisfaction of the RTA (acting reasonably), will progress the submission of the Proposal to the Government for approval to proceed to procurement and implementation of the Proposal; and
- (f) to provide Government with the requisite level of confidence that Hills Motorway is committed to completing the Key Deliverables in a cost effective, timely and professional manner, and to achieving the project outcomes as well as meeting the Government's Project Objectives as described in Section 2 of the Negotiation and Governance Protocol before the Government:
  - (i) publicly announces that the M2 Upgrade will proceed; and



- (ii) engages in community involvement through the environmental assessment exhibition.

## 2. Matters on which the parties have reached "in principle" agreement

### 2.1 Outline Scope of Work

- (a) The parties have agreed the Outline Scope of Work upon which the parties will take forward Hills Motorway's Proposal and seek Government approval for the M2 Upgrade Project to go ahead. The Outline Scope of Work is attached at Attachment A. The Outline Scope of Work may only be amended by way of a document explicitly amending it signed by both parties;
- (b) The parties have developed a substantially complete Scope of Work and Technical Criteria ("**SWTC**") which is based on the Outline Scope of Work and is attached at Attachment B. The SWTC will be amended by the RTA:
  - (i) to reflect any document signed pursuant to clause 2.1(a);
  - (ii) to address those matters in the Commercial Terms Schedule attached as Attachment C ("**Commercial Terms Schedule**") which are agreed by the parties to require changes to the SWTC; and
  - (iii) otherwise as necessary to develop the SWTC to 100% complete standard.
- (c) Subject to clause 2.3, nothing in this Agreement shall prevent the RTA from, in its discretion, requiring an amendment to be made to the SWTC.
- (d) The parties acknowledge that:
  - (i) the requirements of the SWTC shall only apply in respect of the works specific to the M2 Upgrade Project; and
  - (ii) upon completion of the M2 Upgrade Project, the M2 Motorway (as upgraded by the M2 Upgrade Project) will be subject to the Scope of Work and Technical Criteria attached to the M2 Project Deed (as amended).

### 2.2 Capital Cost Estimate

The parties have agreed that, as at the date of this Agreement, the forecast capital cost (including capital raising costs) based on the Outline Scope of Work and the SWTC is \$546 million (outturn) ("**Capital Cost Estimate**"). The parties must agree the Capital Cost Estimate prior to seeking Government approval to procurement and implementation of the Proposal. Hills Motorway acknowledges that the RTA has relied on Hills Motorway to ensure that the Capital Cost Estimate and the contingencies included within it are complete and that they include for all things which Hills Motorway could reasonably have foreseen at the time of entering into this Agreement.

### 2.3 Adjustment of Capital Cost Estimates

The parties agree that, subject to the provisions of clause 2.2 and this clause 2.3, the Capital Cost Estimate includes all estimated costs for the M2 Upgrade Project and may only be adjusted where all of the conditions specified in clauses 2.3(a), 2.3(b), 2.3(c) and 2.3(d) have been met:

- (a) either:
  - (i) an adjustment is made to the Outline Scope of Work, the SWTC, or the Risk Allocation (as defined in clause 2.6) to effect a Material Change to the physical works (including by reason of environmental and planning



approval conditions) which causes the costs of Hills Motorway to be greater than or less than the Capital Cost Estimate (before adjustment pursuant to this clause) and which could not reasonably have been foreseen by Hills Motorway (having regard to the role of Hills Motorway in preparing the environmental assessment documentation in respect of environmental and planning approval conditions) or an experienced developer at the date of this Agreement provided that:

- A. for the purposes of this clause, "**Material Change**" means an increase or decrease exceeding \_\_\_\_\_ and \_\_\_\_\_
- B. no adjustment will be made to the Capital Cost Estimate pursuant to this clause 2.3(a)(i) unless (and until) the aggregate of Material Changes to the physical works are equal to or exceed \_\_\_\_\_

or

(ii) there has been a net increase or decrease in cost to Hills Motorway for any of the following cost estimates contained in the Capital Cost Estimate:

- A. the actual third party cost of the Design Verifier (as defined in clause 4.3(a)) (from the amount of \_\_\_\_\_ (outturn) which is included in the Capital Cost Estimate);
- B. the direct cost of land acquisition including stamp duty (from the amount of \_\_\_\_\_ (outturn) which is included in the Capital Cost Estimate); and
- C. \_\_\_\_\_

- (b) Hills Motorway has submitted a detailed estimate of the effect which the relevant item in clause 2.3(a) will have on the Capital Cost Estimate and any further information which the RTA, acting reasonably, requires; and
- (c) the RTA, acting reasonably, has agreed in writing to an amount in respect of the claimed adjustment; and
- (d) the adjustment is documented in writing and signed by both parties.

#### 2.4 Funding Sources and Methodology

(a) **Base case and enhancement traffic and costs profiles**

The RTA and Hills Motorway have reached in principle agreement to use the base and enhancement case traffic and costs profiles in the financial model which is Attachment G ("**Financial Model**") for the purposes of valuing the funding sources subject to finalisation of remaining issues set out in clause 3. Any adjustment of the Financial Model after the date of this Agreement may only be made with the agreement of both parties in writing.

(b) **New Tolls**



The RTA and Hills Motorway have reached in principle agreement for Hills Motorway to collect tolls at new ramps to be constructed at Herring Road, Christie Road and Windsor Road. The car tolls for the new ramps at 31 December 2009 are inclusive of GST at Herring Road and Christie Road and inclusive of GST for Windsor Road. All toll increases will be calculated in accordance with the methodology set out in the M2 Project Deed.

(c) **Net Present Value Methodology**

The RTA and Hills Motorway have reached in principle agreement to use the net present value of the following sources to fund the implementation of the proposed scope of work with a net present value of (outturn):

- (i) the value of the net uplift in cashflow resulting from the increased capacity of the motorway during the existing concession term is and
- (ii) the value of net cashflows during a concession extension of 4 years is

(d) **Uplift of Existing Tolls**

Based on the valuations for the items specified in clauses 2.4(c)(i) and (ii) and the Estimated Capital Cost as at the date of this Agreement, there is a funding shortfall for the M2 Upgrade Project of (net present value). The parties have agreed in principle that this shortfall is to be funded by way of a toll uplift across all tolling points and vehicle classes of when all stages of the M2 Upgrade are open to the public for the continuous and safe passage of vehicles. Using the Financial Model, from 1 January 2013, the toll uplift (for the escalation profile that is assumed in the Financial Model) for cars including GST at the main plaza is

(e) **Concession term extension**

The parties have agreed in principle that an extension of the M2 concession period of 4 years will be required.

(f) **Adjustments to the toll or the term**

If the Capital Cost Estimate is adjusted after the date of this Agreement by the agreement of the parties, the RTA reserves the right to adjust either:

- (i) the length of the concession term; or
- (ii) the amount of any toll or tolls,

to achieve an optimal balance for Government between concession term extension and toll increase, provided that any resulting adjustment to:

- (iii) the amount of any toll or tolls (in the case of an adjustment to the concession term extension pursuant to clause 2.4(f)(i)), or
- (iv) the length of the concession term (in the case of an adjustment to the amount of the toll pursuant to clause 2.4(f)(ii)),

must be made:

- (v) subject to clause 2.4(f)(vi), by agreement between the parties; and
- (vi) in accordance with the Financial Model's determination of the net present value of the Capital Cost Estimate adjustment.



## 2.5 **Negotiation and Governance Protocol**

The parties have agreed to adhere to the Negotiation and Governance Protocol and Procurement Process Flowchart, both of which are attached at Attachment D, in order to resolve matters which are not yet agreed and to further develop the Proposal. The Negotiation and Governance Protocol and Procurement Process Flowchart may only be amended by agreement by the parties in writing.

## 2.6 **Risk Allocation**

- (a) The parties have agreed and set out at Attachment E the risk allocation for the delivery of the M2 Upgrade which will be the basis upon which the M2 Upgrade Project Deed referred to in Key Deliverable (h) will be documented ("**Risk Allocation**").
- (b) The Risk Allocation may only be amended by:
  - (i) a document explicitly amending it signed by both parties; or
  - (ii) without limiting clause 2.6(b)(i), the execution by the parties of an M2 Upgrade Project Deed.

## 3. **Matters on which the parties have not yet reached "in principle" agreement**

### 3.1 **Deed Consolidation and ring fencing**

The parties acknowledge that the consolidation of the M2 Project Deed

must be agreed and completed by the parties prior to the parties seeking the approvals referred to in Recital G.

### 3.2 **Commercial Terms Schedule**

## 4. **Key Deliverables**

### 4.1 **Need for Key Deliverables**

The parties acknowledge that it will not be possible to prepare and submit an M2 Upgrade Project Deed and related documents in relation to the Proposal for approval by the Government and the boards of Transurban and Hills Motorway unless the Key Deliverables are all agreed between the parties and, where required, completed by Hills Motorway in a timely manner and to a professional standard, and so as to reflect the Government's Project Objectives set out in section 2 of the Negotiation and Governance Protocol.

### 4.2 **Environmental Assessment**

In respect of Key Deliverables 1(a) and 1(b), the parties acknowledge and agree that:

- (a) the RTA will:
  - (i) lodge, as Proponent, a "Project Application" in respect of the Proposal with the Department of Planning ("**DoP**");



- (ii) seek the Director-General of the DoP's requirements for the environmental assessment of the works constituting the Proposal; and
  - (iii) provide reasonable assistance to Hills Motorway for Hills Motorway to resolve environmental and planning issues.
- (b) Hills Motorway must submit each document required to be prepared and finalised as part of Key Deliverables 1(a) and 1(b) to the RTA for review and comment. The RTA will prioritise its review of the documents submitted by Hills Motorway for suitability, and provide any comments in a period of not more than 15 working days from the receipt of those documents. Hills Motorway must incorporate any comments provided by the RTA within that period into a revised document or documents which must then be resubmitted to the RTA for review and comment. This process must be repeated until such time as the RTA indicates that it has no further comments or that it is satisfied with the relevant document;
- (c) nothing in clause 4.2(a) or clause 4.2(b) shall impose any obligation on the RTA to make any comments, nor shall anything in clause 4.2(a) or clause 4.2(b) have the effect of relieving Hills Motorway of any of its obligations under this Agreement; and
- (d) the RTA shall be under no obligation to submit either of the documents listed as Key Deliverables 1(a) and 1(b) if the RTA in its discretion is not satisfied with the document.

The parties acknowledge that Hills Motorway is responsible for compliance with any approval issued under Part 3A of the Environmental Planning and Assessment Act 1979 in respect of the Proposal ("**Project Approval**") unless the RTA agrees otherwise in writing.

#### 4.3 Initial Design

The parties agree that, in respect of Key Deliverables 1(d) and 1(e):

- (a) the parties have agreed to engage an independent design verifier pursuant to the Deed of Appointment of Independent Verifier to be entered into between the parties and an independent design verifier ("**Design Verifier**") prior to Hills Motorway submitting any detailed design to the RTA pursuant to this Agreement ("**IV Deed**") to:
  - (i) verify that Hills Motorway's initial design complies with the requirements of the Outline Scope of Work and the SWTC and this Agreement;
  - (ii) issue such certificates as this Agreement and the Initial Design Plan (as defined in paragraph 1(d) of Attachment F) require to be issued by the Design Verifier; and
  - (iii) otherwise discharge the functions of the Design Verifier specified in this Agreement, the IV Deed and the Initial Design Plan,

in each case acting independently of each of the parties; and
- (b) Hills Motorway must:
  - (i) implement a quality system and quality plan for the management of Hills Motorway's obligations under this Agreement;
  - (ii) engage a quality manager to independently certify the effectiveness and integrity of Hills Motorway's quality system and promptly report to the parties and the Design Verifier on quality issues and quality non-conformances identified by the quality manager;
  - (iii) have its compliance with its quality system and quality plan audited at intervals not exceeding 6 months during the term of this Agreement;



- (iv) hold regular meetings of its design team and the Design Verifier and invite the RTA to attend those meetings;
- (v) give the RTA and the Design Verifier opportunities to comment on and monitor the development of the initial design;
- (vi) carefully check and satisfy itself that there are no ambiguities or inconsistencies between its initial design and the Outline Scope of Work and the SWTC; and
- (vii) certify, and ensure that the Design Verifier certifies, that its initial design satisfies the requirements of the Outline Scope of Work, the SWTC and this Agreement.

**5. Responsibility for Key Deliverables**

- (a) Hills Motorway must procure the various items in the Key Deliverables in a cost-effective, timely and professional manner.
- (b) Without in any way limiting or affecting the responsibility of Hills Motorway under clause 5(a), the RTA will:
  - (i) on or before the date upon which a Project Approval is issued, commence discussions with third party landowners whose property is required for the M2 Upgrade Project; and
  - (ii) in its discretion, provide assistance to Hills Motorway in its discussions and negotiations with landowners and councils with regard to road closures and property adjustments.

**6. Program and costs for completion of the Key Deliverables**

Hills Motorway must prepare and submit to the RTA:

- (a) within 20 working days of Hills Motorway's execution of this Agreement:
  - (i) an accurate and detailed activity plan in a form satisfactory to the RTA showing the proposed date for Financial Close subject to the M2 Upgrade Project receiving Project Approval by June 2010 and including:
    - A. costings of the work done with respect to the Proposal including but not limited to the Key Deliverables as at the date of this Agreement; and
    - B. activities, programme and costings of the work to be done to complete the Proposal including completion of the Key Deliverables with costing forecasts to be based on the Key Deliverable Cost Estimates referred to in clause 7, to the extent that such Key Deliverable Cost Estimates have already been prepared; and
  - (ii) the draft Initial Design Plan, which must include a program for the preparation, independent verification (in accordance with the requirements of the SWTC) and submission to the RTA of independently verified initial design packages; and
- (b) thereafter at the end of the first week of each calendar month after the submission of the documents referred to in clause 6(a) a report which includes:
  - (i) a report against the current activity plan;





- (ii) an updated activity plan;
- (iii) an updated program;
- (iv) a record of actual costs to date; and
- (v) updated forecast costs (based on any applicable Cost Estimates) in the form required by clause 7.

## 7. Key Deliverable Cost Estimates

- 7.1 Within 10 working days of the date of this Agreement and thereafter at the intervals set out in clause 6(b), Hills Motorway must provide the RTA with an estimate of its costs to be incurred in undertaking the Key Deliverables on an "open book" basis, such cost estimate to be broken down by Key Deliverable, key activities within each Key Deliverable, and all relevant consultants ("**Key Deliverable Cost Estimate**").
- 7.2 The RTA may review and provide comments to Hills Motorway on all documents provided by Hills Motorway to the RTA under either clause 6 or clause 7 provided that the RTA uses all reasonable endeavours to do so as soon as possible but in any event within 15 working days of its receipt of the relevant document, and Hills Motorway must make amendments to any document supplied under either clause 6 or clause 7 in respect of which it has received comments from the RTA within the 15 working day period set out in this clause 7.2 to the satisfaction of the RTA (acting reasonably). If Hills Motorway submits any document to the RTA in accordance with either of clauses 6 or 7 and the RTA does not provide any comments on the document within 15 working days then Hills Motorway may proceed in accordance with such document (at its own risk).
- 7.3 Subject to clause 7.4, Hills Motorway must regularly and promptly update the RTA on any changes to the Key Deliverable Cost Estimates provided under this clause 7.
- 7.4 Hills Motorway must not vary any Key Deliverable Cost Estimate unless:
- (a) Hills Motorway has provided prior written notice to the RTA of the proposed variation; and
  - (b) the processes set out in clauses 7.2 and 7.3 have been followed as if a reference in those clauses to Key Deliverable Cost Estimates was a reference to the proposed variation to the Key Deliverable Cost Estimate.

## 8. Insurance

- 8.1 Hills Motorway must ensure that professional indemnity insurance is effected and maintained which:
- (a) covers liability of Hills Motorway arising from a breach of a duty owed in a professional capacity, whether owed in contract or otherwise, by any act or omission of Hills Motorway, its employees, contractors, suppliers or service providers in relation to the performance of the Key Deliverables;
  - (b) has a limit of indemnity of not less than \$25,000,000 for any one claim and in the aggregate; and
  - (c) is for a period commencing from the first submission by Hills Motorway to the RTA of any document (including any draft of such a document) in connection with the Key Deliverables and expiring not earlier than 7 years from the completion of the Key Deliverables or the earlier expiry or termination of this Agreement.
- 8.2 Hills Motorway must ensure that any contractors, suppliers or service providers that perform any of the Key Deliverables also maintain professional indemnity insurance in the same manner and on the same terms as those required to be obtained by Hills Motorway under clause 8.1 or as otherwise may be agreed between the RTA and Hills Motorway.



- 8.3 Hills Motorway must promptly, following written request by the RTA, provide reasonable evidence to the RTA of its compliance with clause 8.
- 8.4 If, despite using its best endeavours, Hills Motorway is unable to obtain the professional indemnity insurance required by clause 8.1 and/or clause 8.2 for a price of less than \$150,000, RTA will offer to effect insurance required by clause 8.1 and/or clause 8.2 (as applicable) at Hills Motorway's expense at a cost not exceeding \$150,000.
9. **Acknowledgement and Release**
- 9.1 Hills Motorway acknowledges and agrees that the RTA is under no obligation to (and has made no representation that it will):
- (a) proceed with the Proposal or the Outline Scope of Work in any form; or
  - (b) enter into any contractual arrangement with Hills Motorway in respect of the Proposal or the Outline Scope of Work or any other arrangement or scope of works similar to the Proposal or the Outline Scope of Work.
- 9.2 Other than a claim for payment in accordance with clause 11, Hills Motorway releases the RTA and Government from all claims whatsoever in respect of any losses, costs or damages incurred or suffered (whether present or future, fixed or unascertained, actual or contingent) arising out of or in connection with any of this Agreement, the Letter of Intent, the Proposal or the Outline Scope of Work or any meetings, discussions or negotiations relating to any of those matters.
- 9.3 The RTA acknowledges and agrees that the Proposal is subject to approval by the boards of Hills Motorway and Transurban and feasibility of financing. Without limiting any other provision of this Agreement (including without limitation clause 10.2), Hills Motorway is under no obligation to:
- (a) proceed with the Proposal or the Outline Scope of Work in any form; or
  - (b) enter into any contractual arrangement with the RTA in respect of the Proposal or the Outline Scope of Work or any other arrangement or scope of work similar to the Proposal or the Outline Scope of Work.
- 9.4 Hills Motorway acknowledges and agrees that:
- (a) the RTA's entry into this Agreement;
  - (b) the RTA's or Government's entry into negotiations in respect of the Proposal, the Outline Scope of Work or the M2 Upgrade Project; and
  - (c) the RTA's or Government's detailed review and assessment of the Proposal, the Outline Scope of Work or the M2 Upgrade Project,
- does not constitute:
- (d) the RTA's or Government's acceptance of, or agreement to; or
  - (e) an acknowledgement by, or representation that, the RTA or Government will accept or agree to,
- the terms of the Proposal or any other matter set out therein, or to proceed with the M2 Upgrade Project.
- 9.5 Without limiting the foregoing or in any way fettering the discretion of the RTA, Hills Motorway acknowledges that the RTA may not receive approval from Government to enter into any contract in respect of the Proposal if Government is not satisfied that the Government's Project Objectives set out in section 2 of the Negotiation and Governance Protocol will be met.





10. **Expiration of this Agreement**

10.1 Hills Motorway and the RTA agree that, unless the parties otherwise agree in writing, this Agreement will expire on the earliest to occur of:

- (a) the date on which the Government or the RTA provides written notice to Hills Motorway that Government has decided not to proceed with the Proposal or any part of it;
- (b) the date on which the RTA provides written notice to Hills Motorway that the RTA is terminating this Agreement (for any reason);
- (c) the date on which Hills Motorway provides written notice to the RTA that Hills Motorway has exercised its right not to proceed with the Proposal;
- (d) the date on which Hills Motorway provides written notice to the RTA that Hills Motorway has exercised its right to terminate this Agreement under clause 10.2;
- (e) (or such other date as may be agreed between the parties in writing);
- (f) the date on which the parties enter into a Subsequent Agreement (as defined in clause 11.4(b)) or any other agreement which supersedes this Agreement.

10.2 Hills Motorway may terminate this Agreement at any time if:

- (a) the RTA commits a substantial breach of this Agreement which the RTA does not rectify, or show cause why it is not obliged to do so, within 14 days of receiving a written notice from Hills Motorway alleging the substantial breach; or
- (b) Hills Motorway:
  - (i)

(ii)

and, having been unable to satisfy the requirements of clause 10.2(b)(i) or (ii), Hills Motorway is unable, despite using its best endeavours (within the meaning of clause 10.3), to obtain project level non-recourse debt finance at a rate which is lower than above the interest rate margin specified in the Financial Model to fund the carrying out of the M2 Upgrade and it notifies the RTA in writing that it wishes to withdraw from the M2 Upgrade Project for this reason.

10.3 For the purposes of clause 10.2(b), Hills Motorway will be considered to have used its best endeavours if it has, as a minimum:



- (a) provided a timetable and work program to the RTA which is in the same format as the timetable and work program provided to the RTA by Transurban in connection with recent refinancing of the M2 in May 2009 and the Eastern Distributor in July 2009 and which is approved by the RTA in writing; and
- (b)
- (c)
- (d) provided to the RTA copies of documentation which sets out the full details of the financing requests, which have been approved by the RTA in writing (acting reasonably), made by Hills Motorway to each of the financiers referred to in clause 10.3(c); and
- (e) provided to the RTA copies of all written responses from each of the financiers referred to in clause 10.3(c), including responses on the amounts of debt offered and terms upon which the debt is offered to Hills Motorway; and
- (f)

10.4 The obligations in clauses 8, 9, 10, 11 and 12 survive any termination or expiry of this Agreement.

**11. Reimbursement of costs upon expiry of this Agreement**

11.1 Subject to clauses 11.2, 11.4 and 11.6, if this Agreement terminates or expires, or the Government or the RTA provides written notice to Hills Motorway that Government has decided not to proceed with the Proposal or any part of it:

- (a) other than in circumstances where:
  - (i) Hills Motorway has terminated this Agreement or exercised its right not to proceed with the Proposal other than in accordance with clause 10.2; or
  - (ii) Hills Motorway has not undertaken the Key Deliverables (disregarding, for the purpose of this clause 11.1(a)(ii) only, section 2 of the Negotiation and Governance Protocol) as required by the Letter of Intent and this Agreement, or properly incurred expenditure in accordance with clause 11.5; or
  - (iii) Hills Motorway has not complied with the Negotiation and Governance Protocol (disregarding, for the purpose of this clause 11.1(a)(iii) only,





section 2 of the Negotiation and Governance Protocol) and attached Procurement Process Flowchart; or

- (iv) the Proposal (as at the date of this Agreement) changes, without the RTA's written approval, such that:
  - A. the Proposal does not meet with the Government's Project Objectives at section 2 of the Negotiation and Governance Protocol; or
  - B. the Proposal includes a toll increase of greater than for any reason other than an increase in the Capital Cost Estimate agreed in accordance with this Agreement; or
  - C. the Proposal includes a term extension of greater than 4 years; or
  - D. the Capital Cost Estimate for the Outline Scope of Work and the SWTC increases other than in accordance with clause 2.3 of this Agreement; and

(b) Hills Motorway has:

- (i) provided the RTA with a claim for payment which complies with clause 11.3, and
- (ii) delivered to the RTA all Proposal Documents as defined in, and in accordance with, clause 12.1; and
- (iii) otherwise complied with each of its obligations under this clause 11,

the RTA will reimburse Hills Motorway:

- (c) 50% of its reasonable costs incurred in undertaking the Preliminary Activities from the Letter of Intent Date up to and including the date of this Agreement (which extends the Letter of Intent date for cost recovery from 30 June 2009), being a reimbursable amount not exceeding \$5.5 million; and
- (d) 100% of its reasonable costs (up to a limit of \$16 million plus reasonable independent verification costs) incurred in complying with its obligations under clause 8 and undertaking such of the Key Deliverables as are carried out after the date of this Agreement up to and including the Delivery Date (as defined in clause 12.1); and
- (e) an amount not exceeding \$10,000 to cover Hills Motorway's actual audited costs of complying with clause 11.1(b)(ii).

11.2 If this Agreement terminates or expires, or the Government or the RTA provides written notice to Hills Motorway that Government has decided not to proceed with the Proposal or any part of it where:

- (a) any of circumstances specified in clauses 11.1(a)(i) to (iv) (inclusive) have arisen; or
- (b) the parties have entered into a Subsequent Agreement or any other agreement which supersedes this Agreement,

and Hills Motorway:

- (c) provides the RTA with a claim for payment which complies with clause 11.3, and
- (d) immediately delivers to the RTA all Proposal Documents as defined in, and in accordance with, clause 12.1,



then, subject to clause 11.4 and clause 11.6, the RTA's obligation to reimburse Hills Motorway will be limited to an amount not exceeding \$10,000 to cover Hills Motorway's actual audited costs of complying with clause 11.2(d) up to and including the Delivery Date (as defined in clause 12.1).

- 11.3 Any claim by Hills Motorway for reimbursement under clause 11.1 or clause 11.2 must be in such form and with such detail and verification as is reasonably required by the RTA and Hills Motorway must have complied with its obligations under clause 6(b) to provide details of forecast costs and actual costs. The RTA may at any time in its discretion have any costs which are included in a claim by Hills Motorway for payment of costs or a cost estimate independently audited and Hills Motorway must assist any auditor appointed for that purpose including providing cooperative access to all its books and records related to the expenditure.
- 11.4 If the Government decides to proceed with all or any part of the Proposal on the terms agreed by the parties:
- (a) the agreed cost included in the Capital Cost Estimate for developing other elements of the Proposal from the Letter of Intent Date will be included in the overall project cost for the Proposal or the selected part of the Proposal; and
  - (b) if a further agreement is entered into by the parties to give effect to those terms, whether by way of M2 Upgrade Project Deed or otherwise ("**Subsequent Agreement**"), Hills Motorway's rights to payment will be limited solely to the rights expressed in the Subsequent Agreement and Hills Motorway will not be entitled to any payment whatsoever under this Agreement or otherwise at law.
- 11.5 Hills Motorway must ensure that the costs incurred by it in connection with the Key Deliverables are necessary or reasonably incidental to completing its commitments under this Agreement.
- 11.6 If this Agreement expires pursuant to clause 10.1(e), Hills Motorway will not be entitled to reimbursement of its costs under clause 11 until 28 February 2011. During the period between and 28 February 2011, the parties will negotiate in good faith to enter into a Subsequent Agreement.
12. **Delivery of materials produced and intellectual property rights**
- 12.1 At the same time as payment of any amount by the RTA to Hills Motorway under clause 11 or otherwise at the expiry or termination of this Agreement (whichever is the earlier) ("**Delivery Date**"), Hills Motorway must (if it has not already done so) deliver to the RTA a copy of all information, materials and documents produced by or on behalf of Hills Motorway in carrying out the Key Deliverables and preparing the Proposal up to and including the Delivery Date ("**Proposal Documents**").
- 12.2 On the Delivery Date:
- (a) all of Hills Motorway's title and interest (including all intellectual property rights) in the Proposal Documents vests automatically in the RTA without the need for further notice; and
  - (b) to the extent to which Hills Motorway does not have title to the Proposal Documents (including to all intellectual property rights in them), Hill Motorway grants, or must procure the grant of, to the RTA an irrevocable, royalty free, non-exclusive licence (including the right to sub-license) to make whatever use of all intellectual property rights in the Proposal Documents, or any other information provided to the RTA, the RTA considers necessary or desirable in relation to the M2 Motorway, or any other project.
13. **General**
- 13.1 Any date or period of time set out in this Agreement may be extended (or otherwise amended) by written agreement between the RTA and Hills Motorway at any time.





- 13.2 This Agreement is governed by the laws in force in the State of New South Wales.
- 13.3 The RTA and Hills Motorway agree that, to the extent permitted by law, the operation of Part 4 of the *Civil Liability Act 2002* (NSW) is excluded in relation to all and any rights, obligations and liabilities arising under or in relation to this Agreement howsoever such rights, obligations or liabilities are sought to be enforced.
- 13.4 Except to the extent specifically otherwise stated in this Agreement, this Agreement supersedes the Letter of Intent.
- 13.5 Each party must promptly do all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to the other party) required by law or reasonably requested by the other party to give effect to this Agreement.
- 13.6 Any dispute or disagreement between the parties under or in connection with this Agreement must be resolved in accordance with section 5 of Attachment D.

14. **Trustee Limitation of Liability**

- 14.1 HMML enters into this Agreement only in its capacity as trustee of the Trust and in no other capacity and references to the HMML in this Agreement are references to it only in this capacity. A liability arising under or in connection with this Agreement is limited to and can be enforced against the HMML only to the extent which it can be satisfied out of the property of the Trust out of which the HMML is actually indemnified for the liability. This limitation of the HMML's liability applies despite any other provision of this Agreement and extends to all liabilities and obligations of the HMML in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this Agreement.
- 14.2 The provisions of this clause 14 do not apply to any obligation or liability of the HMML to the extent that it is not satisfied because under the Trust Deed or by operation of law there is a reduction in the extent of the HMML's indemnification out of the assets of the Trust, as a result of the HMML's fraud, negligence or breach of trust.
- 14.3 No attorney, agent or receiver and manager appointed in accordance with this Agreement has authority to act on behalf of the HMML in a way which exposes the HMML to any personal liability and no act or omission of any such person will be considered fraud, negligence or breach of trust of the HMML for the purpose of clause 14.2.
- 14.4 The HMML is not obliged to do or refrain from doing anything under this Agreement (including incur any liability) unless the HMML's liability is limited in a manner satisfactory to the HMML in its absolute discretion.

15. **Confidentiality and Publicity**

15.1 **General restriction**

Subject to clause 15.2, neither party will, at any time, whether before or after the expiration or sooner determination of this Agreement, without the consent of the other party, divulge or suffer or permit its servants, consultants and agents to divulge to any person:

- (a) any of the contents of this Agreement or its Attachments;
- (b) any information relating to the negotiations concerning the same; or
- (c) any information in respect of the Proposal which may have come to a party's knowledge in the course of such negotiations or otherwise concerning the operations, dealings, transactions, contracts, commercial or financial arrangements or affairs of the other party.

## 15.2 Exceptions

The restrictions imposed by clause 15.1 will not apply to the disclosure of any information:

- (a) which is now or after the date of this Agreement comes into the public domain or which is obtainable with no more than reasonable diligence from sources other than the parties;
- (b) which is required to be disclosed by law or the Listing Rules of the Australian Stock Exchange Limited (if applicable);
- (c) by the RTA to Government or Parliament or any department, office or agency of the Government or their advisers;
- (d) by the RTA for the purposes of giving effect to its rights under clauses 11 and 12 in the event of termination or expiration of this Agreement;
- (e) pursuant to Premier's memorandum No 2007-01 dated 8 January 2007 and the New South Wales Government "Working with Government Guidelines for Privately Financed Projects" December 2006;
- (f) to a court, arbitrator or administrative tribunal in the course of proceedings before it or him to which the disclosing party is a party or to an expert in the course of a determination by him to which the disclosing party is a party; or
- (g) which, in the reasonable opinion of Hills Motorway or the RTA (as the case may be), is required to be disclosed to:
  - (i) any actual or prospective investor in or lender to (or assignee or novatee of a lender to) a party; or
  - (ii) any of any member of Hills Motorway's or the RTA's officers, employees, professional advisers, auditors and consultants.

## 15.3 Publicity

Hills Motorway must not:

- (a) issue any press releases, statements or media announcements in relation to the Proposal without the prior written approval of the RTA; or
- (b) announce, promote or hold any event, function or party in relation to the Proposal on the Motorway (or permit any third party to do so) without the prior written approval of the RTA.

The RTA will, to the extent reasonably practicable, consult with Hills Motorway prior to releasing any information or issuing any press release regarding the M2 Upgrade project.



For and on behalf of the Roads and Traffic Authority

*L Hicks*  
Signed LOUISE HICKS

WITNESSES *J. G. Whit*  
*Peter Goldsmith*

Executed for The Hills Motorway Limited by its attorney

*A. J. Head*  
Attorney

*R. G. Colzar*  
Witness

Andrew James Head  
Name

RAYMOND BOLZAR  
Name

Executed for The Hills Motorway Management Limited as the Trustee of The Hills Motorway Trust by its attorney

*A. J. Head*  
Attorney

*R. G. Colzar*  
Witness

Andrew James Head  
Name

RAYMOND BOLZAR  
Name

## **M2 Upgrade – In Principle Agreement**

### **Contract Disclosure**

The RTA has withheld certain information, as allowed under Section 15A (9) of the FOI Act (1989) and, in accordance with Section 15A (4) of the Act, provides the following information.

Section 2.3 (a) (i) (A) and (B)	- financial information
Section 2.3 (a) (ii) (A), (B) and (C)	- financial information & cost structure
Section 2.4 (b)	- financial information
Section 2.4 (c) (i) and (ii)	- financial information
Section 2.4 (d)	- financial information
Section 3.1	- financial information
Section 3.2	- financial information
Section 6.(a) (i)	- financial information
Section 10.1 (e)	- financial information
Section 10.2 (b) (i) (A) and (B)	- financial information
Section 10.2 (b) (i) and (ii)	- financial information
Section 10.3 (a) and (b)	- financial information
Section 10.3 (c) (i), (ii) and (iii)	- financial information
Section 10.3 (f)	- financial information
Section 11.1 (a) (iv) (B)	- financial information
Section 11.6	- financial information

This information not only relates to the financial affairs of Hills Motorway Limited, but would place the company at a substantial commercial disadvantage in relation to other contractors or potential contractors for future projects of a similar kind.