

# NorthConnex Project

## Project Deed

Roads and Maritime Services  
RMS

NorthConnex Company Pty Ltd  
Project Company

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Our reference 2652/14606/80145688

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**Exhibit I -**

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**Exhibit L -**

**Exhibit M -**

**Exhibit N -**

**Exhibit O -**

## Project Deed

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Date 31 JANUARY 2015

**Parties**                    **Roads and Maritime Services** of Level 9, 101 Miller Street, North Sydney, New South Wales 2060 (**RMS**)

**NorthConnex Company Pty Ltd** (ACN 602 719 513) of 101 Wallgrove Road, Eastern Creek, NSW 2766 (**Project Company**)

### Background

- A.            RMS is a statutory body representing the Crown in the right of the State of New South Wales.
- B.            On 30 March 2012, the Sponsors submitted an unsolicited proposal to the NSW Government for the design, construction, completion, operation and maintenance of two new road tunnels to be located under Pennant Hills Road and the Northern Railway in Sydney linking the M2 Motorway and the M1 Motorway.
- C.            On 29 May 2013, the NSW Government invited the Sponsors to enter into negotiations to finalise all outstanding issues in relation to the Sponsors' unsolicited proposal and enable the Sponsors to submit a binding offer for the consideration of the NSW Government in accordance with applicable NSW Government guidelines.
- D.            On the date of this deed, the NSW Government accepted the Sponsors' binding proposal.
- E.            RMS and the Project Company now enter into this deed to set out the terms and conditions on which the Project Company carries out:
- (a)            the investigation, financing, funding, planning, design and construction of the Project Company's Works and the Temporary Works;
  - (b)            the integration, interface and co-ordination of the Project Company's Activities with the SWC Activities;
  - (c)            the commissioning of the Project Works and the Temporary Works;
  - (d)            the ownership, operation, maintenance and repair of the Motorway;
  - (e)            the handover of the Motorway to RMS at the end of the Term; and
  - (f)            the levying and collection of tolls.
- F.            As between RMS and the Project Company, RMS will:
- (a)            procure the design and construction of the State Works; and
  - (b)            enter into the State Works Deed with the State Works Contractor.
- G.            The overall strategic objectives of the NSW Government and RMS for the Project are:
- (a)            to provide a high standard access controlled motorway that integrates with the regional transport network;

- (b) to minimise adverse social and environmental impacts in the local area during construction and operation;
- (c) to provide opportunities for improved public transport in the area around Pennant Hills Road;
- (d) that the Project will assist RMS and others to reduce traffic congestion, particularly along Pennant Hills Road, and to provide quicker travel times for road users;
- (e) to ensure the Motorway is safe and reliable for road users;
- (f) that the Project will achieve the national objective of connecting Melbourne to Brisbane via a duplicated highway in order to improve the efficient movement of the state and national freight tasks, reducing costs for freight operators and carriers;
- (g) that the Project will contribute to reduce the number of heavy vehicles using Pennant Hills Road and as a result contribute to improvements in local air quality, reduce traffic noise and lead to the reduction of heavy vehicle traffic in local streets;
- (h) that the Project will demonstrate excellence in design and environmental sustainability; and
- (i) that the Project will be economically justified and affordable to government and that Completion of the Project Works will be achieved on time and on budget.

## Operative provisions

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### 1. Definitions and interpretation

#### 1.1 Definitions

In this deed:

**2011 Clean Energy Legislative Package** means the various schemes, policies and programs implemented by the legislation comprising the Commonwealth's "Clean Energy Legislative Package" as passed by the Senate on 8 November 2011.

**Abrided Consent Refinancing** means any Refinancing which satisfies the criteria in clause 33.6 and for which RMS has granted its written consent.

#### **Accreting Instrument**

**Act of Prevention** means:

- (a) a breach of this deed or the State Works Deed by RMS;
- (b) an act or omission by RMS or its Related Parties, not being an act or omission:
  - (i) expressly permitted or allowed by this deed, including any Direction given by RMS or RMS's Representative (other than a matter referred to in paragraph (c) of this definition);

- (ii) which is carried out within the timeframe expressly permitted or allowed by this deed (other than a matter referred to in paragraph (c) of this definition);
  - (iii) to the extent the act or omission is caused or contributed to by a breach by the Project Company of this deed or the State Works Contractor of the State Works Deed, or any negligent or unlawful act or omission of the Project Company, the State Works Contractor or any of their respective Related Parties; or
  - (iv) being the exercise by RMS of any of its functions and powers pursuant to any Law; and
- (c) a Change the subject of a Direction by RMS's Representative, other than a Change approved by RMS under paragraph 2.3 of the Change Procedure.

**Actual Equity Contribution** means, at any time, the aggregate of:

**Actual Revenue** means, for any period, the aggregate amount of

deed for that period. of this

**Agent** means the person appointed as agent for the Debt Financiers in relation to a financing or Refinancing entered into in accordance with clause 33.

**Applicable Period** means each successive period of 3 months during the Term where:

- (a) the first applicable period will begin on the Motorway Opening Date and end on the next 31 March, 30 June, 30 September or 31 December;
- (b) subsequent applicable periods will end on the following 31 March, 30 June, 30 September or 31 December of each year; and
- (c) the last applicable period will begin on the 1 April immediately preceding the Expiry Date and end on the Expiry Date.

**Approval** means any licence, permit, consent, approval, determination, certificate or permission from any Authority or under any Law, or any requirement made under any Law which must be obtained or satisfied (as the case may be):

- (a) to perform the Project Activities;
- (b) in connection with the Project, the Project Site, any Extra Land, the Motorway and the Maintenance Site;

- (c) for the use and occupation of the Motorway after Completion; or
  - (d) otherwise to comply with Law,
- including:
- (e) the Planning Approval; and
  - (f) any Environment Protection Licence issued in relation to the Project Activities,
- but not including:
- (g) any Direction given by RMS or RMS's Representative pursuant to this deed;
  - (h) the exercise by RMS of its rights under this deed; or
  - (i) any requirement by a person carrying out Existing Operations.

**Approved Financing Transactions** means

**Artefacts** means any and all:

- (a) valuable minerals, fossils or coins;
- (b) articles or objects of value or antiquity; or
- (c) objects or things of scientific, geological, historical, heritage, aesthetic, social, spiritual, cultural, archaeological, anthropological or other special interest.

**Asset Element** has the meaning given to that term in Appendix 9, Table A9-1 of the SWTC.

**Asset Management System** means the system referred to in section 9.8 of the SWTC.

**Asset Sub-Type** has the meaning given to that term in Appendix 9, Table A9-1 of the SWTC.

**Asset Type** has the meaning given to that term in Appendix 9, Table A9-1 of the SWTC.

**Associate** has the meaning given in sections 12 and 15 of the Corporations Act, provided that no persons will be deemed to be Associates merely because they are parties to, or become parties to, the Equity Participation Deed or any Project Documents.

**Assumed Value of the Motorway** means the value of the Motorway, assuming that Completion has been achieved, being the amount identified as such in the worksheet of the Model Outputs Schedule that is entitled "RMS",

**Authority** means:

- (a) any governmental or semi-governmental or local government authority, administrative or judicial body or tribunal, department, commission, public authority, agency, Minister, statutory corporation or instrumentality;
- (b) any other person having a right to impose a requirement, or whose consent is required, under Law with respect to any part of the Project Activities; or
- (c) any other person having jurisdiction over, or ownership of, Utility Services, the Utility Service Works, the Local Areas or the Local Area Works,

and includes the Clean Energy Regulator.

**Back Office System** means, at any time, the Toll Collection System excluding the Roadside Tolling System.

**Bank Bill** means a bill of exchange (as defined in the Bills of Exchange Act 1909 (Cth)) that has been accepted by a bank authorised under a Law of the Commonwealth or any state to carry on banking business.

**Base Case Financial Model** means the financial model and assumptions prepared by or for the Project Company and accepted by RMS pursuant to paragraph 7(a) of Schedule 1, as updated from time to time in accordance with clause 33.11(d).

**BBSY**, for a period, means the rate expressed as a yield per cent per annum (rounded up (if necessary) to 4 decimal places) that is quoted as the average bid rate on the Reuters monitor system page "BBSY" (or any page that replaces that page) at about 10:10am (Sydney time) on the first day of the relevant period for which the rate is sought, for Bank Bills that have a tenor in months which is closest to the period, provided that if there is a manifest error in the calculation of that average bid rate or if no average bid rate is so published for Bank Bills of that tenor by 10:30am then the BBSY will be the bid rate specified by the non-defaulting party reasonably, acting in good faith, having regard to the rates otherwise bid for Bank Bills having a tenor as described above at or around that time.

**Beneficial Change in Law** means a change to a law comprising the 2011 Clean Energy Legislative Package (including the (Clean Energy Act 2011 (Cth)) which:

- (a) comes into effect prior to the Date of Completion; and
- (b) decreases the cost of the Project Works, the Temporary Works or the O&M Work.

**Borrower** means any entity which is the recipient of any facilities, financial arrangements or accommodation provided from time to time under the Debt Financing Documents for the purposes of carrying out the Project but excludes Investor FinCo.

**Building Code** means the Building Code 2013 (Cth).

**Business Day** means any day other than a Saturday, Sunday or public holiday in Sydney, or 27, 28, 29, 30 and 31 December.

**Change** means any change or variation to the Project Works, the Temporary Works, the O&M Work or the Project Activities and includes additions, increases, decreases, omissions, deletions, demolition or removal to or from any of these.

**Change Costs** means, to the extent a Change increases the cost of the Project Works, the Temporary Works, the O&M Work or the Project Activities:

**Change in Codes and Standards** means a change in Codes and Standards which takes effect after the date of this deed and prior to the Date of Completion.

**Change in Federal Environmental Law** means:

- (a) a change in a Federal Environmental Law existing at the date of this deed;
- (b) the enactment or making of a new Federal Environmental Law after the date of this deed; or
- (c) a change in the way a Federal Environmental Law is applied, or in the interpretation of a Federal Environmental Law, after the date of this deed,

which requires a Change to the Project Works or a change to the Motorway.

**Change of Control** means, in relation to a company, trust or other entity:

- (a) if the company, trust or other entity comes under the Control of a person (acting alone or together with its Associates) who did not Control the company, trust or other entity as at the date of this deed or following any event which is approved by RMS under clause 34; or
- (b) if a person (acting alone or together with its Associates) who was in Control of a company, trust or other entity as at the date of this deed or following any event which is approved by RMS under clause 34 stops having Control of the company, trust or other entity,

other than as a result of a Permitted Dealing.

**Change Order** means a notice given by RMS under paragraph 1.4(b), paragraph 1.7(b), paragraph 1.7(d), paragraph 1.7(e) or paragraph 1.8 of the Change Procedure.

**Change Procedure** means the procedure in Schedule 12.

**Change Proposal** means a notice given by RMS under paragraph 1.1(a) of the Change Procedure.

**Change Savings** means:

**Claim** includes any claim, action, demand or proceeding for payment of money (including damages) or for an extension of time:

- (a) under, arising out of, or in any way in connection with, this deed;
- (b) arising out of, or in any way in connection with, any task, fact, matter, thing or relationship connected with, the Project, the Project Activities or either party's conduct prior to the date of this deed; or
- (c) otherwise at Law including:



- (i) under or for breach of any statute;
- (ii) in tort for negligence or otherwise, including negligent misrepresentation;  
or
- (iii) for restitution including restitution based on unjust enrichment.

**Clean Energy Regulator** means the "Clean Energy Regulator" established under the Clean Energy Regulator Act 2011 (Cth).

**Code Monitoring Group** has the meaning given to that term in the Building Code.

**Codes and Standards** means the codes, standards, specifications and guidelines referred to in the SWTC.

**Commercially Sensitive Information** means:

- (a) any information relating to any financing arrangement under any Equity Document;
- (b) any information relating to the Project Company's or the State Works Contractor's cost structure or profit margins;
- (c) any information relating to any of the Project Company's or the State Works Contractor's Intellectual Property Rights; or
- (d) any information which is commercially sensitive in that it provides a competitive advantage or has a unique characteristic to the Project Company, the State Works Contractor or the Project Company's or the State Works Contractor's shareholders, financiers or Subcontractors,

which, in respect of the information contained in the Project Documents, is the information described in Schedule 23.

**Commonwealth** means the Commonwealth of Australia.

**Community Liaison Implementation Plan** has the meaning given to that term in the SWTC.

**Compensation Event** means the occurrence of any of the following events prior to the Date of Completion:

- (a) an Act of Prevention other than an Act of Prevention described in paragraph (c) of the definition of "Act of Prevention";
- (b) a Legal Challenge occurs and, as a consequence of that Legal Challenge, the Project Company or the State Works Contractor receives an order by a court or direction by RMS's Representative pursuant to clause 4.5(a) or clause 4.5(c) which requires that the Project Company suspend or cease to perform any or all of its obligations under this deed, or the State Works Contractor suspend or cease to perform any or all of its obligations under the State Works Deed, other than due to:
  - (i) either of the Project Company's or the State Works Contractor's failure to comply with its obligations under a Project Document;
  - (ii) a breach of the Project Company's warranties under clause 4.3;
  - (iii) a wrongful act or omission of the Project Company, the State Works Contractor or their respective Related Parties;

- (iv) a failure by the Project Company, the State Works Contractor or any of their respective Related Parties to comply with the EP&A Act or the EPBC Act or any other applicable legislation; or
  - (v) a wrongful act or omission by the M2 Entities under the M2 Integration Project Deed;
- (c) a Native Title Claim is made and, as a consequence of that Native Title Claim:
- (i) the Project Company receives an order by a court or a direction by RMS's Representative pursuant to clause 9.10(a) or clause 9.10(b), or is required at Law, to suspend or cease to perform any or all of its obligations under this deed; or
  - (ii) the State Works Contractor receives an order by a court or a direction by RMS's Representative pursuant to clause 9.10(a) or clause 9.10(b), or is required at Law, to suspend or cease to perform any or all of its obligations under the State Works Deed; or
- (d) a:
- (i) Change in Federal Environmental Law; or
  - (ii) Discriminatory Change in State Law,
- which requires a Change to be made prior to the Date of Completion.

**Completion** means the stage in the execution of the Project Activities when the Project Company has satisfied all the conditions precedent to completion set out in Schedule 15.

**Concept Design** means the concept design prepared by the Project Company and included in Appendix 14 of the SWTC.

**Conditions Precedent** means the conditions precedent set out in Schedule 1.

**Consent Refinancing** means any Refinancing other than a No Consent Refinancing.

**Consequential Loss** means any:

- (a) loss of income, loss of revenue, loss of profit, loss of financial opportunity, loss of investment return, loss of business or loss of business opportunity, loss of contract, loss of goodwill, loss of use or loss of production (whether the loss is direct or indirect);
- (b) increase in direct or indirect financing costs; or
- (c) any loss, damage, cost, expense or Liability that is:

- (i) special;
- (ii) not a loss, damage, cost, expense or Liability that may fairly and reasonably be considered to arise naturally (being according to the usual course of things) from the breach or relevant matter; or
- (iii) not fairly and reasonably contemplated by both RMS and the Project Company at the date of this deed as the probable result of the breach or relevant matter,

whether present or future, fixed or unascertained, actual or contingent.

**Construction Plan** means the plan of that name which satisfies the requirements of section 5 of Appendix 60 to the SWTC.

**Construction Plant** means plant, equipment (including hand-held tools), machinery, apparatus, vehicles, appliances and things used in the carrying out of the Project Activities but not forming part of the Project Works.

**Consumer Price Index** or **CPI** has the meaning given in Schedule 2.

**Contamination** means the presence in, on or under land or any other aspect of the Environment of a substance, gas, chemical, liquid or other matter (whether occurring naturally or otherwise) which is:

- (a) at a concentration above the concentration at which the substance, gas, chemical, liquid or other matter (whether occurring naturally or otherwise) is normally present in, on or under land or any other aspect of the Environment in the same locality, being a presence that presents a risk of harm to human health or any other aspect of the Environment; or
- (b) toxic, flammable or otherwise capable of causing harm to humans or damage to the Environment including asbestos, toluene, polychlorine biphenyls, lead based paints, glues, solvents, cleaning agents, paints and water treatment chemicals.

**Contamination Notice** means a notice or direction given, or purporting to have been given, under any Law which requires the person to whom it is issued to take action to investigate, remediate or manage Contamination and includes a site investigation notice, remediation notice and requirement to prepare a site management plan.

**Contract Documentation and Materials** has the meaning given to that term in clause 25.1.

**Contractor** means Lend Lease Engineering Pty Limited (ABN 40 000 201 516) and Bouygues Construction Australia Pty Ltd (ABN 37 144 013 801) (jointly and severally).

**Contractor Guarantor** means:

**Contractor's Side Deed** means the deed entitled "NorthConnex Contractor's Side Deed" dated on or about the date of this deed between the Project Company, the State Works Contractor, the Contractor, the Contractor Guarantor and RMS.

**Control** means:

- (a) in relation to a corporation:

- (i) the ability to control, directly or indirectly, the composition of the board of the corporation;
  - (ii) the ability to exercise or control the exercise of the rights to vote in relation to more than % of the voting shares or other form of voting equity in the corporation;
  - (iii) the ability to dispose or exercise control over the disposal of more than % of the shares or other form of equity in the corporation; or
  - (iv) the capacity to determine, directly or indirectly, the outcome of decisions about the financial and operating policies of the corporation within the meaning of section 50AA of the Corporations Act;
- (b) in relation to a trust estate:
- (i) the ability to appoint or remove any trustee of the trust estate or to appoint any trustee in place of or in addition to any trustee of the trust estate;
  - (ii) the capacity to determine, directly or indirectly, the outcome of decisions about the financial and operating policies of the trustee of the trust estate within the meaning of section 50AA of the Corporations Act, or the manner in which the trustee of the trust estate deals with the income or the capital of the trust estate at any time;
  - (iii) the ability to nominate or alter the beneficiaries or unitholders of the trust estate at any time;
  - (iv) where the trust is a unit trust, the ability to exercise or control the exercise of the right to vote in relation to more than % of the units in the unit trust estate; or
  - (v) where the trust is a unit trust, the ability to dispose or exercise control over the disposal of more than % of the units in the unit trust estate; and
- (c) in relation to an association or a partnership, firm or other body whether incorporated or unincorporated (**entity**), the capacity to determine, directly or indirectly, the financial and operating policies of the entity or how the affairs of the entity are to be conducted and managed.

**Corporate WHS Management System** has the meaning given in the Work Health and Safety Management Systems and Auditing Guidelines (5th edition) (September 2013) or any document issued from time to time which amends or replaces this document.

**Corporations Act** means the Corporations Act 2001 (Cth).

**CPPIB** means the Canada Pension Plan Investment Board established under the Canada Pension Plan Investment Board Act, S.C. 1997, c. 40.

**Crown Building Work** has the meaning given to that term in section 109R of the EP&A Act.

**D&C Deed** means the deed entitled "NorthConnex D&C Deed" dated on or about the date of this deed between the Project Company, the State Works Contractor and the Contractor.

**D&C Guarantees** means each deed of guarantee dated on or about the date of this deed which is given by each Contractor Guarantor to the Project Company and the State Works Contractor in respect of the obligations of the Contractor under the D&C Deed.

**D&C Margin** means the amount identified as the D&C Margin in the Model Outputs Schedule.

**D&C Work** means all things or tasks which the Project Company and the State Works Contractor are, or may be, required to do in discharging their respective obligations under this deed and the State Works Deed (as applicable) to design and construct the Project Works and the Temporary Works.

**Data** for the purposes of the definition of "Emissions and Energy Data" and Schedule 5, includes data, information, records and reports.

**Date for Completion** means:

- (a) the date which is 1,719 days after the date of Financial Close; or
- (b) to the extent that clause 14.8(b) applies, only for the purposes of clauses 14.5(b) and 27.1(e), the date resulting from the application of that clause.

**Date of Completion** means the date notified in a Notice of Completion as the date Completion was achieved.

**Date of Final Handover** means the date notified in accordance with clause 30.2(b)(i) as the date Final Handover was achieved.

**Day 1 Clauses** means clauses 1, 2, 3, 4.1, 7.21(c), 8.1, 9.8, 11.4, 12, 23, 26, 28, 31, 32, 33, 34, 36, 39 and 40 and any other clauses, Schedules or Exhibits required to have commenced upon execution of this deed to give effect to those clauses.

**Debt Financiers** means

**Debt Financing Documents** means:

**Debt Service** means, for the relevant period, the aggregate amount of:

**Debt Service Coverage Ratio or DSCR** means each

**Deed of Appointment of Environmental Representative** means the deed entitled "NorthConnex Deed of Appointment of Environmental Representative" entered into between RMS, the Project Company, the State Works Contractor, the Contractor and the Environmental Representative in accordance with clause 9.12(g).

**Deeds of Disclaimer** means any Deeds of Disclaimer signed by the Contractor in favour of the Project Company, the State Works Contractor and RMS, forming Exhibit C to this deed.

**Defect** means:

- (a) any defect, deficiency fault, error or omission in the Project Works, the Temporary Works or the O&M Work; or
- (b) any:
  - (i) cracking, shrinkage, movement or subsidence in the Project Works or the Temporary Works; or
  - (ii) other aspect of the Project Activities, the Project Works, the Temporary Works or the O&M Work,

which is not in accordance with the requirements of this deed.

**Defects Correction Period** means a period referred to in clause 15.2, 15.3 or 15.4.

**Delivery Insurance** means the Project Insurances referred to in Part 1 of Schedule 4.

**Design Documentation** means all:

- (a) design documentation (including design standards, concrete mix designs, design reports, durability reports, specifications, models (including any building information model prepared in relation to the Project Works, the Reviewable Temporary Works or the Project Activities), samples, prototypes, calculations, drawings, digital records and all other relevant data) in electronic, computer readable and written forms, or stored by any other means, which are required for the performance of the Project Activities or which the Project Company, the State Works Contractor or any other person creates in performing the Project Activities (including the design of the Reviewable Temporary Works to codes and standards relevant to their intended use consistent with Good Industry Practice); and
- (b) computer software (including both source code and object code versions) where the computer software has been specifically created or specifically modified for the purposes of the Project Activities.

**Design Plan** means the plan of that name which satisfies the requirements of section 4 of Appendix 60 to the SWTC.

**Design Review Schedule** means Schedule 28.

**Direction** means any certificate, decision, demand, determination, direction, instruction, order, rejection, request or requirement.

**Discriminatory Change in State Law** means:

- (a) the amendment, repeal or change after the date of this deed of a State Law (not including any amendment or change in an Approval resulting from any direct action of the Project Company in accordance with this deed, or the State Works Contractor in accordance with the State Works Deed, including any Change requested by the Project Company) existing at the date of this deed;
- (b) the enactment after the date of this deed of a new State Law; or
- (c) a change after the date of this deed in the interpretation or application of an existing State Law, brought about by:
  - (i) the amendment, repeal or change of another State Law; or
  - (ii) the enactment of a new State Law,

which directly affects the interpretation or application of the first mentioned existing State Law,

and which specifically and only:

- (d) affects the Project; or
- (e) has a direct effect upon the Project together with other privately owned and operated tollroads in the State of New South Wales.

A Discriminatory Change in State Law will be deemed to have occurred if:

- (f) after the date of this deed, the NSW Government introduces (or, after its introduction, changes) a tax on tolls payable for use of the Motorway; or
- (g) as a result of a change in any State Law relating to the identification of motor vehicles, the Project Company's electronic tolling system is not able (after all reasonable efforts and adjustments have been made by the Project Company and its Subcontractors) to identify vehicles in the manner contemplated by this deed.

**Dispute** has the meaning given to that term in clause 28.

**Dispute Resolution Procedure** means the procedure for resolving Disputes set out in Schedule 24.

**Distribution** means

**Duration** means the relevant duration set out in the column in the table headed "Duration" contained in the RMS Traffic Site Access Schedule or a Traffic Management Plan, or as the parties may otherwise agree and the relevant duration set out in the column in the table headed "Duration" contained in the M2 Interface Site Access Schedule or as the parties may otherwise agree.

**Early Termination Amount:**

- (a) means on any date, the total of:
  - (i) on any date after the
  - (ii) the amounts which the
  
  - (iii) an amount equal to



- (b) does not include

**Easements** means the easements, restrictions on use, covenants, agreements, arrangements or other similar arrangements together with any leases, sub-leases, licences and rights and privileges in each case as contemplated pursuant to Schedule 19 to benefit or burden the Motorway Site or any Additional Land (as defined in Schedule 18) and which may be created pursuant to clause 16.2 of this deed.

**EIS** means the document titled "Roads and Maritime Services — NorthConnex: Environmental Impact Statement — Volumes 1A, 1B, 1C, 2, 3, 4, 5 and 6, prepared by AECOM Australia Pty Ltd" dated July 2014.

**Eligible Truck** means a Heavy Vehicle but excludes:

- (a) an Exempt Vehicle; and
- (b) a Heavy Vehicle that is prohibited by Law from using the Motorway (including a Vehicle that is prohibited from using the Motorway because it does not have a relevant authorisation or exemption required under Law for travel on the Motorway or it is over size or carrying dangerous goods).

**Emissions and Energy Data** means:

- (a) any Data of the type that a registered corporation or any other person is required by the NGER Legislation to keep or to provide to the Clean Energy Regulator concerning greenhouse gas emissions, energy production or energy consumption;
- (b) any Data of the type that a registered corporation or any other person is entitled to provide to the Clean Energy Regulator under the NGER Legislation concerning reduction of greenhouse gas emissions, removal of greenhouse gases or offsets of greenhouse gas emissions from any greenhouse gas project; and
- (c) any other Data concerning environmental emissions or energy production, use, consumption or efficiency of the type that any person is required by any other Law to keep or to provide to any Authority.

**Environment** means components of the earth, including:

- (a) land, air and water;
- (b) any layer of the atmosphere;
- (c) any organic or inorganic matter and any living organism;
- (d) human-made or modified structures and areas; and
- (e) interacting natural ecosystems that include components referred to in paragraphs (a) to (c) of this definition.

**Environment Protection Licence** means an environment protection licence granted under the Protection of the Environment Operations Act 1997 (NSW).

**Environmental Documents** means the Planning Approval and Appendix 5 of the SWTC.

**Environmental Management System** means the system referred to in section 2.6.1 of the SWTC.

**Environmental Manager** means the individual referred to in section 2.6.2 of the SWTC.

**Environmental Notice** means any notice (including any notice of an intention to issue an order under the EP&A Act), order or request for information issued by an Authority in respect of a matter concerning the Environment.

**Environmental Representative** or **ER** means the person appointed to perform the responsibilities of the Environmental Representative under this deed and any person appointed by RMS, the Project Company, the State Works Contractor and the Contractor as a replacement from time to time.

**EP&A Act** means the Environmental Planning and Assessment Act 1979 (NSW).

**EPBC Act** means the Environment Protection and Biodiversity Conservation Act 1999 (Cth).

**Equity Documents** means:

- (a) the constitution of the Project Company;
- (b) the constitution of the State Works Contractor;

- (c) the document entitled "Shareholder Loan Note Subscription Deed - Facility A" dated on or about the date of Financial Close;
- (d) the document entitled "Shareholder Loan Note Subscription Deed - Facility B" dated on or about the date of Financial Close;
- (e) the document entitled "State Works Contractor Revolving Facility Deed" dated on or about the date of Financial Close;
- (f)
- (g) the document entitled "WSO Co Funding Facility Deed" dated on or about the date of Financial Close;
- (h) the Funding Default Deed;
- (i) the M7 Concession Enhancement Payment Deed; and
- (j) the document entitled "Intra-group Funding and Payment Directions Deed" dated on or about the date of Financial Close.

**Equity Investor** means:

**Equity Participation Deed** means the deed entitled "Equity Participants Deed" dated 31 October 2014 between the Intoll Entities (as defined therein), the QIC Entities (as defined therein), the Transurban Entities (as defined therein), Hold Co (as defined there) and Hold Trustee (as defined there) and the State Works Contractor.

**Event of Default** means any event specified in clause 27.1.

**Excluded Matters** means the following references in the SWTC:

- (a) Appendix 18, sections 1.6(b), and (c) and (e), in relation to:
  - (i) traffic mix,
  - (ii) traffic speed, volumes and densities, based on PIARC assumptions for average peak traffic speeds from 20km/h to 80km/h,
  - (iii) PIARC conversion factors, including NO<sub>2</sub>/NO<sub>x</sub> ratios, VOC/CO ratios,
  - (iv) VOC and solid particle conversion factors
 to the extent they are used for designing tunnel ventilation; and
- (b) Appendix 58, Attachment 1 in relation to traffic performance and functionality of the intersection and interchanges.

**Excusable Cause of Delay** means:

- (a) an Act of Prevention;

- (b) an event referred to in paragraph (b) or paragraph (c) of the definition of Compensation Event;
- (c) the discovery of an Artefact to the extent that the discovery of that Artefact results in the Project Company or the State Works Contractor being directed, ordered or required by RMS's Representative, an Authority, a court or tribunal or by Law to suspend or cease to perform any or all of the Project Activities for more than 20 Business Days in aggregate (for each discovery of an Artefact);
- (d) the occurrence of a Force Majeure event; or
- (e) a court makes a Final Determination.

**Exempt Vehicle** means a Vehicle that is exempt from tolls, fees or charges pursuant to clause 8 of the Toll Calculation Schedule.

**Existing Operations** means:

- (a) all infrastructure (including the existing infrastructure and Utility Services) which is owned, operated or under the control of an Existing Operator; and
- (b) the businesses and operations undertaken by an Existing Operator,

on or in the vicinity of the Project Site.

**Existing Operator** means:

- (a) RailCorp;
- (b) Sydney Trains;
- (c) Transport for NSW ABN 18 804 239 602;
- (d) Australian Rail Track Corporation Ltd ABN 75 081 455 754;
- (e) Ausgrid ABN 67 505 337 385;
- (f) Endeavour Energy ABN 59 253 130 878;
- (g) Telstra Corporation Limited ABN 33 051 775 556; and
- (h) Sydney Water Corporation ABN 49 776 225 038,

and any of their Related Bodies Corporate.

**Exotic Swap** means

**Expiry Date** means 30 June 2048.

**Extra Land** means the land acquired by RMS or the Project Company pursuant to clauses 9.5(a)(ii), 9.5(b) and 9.5(c).

**Fair Work Building Industry Inspectorate** has the meaning given to that term in the Building Code.

**Federal Environmental Law** means a Law of the Commonwealth which expressly requires or necessitates the installation, modification or enhancement of air filtration or Contamination control measures for the purposes of the Project.

**Final Design Documentation** means the Design Documentation required to be completed for the Final Design Documentation Stage.

**Final Design Documentation Stage** means that stage in the development of the Design Documentation at which the Design Documentation for any discrete design element or part thereof has been fully developed (including all design standards, design reports, specifications, models, calculations and the final developed drawings for the discrete design element or part thereof).

**Final Determination** means a decision of a court:

- (a) from which no appeal can be taken and in respect of which no application for special leave to appeal can be made; or
- (b) in respect of which the relevant appeal or special leave application period has expired without an appeal being taken or an application for special leave to appeal being made,

which prevents the Project Company or the State Works Contractor from undertaking the Project in accordance with this deed or the State Works Deed (respectively) and which is not a result of:

- (c) either of the Project Company's or the State Works Contractor's failure to comply with its obligations under a Project Document;
- (d) a breach by either of the Project Company or the State Works Contractor of its warranties under a Project Document;
- (e) a wrongful act or omission of the Project Company, the State Works Contractor or their respective Related Parties; or
- (f) a failure by the Project Company, the State Works Contractor or any of their respective Related Parties to comply with any Law.

**Final Handover** means the stage when:

- (a) the Project Company has done everything which this deed requires the Project Company to do as a condition precedent to Final Handover; and
- (b) the requirements in the SWTC have been satisfied.

**Financial Close** means the date on which the Conditions Precedent have been satisfied in accordance with clause 3.1.

**Financial Indebtedness** means

**Financiers Tripartite Deed** means a deed substantially in the form of Exhibit L to be entered into between RMS, the Project Company and the Debt Financiers (through their Agent, Security Trustee or other Representative) in accordance with clause 33.3.

**Forecast Equity Contribution** means the aggregate of:

**Forecast Revenue** means, for any period, the

Revenue specified for that period in the Base Case Financial Model (as at the date of this deed).

**Forecast Truck Volumes** means the forecast of  
as set out in the Model Outputs Schedule.

**Force Majeure** means:

- (a) prior to the Motorway Opening Date:
  - (i) earthquake, cyclone, fire, explosion, flood, malicious damage, sabotage, act of a public enemy, terrorism or civil unrest;
  - (ii) war, invasion, hostility between nations, civil insurrection, military coup or act of a foreign enemy;
  - (iii) ionising radiation or radioactive contamination from nuclear waste or the combustion of nuclear fuel; or
  - (iv) confiscation, nationalisation, requisition or property damage under the order of any government; or

- (b) on or after the Motorway Opening Date:
- (i) the events referred to in paragraphs (a)(i) to (iv) of this definition; or
  - (ii) the occurrence of any other event other than:
    - A. a breach of a Project Document by the Project Company or the State Works Contractor or any other event arising directly as a consequence of a breach of a Project Document by the Project Company or the State Works Contractor; or
    - B. an event the risk of which is not otherwise specifically allocated under a Project Document (provided that neither clause 2.2(a) (subject to clause 2.2(b)) nor clause 24.2(a) specifically allocates risk for the purpose of this paragraph (b)(ii)B),

which is beyond the reasonable control of the Project Company, the State Works Contractor and their respective Related Parties and which is:

- (c) an event which; or
  - (d) an event the effects of which,
- both:
- (e) prevents or delays the Project Company or the State Works Contractor from performing an obligation under the Project Documents; and
  - (f) could not have been Mitigated, prevented, avoided, remedied or overcome by the Project Company, the State Works Contractor or their respective Related Parties taking those steps which a prudent, experienced and competent concessionaire, designer, constructor or operator would have taken.

**Funding Default Deed** means

**GIPA Act** means the Government Information (Public Access) Act 2009 (NSW).

**GLiDe Go Live Date** has the meaning given to that term in the Tolling and Customer Management Agreement.

**Good Industry Practice** means that degree of skill, care, prudence, foresight and practice which would reasonably and ordinarily be expected from time to time of a skilled and experienced person, engaged in the same or similar type of undertaking as that of the Project Company, the State Works Contractor or their respective Related Parties, as the case may be, under the same or similar circumstances as the performance of the Project Activities.

**GST, GST law** and other terms used in clause 22.2 and the Toll Calculation Schedule have the meanings used in the *A New Tax System (Goods and Services Tax) Act 1999* (as amended from time to time) or any replacement or other relevant legislation and regulations, except **GST law** also includes any applicable Australian Tax Office rulings and any reference to GST payable by the Supplier (as defined in clause 22.2) includes GST payable by the representative member of any GST group of which the Supplier is a member.

**Hazardous Substance** means any substance which would or might reasonably be expected to cause damage or injury to human beings, any property or the Environment.

**Heavy Vehicle** has the meaning given to that term in the Toll Calculation Schedule.

**Hold Point** means a point beyond which a work process must not proceed without the authorisation or release of a designated authority.

**HoldCo** means NorthWestern Roads Group Pty Ltd ACN 169 328 330.

**Holding Company** means, in relation to a body corporate, a body corporate of which the first body corporate is a Subsidiary.

**IAMA** means The Institute of Arbitrators and Mediators Australia.

**Identified Insurance** means the Project Insurances referred to in paragraphs 1(a)(i), 1(a)(ii), 1(a)(iii), 1(a)(vi), 2(a), 2(b) and 2(d) of Schedule 4.

**IFC Design Documentation** means the design which the Project Company is entitled in accordance with clause 11.3(d) to use for construction purposes and which consists of the Final Design Documentation verified by the Independent Certifier.

**Incident** means any of the following incidents or events arising out of or in connection with the Project Activities:

- (a) any work health and safety, environmental or security incident including:
  - (i) a fatality or injury to any person including any incident which must be reported to the New South Wales WorkCover Authority;
  - (ii) loss of containment, escape of or migration of Contamination off-site and into the Environment;
  - (iii) any fire or dangerous event on the Project Site, Extra Land, Motorway or Maintenance Site;
  - (iv) a security breach;
  - (v) any unauthorised removal of trees;
  - (vi) any incident involving the community;
  - (vii) any accidents involving damage to persons or property occurring upon or in the vicinity of the Project Site, Extra Land, Motorway or Maintenance Site;
  - (viii) a non-compliance with an Approval;
  - (ix) any public complaint; or
- (b) any unplanned and/or undesired event which results in or has the potential to result in injury, ill-health, damage to or loss of property, interruption to operations or environmental impairment,

and includes:

- (c) a near miss, breach of procedure, quality failure and/or injuries to contractors and members of the public; and



(d) "occurrences" and "notifiable occurrences" under the WHS Legislation.

**Independent Certifier** means APP Corporation Pty Limited of Level 10, 111 Pacific Highway, North Sydney NSW 2060 or such other person(s) as may be engaged by RMS, the Project Company and the State Works Contractor in accordance with the Independent Certifier Deed.

**Independent Certifier Deed** means the deed entitled "Independent Certifier Deed" entered into between RMS, the Project Company, the State Works Contractor and the Independent Certifier on or about the date of this deed.

**Indexed** means indexed in accordance with increases in CPI.

**Information Document** means any information, data, document or material (in any format or medium including any electronic form and whether oral or written) which is:

- (a) referred to in Exhibit E;
- (b) issued or made available by, or on behalf of, RMS or the NSW Government, to the Project Company in connection with the Project, the Project Works or the Project Activities (including anything issued or made available through RMS's website), regardless of whether it was expressly classified or stated to be an "Information Document"; or
- (c) referred to, or incorporated by reference, in an Information Document unless such information, data, document or material is otherwise expressly stated to form part of this deed,

whether issued or made available on, before or after the date of execution of this deed.

**Initial Debt Financing Documents** means the first set of Debt Financing Documents entered into by the Borrower after Financial Close in accordance with clause 33.

**Insolvency Event** means:

- (a) a controller (as defined in section 9 of the Corporations Act), administrator or similar officer is appointed in respect of a person or any asset of a person;
- (b) a liquidator or provisional liquidator is appointed in respect of a person;
- (c) any application (not withdrawn or dismissed within 7 days) is made to a court for an order, an order is made, a meeting is convened or a resolution is passed, for the purpose of:
  - (i) appointing a person referred to in paragraph (a) or (b) of this definition;
  - (ii) winding up or deregistering a person; or
  - (iii) proposing or implementing a scheme of arrangement, other than with the prior approval of RMS under a solvent scheme of arrangement pursuant to Part 5.1 of the Corporations Act;
- (d) any application (not withdrawn or dismissed within 7 days) is made to a court for an order, a meeting is convened, a resolution is passed or any negotiations are commenced, for the purpose of implementing or agreeing:
  - (i) a moratorium of any debts of a person;

- (ii) any other assignment, composition or arrangement (formal or informal) with a person's creditors; or
- (iii) any similar proceeding or arrangement by which the assets of a person are subjected conditionally or unconditionally to the control of that person's creditors or a trustee,

or any agreement or other arrangement of the type referred to in this paragraph (d) is ordered, declared or agreed to;

- (e) as a result of the operation of section 459F(1) of the Corporations Act, a person is taken to have failed to comply with a statutory demand (as defined in the Corporations Act);
- (f) any writ of execution, garnishee order, mareva injunction or similar order, attachment or other process is made, levied or issued against or in relation to any asset of a person;
- (g) anything analogous to anything referred to in paragraphs (a) to (f) (inclusive) of this definition, or which has a substantially similar effect, occurs with respect to a person under any law; or
- (h) a person is, or admits in writing that it is, or is declared to be, or is taken under any applicable law to be (for any purpose), insolvent or unable to pay its debts.

**Insured Liability** has the meaning given to that term in clause 24.4.

**Integrated Operating Services** has the meaning given to it in clause 17A.1(a)(iii).

**Integrated Operations Service Provider** has the meaning given to it in clause 17A.1(a)(iii).

**Integrated Operations Side Deed** means a deed in a form acceptable to RMS (acting reasonably) to be entered into between RMS, the Project Company and the Integrated Operation Service Provider in accordance with clause 17A.1(b)(i)E.

**Integration Plan** has the meaning given to it in clause 17A.3(a)(i).

**Integration Reversal** means, at any time after the Project Company implements Integrated Operating Services in accordance with this deed, the Project Company implements an alternative contractual structure for the delivery of the relevant Operating Services.

**Integration Reversal Plan** has the meaning given to it in clause 17A.3(a)(ii).

**Integration Reviewer** has the meaning given in clause 17A.3(b).

**Intellectual Property Right** means any statutory and other proprietary right in respect of inventions, innovations, patents, utility models, registered and registrable designs, circuit layouts, mask rights, copyright (including future copyright), confidential information, trade secrets, technical data and know-how, trade marks and any other right in respect of intellectual property as defined in Article 2 of the Convention establishing the World Intellectual Property Organisation of July 1967.

**Interest Cover Ratio or ICR** means the ratio of:

forecast in the Refinancing Model to be incurred in the 12 month period that occurs following the Proposed Refinancing Date.

**Interface Area** means an area or location specified in the RMS Traffic Site Access Schedule or as the parties may otherwise agree and an area or location specified in the M2 Interface Site Access Schedule or as the parties may otherwise agree.

**Investor FinCo** means NorthConnex Finance Pty Limited ACN 169 448 800.

**Key Relevant Entity** means:

- (a) the Operator;
- (b) the Integrated Operations Services Provider;
- (c) the Technology Operator;
- (d) the Tolling and Customer Management Contractor; and
- (e) any Relevant Entity engaged by the Project Company under a contract or contracts with an aggregate contract value of equal to or greater than \$

**Law** means:

- (a) Commonwealth, New South Wales or local government legislation including regulations, by-laws and other subordinate legislation;
- (b) principles of law or equity established by decisions of courts; and
- (c) Approvals (including any condition or requirement under them).

**LC Expiry Date** means the date which is Business Days after the Date for Completion.

**Legal Challenge** has the meaning given to that term in clause 4.5(a).

**Letter of Credit** means each letter of credit provided in accordance with \_\_\_\_\_ of this deed.

**Liability** includes any liability of any kind whether for debt, cost (including legal costs, deductibles or increased premiums), expense, loss, damage, compensation or charge and whether:

- (a) liquidated or not;
- (b) arising from or in connection with any obligation (whether as a principal obligation, a surety or an indemnity);
- (c) legal or equitable, and whether arising under or for breach of contract, in tort (including negligence), restitution or at Law;
- (d) present, prospective or contingent; or
- (e) owed, incurred or imposed by or to or on account of or for the account of any person alone or severally or jointly with another or others.

**Licensed Maintenance Areas** means the areas shown in Appendix 2 of the SWTC.

**Local Areas** means all public spaces, parks, pedestrian ways, pedal cycle paths, local roads, state highways, regional roads and main roads, including their associated road reserves, which:

- (a) are adjacent to;
- (b) connect to;
- (c) intersect;
- (d) cross; or
- (e) are in any way affected by,

the Project Works or the Temporary Works, including those sections of public spaces, parks, pedestrian ways, pedal cycle paths, local roads, state highways, regional roads and main roads, including any associated road reserves, that are made redundant or become service roads as part of the road network.

**Local Area Works** means the modification, reinstatement and improvement of Local Areas which the Project Company or the State Works Contractor must design and construct and hand over to RMS or the relevant Authority in accordance with this deed and the SWTC including Appendix 27 of the SWTC (and including, to the extent relevant to such works, Changes directed in accordance with this deed).

**Loss** means:

- (a) any cost, expense, fee, loss, damage, Liability or other amount; and
- (b) without being limited by paragraph (a) of this definition and only to the extent not prohibited by Law, any fine or penalty,

whether direct, indirect, consequential, present, future, fixed, unascertained, actual or contingent.

**M1 Motorway** means the motorway known as the M1 Motorway located between Wahroonga and Berowra.

**M2 Entities** means The Hills Motorway Limited ACN 062 329 828 and Hills Motorway Management Limited ACN 064 687 645 in its capacity as trustee of the Hills Motorway Trust including their executors, administrators, successors and permitted substitutes and assigns, including persons taking by way of novation and, in the case of a trustee, includes a substituted or additional trustee.

**M2 Handover Assets** has the meaning given to them in the M2 Interface Deed.

**M2 Integration Project Deed** means the deed entitled "M2 Integration Project Deed" entered into between RMS, The Hills Motorway Limited and Hills Motorway Management Limited on or about the date of this deed.

**M2 Interface Deed** means the deed entitled "M2/NorthConnex Interface Deed" entered into between the Project Company, RMS, The Hills Motorway Limited and Hills Motorway Management Limited on or about the date of this deed.

**M2 Interface Site Access Schedule** means the document of that name set out in Exhibit N.

**M2 Motorway** means The Hills M2 Motorway which opened to traffic in May 1997 and links the Lane Cove Tunnel and the M7 Motorway (as upgraded).

**M7 Amendment Date** means the date on which all conditions precedent to the M7 Amending Deeds have been satisfied or waived.

**M7 Amending Deed** means each of the following documents entered into on or about the date of this deed:

- (a) a deed entered into between RMS, WestLink Motorway Limited, WSO Co Pty Limited, WSO Finance Pty Limited, each Westlink Partner (as defined therein) and the M7 Security Trustee to amend the M7 Motorway Project Deed, the "Motorway Stratum Agreement to Lease" (as defined in the M7 Motorway Project Deed), the "Gantry Land Agreement to Lease" (as defined in the M7 Motorway Project Deed) and the "RTA Consent Deed" (as defined in the M7 Motorway Project Deed);
- (b) *not used*; and
- (c) the deeds entered into between RMS, WSO Co Pty Limited and Roam Tolling Pty Limited to amend and restate the "TCM Agreement" and the "TCM Operator's Side Deed" (each as defined in the M7 Motorway Project Deed).

**M7 Interface Deed** means the deed entitled "M7/NorthConnex Interface Deed" entered into between the Project Company, RMS, Westlink Motorway Limited and WSO Co Pty Limited on or about the date of this deed.

**M7 Motorway** means the 'Westlink M7 Motorway' which links the M2 Motorway at Baulkham Hills, the M4 Motorway at Eastern Creek and the M5/Hume Highway at Prestons (as upgraded).

**M7 Motorway Project Deed** means the document entitled "Western Sydney Orbital Project Deed" entered into between RMS, WestLink Motorway Limited and WSO Co Pty Limited on 13

February 2003, as amended by the amending deed referred to in paragraph (a) of the definition of "M7 Amending Deed".

**M7 Project** has the meaning given to "Project" in the M7 Motorway Project Deed.

**M7 Security Trustee** has the meaning given to "Security Trustee" in the M7 Motorway Project Deed.

**Maintenance Site** means all areas affected by the O&M Work, or on which the O&M Work is carried out, including:

- (a) the Motorway Site;
- (b) the Licensed Maintenance Areas; and
- (c) for a period of 12 months commencing on the date on which the Defects Correction Period begins for the Local Area Works, the landscaped areas of the Local Area Works.

**Major Australian Bank** means Australia and New Zealand Banking Group Limited, Westpac Banking Corporation, National Australia Bank Limited and Commonwealth Bank of Australia.

**Management Services Agreement** means the agreement entitled 'NorthConnex Management Services Agreement' between NorthWestern Roads Management Services Company Pty Ltd and the Project Company dated on or about the date of Financial Close.

**Material Adverse Effect** means an adverse effect that is a Qualifying Adverse Effect on the ability of:

**Materials** means any equipment, plant, materials, fixtures, fittings, furniture, machinery, goods parts and other items incorporated or to be incorporated into the Project Works or the Temporary Works.

**Maximum Liability** means \$ \_\_\_\_\_ less the amount by which the aggregate of:

exceeds \$ \_\_\_\_\_

**Maximum Upfront Costs Cap** means \_\_\_\_\_

**Measurement Equipment** means all systems, processes and equipment (including the tolling equipment on the Motorway) which satisfy the requirements in clause 20.3.

**Minister** means any minister responsible for administering Part 5 (Classification of Roads) of the Roads Act.

**Mitigate** means, in respect of any event, taking all reasonable steps to preclude the cause of the event and avoiding or minimising the consequences of the event, including by expending reasonable sums of money and taking reasonable steps to accommodate the event or the effect of the event on the Project Activities (including by changing the sequencing or timing of, or the construction methodologies used by the Project Company or the State Works Contractor in carrying out, the Project Activities).

**Model Outputs Schedule** means the schedule identified as such in the Base Case Financial Model, as at the date of this deed.

**Modification Application Documents** has the meaning given to that term in clause 4.3(a).

**Monthly Operational Management Report** means a report which satisfies the requirements of Schedule 22.

**Moral Rights** means any rights of integrity of authorship, rights of attribution of authorship, rights not to have authorship falsely attributed and rights of a similar nature conferred by statute that exist, or may come to exist, anywhere in the world.

**Moral Rights Consent** means a consent by the owner of Moral Rights substantially in the form of Schedule 25.

**Motorway** means the road, tunnel and other physical works, facilities, systems and Utility Services described in section 2.3.2(a) of the SWTC including the Motorway Control Centre and all plant, machinery, equipment, fixtures, furniture, fittings, landscaping, spare parts and other improvements on or in the Motorway or on the Motorway Site and to be called the NorthConnex or such other name as may be determined by RMS, but to avoid doubt, excludes the Back Office System and any plant, equipment, fixtures, fittings, furniture, machinery and spare parts relating to the Back Office System. On and from the Date of Completion (or any earlier date at which the parties to the M2 Interface Deed agree to handover any M2 Handover

Assets under clause 3.11(d) of the M2 Interface Deed), the M2 Handover Assets will be deemed not to be part of the Motorway.

**Motorway Control Centre** means the building, facilities, equipment and systems described in section 7.22.1 of the SWTC.

**Motorway Opening Date** means the date of a notice issued by the Independent Certifier pursuant to clause 14.13(b)(iv)A.

**Motorway Site** means the land both above and below ground which is contained within the Project Site and leased to the Project Company for the duration of the Term and which is described in Exhibit G, as amended to include any Extra Land acquired by RMS or the Project Company pursuant to clauses 9.5(a)(ii), 9.5(b) and 9.5(c) and, from the Date of Completion, the Transfer Land (as defined in the M2 Interface Deed).

**Motorway Site Lease** means a lease of the Motorway Site granted in accordance with clause 16 on the terms specified in Exhibit H.

**Native Title Claim** means any claim or application relating to native title under the Native Title Act 1993 (Cth) or any other Law concerning native title.

**NCX Group Entity** means:

**NGER Legislation** means the National Greenhouse and Energy Reporting Act 2007 (Cth) and the regulations and any other legislative instruments under that Act.

**No Consent Refinancing** means any Refinancing which:

- (a) satisfies the criteria in clause 33.5; and
- (b) RMS has confirmed in writing under clause 33.4(c) is a No Consent Refinancing or which RMS is deemed to have so confirmed under clause 33.4(d).

**NorthConnex Debt** means

**NorthConnex Debt Profile** means

**Notice of Completion** means a notice in the form of Schedule 17 issued by the Independent Certifier pursuant to clause 14.10(e)(i).

**NSW Code** means the NSW Government Code of Practice for Procurement (January 2005) or any substitute for, or update to, such code as contemplated in the NSW Guidelines.

**NSW Government** means the Government of the State of New South Wales.

**NSW Government Policies** means the NSW Code, NSW Guidelines, Aboriginal Participation in Construction Guidelines (January 2007), Environmental Management Systems Guidelines (3rd edition) (August 2013), Work Health and Safety Management Systems and Auditing



Guidelines (5th edition) (September 2013), Training Management Guidelines (February 2009), Waste Reduction and Purchasing Policy (WRAPP) (2011-2014) and any other NSW Government guidelines and requirements specified or required by this deed.

**NSW Guidelines** means the Implementation Guidelines to the New South Wales Code of Practice for Procurement: Building and Construction (July 2013) (as published by NSW Treasury on 7 June 2013).

**NWRL Deed** means the document entitled "Development Deed - Works in Proximity to the NWRL Project and Railway Corridor" between the Project Company and Transport for NSW.

**O&M Best Practices** means operating, maintenance and repair practices performed with the due skill, care and diligence which may reasonably be expected of a skilled professional suitably qualified in the performance of obligations similar to the Operator's obligations under the O&M Deed so as to achieve a result consistent with Law, reliability, safety, protection of the Environment and the requirements of this deed, including everything reasonably necessary to ensure that:

- (a) the Motorway is operated, maintained and repaired in a manner safe to all people and the Environment;
- (b) the Motorway is functioning as designed;
- (c) the Motorway is available pursuant to the requirements of section 5.17 of the SWTC;
- (d) operation, maintenance and repairs are performed to ensure reliable long-term and safe operation and are performed by trained and experienced personnel utilising proper equipment, tools and procedures;
- (e) sufficient operation and maintenance personnel are available and are adequately experienced and trained;
- (f) adequate materials, resources and supplies are available to ensure compliance with the requirements of this deed under normal conditions and reasonably anticipated abnormal conditions;
- (g) the principle of continuous improvement is adhered to, that is, a commitment to continually improving the standards and quality of the operation and maintenance of the Motorway and the manner in which it is carried out so as to ensure that the operation and maintenance of the Motorway is carried out in a manner which at all times remains consistent with the overall road network systems and standards; and
- (h) advancements in technology and updates to Codes and Standards which are required to comply with the principle in paragraph (g) of this definition are promptly responded to and incorporated into the operation and maintenance of the Motorway.

**O&M Deed** means the deed entitled "NorthConnex O&M Deed" dated on or about the date of this deed between the Project Company and the Operator.

**O&M Guarantee** means the deed of guarantee dated on or about the date of this deed given by the Operator Guarantor to the Project Company in respect of the obligations of the Operator under the O&M Deed.

**O&M Manuals** means the manuals described in clause 17.4 (as amended and updated from time to time in accordance with clause 17.4) including the Project Plans incorporated into them as required by clause 7.5(e), which describes the policy, practices and procedures for the operation, maintenance and repair of the Motorway.

**O&M Margin** means the amount identified as the O&M Margin in the Model Outputs Schedule.

**O&M Plan** means the plan of that name which satisfies the requirements of section 6 of Appendix 60 to the SWTC.

**O&M Work** means all things or tasks which the Project Company is, or may be, required to do in discharging its operation, maintenance and repair obligations under this deed.

**OHS Accreditation Scheme** means the Australian Government Building and Construction OHS Accreditation Scheme established by the Fair Work (Building Industry) Act 2012 (Cth).

**Opening Conditions Precedent** means:

- (a) each of the conditions precedent to Completion set out in Schedule 15, other than the conditions precedent referred to in paragraphs 2(a)(i), 2(a)(iii), 2(c)(i), 4, 5, 6(a), 7(a), 7(g), 7(h) and 7(i) of Schedule 15;
- (b) that the Motorway is capable of being operated for the safe, efficient and continuous passage of vehicles; and
- (c) that the Project Company has obtained:
  - (i) the Contractor's written consent to the opening of the Motorway pursuant to clause 14.13(e) of the D&C Deed; and
  - (ii) the Operator's written consent to the opening of the Motorway pursuant to clause 14.14(f) of the O&M Deed.

**Operating Costs** means

**Operating Services** means those activities which comprise:

- (a) the Project Company's operation, maintenance and repair obligations under this deed in respect of the Motorway; and
- (b) Tolling Services.

**Operational Readiness Group** has the meaning given to that term in the Independent Certifier Deed.

**Operations Insurance** means the Project Insurances referred to in Part 2 of Schedule 4.

**Operator** means Tollaust Pty Limited (ACN 050 538 693), or such other person approved by RMS.

**Operator Guarantor** means \_\_\_\_\_, or such other person approved by RMS.

**Operator's Side Deed** means the deed entitled "NorthConnex Operator's Side Deed" dated on or about the date of this deed between the Project Company, the Operator, the Operator Guarantor and RMS.

**Overall D&C Program** means the overall program for design and construction activities which is contained in Exhibit F, as updated in accordance with clause 14.3(c).

**PAFA Act** means the *Public Authorities (Financial Arrangements) Act 1987 (NSW)*.

**PAFA Act Guarantee** means the guarantee made on or prior to the date of this deed pursuant to section 22B of the PAFA Act in respect of RMS's financial obligations under the Project Documents.

**PDCS** means the Project Company Group's web based project data and collaboration system, or such other electronic project data and collaboration system notified by RMS's Representative under clause 6.7.

**Performance Standards** means the standards to which this deed requires the Project Company to perform Operating Services, including the:

- (a) security standards to be met by the Project Company in respect of the Motorway;
- (b) required functionality of the Motorway;
- (c) safety and reliability standards to be met by the Motorway; and
- (d) level of service to be provided in respect of the Motorway,

as required by this deed, including as ascertainable from this deed (excluding Recital G to this deed and section 1.1 of the SWTC).

**Permitted Dealing** means:

**Permitted RMS Activity** has the meaning given to that term in clause 20.7.

**Permitted Working Hours** means the permitted working hours specified in the Planning Approval.

**PHR Route** means the section of Pennant Hills Road connecting the M1 Motorway at Wahroonga and the M2 Motorway between:

- (a) Point A and Point B, being a south bound journey; or

(b) Point C and Point D, being a north bound journey,

as identified on the map which is Exhibit O.

**PHR Route Time Limits** means the time limits determined from time to time in accordance with clause 20.4(e)(iv).

**PHR Truck Regulatory Measure** means any Regulatory Measure associated with travel by some or all Eligible Trucks on the PHR Route or the Motorway, whether or not that Regulatory Measure also extends to other roads and other vehicles.

**PHR Truck Management Payments** means the payment calculated in accordance with clause 20.4.

**Planning Approval** means:

- (a) the approval granted by the Minister for Planning and Infrastructure under the EP&A Act to the Planning Approval Application, including all conditions to such approval and documents incorporated by reference;
- (b) any modification to the approval referred to in paragraph (a) of this definition; and
- (c) any other consent, concurrence or approval, or determination of satisfaction with any matter, which is made, given or issued under the approval referred to in paragraph (a) of this definition from time to time and all conditions to any of them, and includes all documents incorporated by reference, as that consent, concurrence or approval may be modified from time to time.

**Planning Approval Application** means the application for approval under Part 5.1 of the EP&A Act in respect of the Concept Design prepared and submitted by RMS to the Minister for Planning and Infrastructure on or about 12 September 2013 and the supplementary application for approval prepared and submitted to the Minister for Planning and Infrastructure on or about 10 March 2014.

**Planning Approval Change** means:

- (a) the Planning Approval is modified under the EP&A Act; or
- (b) the Minister for Planning and Infrastructure issues a new Approval in respect of the Motorway in substitution for or replacement of the Planning Approval; or
- (c) any new Approval referred to in paragraph (b) of this definition is modified under the EP&A Act.

**Planning Approval Change Event** means the occurrence of a Planning Approval Change not arising as a consequence of:

- (a) either of the Project Company's or the State Works Contractor's failure to comply with its obligations under a Project Document;
- (b) a breach by the Project Company of its warranties under clause 4.3;
- (c) a wrongful act or omission of the Project Company, the State Works Contractor or their respective Related Parties;
- (d) a failure by the Project Company, the State Works Contractor or any of their respective Related Parties to comply with the EP&A Act or the EPBC Act or any other applicable legislation; or

- (e) a wrongful act or omission of the M2 Entities under the M2 Integration Project Deed.

**Potential MAE Trigger** means:

- (a) a Planning Approval Change Event occurs;
- (b) an event or circumstance referred to in clause 20.6 occurs;
- (c) a Qualifying Change in Law occurs;
- (d) an Uninsurable Force Majeure Event occurs; or
- (e) the offence of failing or refusing to pay the toll for the use of the Motorway is not enforced or recovery procedures are not pursued to the standard required by this deed.

**PPS Act** means the Personal Property Securities Act 2009 (Cth) and regulations made under that Act.

**Pre-Agreed Change** means any of the Changes described in Schedule 13.

**Principal Contractor Deed** means the deed entitled "NorthConnex Deed of Engagement of Principal Contractor" entered into between RMS, the Project Company and the Contractor on or about the date of this deed in the form of Schedule 31 to this deed.

**Principal Repayment** means

**Project** means:

- (a) the investigation, financing, funding, planning, design, construction and commissioning of the Project Works and the Temporary Works;
- (b) the ownership, operation, maintenance and repair of the Motorway;
- (c) the handover of the Motorway to RMS at the end of the Term; and
- (d) the levying and collection of tolls.

**Project Aboriginal Participation Plan** means a plan that satisfies the requirements of the NSW Government Aboriginal Participation in Construction Guidelines for an "Aboriginal Participation Plan".

**Project Activities** means all things and tasks which the Project Company or the State Works Contractor does, is, or may be, required to carry out or do to comply with its obligations under the RMS Project Documents, whether or not the performance of such things or tasks is subcontracted by the Project Company or the State Works Contractor to another person, including carrying out the D&C Work and the O&M Work. It is comprised by the Project Company's Activities and the SWC Activities.

**Project Company Documentation Schedule** means Appendix 59 of the SWTC.

**Project Company Group** means the Project Company, the State Works Contractor, the Borrower and any wholly owned subsidiary of any of them, and **Project Company Group Member** means any of them.

**Project Company's Activities** means all things and tasks which the Project Company does, is, or may be, required to carry out or do to comply with its obligations under the RMS Project Documents with respect to the Project Company's Works, the Temporary Works and the O&M Work, but does not include the SWC Activities.

**Project Company's Controlling Corporation** means the entity that is the "controlling corporation" of the Project Company within the meaning of the NGER Legislation.

**Project Company's Delay Costs** means, in relation to a Compensation Event,

(excluding any amounts payable

**Project Company's Emissions and Energy Data** means any Emissions and Energy Data relating to any aspect of the Project Activities, or the activities of any Subcontractors engaged by the Project Company or the State Works Contractor, in connection with the Project Activities under this deed or the State Works Deed, including any such Emissions and Energy Data that:

- (a) the Project Company is required at any time to keep or to provide to RMS or to any Authority (or both) pursuant to an obligation under this deed, or the State Works Contractor is required at any time to keep or to provide to RMS or to any Authority (or both) pursuant to an obligation under the State Works Deed;
- (b) the Project Company, the State Works Contractor or the Project Company's Controlling Corporation is required at any time to keep or to provide to RMS or to any Authority (or both) pursuant to an obligation at Law (including an obligation under the NGER Legislation); or
- (c) the Project Company, the State Works Contractor or the Project Company's Controlling Corporation is entitled at any time to provide to the Clean Energy Regulator under the NGER Legislation concerning any greenhouse gas project.

**Project Company's Works** means the Project Works other than the State Works.

**Project Debt** means:

**Project Documents** means:

- (a) this deed;
- (b) the D&C Deed;
- (c) each D&C Guarantee;
- (d) the Contractor's Side Deed;
- (e) the Operator's Side Deed;
- (f) the State Securities;
- (g) the O&M Deed;
- (h) the O&M Guarantee;
- (i) the Equity Documents;
- (j) the Debt Financing Documents;
- (k) on and from the date it comes into effect, the Financiers Tripartite Deed;
- (l) the State Works Deed;
- (m) the Independent Certifier Deed;
- (n) the Sub Deed of Appointment of Independent Certifier;
- (o) the Deed of Appointment of Environmental Representative;
- (p) the PAFA Act Guarantee;
- (q) the Motorway Site Lease;



- (r) the M2 Interface Deed;
- (s) *not used*;
- (t) the Principal Contractor Deed;
- (u) the Tolling Equipment Works Contract;
- (v) the Tolling and Customer Management Agreement;
- (w) the Technology Implementation and Services Agreement;
- (x) the TCM Operator's Side Deed;
- (y) the TISA Side Deed; and
- (z) any other document the parties agree is a Project Document.

**Project Insurance** means a policy or policies of insurance which the Project Company is obliged to obtain under clause 24.

**Project Plan** means any plan of the kind referred to in clause 7.5(a), as that plan may be updated, amended and further developed under clause 7.5 and Schedule 6.

**Project Site** means:

- (a) the Motorway Site; and
- (b) the Temporary Areas.

**Project Training Management Plan** means the plan of that name which satisfies the requirements of section 11 of Appendix 60 to the SWTC.

**Project WHS Management Plan** means the plan of that name which satisfies the requirements of section 9 of Appendix 60 to the SWTC.

**Project Works** means:

- (a) the physical works which the Project Company must design, construct and complete under this deed; and
- (b) the physical works which the State Works Contractor must design, construct and complete under the State Works Deed,

(including, to the extent relevant to such works, Changes directed in accordance with this deed) including:

- (c) the Motorway;
- (d) the Utility Service Works;
- (e) the Local Area Works; and
- (f) the Property Works,

but excluding the Temporary Works. It is comprised by the Project Company's Works and the State Works.

**Property Works** means all works required to existing buildings and infrastructure or to and within properties arising out of the Project Activities as described or specified in the SWTC, including in section 2.3.2 of the SWTC (and including, to the extent relevant to such works, Changes directed in accordance with this deed).

**Proposed Westlink Motorway Group Restructure** has the meaning

**Proposed Westlink Motorway Group Simplification** has the meaning

**Proposed Refinancing Date** means, in respect of a Refinancing, the date contained in the Refinancing Model upon which the Refinancing is expected to occur (or such earlier date as the parties may agree).

**Pure Economic Loss** means economic loss other than economic loss referred to in clause 24.2(a)(iii).

**QIC** means QIC Private Capital Pty Ltd ABN 83 076 279 528, on behalf of its managed clients.

**QSuper** means The Board of Trustees of the State Public Sector Superannuation Scheme, as trustee of the State Public Sector Superannuation Fund.

**QTC** means Queensland Treasury Corporation.

**Qualified LC Issuer** means an entity,

- (a) which holds the Required Rating, or is guaranteed or indemnified on terms acceptable to RMS which has the Required Rating;
- (b) whose obligations under a Letter of Credit which holds the Required Rating; or
- (c) which RMS has confirmed in writing prior to Financial Close as being an acceptable provider of a Letter of Credit.

**Qualifying Additional Debt** means,

**Qualifying Adverse Effect** means an adverse effect on the

**Qualifying Change in Law** means:

- (a) a Discriminatory Change in State Law; or
- (b) a Change in Federal Environmental Law.

**Quality Manager** means the person notified by the Project Company to RMS who will perform the responsibilities of the Quality Manager under this deed.

**Quality Management System** means a corporate system that details the organisational structure, policies, procedures, practices, recourses and responsibilities for quality management.

**Quality Plan** has the meaning given to that term in the SWTC.

**Quarter** means:

- (a) in the case of the first Quarter, the period commencing on the first day of the Term and expiring on the day immediately prior to the first Quarterly Date occurring during the Term;
- (b) each 3 month period commencing on a Quarterly Date thereafter; and
- (c) in the case of the last Quarter, the period commencing on the last Quarterly Date occurring during the Term and ending on the expiry of the Term.

**Quarterly Date** means 1 January, 1 April, 1 July and 1 October in any year during the Term.

**RailCorp** means Rail Corporation New South Wales ABN 59 325 778 353.

**Refinancing** means

**Refinancing Gain** has the meaning given to that term in clause 33.8.

**Refinancing Model** has the meaning given to that term in clause 33.4.

**Refinancing Model Outputs Schedule** means the schedule identified as such in a Refinancing Model prepared in accordance with clause 33.11.

**Regulatory Measures** means measures that regulate traffic or have the effect of regulating traffic, whether or not those measures are Law or are supported by Law, and includes traffic control facilities, advisory and regulatory signage, permits, route designations, notices, statutory imposts, access charges, tolls, road user charges or planning instruments.

**Reinstatement** has the meaning given to that term in clause 27.6(a).

**Related Body Corporate** has the same meaning as in the Corporations Act.

**Related Parties** means:

- (a) in respect of RMS, RMS's Representative and any of the respective employees, agents, contractors or officers of RMS and RMS's Representative, excluding:
  - (i) the Independent Certifier;
  - (ii) the Environmental Representative;
  - (iii) the Project Company and its Subcontractors;
  - (iv) the State Works Contractor and its Subcontractors; and
  - (v) employees, agents, consultants and officers of the persons listed in paragraphs (a)(i) to (iv) of this definition;
- (b) in respect of the Project Company:
  - (i) any NCX Group Entity;
  - (ii) the State Works Contractor and each Subsidiary of the State Works Contractor;
  - (iii) its Subcontractors (in their capacity as contractors for the Project); and
  - (iv) any of the respective employees, agents, contractors (in their capacity as employees, agents or contractors for the Project) and officers of the Project Company, any NCX Group Entity, the State Works Contractor and its Subcontractors,

excluding the Independent Certifier, the Environmental Representative and each of their respective employees, agents, consultants and officers; and

- (c) in respect of the State Works Contractor;
- (i) any NCX Group Entity;
  - (ii) the Project Company and each Subsidiary of the Project Company;
  - (iii) its Subcontractors (in their capacity as contractors for the Project); and
  - (iv) any of the respective employees, agents, contractors (in their capacity as employees, agents or contractors for the Project) and officers of the State Works Contractor, any NCX Group Entity, the Project Company and its Subcontractors,

excluding the Independent Certifier, the Environmental Representative and each of their respective employees, agents, consultants and officers.

**Relevant Entity** means each Key Relevant Entity and any other Subcontractor or other entity that carries out operation, maintenance, refurbishment and/or repair works or services in respect of the Motorway.

**Relevant Insurer** means an insurance company having a financial performance rating of at least by Standard and Poor's (or equivalent rating).

**Relevant Proportionate Liability Legislation** has the meaning given to that term in paragraph 1 of Appendix A to Schedule 24.

**Remedy** means to remedy or cure the Event of Default or, if the Event of Default is not capable of being remedied or cured, to overcome the consequences of the Event of Default.

**Representative** means, in respect of a Debt Financier, an Agent, Security Trustee, an intercreditor agent or other trustee (including a note trustee) acting on behalf of that Debt Financier.

**Required Rating** means:

- (a) in respect of the Qualified LC Issuer, a credit rating of no less than by Standard and Poor's (or equivalent rating); and
- (b) otherwise, a credit rating of no less than by Standard and Poor's (or equivalent rating).

**Revenue** means for a period all the following amounts received by the Project Company from or in relation to the Project during that period:

but excluding:

**Review Periods** has the meaning given to that term in clause 17A.4(b).

**Reviewable Temporary Works** means any Temporary Works that:

- (a) have an impact upon the amenity of any members of the public or stakeholders;
- (b) involve any potential risk to the health or safety of members of the public or property; or
- (c) have a significant interface with the Project Works.

**RMS Interface Site Access Schedule** means the document of that name set out in Exhibit M, amended as the parties may agree.

**RMS Project Documents** means those Project Documents to which RMS is expressed to be a party.

**RMS Refinancing Share** has the meaning given in clause 33.8(e).

**RMS Security** means the Security Interest granted by the Project Company in favour of RMS to secure performance of the Project Company's obligations under this deed and the other Project Documents.

**RMS Traffic Site Access Schedule** means the document of that name set out in Exhibit M, amended as the parties may agree.

**RMS's Consequential Loss** means Consequential Loss incurred or sustained by RMS and its Related Parties between Financial Close and the Date of Completion.

**RMS's Representative** means:

- (a) the person appointed by RMS under clause 6.1(a)(i); or
- (b) any other person appointed from time to time by RMS under clause 6.1(a)(ii),

and includes any appointee under clauses 6.1(b) or 6.1(d).

**Roads Act** means the Roads Act 1993 (NSW).

**Roadside Tolling System** means:

- (a) the Technical Cabinets;
- (b) the devices installed on gantries; and
- (c) associated cabling on the gantries and to the Technical Cabinets on or over the Motorway's carriageway or otherwise on or near the Motorway,

which comprise part of or are used in connection with the Toll Collection System elements described in clauses 3.1(a)(i) to 3.1(a)(iv) of Appendix 15 to the Scope of Works and Technical Criteria.

**ROL** has the meaning given to that term in clause 9.3(a)(i)B.

**Security Interest** means any mortgage, pledge, lien or charge or any security or preferential interest or arrangement of any kind and includes:

- (a) a "security interest" as defined in section 12 of the PPS Act;
- (b) anything which gives a creditor priority to other creditors with respect to any asset; and
- (c) retention of title (other than in the ordinary course of day-to-day trading) and a deposit of money by way of security.

**Security Trustee** means the person appointed as security trustee for the Debt Financiers in relation to a financing or Refinancing entered into in accordance with clause 33.

**Senior Project Group** means the group referred to in clause 6.4.

**Sister Entity** means a company or trust, the shares or units in which are wholly owned (directly or indirectly)

**Site Conditions** means any physical conditions and characteristics of, upon, above, below or over the surface, or in the vicinity of, the Project Site and any Extra Land or their surroundings including:

- (a) Artefacts and any other natural and artificial conditions;
- (b) physical and structural conditions, including old footings, underground structures, buildings, improvements, partially completed structures and in-ground works;
- (c) all improvements, including any artificial things, foundations, retaining walls and other structures installed by or on behalf of RMS or others;
- (d) surface water, ground water, ground water hydrology and the effects of any dewatering;
- (e) any Contamination, Hazardous Substance or other spoil or waste;
- (f) topography of the Project Site and Extra Land, ground surface conditions and geology, including rock and sub-surface conditions or other materials encountered at the Project Site or Extra Land;
- (g) geological, geotechnical and subsurface conditions or characteristics;
- (h) any underground strata;
- (i) all Utility Services, systems and facilities, above or below ground level and all facilities with which such Utility Services and systems are connected;
- (j) the Environment, water and weather or climatic conditions, or the effects of the Environment, water and weather or climatic conditions, including rain, surface water runoff and drainage, floods, water seepage, wind blown dust and sand, seasons

and physical conditions that are a consequence of weather or climatic conditions;  
and

- (k) any latent conditions.

**Site Schedule** means Exhibit B.

**Sponsor Entity** means each of:

**Sponsors** means:

- (a) in respect of clause 35.2 only, QIC, CPPIB and each member of the that is involved in the Project; and
- (b) in all other cases, QIC, Transurban Limited and CPPIB.

**Starting Date** means:

- (a) in respect of the RMS Traffic Site Access Schedule, the relevant date (identified as the 'Starting Date'), notified by the Project Company by providing three months' advance written notice to RMS or application to the TMC in accordance with clause 9.3(a)(i), on which the Project Company and its Related Parties will require access to an Interface Area (and such notice may only be provided by the Project Company on or after the submission of the relevant Traffic Management Plan to RMS or TMC or other relevant entity); and
- (b) in respect of the M2 Interface Site Access Schedule, the relevant date, specified in the column in the table headed "Starting Date" or as otherwise notified by the Project Company by providing three months' advance written notice to RMS and the M2 Entities, on which the Project Company and its Related Parties will require access to an Interface Area (and such notice may only be provided by the Project Company on or after the submission of a relevant Traffic Management Plan to the M2 Entities or other relevant entity in accordance with clause 2.2 of the M2 Interface Deed).

**State Law** means legislation of the State of New South Wales including regulations and subordinate legislation (but which excludes any Approval).

**State Securities** means the RMS Security and the State Works Security.

**State Works** has the meaning given to that term in the State Works Deed.

**State Works Advances** means the amounts advanced from time to time, up to the State Works Advances Limit, by the State Works Investors to the State Works Contractor in accordance with the State Works Contractor Facility Deed.

**State Works Advances Limit** means the amount identified as the State Works Advances Limit in the Model Outputs Schedule.

**State Works Contractor** means NorthConnex State Works Contractor Pty Ltd ACN 169 328 385.



**State Works Contractor Facility Deed** means the deed entitled "State Works Contractor Revolving Facility Deed" dated on or about the date of this deed between the State Works Contractor and Investor FinCo.

**State Works Deed** means the document entitled "NorthConnex - State Works Deed" entered into between RMS and the State Works Contractor on or about the date of this deed.

**State Works Instalment** means an amount paid to the State Works Contractor by RMS under the State Works Deed.

**State Works Investors** means each person who has made the State Works Advances in accordance with the State Works Contractor Facility Deed. As at the date of Financial Close, this is Investor FinCo.

**State Works Repayments** has the meaning given to that term in the State Works Deed.

**State Works Security** means the Security Interest granted by the State Works Contractor in favour of RMS to secure the performance of the State Works Contractor's obligations under the State Works Deed.

**Sub Deed of Appointment of Independent Certifier** means the deed entitled "NorthConnex Sub Deed of Appointment of Independent Certifier" entered into between the Project Company, the State Works Contractor, the Contractor and the Sub IC on or about the date of this deed.

**Sub Holdco** means NorthConnex Holding Company Pty Limited ACN 169 448 846.

**Sub IC** means APP Corporation Pty Limited of Level 10, 111 Pacific Highway, North Sydney NSW 2060 or such other person(s) as may be engaged by the Project Company, the State Works Contractor and the Contractor in accordance with the Sub Deed of Appointment of Independent Certifier.

**Subcontract** means a contract between the Project Company and/or the State Works Contractor and a Subcontractor and includes the D&C Deed, the O&M Deed, the Tolling Equipment Works Contract, the Tolling and Customer Management Agreement, the Technology Implementation and Services Agreement and any other agreement for supply of goods or services (including professional services and Construction Plant hire) or both.

**Subcontractor** means a subcontractor of the Project Company and/or the State Works Contractor and includes the Contractor, the Operator, the Tolling Equipment Works Contractor, the Tolling and Customer Management Contractor, the Technology Operator and any other supplier of goods or services (including professional services and Construction Plant hire) or both.

**Submitted Documents** has the meaning given in clause 17A.4(a).

**Subsidiary** has the meaning given to that term in the Corporations Act, but an entity will also be taken to be a Subsidiary of an entity if that entity Controls it and without limitation:

- (a) a trust may be a Subsidiary, for the purposes of which a unit or other beneficial interest will be regarded as a share;
- (b) an entity may be a Subsidiary of a trust if it would have been a Subsidiary if that trust were a corporation; and
- (c) if there are one or more interposed entities between it and the entity that Controls it.

For the purposes of this definition, any shares held, or power exercisable by, a Holding Company in a fiduciary capacity only will be regarded as not held or exercisable by it.

**Subsidiary D&C Program** means a subsidiary program for design and construction activities of the kind referred to in clause 14.3(a) as updated under clause 14.3(c).

**Sunset Date** means:

- (a) as at the date of this deed, the date which is \_\_\_\_\_ after the Date for Completion; or
- (b) where an extension of time to the Sunset Date is granted by RMS's Representative or allowed pursuant to the Dispute Resolution Procedure, the date resulting from that extension of time.

**SWC Activities** means all things and tasks which the State Works Contractor does, is, or may be, required to carry out or do to comply with its obligations under the State Works Deed with respect to the State Works, but does not include the Project Company's Activities or the O&M Work.

**SWTC or Scope of Works and Technical Criteria** means Exhibit A.

**Sydney Trains** means Sydney Trains ABN 38 284 779 682.

**Target Financial Close Date** means the date which is \_\_\_\_\_ after the date of this deed.

**Tax Funding Agreement** means an agreement entered into by members (as defined in section 703-15 of the Income Tax Assessment Act 1997) of a consolidated group (as defined in section 703-5 of the Income Tax Assessment Act 1997) for the purpose of determining the funding of group liabilities (as defined in section 721-10 of the Income Tax Assessment Act 1997) of a consolidated group between group members.

**Taxes** means income, stamp, indirect or other taxes (including payroll tax), levies, imposts, deductions, charges (including any superannuation guarantee charge), duties (including import duty), workers compensation insurance premiums, compulsory loans and withholdings (including financial institutions duty, debits tax or other taxes whether incurred by, payable by return or passed on to another person) together with interest thereon or penalties, if any, and charges, fees or other amounts made on, or in respect thereof.

**TCM Margin** means the amount identified as the TCM Margin in the Model Outputs Schedule.

**TCM Operator's Side Deed** means the deed entitled "NorthConnex Project TCM Operator's Side Deed" between the Project Company, the Tolling and Customer Management Contractor and RMS dated on or about the date of this deed.

**Technical Cabinet** means a secure metal enclosure containing the supporting electronic equipment package located near the Motorway's carriageway to control the detection, classification, electronic imaging and tag communication and electronic imaging devices.

**Technology Implementation and Services Agreement** means the agreement entitled "Technology Implementation and Services Agreement for NCX" dated on or about the date of this deed between the Project Company and the Technology Operator.

**Technology Margin** means the amount identified as the Technology Margin in the Model Outputs Schedule.

**Technology Operator** means Transurban Limited (ACN 098 143 410), or such other person approved by RMS.

**Temporary Areas** means the land contained within the Project Site but not forming part of the Motorway Site which will be made available to the Project Company for the purpose of undertaking the Project Company's obligations under this deed, including the D&C Work, and which is identified in the Site Schedule, the RMS Interface Site Access Schedule and the RMS Traffic Site Access Schedule and described in Exhibits B and M.

**Temporary Works** means any temporary physical works required for the purpose of the carrying out of the Project Company's Activities, but which does not form part of the Project Company's Works including any such works specified in section 2.3.2 of the SWTC and including, to the extent relevant to such works, Changes directed in accordance with this deed.

**Term** means the period commencing on the Date of Completion and ending on the earlier of:

- (a) the termination of this deed; and
- (b) the Expiry Date.

**TEW Margin** means the amount identified as the TEW Margin in the Model Outputs Schedule.

**TfNSW Direction** has the meaning given to that term in clause 13.8.

**Third Party Agreements** means:

- (a) the document entitled "Development Deed - Works Adjacent to the Railway Corridor" between the Project Company and RailCorp; and
- (b) the document entitled "Development Deed - Works in Proximity to the NWRL Project and Railway Corridor" between the Project Company and Transport for NSW,

(substantially in the forms contained in Exhibit K) to be entered into in accordance with clause clauses 7.18(a) and 7.18(b).

**Third Party Software** means the NorthConnex Motorway Control System - Operations Management and Control System (OMCS), Plant Monitoring and Control System (PMCS), Traffic Management and Control System (TMCS) and SCADA Interface - Infrastructure Control and Monitoring System (ICMS).

**Third Party Works** means the Local Area Works, Property Works and Utility Service Works.

**TISA Side Deed** means the deed entitled "NorthConnex Project TISA Side Deed" between the Project Company, the Technology Operator and RMS dated on or about the date of this deed.

**TMC** has the meaning given to that term in clause 9.3(a)(i).

**Toll Calculation Schedule** means Schedule 26.

**Toll Collection System** means the system proposed to be used or used (as the case may be) for imposing and collecting tolls in relation to the use of the Motorway, as described in Appendix 15 of the SWTC.

**Tollable Section** has the meaning given to that term in the Toll Calculation Schedule.

**Tolled Eligible Truck Trips** means, in any Applicable Period, the number of Heavy Vehicles tolled on the Motorway.

**Tolling and Customer Management Agreement** means the agreement entitled "NCX Tolling and Customer Management Agreement" between the Project Company and the Tolling and Customer Management Contractor dated on or about the date of this deed.

**Tolling and Customer Management Contractor** means Roam Tolling Pty Limited (ACN 103 186 670), or such other person approved by RMS.

**Tolling Equipment Works Contract** means the document entitled "NorthConnex Project Tolling Equipment D&C Deed" between the Project Company and the Tolling Equipment Works Contractor on or about the date of this deed.

**Tolling Equipment Works Contractor** means Kapsch TrafficCom AB (Corporate Identity Number 556042-6289).

**Tolling Services** means the collection of tolls, charges and fees, including the management of customer accounts, transaction processing and billing.

**Traffic Management Plan** has the meaning given to that term in clause 9.3(a)(i)A.

**Training Management Guidelines** means the document entitled "Training Management Guidelines" prepared by the NSW Government Department of Premier and Cabinet and dated February 2009, as updated from time to time.

**Transurban Holdings** means Transurban Holdings Limited ABN 86 098 143 429.

**Transurban Holding Trust** means Transurban Holding Trust (ARSN 098 807 419).

**Trigger Event** means

**Ultimate Shareholder** means:

**Uninsurable** means, in relation to a risk, either that:

- (a) insurance is not available with any Relevant Insurer; or
- (b) the insurance premium payable for the insurance is at such a level or the terms and conditions are such that a reputable insurance broker acceptable to the parties certifies that in its reasonable opinion the risk is not generally being insured against with Relevant Insurers by prudent, competent and experienced concessionaires, designers, contractors and/or operators (as applicable) of motorways or tollroads.

**Uninsurable FM Termination Amount:**

(a) means on any date, the total of:

- (i) on any date
- (ii) the amounts

(iii) an amount equal to

- (b) does not include

**Uninsurable Force Majeure Event** means, at any time:

- (a) a Force Majeure event referred to in paragraphs (a)(ii), (a)(iii) or (a)(iv) of the definition of "Force Majeure"; or
- (b) a Force Majeure event which:
  - (i) causes physical loss or damage to the Project Works, the Temporary Works or the Motorway; or
  - (ii) prevents the Motorway being open to the public for the safe, continuous and efficient passage of vehicles,

in respect of which neither the Project Company nor the State Works Contractor is insured and which is Uninsurable.

**Unowned Parcel** means a parcel of land and property of which RMS is not the registered proprietor and in relation to which, or upon which, Property Works are to be undertaken.

**Unreasonable Objection** means:

- (a) an objection by RMS to, or a refusal by RMS to approve, the Duration, Starting Date or, an Interface Area in respect of the RMS Traffic Site Access Schedule where it would not be reasonable for a skilled and experienced motorway operator, who accepts that the Motorway will connect to its motorway and that this involves the carrying out of works in and around the interface between the Motorway and its motorway, to object or refuse to approve;

- (b) a refusal by TMC (as defined in clause 9.3(a)(i)) to grant a ROL in respect of the Duration, Starting Date or an Interface Area in respect of the RMS Traffic Site Access Schedule with respect to the M1 Motorway where it is not reasonable for TMC to do so; or
- (c) a refusal by TMC (as defined in clause 9.3(a)(i)) to grant a ROL in respect of the Duration, Starting Date or an Interface Area in respect of the M2 Interface Site Access Schedule where it is not reasonable for TMC to do so.

**Upfront Costs** means all fees, costs and expenses payable by the Borrower or the Project Company (or a Related Body Corporate of the Project Company) to external financiers, advisers or consultants or to RMS under clause 33.9 in connection with a Refinancing at the time of financial close of that Refinancing.

**Utility Service** means any service, facility or item of infrastructure, including water, electricity, gas, ethane, fuel, telephone, drainage, sewerage, railway, industrial waste disposal and electronic communications service.

**Utility Service Works** means the construction, modification or relocation of Utility Services all of which are to be designed and constructed by the Project Company or the State Works Contractor and handed over to RMS, an Authority or any other person in accordance with this deed including any such works specified in the SWTC, including in section 2.3.2 of the SWTC (and including, to the extent relevant to such works, Changes directed in accordance with this deed).

**Vehicle** has the meaning given to that term in the Toll Calculation Schedule.

**WHS Legislation** means:

- (a) the Work Health and Safety Act 2011 (NSW) and the Work Health and Safety Regulation 2011 (NSW); and
- (b) any legislation in other States and Territories of Australia addressing work health and safety which applies to the Project Works or the Temporary Works.

**Withdrawal Notice** has the meaning given to that term in clause 12.7(c)(iv)

**WSO Co** means WSO Co Pty Limited ACN 102 757 924.

## 1.2 Interpretation

In this deed:

- (a) headings are for convenience only and do not affect the interpretation of this deed; and unless the context indicates a contrary intention:
  - (b) **person** includes an individual, the estate of an individual, a body politic, a corporation, a statutory or other authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
  - (c) a reference to a party includes that party's executors, administrators, successors, and permitted substitutes and assigns, including persons taking by way of novation and, in the case of a trustee, includes a substituted or an additional trustee;
  - (d) **includes** in any form is not a word of limitation;
  - (e) a reference to any Authority, institute, association or body is:

- (i) if that Authority, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that Authority, institute, association or body are transferred to another organisation, deemed to refer to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as the case may be; and
  - (ii) if that Authority, institute, association or body ceases to exist, deemed to refer to the organisation which serves substantially the same purposes or object as that Authority, institute, association or body;
- (f) a reference to a document (including this deed and any other deed, agreement, instrument, guideline, code of practice or code and standard but not including RMS policies referred to in the SWTC) is to that document as amended, varied, novated, ratified, supplemented or replaced from time to time;
- (g) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or any section or provision of either of these includes:
- (i) all ordinances, by-laws, regulations of and other statutory instruments (however described) issued under the statute or delegated legislation; and
  - (ii) any consolidations, amendments, re-enactments and replacements;
- (h) a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause schedule, exhibit, attachment or annexure to or of this deed;
- (i) a reference to:
- (i) this deed includes all schedules, exhibits, attachments and annexures to it, including the SWTC; and
  - (ii) the SWTC includes all Appendices to the SWTC;
- (j) a word importing the singular includes the plural (and vice versa) and a word indicating a gender includes every other gender;
- (k) if a word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- (l) for the purposes of clause 14.7:
- (i) any extension of time stated in days; or
  - (ii) any reference to "day",
- will exclude days which are public holidays in Sydney and include only those days which are stated in the most recent Subsidiary D&C Program submitted under clause 14.3(c) as working days;
- (m) for all purposes other than as set out in clause 1.2(l), "day" means calendar day;
- (n) a reference to a court or tribunal is to an Australian court or tribunal;



- (o) a reference to a group of persons is a reference to all of them collectively, to any two or more of them collectively and to each of them individually;
- (p) a reference to a "month" is a reference to a calendar month;
- (q) a reference to "\$" or "dollar" is to Australian currency;
- (r) the Environmental Representative will perform the functions of the Environmental Representative or the ER under the Planning Approval and this deed;
- (s) any reference to:
  - (i) the Project Works (including the Third Party Works);
  - (ii) the Temporary Works;
  - (iii) the Motorway;
  - (iv) the Project Plans;
  - (v) the SWTC (excluding the Excluded Matters);
  - (vi) the Design Documentation; or
  - (vii) excluding clause 5, any other document or thing,
 or any part of any of them:
  - (viii) being fit for its purpose or for its intended purpose; or
  - (ix) as having an intended use,
 (or any similar reference) will be read as referring to the purpose, intended purpose or intended use stated in, contemplated by or ascertainable from:
  - (x) this deed:
    - A. subject to clause 1.2(s)(x)C, including the SWTC;
    - B. including the requirement that the Project Works, when completed, will be designed and constructed in compliance with all health and safety requirements of the WHS Legislation; and
    - C. excluding Recital G to this deed and section 1.1 of the SWTC; and
  - (xi) (to the extent relevant for determining the purpose, intended purpose or intended use in connection with a Change), any document provided by RMS to the Project Company specifically in connection with the Change (excluding any Information Documents),
 provided that:
  - (xii) if the Motorway is fit for its purpose, intended purpose or intended use as at the Date of Completion; and

- (xiii) the Project Company complies at all relevant times with its express obligations in connection with the O&M Works and the Motorway after the Date of Completion, including to perform the O&M Work in accordance with clause 17.3 of this deed,

then the Motorway will be treated as remaining and having remained fit for its purpose, intended purpose or intended use;

- (t) any reference to "information" will be read as including information, representations, statements, data, samples, bore logs, calculations, assumptions, deductions, determinations, drawings, design, specifications, models, plans and other documents in all forms including the electronic form in which it was generated; and
- (u) any obligation of the Project Company under this deed with respect to a Project Plan, will be read as an obligation with respect to the version of the relevant Project Plan last submitted by the Project Company to RMS's Representative under clause 7.5 in respect of which RMS's Representative has not given a notice under clause paragraph 2.2(a)(ii) of Schedule 6.

### **1.3 Contra proferentem**

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

### **1.4 Business Day**

If the day on or by which any thing is to be done under this deed is not a Business Day, that thing must be done:

- (a) if it involves a payment other than a payment which is due on demand, on the preceding Business Day; and
- (b) in all other cases, no later than the next Business Day.

### **1.5 Certification**

For the purposes of this deed, a copy of a document will be regarded as duly certified by the Project Company if it is certified as a true copy by a director, secretary or general manager of the Project Company, as the case may be.

### **1.6 Ambiguous terms**

- (a) If RMS's Representative considers, or if the Project Company notifies RMS's Representative in writing that it or the State Works Contractor considers, that there is an omission, ambiguity, discrepancy, inadequacy or inconsistency in, or between, the documents comprising this deed (including in any exhibits), RMS's Representative must, subject to clause 1.7, direct the interpretation of this deed which the Project Company and the State Works Contractor must follow.
- (b) RMS's Representative, in giving a direction in accordance with clause 1.6(a), is not required to determine whether or not there is an omission, ambiguity, discrepancy, inadequacy or inconsistency in, or between, the documents comprising this deed.
- (c) Any direction which RMS's Representative gives in accordance with clause 1.6(a):
  - (i) will not relieve:

- A. the Project Company from or alter its liabilities or obligations under this deed or otherwise according to Law; and
  - B. the State Works Contractor from or alter its liabilities or obligations under the State Works Deed or otherwise according to Law;
- (ii) will not entitle the Project Company or the State Works Contractor to make (nor will it make RMS liable upon) any Claim arising out of or in any way in connection with the direction;
- (iii) will not limit or otherwise affect RMS's rights against:
- A. the Project Company, whether under this deed or otherwise according to Law; and
  - B. the State Works Contractor, whether under the State Works Deed or otherwise according to Law; and
- (iv) must, in respect of a notice given by the Project Company under clause 1.6(a), be given within 20 Business Days of receipt of that notice.

## 1.7 Order of precedence

The following order of precedence applies in the event of any ambiguity, discrepancy or inconsistency in, or between, the documents comprising this deed:

- (a) if the ambiguity, discrepancy or inconsistency is in or between the documents comprising this deed, the documents will be given precedence in accordance with the following:
  - (i) this deed excluding the schedules and exhibits; and
  - (ii) the schedules and exhibits;
- (b) to the extent that clause 1.7(a) does not apply or resolve the ambiguity, discrepancy or inconsistency and the ambiguity, discrepancy or inconsistency is in or between different codes, standards, specifications or guidelines with which the Project Company must comply, the order of precedence set out in section 7.2.2 of the SWTC will apply; and
- (c) to the extent that clauses 1.7(a) and (b) do not apply or resolve the ambiguity, discrepancy or inconsistency, that part of the deed, SWTC or Environmental Documents which prescribes or requires the highest standard of compliance, the highest quality or standard or the more onerous obligation will take precedence (unless directed otherwise by RMS's Representative).

The documents comprising this deed (including the SWTC and the Environmental Documents) are to be regarded as mutually explanatory and anything contained in one but not the others will be equally binding as if contained in all of them.

## 1.8 Severability

If at any time any provision of this deed is or becomes void, illegal, invalid or unenforceable in any respect under the Law of any jurisdiction, then:

- (a) that will not affect or impair:

- (i) the legality, validity or enforceability in that jurisdiction of any other provision of this deed; or
  - (ii) the legality, validity or enforceability under the Law of any other jurisdiction of that or any other provision of this deed; and
- (b) the provision will be construed in a manner which:
- (i) avoids the provision being void, illegal, invalid or unenforceable; and
  - (ii) subject to clause 1.8(b)(i), preserves to the maximum possible extent:
    - A. the enforceability of the provision and the provisions of this deed; and
    - B. the original effect and intent of this deed.

## 1.9 Electronic files

Where this deed (including the SWTC) refers to an electronic file on a separate disc which forms part of this deed, such electronic files are contained in the disc or discs included in Exhibit A.

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## 2. Grant of concession

### 2.1 Terms of concession

- (a) The Day 1 Clauses commence on the date of this deed.
- (b) Except for the Day 1 Clauses, this deed commences on the date of Financial Close, and the time limitations within which the Project Company must exercise its rights, claim its entitlements or perform its obligations under this deed other than under a Day 1 Clause do not begin to run until Financial Close.
- (c) In consideration for the Project Company agreeing to perform its obligations under this deed, RMS agrees to enter into each M7 Amending Deed and grants the Project Company a right to carry out the Project subject to, and in accordance with, this deed.

### 2.2 Project risks

Subject to the express provisions of this deed, the Project Company:

- (a) accepts all risks associated with the Project;
- (b) without limiting the generality of clause 2.2(a), accepts all risks associated with:
  - (i) the cost of the Project, including the cost of all Subcontractors and increases in the cost of Materials, Construction Plant, Utility Services and labour required for the performance of the Project Activities;
  - (ii) the performance of Subcontractors;
  - (iii) obtaining access to all areas other than the Project Site;
  - (iv) the occupation and use of the Project Site, the Motorway Site and the Motorway by the Project Company and the State Works Contractor;

- (v) the Site Conditions encountered;
  - (vi) all information provided or not provided by RMS about the Project Works, the Temporary Works, the Motorway and the Project Site;
  - (vii) Contamination of any land upon or within which the Project is undertaken;
  - (viii) traffic conditions on approach roads to the Project Site and any other difficulties with obtaining access to and from the Project Site;
  - (ix) complying with all Laws, Approvals and requirements of Authorities;
  - (x) the existence, location, condition and availability of Utility Services in respect of the Project Activities;
  - (xi) reliance upon or the use of the Concept Design;
  - (xii) providing all Materials, Construction Plant, Utility Services and labour necessary for the Project Activities;
  - (xiii) industrial relations issues;
  - (xiv) foreign exchange movements in any currencies adverse to the Project Company or the State Works Contractor;
  - (xv) damage to the Project Activities, Project Works, Temporary Works, Project Site, Extra Land or Motorway;
  - (xvi) the time taken to achieve Completion;
  - (xvii) third party claims;
  - (xviii) revenue from the Project and traffic volumes, including the risk that revenue from the Project or traffic volumes may be less than expected by the Project Company Group or its advisers; and
  - (xix) Liability for Taxes, including the risk that Liability for Taxes is greater than estimated by the Project Company Group or its advisers; and
- (c) acknowledges that RMS has not made any representation or given any warranty in respect of the traffic usage of the Motorway or any other road.

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### **3. Conditions precedent**

#### **3.1 Satisfaction of conditions precedent**

- (a) RMS must use all reasonable endeavours to satisfy the Conditions Precedent referred to in paragraphs 9, 10 and 11 of Schedule 1 by the Target Financial Close Date.
- (b) The Project Company must use all reasonable endeavours to satisfy the Conditions Precedent referred to in paragraphs 1 to 8 (inclusive) of Schedule 1 by the Target Financial Close Date.
- (c) The parties may waive the Conditions Precedent as follows:

- (i) RMS may waive in writing any of the Conditions Precedent referred to in paragraphs 3, 5, 7 and 8 of Schedule 1;
  - (ii) the Project Company may waive in writing any of the Conditions Precedent referred to in paragraphs 9 and 11 of Schedule 1; and
  - (iii) RMS and the Project Company may together waive the Conditions Precedent referred to in paragraphs 1, 2, 4, 6 and 10 of Schedule 1.
- (d) The Project Company must give RMS's Representative written notice when the Project Company has reasonably formed the view that a Condition Precedent (other than a Condition Precedent referred to in paragraphs 9, 10 or 11 of Schedule 1) has been satisfied or unconditionally waived, and RMS's Representative must give written notice to the Project Company of whether or not it agrees with the Project Company's notice.
- (e) RMS must give the Project Company written notice when RMS has reasonably formed the view that a Condition Precedent referred to in paragraphs 1, 2, 4, 6, 9, 10 or 11 of Schedule 1 has been satisfied or unconditionally waived, and the Project Company must give written notice to RMS of whether or not it agrees with RMS's notice.
- (f) RMS's Representative will notify the Project Company promptly of the date on which RMS's Representative is satisfied that all Conditions Precedent have been satisfied or unconditionally waived.
- (g) The parties acknowledge that any ruling in respect of the Proposed Westlink Motorway Group Simplification is not a Condition Precedent for the purposes of paragraph 6 of Schedule 1.

### **3.2 Target Financial Close Date**

- (a) If a Condition Precedent has not been satisfied (or waived under clause 3.1) by 11:59pm on the Target Financial Close Date, then either party may terminate this deed by prior notice in writing to the other party.
- (b) The period of the notice referred to in clause 3.2(a) will expire 5 Business Days after 11:59pm on the Target Financial Close Date and this deed will only be terminated if the Conditions Precedent have not been satisfied (or waived under clause 3.1) within that period.
- (c) If this deed is terminated pursuant to this clause 3.2:
- (i) each of the other RMS Project Documents will be taken to have terminated at the time this deed is terminated;
  - (ii) RMS must return all unconditional undertakings and letters of credit provided by the Project Company Group to RMS within 5 Business Days after the date of termination of this deed; and
  - (iii) no party will have any Claim against any other party under or in respect of the RMS Project Documents or in respect of the reimbursement of costs or expenses or otherwise in connection with the Project, except for any Claim in relation to breaches of any Day 1 Clause.

## 4. Compliance with Law and Approvals

### 4.1 Compliance with Law

The Project Company must:

- (a) in carrying out the Project Company's Activities, comply with;
- (b) ensure that the State Works Contractor and its Related Parties, in carrying out the SWC Activities, comply with;
- (c) ensure that its Related Parties, in carrying out the Project Activities, comply with; and
- (d) ensure that the Project Works, the Temporary Works and the Motorway comply with,

all:

- (e) applicable Laws, including any change in Law after the date of this deed; and
- (f) NSW Government Policies,

and must not engage in, and must ensure that the State Works Contractor and their respective Related Parties, in carrying out the Project Activities, do not engage in, any fraud, bribery or corruption.

### 4.2 Consents and Approvals

- (a) The Project Company acknowledges that RMS has obtained the Planning Approval.
- (b) In relation to any document required to be prepared pursuant to the Planning Approval which is also required to be submitted to an Authority (other than the Planning Approval Application), the Project Company must (but only in respect of those conditions or requirements in the Planning Approval with which the Project Company must comply pursuant to Part B of Schedule 3):
  - (i) provide RMS's Representative with copies of any such documents;
  - (ii) provide RMS with an opportunity to comment on any such documents;
  - (iii) consider any comments made by RMS in relation to any such documents;
  - (iv) deliver a final version of any such documents in order to enable RMS to submit the relevant document to any Authority in accordance with the requirements of the Planning Approval; and
  - (v) provide RMS with such assistance as may be reasonably required by RMS to enable RMS to comply with all applicable Laws.
- (c) The Project Company must:
  - (i) expeditiously apply for and obtain from each relevant Authority all Approvals (other than the Planning Approval and the Approvals specified in Part A of Schedule 3);

- (ii) comply with, and ensure that the State Works Contractor complies with, the lawful requirements of each such Authority to permit their proper consideration of the applications for Approvals;
  - (iii) comply with, carry out and fulfil, and ensure that the State Works Contractor complies with, carries out and fulfils, all conditions and requirements of all Approvals (including those which RMS is expressed under the terms of the Approval to be required to comply with, carry out and fulfil), subject to the terms of Part B of Schedule 3;
  - (iv) in respect of any Approval, pay all fees, effect all insurances, provide any bonds and execute any undertakings or agreements required by any relevant Authority; and
  - (v) otherwise comply with, and ensure that the State Works Contractor complies with, clause 4.1.
- (d) Notwithstanding anything to the contrary in the Project Documents, the Project Company and the State Works Contractor are not responsible for applying for or obtaining any Approvals under the EPBC Act.
- (e) Except to the extent prohibited by Law, the Project Company indemnifies RMS from and against any claims against RMS, or Loss suffered or incurred by RMS (including any amount which RMS is required to expend pursuant to any condition of the Planning Approval), arising out of or in any way in connection with a failure by the Project Company to comply with its obligations under clauses 4.1, 4.2(b), 4.2(c) or 4.3, including a failure of the Project Company to procure that the State Works Contractor complies with any of those obligations.
- (f) Without limiting clause 6.3(d), if requested in writing by the Project Company, RMS will cooperate with, and (at the Project Company's cost) provide reasonable assistance to, the Project Company and the State Works Contractor in obtaining:
- (i) Approvals required to be obtained from RailCorp or Sydney Trains; and
  - (ii) Approvals in respect of Utility Services,
- necessary to carry out the Project Activities, provided that the Project Company and the State Works Contractor will not be entitled to make any Claim against RMS arising out of or in any way in connection with those Approvals (including the conditions of those Approvals, any delay to the grant of any Approval or any refusal by RailCorp, Sydney Trains or a Utility Service provider to grant any Approval).

### 4.3 Modification Application Documents

- (a) The parties agree that subject to the terms of Part B of Schedule 3, the Project Company will prepare any applications, documentation, plans or reports required to be prepared in respect of any proposed modification to the Planning Approval (including, if applicable, the documents referred to in clause 4.2(b) and any other documents required to be submitted with the application for modification) **(Modification Application Documents)**.
- (b) The Project Company warrants that:
  - (i) it will use its best endeavours to ensure that each Modification Application Document will comply with the EP&A Act, the EPBC Act and any other applicable legislation; and



- (ii) it will prepare each Modification Application Document in accordance with Good Industry Practice.
- (c) The Project Company:
  - (i) acknowledges and agrees that RMS is the proponent under the EP&A Act in respect of the Planning Approval and submission of any Modification Application Documents; and
  - (ii) acknowledges that RMS will rely upon the Project Company's warranties in this clause 4.3.

#### 4.4 Modifications to the Planning Approval

- (a) Without limiting clause 4.4(b), clause 12.1 will apply as if RMS had given a Change Order if a Planning Approval Change Event occurs prior to the Date of Completion and requires:
  - (i) a Change to be made to the Project Works (but excluding any change which such Planning Approval Change Event requires to be made to the Temporary Works or the process required to design and construct the Project Works);
  - (ii) a reduction in the Permitted Working Hours; or
  - (iii) a Change to the Motorway or its operation.
- (b) The Project Company must:
  - (i) take all reasonable steps, and ensure that the State Works Contractor takes all reasonable steps, to Mitigate the cost of the Change;
  - (ii) for this purpose, comply with, and ensure that the State Works Contractor complies with, all reasonable directions of RMS concerning the Change, and its consequences; and
  - (iii) ensure that its Subcontractors, and the State Works Contractor and its Subcontractors, comply with this clause 4.4(b),

and RMS's liability under clause 4.4(a) will be reduced to the extent that the Project Company fails to comply with these obligations.
- (c) Except to the extent expressly stated otherwise in this clause 4.4, the Project Company will not be entitled to make, and RMS will not be liable upon, any Claim arising out of or in any way in connection with a modification to the Planning Approval.
- (d) Without limiting any other provision of this deed, RMS must:
  - (i) consult with the Project Company prior to making or applying for a modification to the Planning Approval proposed by RMS;
  - (ii) give reasonable consideration to:
    - A. any modification to the Planning Approval proposed by the Project Company; and

- B. the Project Company's comments in respect of any modification to the Planning Approval proposed by RMS; and
- (iii) respond to any comments made by the Project Company in respect of any proposed modification to the Planning Approval within a reasonable period of time.
- (e) The Project Company:
  - (i) acknowledges and agrees that:
    - A. as between RMS, the Project Company and the State Works Contractor, only RMS is permitted to make or apply for modifications to the Planning Approval;
    - B. RMS may, provided that RMS has complied with its obligations under clause 4.4(d), refuse to make, seek or apply for such modification or discontinue or withdraw or change an application for such modification at any time; and
    - C. RMS need not apply for any modification to the Planning Approval on behalf of the Project Company or the State Works Contractor unless the Project Company first submits its proposal for modification to RMS's Representative for its review and RMS's Representative consents to the modification. In considering whether to give consent, RMS must comply with its obligations under clause 4.4(d)(ii)A;
  - (ii) must not make, seek to or apply for any modification to the Planning Approval other than through RMS; and
  - (iii) must pay to RMS all fees, costs and expenses arising out of, or in any way in connection with, any modification to the Planning Approval instigated by the Project Company.

#### 4.5 Environmental assessment

- (a) If there is a legal challenge brought about by way of commencement of court proceedings in relation to the environmental assessment or a determination in respect of the Project, the Project Works, the Temporary Works or the Motorway under:
  - (i) the EP&A Act;
  - (ii) the EPBC Act; or
  - (iii) any other Law,

(including a legal challenge to the Planning Approval) (**Legal Challenge**), the Project Company must continue to perform its obligations under this deed, and ensure that the State Works Contractor continues to perform its obligations under the State Works Deed, unless, as a result of that Legal Challenge, it is otherwise ordered by a court or directed by RMS's Representative.
- (b) Subject to clause 4.5(b1), as between RMS, the Project Company and the State Works Contractor, RMS is responsible for dealing with the Legal Challenge as it sees fit in its absolute discretion and at its own cost.

- (b1) If requested to do so by RMS, the Project Company must procure that the Contractor provides reasonable assistance to RMS in dealing with any Legal Challenge, including by attending any relevant meetings and providing any information available to the Contractor, at the Project Company's cost.
- (c) For the purposes of clause 4.5(a), RMS's Representative may by written notice direct the Project Company to suspend any or all of its obligations under this deed, and cause the State Works Contractor to suspend any or all of its obligations under the State Works Deed, until such time as RMS gives the Project Company further written notice and the Project Company must comply, and ensure that the State Works Contractor complies, with that notice.
- (d) RMS will have no liability to the Project Company or the State Works Contractor in respect of an order by a court or direction by RMS's Representative that the Project Company cease to perform its obligations under this deed or the State Works Contractor cease to perform its obligations under the State Works Deed as a result of a Legal Challenge (including under clause 14.8) to the extent that the Legal Challenge:
  - (i) is initiated or upheld, or the court order is made, due to:
    - A. either of the Project Company's or the State Works Contractor's failure to comply with its obligations under a Project Document;
    - B. a breach of the Project Company's warranties under clause 4.3;
    - C. a wrongful act or omission of the Project Company, the State Works Contractor or their respective Related Parties;
    - D. a failure by the Project Company, the State Works Contractor or any of their respective Related Parties to comply with the EP&A Act or the EPBC Act; or
    - E. a wrongful act or omission of the M2 Entities under the M2 Integration Project Deed,
  - (ii) relates to or arises out of or in connection with any Change proposed by the Project Company in accordance with paragraph 2.3 of the Change Procedure or otherwise carried out by the Project Company or the State Works Contractor without RMS having issued a Change Order in respect of that Change.

#### **4.6 Roads Act declarations and directions**

- (a) RMS must recommend to the Minister to make, and ensure that the Minister makes a declaration under section 52 of the Roads Act of any part of the Motorway not already declared to be a tollway (as contemplated by paragraph 9 of Schedule 1) as a tollway no later than the Motorway Opening Date.
- (b) RMS must ensure that the declaration referred to in paragraph 9 of Schedule 1 and clause 4.6(a) is effective from the date on which it is made until the end of the Term.

## 5. State Works

### 5.1 State Works Deed

- (a) As between RMS and the Project Company, RMS will procure the design and construction of the State Works.
- (b) RMS will enter into the State Works Deed pursuant to which the State Works Contractor must procure and manage the design and construction of the State Works.

### 5.2 Acknowledgements regarding State Works

The Project Company acknowledges and agrees that:

- (a) except as expressly provided in this deed, RMS has no liability whatsoever to the Project Company and the Project Company has no Claim whatsoever against RMS arising out of or in connection with the State Works, the SWC Activities or the State Works Deed, including in respect of:
  - (i) any Defects in the State Works;
  - (ii) late completion of, or failure to complete, the State Works;
  - (iii) the State Works not being fit for their intended purposes; or
  - (iv) any non-compliance by the State Works Contractor with any requirements applying to the State Works or the SWC Activities;
- (b) the Project Company is not excused from any breach of its obligations under the Project Documents which arises as a result of any act or omission of:
  - (i) the State Works Contractor; or
  - (ii) any Related Party of the State Works Contractor in carrying out the SWC Activities,

except to the extent the breach results from RMS's failure to comply with its obligations under the State Works Deed;
- (c) the Project Company must indemnify RMS in respect of any Loss or Claim brought against, suffered or incurred by RMS arising out of or in connection with the State Works other than payments which RMS is expressly required to make to the State Works Contractor under the State Works Deed, or pursuant to clauses 12.3, 14.9, 21 or 27.15 of this deed;
- (d) the Project Company must integrate, interface and co-ordinate the design and construction of the State Works with the design and construction of the Project Company's Works and the Temporary Works;
- (e) the Project Company must supervise and manage the performance of the SWC Activities to ensure that the Project Works (including the State Works) and the Project Activities (including the SWC Activities) comply with the requirements of this deed;
- (f) where the Project Company has any obligation under this deed which relates to the performance of the SWC Activities, the Project Company must satisfy the obligation by supervising and managing the performance of the SWC Activities; and

- (g) the Project Company must provide the State Works Contractor with sufficient access to the Project Site to enable the State Works Contractor to perform its obligations under the State Works Deed.

The parties acknowledge that the design and construction of the State Works will be treated as part of the Project Activities under this deed, and repair and maintenance of the State Works will be treated as part of the Project Activities under this deed, for the purposes of determining the amount of any redress to be provided to the Project Company under clause 21.

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## **6. Relationship of RMS and the Project Company**

### **6.1 RMS's Representative**

- (a) RMS:
- (i) must appoint a person to be RMS's Representative for the purposes of this deed;
  - (ii) may at any time replace RMS's Representative, in which event RMS must appoint another person as RMS's Representative; and
  - (iii) must give written notice of all appointments under clauses 6.1(a)(i) and (ii) to the Project Company.
- (b) RMS's Representative may:
- (i) by written notice to the Project Company appoint persons to exercise any of RMS's Representative's functions under this deed;
  - (ii) not appoint more than one person to exercise the same function under this deed; and
  - (iii) vary or revoke any appointment under clause 6.1(b)(i) by notice in writing to the Project Company.
- (c) RMS's Representative may continue to exercise a function under this deed despite appointing another person to exercise the function under clause 6.1(b).
- (d) An appointee of RMS's Representative under clause 6.1(b) may:
- (i) by written notice to the Project Company appoint persons to exercise any of the appointee's functions under this deed;
  - (ii) not appoint more than one person to exercise the same function under this deed; and
  - (iii) revoke any appointment under clause 6.1(d)(i) by notice in writing to the Project Company.
- (e) RMS and the Project Company acknowledge and agree that RMS's Representative acts at all times as the servant or agent of RMS and is subject to the directions of RMS and will act solely in the interests of RMS.
- (f) Unless expressly provided otherwise in this deed, a representative of RMS appointed pursuant to this clause 6.1 is not obliged to review, or comment upon, any documentation or information which the Project Company or the State Works Contractor gives to RMS in respect of the Project.

## 6.2 Project Company's representatives

- (a) The Project Company must, prior to the date of this deed, give notice in writing to RMS in which it nominates the person that will act as a representative of and be authorised to act on behalf of it in discharging its functions under this deed.
- (b) The Project Company may nominate more than one such person, and if so, it must in its written notice specify the functions which each person is authorised to discharge. The Project Company may not nominate more than one person to discharge the same function or functions under this deed.
- (c) The Project Company may by notice in writing to RMS substitute a person appointed under this clause with another person.

## 6.3 Authorities

- (a) This deed will not in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of RMS to exercise any of its functions and powers pursuant to any Law.
- (b) The Project Company acknowledges and agrees that, without limiting clause 6.3(a), anything which RMS does, fails to do or purports to do pursuant to its functions and powers under any Law will be deemed not to be an act or omission by RMS (including a breach of contract) under or in connection with this deed and will not entitle the Project Company to make any Claim against RMS.
- (c) The parties agree that clauses 6.3(a) and (b) are taken not to limit any Liability which RMS would have had to the Project Company under this deed as a result of a breach by RMS of a term of this deed but for clauses 6.3(a) and (b).
- (d) The Project Company acknowledges and agrees that:
  - (i) there are Authorities (other than RMS) with jurisdiction over aspects of the Project Activities, parts of the Project Site and other areas affected by the Project Activities (including Extra Land);
  - (ii) such Authorities may from time to time exercise their statutory functions and powers in such a way as to disrupt, interfere with or otherwise affect the Project Activities (including the exercise by persons (including individuals) acting on behalf of such Authorities of powers and functions including as necessary for such Authorities to comply with their statutory functions and powers);
  - (iii) notwithstanding any other provision of this deed, RMS is not authorised to:
    - A. exercise any power, function or duty within the responsibility of any other Authority; or
    - B. influence, override or direct any Authority in the proper exercise of its legal duties and functions;
  - (iv) notwithstanding any requirement that RMS use its best endeavours or reasonable endeavours to do anything or bring about any outcome under any Project Document, RMS is not obliged to:
    - A. interfere with or influence the exercise by any Authority of a statutory power or discretion;

- B. exercise a power or discretion or otherwise act in a manner that it regards as not being in the public interest; or
  - C. develop policy or legislate by reference only, or predominantly, to the interests of the Project; and
- (v) except to the extent expressly stated otherwise in this deed, it bears the full risk of all occurrences of the kind referred to in clause 6.3(d)(ii) and will not be entitled to make, and RMS will not be liable upon, any Claim arising out of or in any way in connection with such occurrences.

#### 6.4 Senior Project Group

- (a) A Senior Project Group must be established, and the parties must participate in the Senior Project Group, in accordance with Schedule 11.
- (b) The parties may agree to establish additional project management groups.

#### 6.5 No partnership, joint venture or other fiduciary relationship

Neither this deed nor any other Project Document to which RMS or the Project Company are expressed to be parties creates a partnership, joint venture or fiduciary relationship between RMS (on the one hand) and the Project Company (on the other hand).

#### 6.6 RMS action

- (a) If:
  - (i) the Project Company:
    - A. fails to perform an obligation under this deed, including the rectification of minor Defects referred to in paragraph 1 of Schedule 15; and
    - B. has not within a reasonable time after the date of receipt of a written notice from RMS requiring such failure to be remedied or a direction from RMS under clause 15.1(b), taken steps to remedy the failure, or having taken such steps, fails to remedy the failure within a reasonable time; or
  - (ii) RMS considers that urgent action is reasonably necessary to minimise the risk of harm to:
    - A. the health or safety of persons;
    - B. the Environment;
    - C. any property; or
    - D. the safe operation of any road,

then RMS may take such action as RMS considers necessary to remedy the failure by the Project Company (including requiring the Motorway or part of it to be closed) or to take that urgent action to minimise that risk of harm and RMS may for this purpose enter and remain on the Project Site, any Extra Land, the Maintenance Site and any other land upon which the Project Activities are being carried out. In taking action pursuant to clause 6.6(a)(ii), RMS may only remain on the Project Site, any Extra Land, the Maintenance Site and any other land upon which the Project

Activities are being carried out for the period of time necessary to minimise that risk of harm.

- (b) Subject to clause 6.6(c), any Loss suffered or incurred by RMS in taking action referred to in clause 6.6(a) will be a debt due and payable from the Project Company to RMS.
- (c) RMS acknowledges and agrees that the Project Company will not be liable to RMS for any Loss arising as a consequence of RMS's default or negligent act or omission in taking any action referred to in clause 6.6(a)(ii) other than action taken by RMS in connection with an act or omission of the Project Company. To the extent that the Project Company has paid RMS an amount in respect of such Loss, RMS must reimburse that amount to the Project Company within 20 Business Days of receiving a written demand for reimbursement from the Project Company.
- (d) The Project Company must indemnify RMS in respect of any Loss or Claim brought against, suffered or incurred by RMS arising out of or in connection with RMS action under this clause 6.6 which arises out of or is in connection with the State Works.
- (e) Notwithstanding anything else in this clause 6.6, RMS acknowledges and agrees that its rights under this clause 6.6 in connection with the Tolling Services and the Back-Office System will be limited to the rights that are exercisable by RMS under the TCM Operator's Side Deed and the TISA Side Deed in the relevant circumstances.

## 6.7 Document management and transmission

- (a) The Project Company must manage and transmit documents, and ensure that the State Works Contractor manages and transmits documents, (other than Notices referred to in clause 39) including using an electronic medium (such as the PDCS) where required by RMS's Representative, in accordance with the processes, procedures and systems in the SWTC or as otherwise reasonably required by RMS's Representative.
- (b) Documents supplied to the Project Company or the State Works Contractor by or for RMS will, as between RMS (on the one hand) and the Project Company and the State Works Contractor (on the other), remain the property of RMS and must be returned by the Project Company to RMS on demand in writing. The documents must not, without the prior written approval of RMS, be used, copied or reproduced for any purpose other than the execution of the Project Activities.
- (c) The Project Company must keep all the Project Company's and the State Works Contractor's records relating to the Project Activities in a secure and fire proof storage.
- (d) The Project Company will not be entitled to make, and RMS will not be liable upon, any Claim arising out of or in any way in connection with complying with its obligations under this clause 6.7.
- (e) The Project Company must ensure that any documentation that it or the State Works Contractor provides to RMS in computer readable form contains no virus or computer software code which is intended or designed to:
  - (i) permit access to or use of a computer system by a third person not authorised by RMS; or
  - (ii) disable, damage or erase, or disrupt or impair the normal operation of any other software or data on a computer system.



## 7. Project Company's fundamental obligations

### 7.1 Project Company's general obligations

The Project Company:

- (a) must carry out the Project Company's Activities, including:
  - (i) investigating, financing, funding, planning, designing and constructing the Project Company's Works and the Temporary Works;
  - (ii) commissioning the Project Works and the Temporary Works;
  - (iii) contracting for the provision of, acquiring or otherwise procuring or providing all Materials, Construction Plant and Utility Services required for the performance of its obligations under this deed;
  - (iv) undertaking the O&M Work;
  - (v) operating, maintaining and repairing the Motorway;
  - (vi) keeping all traffic lanes of the Motorway open to the public for the safe, efficient and continuous passage of vehicles at all times during the Term; and
  - (vii) yielding up possession of the Motorway to RMS in accordance with clause 30 at the end of the Term,

in accordance with this deed;
- (b) must integrate, interface and co-ordinate the Project Company's Activities with the SWC Activities;
- (c) warrants that:
  - (i) the Project Works (other than the Third Party Works) will, upon Completion, be and will remain at all relevant times fit for their intended purposes;
  - (ii) in respect of each discrete part of the Third Party Works:
    - A. if the Third Party Works are Local Area Works or Utility Service Works, those Third Party Works will, upon RMS and the Independent Certifier being provided with a copy of the notice referred to in clause 15.2(a)(ii) or 15.3(a)(ii) (as applicable), be fit for their intended purpose; or
    - B. if the Third Party Works are Property Works, those Third Party Works will, upon RMS's Representative being provided with a certificate or statement referred to in clause 9.4(a)(ii), be fit for their intended purpose; and
  - (iii) the Temporary Works will at all relevant times be fit for their intended purposes; and
- (d) will be liable to RMS for the acts and omissions of its Related Parties and their respective employees and agents as if such acts or omissions were acts or omissions of the Project Company.

## 7.2 Subcontracts

- (a) The engagement by the Project Company and the State Works Contractor of the Contractor to perform some or all of the Project Company's obligations under this deed and the State Works Contractor's obligations under the State Works Deed will not limit or affect the Project Company's or the State Works Contractor's obligations or Liability under any RMS Project Document.
- (b) The Project Company will be vicariously liable to RMS for the acts and omissions of its Related Parties, the Contractor, the Operator, any other Subcontractors, the Contractor's subcontractors, the Operator's subcontractors and their respective related parties in performing the Project Activities as if such acts or omissions were the acts or omissions of the Project Company.
- (c) RMS and the Project Company acknowledge and agree that the Project Company's obligations under this deed, and the State Works Contractor's obligations under the State Works Deed, are not lessened or otherwise affected by RMS's awareness of the terms of any Subcontract.
- (d) The Project Company must notify RMS of any proposed or executed contract in respect of the Project Works or the Temporary Works (regardless of whether or not the Project Company is a party to that contract), and if RMS requires, give RMS:
  - (i) access to any such contract with a contract sum of more than \$ (including to all plans, specifications and drawings relating to that contract); and
  - (ii) a copy of any such contract with a contract sum of more than \$ (including of all plans, specifications and drawings relating to that contract).
- (e) The Project Company must ensure that every Subcontract which has a contract value of \$ or more includes a clause providing that if the Project Deed is terminated for any reason or RMS takes over the Project Activities:
  - (i) subject to the Contractor's Side Deed, the Operator's Side Deed, the TCM Operator's Side Deed or the TISA Side Deed (as applicable), the Project Company and/or the State Works Contractor and the Subcontractor must, after RMS's Representative has given a Direction to do so, consent to a novation of the Subcontract to RMS; or
  - (ii) if RMS does not elect to novate the Subcontract, the Project Company and/or the State Works Contractor may terminate the Subcontract and pay to the Subcontractor an early termination amount equal to the amount determined by the Independent Certifier (or such other independent person as the parties agree) as being:
    - A. in respect of the D&C Deed or any other Subcontract entered into in connection with the Project Works, the aggregate of:

- B. in respect of the O&M Deed or any other Subcontract entered into in connection with the O&M Work, the aggregate of:

- (f) The Project Company must ensure that the State Works Contractor, the Contractor and the Operator include an equivalent clause to clause 7.2(e)(ii) in each contract which has a contract value of \$ \_\_\_\_\_ or more entered into by the State Works Contractor, the Contractor or the Operator (respectively) with any subcontractor, supplier or consultant.

**7.3 Utility Services**

The Project Company:

- (a) must obtain and pay for any Utility Services and all connections for all Utility Services the Project Company and the State Works Contractor need to perform their obligations under the Project Documents;
- (b) must investigate, protect, relocate, remove, modify, support, reinstate and provide for Utility Services necessary for the Project Company to comply with its obligations under this deed or the State Works Contractor to comply with its obligations under the State Works Deed;
- (c) must ensure there are no unplanned disruptions to the Utility Services in carrying out the Project Activities and that planned disruptions to the Utility Services are

minimised and that otherwise no Utility Services are damaged, destroyed, disconnected, disrupted, interfered with or interrupted by reason of the performance of the Project Activities;

- (d) must, to the extent not prohibited by Law, indemnify RMS from and against any claims against RMS, or Loss suffered or incurred by RMS, arising out of or in connection with:
- (i) any damage to, disconnection or destruction of, disruption to or interference with or interruption to, any Utility Service arising out of or in connection with:
    - A. a failure by the Project Company to comply with any obligations under this deed, or the State Works Contractor to comply with any obligations under the State Works Deed; or
    - B. any act or omission of the Project Company, the State Works Contractor or their respective Related Parties; or
  - (ii) a failure by the Project Company to comply with any obligation under this deed, or the State Works Contractor to comply with any obligation under the State Works Deed, with respect to Utility Services or the Utility Service Works including the obligations under the SWTC (including section 2.3.2(d) of the SWTC).

The Project Company is responsible for, and assumes the risk of, all additional work, increased costs and any other Loss, delay or disruption (including any delay in achieving Completion) it or the State Works Contractor suffers or incurs arising out of or in any way in connection with the existence, location, condition and availability of all Utility Services required for the execution of the Project Activities.

#### 7.4 Long service levy

Before any construction work commences under this deed or the State Works Deed, the Project Company must:

- (a) pay (or procure payment) to the Long Service Corporation or that body's agent all amounts due and payable for the long service levy in respect of the Project Activities under the Building and Construction Industry Long Service Payments Act 1986 (NSW); and
- (b) produce to RMS's Representative the documents evidencing payment of the amounts referred to in clause 7.4(a).

#### 7.5 Project Plans

- (a) The Project Company must prepare and develop the Project Plans specified in Appendix 60 of the SWTC in accordance with Schedule 6.
- (b) No review of, comments upon, notice in respect of any Project Plan or any other act or omission of RMS's Representative (including a direction under paragraph 5 of Schedule 6) about any Project Plan will lessen or otherwise affect:
  - (i) the Liabilities or responsibilities of:
    - A. the Project Company under this deed or otherwise according to Law; or

- B. the State Works Contractor under the State Works Deed or otherwise according to Law; or
- (ii) RMS's rights against:
  - A. the Project Company, whether under this deed or otherwise according to Law; or
  - B. the State Works Contractor, whether under the State Works Deed or otherwise according to Law.
- (c) The Project Company:
  - (i) must comply, and must procure that the State Works Contractor complies, with each Project Plan which has been submitted to RMS's Representative under this clause 7.5 and in respect of which RMS's Representative has not given a notice under paragraph 2(a)(ii) of Schedule 6; and
  - (ii) agrees that compliance with any Project Plan will not in any way lessen or affect:
    - A. the Liabilities or responsibilities of:
      - 1) the Project Company under this deed or otherwise according to Law; or
      - 2) the State Works Contractor under the State Works Deed or otherwise according to Law; or
    - B. RMS's rights against:
      - 1) the Project Company, whether under this deed or otherwise according to Law; or
      - 2) the State Works Contractor, whether under the State Works Deed or otherwise according to Law.
- (d) The Project Company must comply, and ensure that the State Works Contractor complies, with the restrictions upon the carrying out of the Project Activities specified in the SWTC.
- (e) To the extent they are relevant to operation, maintenance, repair and reinstatement of the Motorway during the Term, all Project Plans must be incorporated into the O&M Manuals.

## 7.6 Control of traffic

- (a) The Project Company must not undertake, and must ensure that the State Works Contractor does not undertake, any Project Works or Temporary Works which have the effect of restricting, closing, interfering with or obstructing the free flow of traffic on any local road:
  - (i) without a road occupancy licence issued by RMS in accordance with the requirements of Appendix 21 of the SWTC;
  - (ii) outside of the permitted times stated in the road occupancy licence; or

- (iii) otherwise than in accordance with the terms and conditions of the road occupancy licence.
- (b) The Project Company:
  - (i) is responsible for the control, direction and protection of all traffic in any way affected by the carrying out of the Project Activities;
  - (ii) must manage all such traffic to ensure:
    - A. its continuous, safe and efficient movement;
    - B. the traffic carrying capacity of Local Areas is maintained; and
    - C. that any delays and disruptions to such traffic and the movement of such traffic are kept to an absolute minimum;
  - (iii) must coordinate its activities so as to ensure that no unnecessary interference is caused to members of the public (including the passage of people, vehicles and traffic) or the operations of Authorities;
  - (iv) must at all times comply with the relevant traffic management plan prepared in accordance with the Planning Approval (where applicable) and the requirements of the SWTC and any Third Party Agreement in respect of road traffic management and safety; and
  - (v) must comply with the directions of any relevant Authority and RMS (in its capacity as an Authority) with respect to such management.

## 7.7 Principal contractor

- (a) In this clause 7.7 and clause 7.8, the terms "principal contractor", "workplace", "relevant entity", "construction project" and "construction work" have the same meaning as assigned to those terms in the WHS Legislation. For the purposes of the WHS Legislation, this deed and the State Works Deed, the Project Company's Works, the State Works and the Temporary Works are taken to be part of the same "construction project".
- (b) The Project Company:
  - (i) acknowledges that the Project Company, RMS and Lend Lease Engineering Pty Limited (ABN 40 000 201 516) are party to the Principal Contractor Deed;
  - (ii) acknowledges that pursuant to the Principal Contractor Deed, RMS has engaged Lend Lease Engineering Pty Limited (ABN 40 000 201 516) as the principal contractor in respect of the Project Company's Works, the State Works and the Temporary Works; and
  - (iii) without limiting the Principal Contractor Deed, undertakes to RMS to manage Lend Lease Engineering Pty Limited (ABN 40 000 201 516) to ensure that it discharges the duties imposed on a principal contractor by the WHS Legislation in respect of the Project Company's Works, the State Works and the Temporary Works.
- (c) Without limiting the Project Company's obligations under any other provision of this deed or the Principal Contractor Deed, if:

- (i) the engagement of Lend Lease Engineering Pty Limited (ABN 40 000 201 516) as principal contractor pursuant to the Principal Contractor Deed is not effective for any reason or is not effective in respect of the whole of the Project Company Works, State Works or Temporary Works; or
- (ii) the Principal Contractor Deed is terminated for any reason before the Project Company's Works, the State Works or the Temporary Works are complete:

then:

- (iii) to the extent that the Project Company's Works, the State Works or the Temporary Works includes construction work, RMS:
    - A. engages the Project Company as the principal contractor in respect of the Project Company's Works, the State Works and the Temporary Works on and from the date on which RMS's engagement and authorisation of Lend Lease Engineering Pty Limited (ABN 40 000 201 516) as principal contractor is terminated; and
    - B. authorises the Project Company to have management and control of each workplace at which the Project Company's Works, the State Works and the Temporary Works is to be carried out and to discharge the duties of a principal contractor under the WHS Legislation; and
  - (iv) the Project Company accepts the engagement as principal contractor and agrees to discharge the duties imposed on a principal contractor by the WHS Legislation.
- (d) The Project Company's engagement and authorisation as principal contractor pursuant to clause 7.7(c) will continue:
- (i) subject to clause 7.7(d)(ii), until the earlier of:
    - A. the termination of this deed;
    - B. the Date of Completion;
    - C. in respect of each discrete part of the Third Party Works, the point in time when:
      - 1) if the Third Party Works are Local Area Works or Utility Service Works, RMS and the Independent Certifier have been provided with a copy of the notice referred to in clause 15.2(a)(ii) or 15.3(a)(ii) (as applicable); or
      - 2) if the Third Party Works are Property Works, RMS's Representative has been provided with a certificate or statement referred to in clause 9.4(a)(ii); or
    - D. in respect of the areas specified in the Site Schedule, the RMS Interface Site Access Schedule, the RMS Traffic Site Access Schedule or the M2 Interface Site Access Schedule,

the termination or expiry of the rights referred to in clause 9.1(a) or 9.3 (as applicable),

(unless sooner revoked by RMS); and

- (ii) in respect of any defect rectification work carried out under clause 15.1 that is construction work (other than any defect rectification work for which Lend Lease Engineering Pty Limited (ABN 40 000 201 516) is the principal contractor), during the period any such work is carried out.
- (e) Without limiting the Project Company's obligations under any other provision of this deed, to the extent that:
- (i) the O&M Work; or
  - (ii) any other work carried out pursuant to clause 15 (other than any work for which Lend Lease Engineering Pty Limited (ABN 40 000 201 516) has been engaged as principal contractor under the Principal Contractor Deed) or the Change Procedure after the date referred to in clause 7.7(d),  
  
(together the **O&M Phase Work**) includes construction work:
    - (iii) RMS engages the Project Company as the principal contractor in respect of the O&M Phase Work;
    - (iv) the Project Company acknowledges that clause 16.1 permits the Project Company to manage and control each workplace at which the O&M Phase Work is to be carried out and to discharge the duties of a principal contractor under the WHS Legislation;
    - (v) the Project Company accepts the engagement as principal contractor and agrees to discharge the duties imposed on a principal contractor by the WHS Legislation; and
    - (vi) the Project Company's engagement and authorisation as principal contractor pursuant to this clause 7.7(e) will continue until the termination of this deed (unless sooner revoked by RMS).
- (f) If the Project Company is engaged as principal contractor pursuant to clause 7.7(c) or clause 7.7(e), the Project Company must:
- (i) ensure that if any Law, including in the State or Territory in which the Project Works, the Temporary Works or the O&M Works are situated or being carried out (as the case may be) requires that:
    - A. a person:
      - 1) be authorised or licensed (in accordance with the WHS Legislation) to carry out any work at that workplace, that person is so authorised or licensed and complies with any conditions of such authorisation or licence; and/or
      - 2) has prescribed qualifications or experience or, if not, is to be supervised by a person who has prescribed qualifications or experience (as defined in the WHS Legislation), that person has the



required qualifications or experience or is so supervised; or

- B. a workplace, plant or substance (or design) or work (or class of work) be authorised or licensed, that workplace, plant or substance, or work is so authorised or licensed;
  - (ii) not direct or allow a person to carry out work or use plant or substance at a workplace unless the requirements of clause 7.7(e)(i) are met (including any requirement to be authorised, licensed, qualified or supervised); and
  - (iii) if requested by RMS or required by the WHS Legislation, produce evidence of any approvals, certificates, authorisations, licences, prescribed qualifications or experience or any other information relevant to work health and safety (as the case may be) to the satisfaction of RMS (acting reasonably) before the Project Company, the State Works Contractor or a Subcontractor (as the case may be) commences such work.
- (g) If the engagement of the Project Company as principal contractor under this clause is not effective for any reason, the Project Company agrees that it will exercise and fulfil the functions and obligations of the principal contractor under the WHS Legislation as if it had been validly engaged and authorised as principal contractor under clause 7.7(c) or clause 7.7(e) (as applicable).

## 7.8 Work health and safety

- (a) The Project Company must carry out the Project Company's Works and the Temporary Works, and ensure that the State Works Contractor carries out the State Works:
  - (i) safely and in a manner that does not put the health and safety of persons at risk; and
  - (ii) in a manner that protects property.
- (b) If there is a risk of injury to people or damage to property arising from the Project Works or the Temporary Works:
  - (i) RMS's Representative may direct the Project Company to change its manner of working or to cease working, or procure that the State Works Contractor changes its manner of working or ceases working to minimise that risk; and
  - (ii) the Project Company must, at its cost, comply with, and ensure that the State Works Contractor complies with, any direction given by RMS's Representative under clause 7.8(b)(i).
- (c) The Project Company must:
  - (i) ensure that in carrying out the Project Activities under this deed and the State Works Deed, the Project Company and the State Works Contractor (respectively):
    - A. comply with all Laws and other requirements of this deed and the State Works Deed for work, health, safety and rehabilitation management;

- B. ensure that all Subcontractors engaged by the Project Company or the State Works Contractor and all subcontractors and consultants engaged by the Contractor comply with their respective obligations under the WHS Legislation; and
  - C. comply with their obligations under the WHS Legislation to consult, cooperate and coordinate activities with all other persons who have a work health and safety duty in relation to the same matter;
- (ii) have, and ensure that the State Works Contractor has, a Corporate WHS Management System which complies with the Law and is otherwise in accordance with the NSW Government Work Health & Safety Management Systems and Auditing Guidelines (5th Edition) (September 2013);
  - (iii) ensure that the Contractor (or, if the Project Company is engaged as principal contractor pursuant to clause 7.7, the Project Company) exercises and fulfils all of the functions and obligations of a principal contractor under the WHS Legislation so as to:
    - A. ensure that the responsibilities imposed on a principal contractor by the WHS Legislation are discharged; and
    - B. enable RMS to satisfy its obligations under the WHS Legislation in connection with the Project Site;
  - (iv) notify RMS's Representative immediately (and in any event, within 12 hours after such matter arising) of all work health, safety and rehabilitation matters arising out of, or in any way in connection with, the Project Activities;
  - (v) institute, and ensure that the State Works Contractor institutes, systems to obtain regular written assurances from all Subcontractors about their ongoing compliance with WHS Legislation including the due diligence obligations contained therein;
  - (vi) provide, and ensure that the State Works Contractor provides, RMS's Representative with the written assurances referred to in clause 7.8(c)(v), together with written assurances from the Project Company about the Project Company's ongoing compliance with the WHS Legislation and from the State Works Contractor about the State Works Contractor's ongoing compliance with the WHS Legislation;
  - (vii) provide RMS's Representative with a written report of all work health, safety and rehabilitation matters (including matters concerning or arising out of, or in any way in connection with, clauses 7.7 and 7.8) or any other relevant matters as RMS's Representative may reasonably require from time to time, including a summary of the Project Company's and the State Works Contractor's compliance with the WHS Legislation;
  - (viii) cooperate with RMS to ensure that all parties are able to comply with their respective obligations under the WHS Legislation;
  - (ix) exercise a duty of utmost good faith to RMS, and ensure that the State Works Contractor exercises a duty of utmost good faith to RMS, in carrying out the Project Activities to enable RMS to discharge its duties under the WHS Legislation;

- (x) ensure that it does not do anything or fail to do anything, and ensure that the State Works Contractor does not do anything or fail to do anything, that would cause RMS to be in breach of the WHS Legislation; and
  - (xi) ensure that each Subcontract includes provisions equivalent to clause 7.8.
- (d) To the extent not prohibited by Law, the Project Company must indemnify RMS from and against any claims against RMS, or Loss suffered or incurred by RMS, arising out of or in any way in connection with:
- (i) if the Project Company is engaged as principal contractor pursuant to clause 7.7, the failure of the Project Company to exercise or fulfil the functions and responsibilities of the principal contractor under WHS Legislation;
  - (ii) the Project Company's failure to comply with clauses 7.7 or 7.8 to the extent such failure arises out of or in connection with the State Works; or
  - (iii) the Project Company's failure to otherwise comply with clauses 7.7 or 7.8,

except to the extent the appointment or engagement of the Project Company as principal contractor is revoked by RMS (in which case the Project Company must indemnify RMS from and against any claims against RMS, or Loss suffered or incurred by RMS, arising out of or in any way in connection with a failure by the Project Company referred to in clause 7.8(d)(i) or (iii) before that revocation).

## 7.9 Project WHS Management Plan

- (a) The Project Company acknowledges that preparation of the Project WHS Management Plan in accordance with clause 7.5 is a condition precedent to the commencement of RMS's obligations under clause 9.1(a).
- (b) Without limiting any requirement of the WHS Legislation or this deed, the Project WHS Management Plan must:
  - (i) set out in adequate detail the procedures the Project Company and the State Works Contractor will implement to manage the Project Works and the Temporary Works from a work health and safety perspective;
  - (ii) describe how the Project Company and the State Works Contractor propose to ensure that the Project Works and the Temporary Works are performed consistently with the WHS Legislation and any other Law;
  - (iii) address the matters specified in the WHS Legislation;
  - (iv) comply with the requirements applicable to a "Work Health and Safety Management Plan" or "Site Specific Safety Management Plan" set out in section 9 of the NSW Guidelines; and
  - (v) comply with the requirements applicable to a "Project WHS Management Plan" set out in the NSW Government Work Health and Safety Management Systems and Auditing Guidelines (5th edition) (September 2013).
- (c) Without limiting clause 7.5, the Project Company must:

- (i) continue to correct any defects in or omissions from the Project WHS Management Plan (whether identified by RMS's Representative or the Project Company); and
  - (ii) regularly review and, as necessary, revise the Project WHS Management Plan in accordance with the WHS Legislation,
- and submit an amended draft of its Project WHS Management Plan to RMS's Representative, after which clause 7.5 will reapply (to the extent applicable).
- (d) The Project Company must document and maintain detailed records of inspections or audits undertaken as part of the Project WHS Management Plan.
  - (e) The Project Company must carry out, and ensure that the State Works Contractor carries out, the Project Works and the Temporary Works in accordance with, and otherwise implement, the latest Project WHS Management Plan.

### 7.10 Site induction

- (a) Without limiting the Project Company's obligations under clause 4.2(c) to comply, and ensure that the State Works Contractor complies, with the conditions and requirements of all Approvals, the Project Company must:
  - (i) provide safety and environmental site induction for persons nominated by RMS's Representative on the Project Site and for all personnel directly or indirectly engaged by the Project Company or the State Works Contractor and requiring access to the Project Site, any Extra Land and any other land upon which the Project Activities are being carried out; and
  - (ii) ensure such persons satisfactorily complete such site induction before such persons are given such access or commence such work.
- (b) The induction must:
  - (i) comply with all applicable Law, Project Plans and RMS's procedures, policies and rules; and
  - (ii) otherwise be in accordance with the requirements of this deed.
- (c) The Project Company must keep and maintain comprehensive and detailed induction records and provide RMS's Representative or its nominee, upon request, with access to such records.

### 7.11 Community relations

The Project Company:

- (a) acknowledges that the areas where the Project Activities are being carried out are of great importance to many people, including local residents and businesses; and
- (b) must manage and participate in all community relations and involvement programs and activities as:
  - (i) required by the SWTC;
  - (ii) contained in the Community Liaison Implementation Plan; or

- (iii) reasonably required by RMS from time to time.

## 7.12 Environmental Requirements

The parties must comply with the requirements of Schedule 5.

## 7.13 Liability under the NGER Legislation

- (a) Without limiting any other clause in this deed, the Project Company acknowledges and agrees that if the Project Activities or the Project Works and the Temporary Works constitute a "facility" within the meaning of the NGER Legislation, then for the purposes of the NGER Legislation, it has operational control of that facility or facilities and the Project Company will comply, and ensure that the State Works Contractor complies, with any obligations arising in respect of the Project Activities or the Project Works and the Temporary Works under the NGER Legislation.
- (b) If, despite the operation of clause 7.13(a), RMS incurs, or but for this clause 7.13 would incur, a Liability under or in connection with the NGER Legislation as a result of or in connection with the Project Activities or the design and construction of the Project Works and the Temporary Works (but not the operation of the Project Works), and the NGER Legislation provides that such Liability can be transferred by RMS to the Project Company, the Project Company must, upon the written request of RMS, do all things reasonably necessary to transfer the Liability to the Project Company.

## 7.14 Indemnity

The Project Company must at all times indemnify RMS and its Related Parties from and against any Claim against, or Loss suffered or incurred by, RMS or its Related Parties, arising out of or in connection with:

- (a) the Project Company's breach of its obligations, including a failure to procure that the State Works Contractor complies with its obligations; and
- (b) any inaccuracy or omission in information provided to RMS by the Project Company or the State Works Contractor,

under clause 7.13 and paragraphs 4 and 5 of Schedule 5.

## 7.15 Aboriginal participation in construction

- (a) The Project Company must comply with, and ensure that the State Works Contractor complies with, the NSW Government Aboriginal Participation in Construction Guidelines (**Guidelines**) as amended from time to time (as at the date of signing of this deed, the edition of the Guidelines applying to projects commencing after 1 January 2007).
- (b) The Project Company must:
  - (i) prior to it or the State Works Contractor commencing any Project Activities on the Project Site, submit to RMS a "Statement of Opportunities for Aboriginal Participation" (as defined in the Guidelines) and document and submit to RMS's Representative a Project Aboriginal Participation Plan; and
  - (ii) implement, and ensure that the State Works Contractor implements, the Project Aboriginal Participation Plan.

- (c) The Project Company must systematically manage, and ensure that the State Works Contractor systematically manages, its Aboriginal participation processes in accordance with the Project Aboriginal Participation Plan.
- (d) The Project Company must demonstrate to RMS, and ensure that the State Works Contractor demonstrates to RMS, whenever requested, that it has met and is meeting at all times its obligations under clauses 7.15(a) to (c) inclusive.
- (e) The Project Company acknowledges that RMS's Representative may review the Project Aboriginal Participation Plan:
  - (i) prior to the commencement of the Project Activities on the Project Site; and
  - (ii) periodically during the course of the carrying out of the Project Activities, including by conducting an on-site verification that the Project Aboriginal Participation Plan is being correctly implemented, that performance targets are being met and that the stated outcomes are being achieved.

#### 7.16 Management of customers, stakeholders and other affected parties

- (a) The Project Company must, and must procure the State Works Contractor to, in carrying out the Project Activities:
  - (i) do all things necessary to minimise the disturbance, nuisance or inconvenience caused to the occupants of land adjoining the Project Site, Extra Land or Maintenance Site or located in the vicinity of the Project Site, Extra Land or Maintenance Site (including Existing Operations and Utility Services) as a result of the Project Activities;
  - (ii) to the extent reasonably possible in performing the Project Activities, not interfere with the free movement of traffic into and out of, adjacent to, around, on or about the Project Site or block or impair access to any premises, carpark, roadway, pedestrian ways, public spaces, parks, bicycle paths or facilities associated with the Existing Operations and Utility Services and must comply with RMS's reasonable directions in relation to them; and
  - (iii) program and coordinate the Project Activities using best practices so as to minimise the effect of the Project Activities on occupants of land adjoining the Project Site, Extra Land or Maintenance Site or located in the vicinity of the Project Site, Extra Land or Maintenance Site (including Existing Operations and Utility Services).
- (b) The Project Company must, in dealing with customers of the Motorway, stakeholders and other third parties affected by the Project Activities (**Stakeholders**):
  - (i) ensure that a representative of the Project Company can be contacted by Stakeholders during normal business hours and that the Project Company's contact details are publicly available, including on the Project Company's website;
  - (ii) give reasonable consideration to all feedback received from Stakeholders; and
  - (iii) actively manage any issues raised by Stakeholders.

- (c) The Project Company must immediately notify RMS in writing if any:
- (i) complaint is made or any proceedings are instituted or threatened;
  - (ii) letter of demand is issued; or
  - (iii) order or direction is made,
- by anyone (including any Authority or any landowner, lessee or licensee on or near the Project Site, Extra Land or Maintenance Site) against the Project Company, the State Works Contractor or any of their respective Related Parties in respect of any aspect of the carrying out of the Project Activities, including:
- (iv) Contamination, noise or vibration arising out of, or in any way in connection with, the Project Activities;
  - (v) the Project Company's or the State Works Contractor's non-compliance with any Environmental Document (or condition or requirement thereunder), any Project Plan or any Law regarding the Environment;
  - (vi) the Contractor's use or occupation of the Project Site or any Extra Land; or
  - (vii) Loss or damage of the kind referred to in clause 24.3.
- (d) Without limiting the Project Company's obligations under section 11 of the SWTC, the Project Company must (at its own cost):
- (i) deal proactively with any complaint, proceedings, letter of demand, order or direction referred to in clauses 7.16(b) and (c);
  - (ii) take all reasonable measures to resolve those matters as soon as possible (including defending any proceedings); and
  - (iii) keep a register of all complaints, proceedings, orders, letters of demand and directions referred to in clause 7.16(c), which:
    - A. contains full details of:
      - 1) each complaint, proceedings, letter of demand, order and direction; and
      - 2) the action taken by the Project Company with respect to each complaint, proceedings, letter of demand, order and direction;
    - B. is promptly updated to take into account any developments with respect to any complaint, proceedings, letter of demand, order or direction; and
    - C. may be inspected by RMS's Representative whenever RMS's Representative reasonably requires.
- (e) The Project Company must notify anyone who may be adversely affected by the Project Activities before the relevant work is carried out including notification of:
- (i) the likely duration of that work; and

- (ii) the NorthConnex 24 hour telephone number, postal address and email address established by RMS, in case any person wishes to make a complaint.

## 7.17 Existing Operations

- (a) The Project Company acknowledges that:
  - (i) Existing Operators must not be prevented from continuing their Existing Operations during the course of the carrying out of the Project Activities; and
  - (ii) the access ways to the Project Site are used by other persons (including in connection with the Existing Operations) and will not be available exclusively to the Project Company or the State Works Contractor.
- (b) The Project Company bears the risk of coordinating its access to the Project Site with any other relevant party (including Existing Operators and the State Works Contractor) that use the access ways to the Project Site.
- (c) Without limiting any other obligations of the Project Company or the State Works Contractor under the Project Documents, the Project Company must:
  - (i) comply, and ensure that the State Works Contractor complies, with RMS's reasonable directions in connection with:
    - A. the Existing Operations (including access to and use of the Project Site) to the extent required to give effect to clause 7.17(a); and
    - B. work health and safety issues to enable RMS to comply with, and not place RMS in breach of, its obligations under any Law relating to work health and safety;
  - (ii) comply, and ensure that the State Works Contractor complies, with all reasonable policies, procedures and rules of RMS applying from time to time (as notified by RMS) in respect of the Existing Operations (including in relation to workplace health and safety and/or the Environment);
  - (iii) keep itself informed, and ensure that the State Works Contractor keeps itself informed, as to the requirements to comply with and not do anything which may place RMS in breach of Law applying to the Existing Operations on the Project Site;
  - (iv) ensure that it and the State Works Contractor, in carrying out and completing the Project Activities, ensure that the Project Works properly interface and integrate with, and connect to, the physical infrastructure of the Existing Operations so as to enable the Project Works, when completed, to fully comply with the requirements of this deed; and
  - (v) immediately:
    - A. repair and make good, and ensure that the State Works Contractor repairs and makes good, any damage to the physical infrastructure of the Existing Operations to the extent arising out of or in any way in connection with the Project Activities; and



- B. when directed by RMS's Representative, take such action, and ensure that the State Works Contractor takes such action, as is required to ensure that its obligations in this clause 7.17(c) are complied with.
- (d) If the Project Company becomes aware that a person who is not an Existing Operator (**Other Operator**):
- (i) owns, operates or controls any infrastructure (including existing infrastructure and Utility Services), or
  - (ii) undertakes any business or operation,
- on or in the vicinity of the Project Site (**Other Operations**), the Project Company must use reasonable endeavours to:
- (iii) ensure that the Other Operator is not prevented from carrying out the Other Operations by the Project Activities;
  - (iv) comply with RMS's reasonable directions in connection with the Other Operations; and
  - (v) not do anything to place RMS in breach of Law applying to the Other Operations on the Project Site.
- (e) The Project Company must ensure that the State Works Contractor and their respective Related Parties at all times comply with this clause 7.17.

## 7.18 Third Party Agreements

- (a) The Project Company must, within 20 Business Days after the date of this deed, execute the Third Party Agreements (substantially in the forms contained in Exhibit K).
- (b) RMS must, within 20 Business Days after the date of this deed, procure the execution of:
- (i) the document entitled "Development Deed - Works Adjacent to the Railway Corridor" between the Project Company and RailCorp; and
  - (ii) the document entitled "Development Deed - Works in Proximity to the NWRL Project and Railway Corridor" between the Project Company and Transport for NSW,
- (substantially in the forms contained in Exhibit K) by RailCorp and Transport for NSW, respectively.
- (c) With effect from the execution of the Third Party Agreements by all parties to them, the Project Company must comply with, and perform its obligations under, the Third Party Agreements.

## 7.19 M2 Motorway integration

- (a) The Project Company must, in carrying out the Project Activities comply, and ensure that the State Works Contractor complies, with:
- (i) all conditions and requirements set out in the M2 Interface Deed; and

- (ii) any directions of RMS in relation to compliance with the conditions and requirements of this deed and the State Works Deed (respectively).
- (b) The Project Company must indemnify RMS from and against any Claim or Loss RMS suffers or incurs arising out of or in connection with:
  - (i) physical damage to the M2 Motorway caused by connection of the Motorway to the M2 Motorway; or
  - (ii) the impact of the carrying out of the Project Works on the revenue derived from the M2 Motorway.

## 7.20 M7 Motorway integration

- (a) The Project Company must, in carrying out the Project Activities comply, and ensure that the State Works Contractor complies, with:
  - (i) all conditions and requirements set out in Appendix 64 of the SWTC and the M7 Interface Deed; and
  - (ii) any directions of RMS in relation to compliance with the conditions and requirements of this deed and the State Works Deed (respectively).
- (b) The Project Company must indemnify RMS from and against any Claim or Loss RMS suffers or incurs arising out of or in connection with physical damage to the M7 Motorway caused by the Project Company's Activities.
- (c) RMS consents to the Project Company entering into, performing its obligations and exercising its rights in accordance with the M7 Interface Deed.

## 7.21 M1 Motorway integration

- (a) The Project Company must, in carrying out the Project Activities comply, and ensure that the State Works Contractor complies, with:
  - (i) all conditions and requirements set out in the SWTC in respect of the M1 Motorway; and
  - (ii) any directions of RMS in relation to compliance with the conditions and requirements of this deed and the State Works Deed (respectively).
- (b) Without limiting any other indemnity in this deed, the Project Company must indemnify RMS from and against any Claim or Loss RMS suffers or incurs arising out of or in connection with physical damage to the M1 Motorway caused by the Project Company's Activities.
- (c) Notwithstanding clause 7.21(b) or anything to the contrary in any Project Document, the Project Company will have no liability to RMS or its Related Parties in respect of any Claim or Loss RMS or its Related Parties suffer or incur arising out of or in connection with loss of access charges, tolls or road user charges levied in respect of the M1 Motorway.

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## 8. Securities

### 8.1 Unconditional undertakings

- (a) The Project Company must provide to RMS or procure that RMS is provided with:

- (i) within \_\_\_\_\_ after the date of this deed:
  - A. \_\_\_\_\_ letters of credit for an aggregate amount equal to \$: \_\_\_\_\_ and \_\_\_\_\_
  - B. \_\_\_\_\_ not used;
- (ii) \_\_\_\_\_ two unconditional undertakings for \$: \_\_\_\_\_ ; and \_\_\_\_\_
- (iii) the unconditional undertakings referred to in clauses 17.5(b) and 17.14(c)(i)B if and when required by this deed,

each of which must be:

- (iv) in respect of the letters of credit referred to in clause 8.1(a)(i)A, in the form of Schedule 30 (but without utilising the "Notice of Reduction" mechanism in clause 7(b) of Schedule 30) and, in respect of the unconditional undertakings referred to in clauses 8.1(a)(ii) and (iii), in the form of Schedule 7;
  - (v) only in favour of RMS;
  - (vi) where required, duly stamped;
  - (vii) in respect of the letters of credit referred to in clause 8.1(a)(i)A, at all times provided by a Qualified LC Issuer, and in respect of the unconditional undertakings referred to in clauses 8.1(a)(ii) and (iii), be issued by \_\_\_\_\_ with a credit rating of no less than the Required Rating, or as otherwise approved by RMS in its absolute discretion; and
  - (viii) payable at an office of the issuer in Sydney (or such other place as RMS may approve).
- (b) The parties acknowledge and agree that:
- (i) the Project Company will be deemed to have satisfied its obligation under clause 8.1(a)(ii) \_\_\_\_\_ to provide two unconditional undertakings meeting the requirements of clauses 8.1(a)(iv) to 8.1(a)(viii) (inclusive) directly to RMS; and
  - (ii) RMS may call on the unconditional undertakings \_\_\_\_\_ as contemplated by clause 8.1(b)(i) in accordance with the terms of this deed.
- (c) The parties acknowledge and agree that:
- (i) the Project Company will be deemed to have satisfied its obligation under clause 8.1(a)(i)A by \_\_\_\_\_ to provide the letters of credit which satisfy the requirements of clauses 8.1(a)(iv) to 8.1(a)(viii) (inclusive) directly to RMS; and
  - (ii) RMS may call on the letters of credit \_\_\_\_\_ as contemplated by clause 8.1(c)(i) in accordance with the terms of this deed.

- (d) Subject to clause 8.1(g) and to RMS's rights to have recourse to the unconditional undertakings and letters of credit and to the cash proceeds if one or more of the unconditional undertakings or letters of credit are converted into cash, RMS must:
- (i) within \_\_\_\_\_ after the Date of Completion, release the letters of credit procured by the Project Company under clause 8.1(a)(i)A (or the remaining proceeds of the letters of credit if they have been converted into cash);
  - (ii) not used;
  - (iii) within \_\_\_\_\_ after the correction of all Defects in the Local Area Works, release the unconditional undertakings procured by the Project Company under clause 8.1(a)(ii) (or the remaining proceeds of the unconditional undertakings if they have been converted into cash); and
  - (iv) release any unconditional undertaking provided by the Project Company under clause 8.1(a)(iii) in respect of clause 17.5(b) (or the remaining proceeds of the unconditional undertaking if it has been converted into cash) within \_\_\_\_\_ after the date on which the Project Company demonstrates to RMS's satisfaction (acting reasonably) that the non-conformances referred to in clause 17.5(b) have been rectified to the full extent to which they can be rectified.
- (e) RMS:
- (i) may have recourse to at any time after Financial Close:
    - A. any unconditional undertaking or letter of credit provided under this clause 8.1 at any time; or
    - B. the proceeds of any unconditional undertaking or letter of credit if it has been converted into cash;
  - (ii) is not obliged to pay the Project Company or any Related Party of the Project Company interest on:
    - A. any unconditional undertaking or letter of credit; or
    - B. the proceeds of any unconditional undertaking or letter of credit if it has been converted into cash;
  - (iii) does not hold the proceeds referred to in clauses 8.1(e)(i)B or 8.1(e)(ii)B on trust for the Project Company or any Related Party of the Project Company; and
  - (iv) will, as soon as reasonably practicable after RMS has had recourse to an unconditional undertaking or letter of credit provided under this clause 8.1 (or the proceeds of an unconditional undertaking or letter of credit provided under this clause 8.1 which has been converted into cash), give the Project Company a written notice of RMS's reasons for doing so.
- (f) The Project Company must not, and must procure that its Related Parties do not, take any steps to injunct or otherwise restrain:

- (i) any issuer of any unconditional undertaking or letter of credit provided under this clause 8.1 from paying RMS pursuant to the unconditional undertaking or letter of credit;
  - (ii) RMS from taking steps for the purposes of making a demand under any unconditional undertaking or letter of credit provided under this clause 8.1 or receiving payment under any such unconditional undertaking or letter of credit; or
  - (iii) RMS using the proceeds received under any unconditional undertaking or letter of credit provided under this clause 8.1.
- (g) Despite any other provision of this deed to the contrary, where this deed may otherwise require RMS to release an unconditional undertaking or letter of credit or this deed is terminated by RMS, RMS may continue to hold the unconditional undertaking or letter of credit after the date for its release or the termination of this deed to the extent of any claim which RMS may have against the Project Company or the State Works Contractor arising out of, or in any way in connection with, this deed, the State Works Deed or the Project Activities whether for damages (including liquidated damages) or otherwise provided that RMS must release or procure the release of each unconditional undertaking or letter of credit (or the remaining proceeds of the unconditional undertaking or letter of credit if it has been converted into cash) to the Project Company or the State Works Contractor after such claim has been satisfied.
- (h) If the issuer of an unconditional undertaking provided to RMS under clause 8.1 ceases to have the Required Rating, the Project Company must:
- (i) promptly, and within \_\_\_\_\_ of the Project Company becoming aware of that circumstance, notify RMS of that circumstance;
  - (ii) subject to clause 8.1(h)(iii), within \_\_\_\_\_ of being requested to do so by RMS, procure the issue to RMS of a replacement unconditional undertaking which satisfies the requirements of this clause 8.1, provided that if, at that time, \_\_\_\_\_ no longer have the Required Rating, the Project Company may procure a replacement unconditional undertaking from the Major Australian Bank with the then highest rating below the Required Rating. However, if the conditions upon which such replacement unconditional undertaking is provided are materially different to those of the unconditional undertaking which it is replacing, the Project Company may seek RMS's consent (which is not to be unreasonably withheld or delayed) to procure a replacement unconditional undertaking from a foreign bank with a branch in Sydney which has the same rating; and
  - (iii) if, at any time after the Project Company has procured a replacement unconditional undertaking from a Major Australian Bank which does not have the Required Rating or a foreign bank pursuant to clause 8.1(h)(ii), \_\_\_\_\_ have the Required Rating, the Project Company must:
    - A. promptly, and within \_\_\_\_\_ of becoming aware of that circumstance, notify RMS of that circumstance; and
    - B. within \_\_\_\_\_ of becoming aware of that circumstance, procure the issue to RMS of a replacement unconditional undertaking from a Major Australian Bank with the Required Rating which satisfies the requirements of this clause 8.1.

- (i) If an issuer of a letter of credit referred to in clause 8.1(a)(i)A ceases to be a Qualified LC Issuer, then the Project Company must:
  - A. promptly notify RMS of that circumstance; and
  - B. within 20 Business Days of being requested by RMS to do so, procure the issue to RMS of one or more replacement Letters of Credit which satisfy the requirements of this clause 8.1.



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## 9. Access and Project Site

### 9.1 Access

- (a) Subject to clause 7.9(a), Schedule 8 and any other provision of this deed affecting access to land, RMS must:
- (i) give, or ensure the Project Company, the State Works Contractor and each of their respective Related Parties and invitees have access to each area of the Project Site specified in the Site Schedule by the relevant dates set out in the Site Schedule (and if a period is specified in relation to access to a part of the Project Site, then by the last day of that period); and
  - (ii) thereafter continue to allow, or ensure that the Project Company, the State Works Contractor, each of their Related Parties and invitees continue to be allowed, access to each such area of the Project Site specified in the Site Schedule.
- (b) The rights under clause 9.1(a) in respect of the areas of the Project Site (or any part of them) specified in the Site Schedule will expire upon the later of:
- (i) the dates specified in the Site Schedule;
  - (ii) in respect of those parts of the Project Site on which Local Area Works, Property Works or Utility Service Works are carried out, the date of correction of all Defects in the Local Area Works, the Property Works and the Utility Service Works (as applicable) in accordance with clauses 15.2, 15.3 and 15.4;
  - (iii) in respect of those parts of the Project Site referred to in paragraph 2(a)(i) of Schedule 18, the date of receipt by RMS of the survey referred to in, and meeting the requirements of, paragraph 2 of Schedule 18; and
  - (iv) otherwise, the Date of Completion.
- (c) The Project Company acknowledges and agrees that access to the Project Site or any part of it in accordance with the Site Schedule pursuant to this clause 9.1 and Schedule 8 will confer on the Project Company a right to such management and control as is necessary to:
- (i) enable the Project Company and the State Works Contractor to execute the Project Activities in accordance with this deed and the State Works Deed; and
  - (ii) discharge its responsibilities under the WHS Legislation, including to discharge its responsibilities as principal contractor.



## 9.2 Mitigation

The Project Company must take all reasonable steps to Mitigate any delay caused by, or any other effect of, a failure by RMS to give, or ensure that the Project Company has, access to the Project Site in accordance with the Site Schedule pursuant to clause 9.1, including making reasonable changes to the sequencing or timing of, or the construction methodologies used in, the Project Activities and, where reasonably practicable, changing the Overall D&C Program or the Subsidiary D&C Programs to reflect this.

## 9.3 Access to Interface Areas and locations specified in RMS Interface Site Access Schedule

(a) The Project Company must procure that the Contractor undertakes all matters necessary to obtain approval to carry out relevant Project Works and Temporary Works at:

- (ia) locations set out in the RMS Interface Site Access Schedule; and
- (ib) an Interface Area from the relevant Starting Date until the end of the relevant Duration,

including but not limited to:

- (i) preparing and submitting to the Transport for NSW Transport Management Centre (**TMC**):
  - A. traffic management plans (**Traffic Management Plans**); and
  - B. applications for road occupancy licences (**ROLs**) from TMC,

in accordance with Good Industry Practice (including, but not limited to submitting such documents in a timely manner so as to allow all relevant entities sufficient time (which, in respect of a Traffic Management Plan for a relevant Interface Area, is not less than 3 months after the date of provision to the relevant entity of the version which is capable of approval) to consider, amend (if necessary) and agree);
- (ii) using all reasonable endeavours in accordance with Good Industry Practice to agree and obtain approval of the Traffic Management Plans and ROLs;
- (iii) complying with its obligations in the RMS Interface Site Access Schedule, the RMS Traffic Site Access Schedule and the M2 Interface Site Access Schedule and under this deed;
- (iv) complying with road occupancy requirements, including all Traffic Management Plans and ROLs;
- (v) accepting and implementing the reasonable requirements of the parties who have input into the Traffic Management Plans and the approval of ROLs (other than any Unreasonable Objection); and
- (vi) providing RMS with not less than 4 Business Days prior written notice of the date on which the Project Company, the State Works Contractor, the Contractor or their Related Parties anticipates it will access an Interface Area (in respect of the RMS Interface Site Access Schedule and the RMS Traffic Site Access Schedule) the subject of a ROL to carry out Project Works or Temporary Works.

- (b) If:
- (i) an Unreasonable Objection arises in respect of an Interface Area, other than as a result of the Project Company's failure to comply with clause 9.3(a); and
  - (ii) as a result of that Unreasonable Objection, the Project Company or the State Works Contractor or their Related Parties are denied access to, occupation or use of an Interface Area from the corresponding Starting Date until the end of the corresponding Duration (in each case for the purposes contemplated by the RMS Traffic Site Access Schedule or the ROL),
- then:
- (iii) in respect of the RMS Traffic Site Access Schedule, RMS must procure that the Project Company, the State Works Contractor and its Related Parties has access to, and occupation and use of that Interface Area from the Starting Date until the end of the corresponding Duration; and
  - (iv) in respect of the M2 Interface Site Access Schedule, provided there is no Unreasonable Objection (as that term is defined in the D&C Deed) from the M2 Entities, RMS must procure that the Project Company, the State Works Contractor and its Related Parties has access to, and occupation and use of that Interface Area from the Starting Date until the end of the corresponding Duration.
- (c) It shall be considered an Unreasonable Objection to require access to, occupation or use of an Interface Area to be delayed beyond the Starting Date if:
- (i) the Project Company and the State Works Contractor have complied with their obligations pursuant to clause 9.3(a) with respect to obtaining approval for access to, occupation or use of that Interface Area; and
  - (ii) such delay:
    - A. exceeds 10 Business Days after the Starting Date; and
    - B. will delay Completion beyond the Project Company's and State Works Contractor's planned date for Completion as set out in the Overall D&C Program.
- (d) RMS shall not be in breach of its obligations under clause 9.3(b) if and to the extent that:
- (i) a Force Majeure event;
  - (ii) the police and/or emergency services; or
  - (iii) a NSW Road Authority (acting in circumstances of an emergency or to ensure safety) or Authority (other than RMS or TMC),

prevents or restricts RMS from providing the Project Company or the State Works Contractor or their Related Parties with access to and occupation and use of the whole or part of that Interface Area. RMS must notify the Project Company and the State Works Contractor as soon as reasonably practicable after it ceases to be prevented from providing access as a result of such event or entities and must provide access as soon as reasonably practicable thereafter.

## 9.4 Property Works

- (a) The Project Company must:
- (i) carry out, and ensure that the State Works Contractor carries out, the Property Works:
    - A. in accordance with the SWTC; and
    - B. so that they are, upon RMS's Representative being provided with a certificate or statement referred to in clause 9.4(a)(ii), fit for their intended purpose;
  - (ii) after completion of the Property Works with respect to an Unowned Parcel, including the work described in clause 9.4(f), provide to RMS's Representative:
    - A. a certificate in the form of Schedule 9, duly executed by the owner or owners of any part of the Unowned Parcel; or
    - B. a statement signed by the Project Company to the effect that such owner or owners have failed or refused to sign a certificate in the form of Schedule 9 within 15 Business Days of it being provided by the Project Company or the State Works Contractor to the owner or owners following completion of the Property Works including the work described in clause 9.4(f); and
  - (iii) indemnify RMS from and against any claims against RMS, or Loss suffered or incurred by RMS, arising out of or in any way in connection with a claim by the owner or owners of any part of an Unowned Parcel where:
    - A. such owner or owners have not duly signed a certificate in the form of Schedule 9; and
    - B. the claim or Loss arises out of or in any way in connection with a claim that the Property Works have not been carried out in accordance with this deed.
- (b) The acceptance of a certificate or statement provided by the Project Company under clause 9.4(a)(ii) by RMS's Representative is not approval by RMS or RMS's Representative of the Project Company's performance of its obligations under this clause 9.4 or the State Works Contractor's performance of any Property Works.
- (c) Where any Property Works are required to be carried out on an Unowned Parcel, the Project Company must give a written notice to the owner or owners of the property (with a copy to RMS's Representative) which:
- (i) describes the Property Works to be carried out;
  - (ii) requests access for the purposes of carrying out the Property Works; and
  - (iii) specifies the intended date for commencement of the Property Works,
- not less than 10 Business Days prior to the day on which the Project Company intends to commence the Property Works

- (d) If the owner or owners of a property do not provide the Project Company or the State Works Contractor with sufficient access to carry out the Property Works from either:
- (i) the date notified in the notice under clause 9.4(c); or
  - (ii) such other date as may be agreed between the Project Company and the owner or owners,
- the Project Company must:
- (iii) give RMS's Representative a notice stating this; and
  - (iv) not carry out, and ensure that the State Works Contractor does not carry out, the Property Works until RMS's Representative gives the Project Company a notice specifying that the owner or owners of the property have agreed to give access, in which event clause 9.4(c) will reapply.
- (e) Upon being given access to any property for the purpose of carrying out any Property Works, the Project Company must promptly carry out, or ensure that the State Works Contractor carries out, those Property Works in a manner which minimises inconvenience and disruption to the owners, occupiers and users of the Unowned Parcel.
- (f) The Project Company must:
- (i) rehabilitate, or ensure that the State Works Contractor rehabilitates, any part of an Unowned Parcel to the state agreed with the owner of such Unowned Parcel prior to commencing the work or, if no such agreement is reached, the state it was in immediately prior to the Project Company or the State Works Contractor obtaining access; and
  - (ii) otherwise repair, or ensure that the State Works Contractor repairs, any damage or degradation to such a part arising out of or in any way in connection with the performance of its obligations under this clause 9.4.

## 9.5 Extra Land

- (a) The Project Company must:
- (i) subject to this clause 9.5, carry out, and procure the State Works Contractor to carry out, the Project Works to ensure that, on Completion, the whole of the Motorway Structure (as defined in Schedule 18), excluding:
    - A. associated ancillary infrastructure including cables, signage, conduits and cameras located on the M2 Motorway and the M7 Motorway;
    - B. infrastructure on the Remote Areas (as defined in clause 9.13); or
    - C. any part of the Motorway Structure which is on the Temporary Areas,
 is located within the Motorway Site; and

- (ii) subject to clause 9.5(c), procure for itself and the State Works Contractor, and at its own cost, the occupation or use of or relevant rights over any land or buildings in addition to:
- A. the Project Site;
  - B. subject to clause 9.3, the areas and locations specified in the M2 Interface Site Access Schedule and the RMS Traffic Site Access Schedule; and
  - C. subject to clause 9.13, the Remote Areas,
- which is necessary or which it requires for the execution of the Project Activities (which may include additional land or buildings required for the Third Party Works); and
- (iii) indemnify RMS from and against any claims against RMS, or Loss suffered or incurred by RMS, arising out of or in any way in connection with a claim by the owner or occupier of any part of the Extra Land where:
- A. such owner or occupier has not executed a release in the form of Schedule 9; and
  - B. the claim or Loss arises out of or in connection with the Project Activities.
- (b) Without limiting clause 9.5(a)(ii) but subject to clauses 9.5(c), (d) and (e), to the extent that the Project Company is not able to comply, or has not complied, with clause 9.5(a)(i), the Project Company must procure for RMS, at the Project Company's cost, any land not referred to in any of clauses 9.5(a)(i)(A), (B) or (C), in addition to the Project Site on which the Project Company or the State Works Contractor has constructed the Motorway Structure (as defined in Schedule 18) and:
- (i) the Project Company must promptly give written notice to RMS containing details of the land which it is obliged to procure; and
  - (ii) RMS may give written notice to the Project Company that RMS will procure all or part of the land the subject of the Project Company's notice.
- (c) Without limiting the Project Company's obligations under clauses 11 and 13 of this deed but subject to clauses 9.5(d) and (e), if the Project Company believes (acting reasonably) that an adjustment to the volumetric boundaries of the Motorway Site specified in Part B of the Site Schedule is required to accommodate an adjustment to the Motorway Structure:
- (i) as a consequence of Site Conditions:
    - A. which were not identified in any of the Information Documents; or
    - B. which a competent and experienced contractor carrying out activities similar to the Project Activities, acting in accordance with Good Industry Practice, would not have identified had it done the things which the Project Company warrants that it and the State Works Contractor have done under clause 9.7;

- (ii) to satisfy applicable safety and design standards which have come into effect after the date of this deed; or
  - (iii) to enable the Project Company to obtain third party certifications that are required to be obtained before the Motorway may be opened to the public for the safe, continuous and efficient passage of vehicles,
- then:
- (iv) the Project Company may give RMS a written notice requesting that RMS adjust the volumetric boundaries specified in Part B of the Site Schedule at the Project Company's cost; and
  - (v) if the Project Company gives RMS a written notice pursuant to clause 9.5(c)(iv), RMS must use its best endeavours to promptly procure the land the subject of the Project Company's notice.
- (d) The Project Company acknowledges that:
- (i) integration of the requirements for access to Extra Land is at the sole risk of the Project Company; and
  - (ii) RMS will not be liable upon any Claim (insofar as is permitted by Law) by the Project Company or the State Works Contractor arising out of or in any way in connection with:
    - A. identifying and obtaining access to Extra Land; or
    - B. any delay, additional costs or other effects on the Project Activities related to the ability of the Project Company, the State Works Contractor or their respective Subcontractors to obtain access to Extra Land.
- (e) If RMS gives the Project Company a notice pursuant to clause 9.5(b)(ii) or the Project Company gives RMS a notice under clause 9.5(c), the Project Company indemnifies RMS against the reasonable costs incurred by RMS in procuring the relevant land, including but not limited to:
- (i) any compensation payable by RMS in respect of the acquisition of that land under the Land Acquisition (Just Terms Compensation) Act 1991 and any other reasonable compensation; and
  - (ii) reasonable legal and property valuer and other expert fees payable by RMS in connection with the procurement of the land and any reasonable surveyor's fees.

## 9.6 Access and inspection by RMS

- (a) The Project Company must:
- (i) ensure that at all times RMS's Representative, any person authorised or nominated by RMS (including visitors invited by RMS and other contractors and consultants who are to perform work on the Project Site), the Environmental Representative, the Independent Certifier and the personnel referred to in clause 37.3(b); and
  - (ii) use its best endeavours to ensure that Existing Operators and any other Authorities,

are:

- (iii) entitled, subject to normal safety and security constraints (including compliance with the Contractor's reasonable access rules, site induction requirements and safety and security procedures), to safe and convenient access during business hours or on reasonable notice (except in the case of an emergency, when the right of access will be immediate) to:
  - A. the Project Site and Extra Land;
  - B. the Project Works and the Temporary Works;
  - C. the Motorway and Maintenance Site;
  - D. all other areas relevant to the Project Activities; and
  - E. the Design Documentation and any other documentation created for the purposes of the Project Activities; and
- (iv) not prevented from exercising the rights of access referred to in clause 9.6(a)(iii), including for the purposes of:
  - A. observing progress in and inspecting the Project Activities and monitoring compliance by the Project Company with its obligations under this deed and compliance by the State Works Contractor with its obligations under the State Works Deed;
  - B. seeking comments from others in respect of the Project Activities; and
  - C. exercising any right or performing any obligation which RMS has under any Project Document.
- (b) The Project Company must provide, and ensure that the State Works Contractor provides, RMS, RMS's Representative and the Independent Certifier with every reasonable facility necessary for the inspection of the Project Activities.
- (c) RMS and RMS's Representative may at any time provide comments to the Independent Certifier in respect of the Project Company's Activities (with a copy to the Project Company) or the SWC Activities (with a copy to the State Works Contractor).
- (d) If RMS believes that the Project Works or the Temporary Works are not being constructed, or the Project Activities are not being carried out, in accordance with the requirements of this deed or the State Works Deed, RMS may give notice to the Project Company specifying the non-conformance or the Defect.
- (e) If the Project Company disagrees with any notice given by RMS pursuant to clause 9.6(d), it must within 5 Business Days after receipt of such a notice give notice of its disagreement to RMS. RMS and the Project Company must use reasonable endeavours to resolve the matter the subject of the disagreement. If the matter is not resolved within 5 Business Days thereafter, either party may by notice to the other and the Independent Certifier refer the matter for determination by the Independent Certifier, who must within 5 Business Days make a determination as to the matter and notify the parties in writing of its determination.

- (f) If RMS gives a notice under clause 9.6(d) and the Project Company does not give a notice under clause 9.6(e) (or if the Project Company does give a notice under clause 9.6(e) and the Independent Certifier determines that the Project Works or the Temporary Works are not being constructed, or the Project Activities are not being carried out, in accordance with the requirements of this deed or the State Works Deed), the Project Company must correct the non-conformance or the Defect the subject of the notice under clause 9.6(d).
- (g) Neither RMS nor RMS's Representative nor any person authorised by RMS under clause 9.6(a) owes any duty to the Project Company or the State Works Contractor to:
  - (i) inspect the Project Activities; or
  - (ii) review any construction, maintenance or repair for errors, omissions or compliance with the requirements of this deed if it does so inspect.
- (h) No inspection or review of the Project Activities or of any construction, maintenance or repair by RMS, RMS's Representative or any person authorised by RMS under clause 9.6(a) will in any way lessen or otherwise affect:
  - (i) the obligations or warranties of:
    - A. the Project Company under this deed or otherwise according to Law; or
    - B. the State Works Contractor under the State Works Deed or otherwise according to Law; or
  - (ii) RMS's rights against:
    - A. the Project Company, whether under this deed or otherwise according to Law; or
    - B. the State Works Contractor, whether under the State Works Deed or otherwise according to Law.

## 9.7 Physical conditions

- (a) Without limiting clause 9.8(b), the Project Company warrants and for all purposes it will be deemed to be the case that, prior to the date of this deed, each of:
  - (i) the Project Company; and
  - (ii) other than in respect of the O&M Work, the State Works Contractor,
 has:
  - (iii) examined the RMS Project Documents, the Project Site and its surroundings, and any other information that was made available in writing by RMS, or any other person on RMS's behalf, to the Project Company for the purpose of submitting a proposal for the Project;
  - (iv) examined, and relied solely upon its own assessment, skill, expertise and enquiries in respect of, all information relevant to the risks, contingencies and other circumstances having an effect on its proposal for the Project and its obligations under the RMS Project Documents;



- (v) satisfied itself as to the correctness and sufficiency of its proposal and that it has made adequate allowance for the costs of complying with all of its obligations under the RMS Project Documents and of all matters and things necessary for the due and proper performance and completion of the Project Activities;
  - (vi) informed itself of:
    - A. all matters relevant to the employment of labour at the Project Site; and
    - B. all industrial matters relevant to the Project Site, the Maintenance Site and the Project Activities;
  - (vii) been given the opportunity to itself undertake, and to request others to undertake, tests, enquiries and investigations:
    - A. relating to the subject matter of Information Documents; and
    - B. for design purposes and otherwise;
  - (viii) had a sufficient opportunity to obtain and obtained all necessary legal, geotechnical and other technical advice in relation to the terms of the RMS Project Documents, the Information Documents, the Site Conditions, as well as the risks, contingencies and other circumstances having an effect on its proposal, the performance of its obligations and its potential Liabilities under the RMS Project Documents; and
  - (ix) undertaken sufficient tests, enquiries and investigations, had sufficient information and obtained a sufficient understanding of the risks involved to enable it to make an informed decision about whether or not to enter into the RMS Project Documents and assume the obligations and potential risks and Liabilities which they impose on the Project Company and the State Works Contractor.
- (b) Without limiting or otherwise affecting clauses 9.7(c), 9.7(d) or 9.8, RMS makes no representation and gives no warranty to the Project Company or the State Works Contractor in respect of:
- (i) the Site Conditions likely to be encountered during the execution of the Project Activities or otherwise in respect of the condition of:
    - A. the Project Site, Extra Land or their surroundings; or
    - B. any structure or other thing on, under, above or adjacent to the Project Site or Extra Land; or
  - (ii) the existence, location, condition or availability of any Existing Operations or Utility Service on, under, above, adjacent to or related to the Project Site or Extra Land.
- (c) The Project Company accepts:
- (i) the Project Site and any Extra Land; and
  - (ii) any structures or other things on, above or adjacent to, or under the surface of, the Project Site and any Extra Land,

in their present condition subject to all defects and Site Conditions and agrees that it and the State Works Contractor are responsible for, and assume the risk of:

- (iii) all Loss, delay or disruption it suffers or incurs; and
- (iv) any adverse effect on the Project Works or the Temporary Works,

arising out of, or in any way in connection with, the Site Conditions encountered in performing the Project Activities.

(d) The Project Company:

- (i) must investigate, design and construct the Project Company's Works and the Temporary Works in accordance with this deed;
- (ii) must ensure that the State Works Contractor investigates, designs and constructs the State Works in accordance with this deed and the State Works Deed; and
- (iii) acknowledges that it will not be relieved of its obligations under this deed and the State Works Contractor will not be relieved of its obligations under the State Works Deed,

irrespective of:

- (iv) the Site Conditions encountered in performing the Project Company's Works, the Temporary Works or the State Works (as applicable);
- (v) whatever may be the condition or characteristics (including all sub-surface conditions) of:
  - A. the Project Site or any Extra Land, the Environment or their surroundings; or
  - B. any structure or other thing on, above or adjacent to, or under the surface of, the Project Site or any Extra Land, the Environment or their surroundings; and
- (vi) any assumptions, projections, estimates, contingencies or otherwise that the Project Company or the State Works Contractor may have made in relation to the Site Conditions or the conditions or the characteristics of any of the matters referred to in clause 9.7(d)(v).

## 9.8 Information Documents

- (a) The parties acknowledge that, prior to the date of this deed, the Contractor signed each Deed of Disclaimer and provided them to RMS in respect of information (including Information Documents) provided by RMS to the Project Company and the Contractor.
- (b) Without limiting or otherwise affecting clause 9.8(c):
  - (i) RMS does not warrant, guarantee or assume any duty of care or other responsibility for or make any representation about the accuracy, adequacy, suitability or completeness of the Information Documents;
  - (ii) whether or not an Information Document or any part thereof forms an exhibit to this deed, the Project Company acknowledges that:

- A. the Information Document or part thereof does not form part of this deed and that clause 9.8(c) applies to the Information Document or part thereof; and
  - B. where an Information Document or any part thereof forms an exhibit to this deed, it does so only for the purposes of identification of that document or part thereof;
- (iii) insofar as is permitted by Law, RMS will not be liable upon any Claim by the Project Company arising out of or in any way in connection with:
- A. the provision of, or the purported reliance upon, or use of the Information Documents to or by the Project Company or any other person to whom the Information Documents are disclosed; or
  - B. a failure prior to the date of this deed by RMS to provide any information to the Project Company or the State Works Contractor.
- (c) The Project Company:
- (i) warrants that (except in relation to Excluded Matters) it did not in any way rely upon:
    - A. any information, data, representation, statement or document made by, or provided to the Project Company or the State Works Contractor, by RMS or anyone on behalf of RMS or any other information, data, representation, statement or document for which RMS is responsible or may be responsible whether or not obtained from RMS or anyone on behalf of RMS; or
    - B. the accuracy, adequacy, suitability or completeness of such information, data, representation, statement or document,

for the purposes of entering into this deed or carrying out the Project Activities but nothing in this clause 9.8(c)(i) will limit or otherwise affect the Project Company's obligations under this deed or the State Works Contractor's obligations under the State Works Deed;
  - (ii) warrants that it enters into this deed based on its own investigations, interpretations, deductions, information and determinations; and
  - (iii) acknowledges that it is aware that RMS has entered into this deed relying upon:
    - A. the warranties, acknowledgements and agreements in clauses 9.8(c)(i) and (ii); and
    - B. the warranties and acknowledgements in the Deeds of Disclaimer submitted by the Contractor.
- (d) The Project Company releases and indemnifies RMS from and against:
- (i) any Claim against RMS by, or Liability of RMS to, any person; or

- (ii) (without being limited by clause 9.8(d)(i)) any Loss suffered or incurred by RMS,

arising out of or in any way in connection with:

- (iii) the provision of, or the purported reliance upon, or use of, the Information Documents to or by the Project Company, the State Works Contractor or any other person to whom the Information Documents are disclosed by the Project Company or the State Works Contractor;
- (iv) a failure prior to the date of this deed by RMS to provide any information to the Project Company or the State Works Contractor; or
- (v) the Information Documents being relied upon or otherwise used by the Project Company, the State Works Contractor or their respective Related Parties in the preparation of any information or document, including any Information Document which is "misleading or deceptive" or "false and misleading" (within the meaning of those terms in sections 18 and 29 (respectively) of the Australian Consumer Law in Schedule 2 to the Competition and Consumer Act 2010 (Cth) or any equivalent provision of State or Territory legislation).

## 9.9 Artefacts

As between RMS, the Project Company and the State Works Contractor, any Artefacts found on or under the surface of the Project Site are the property of RMS.

The Project Company must upon the discovery of any Artefact on or under the surface of the Project Site:

- (a) at its cost, immediately notify RMS's Representative that an Artefact has been found;
- (b) at its cost, ensure that the Artefact is protected and not disturbed any further;
- (c) comply with all requirements of Authorities and Directions of RMS's Representative in relation to the Artefact; and
- (d) continue to perform, and ensure that the State Works Contractor continues to perform, the Project Activities except to the extent otherwise:
  - (i) directed by RMS's Representative;
  - (ii) ordered by a court or tribunal; or
  - (iii) required by Law.

## 9.10 Native Title Claim

- (a) If there is a Native Title Claim with respect to the Project Site or the Maintenance Site, or any part of it, the Project Company must continue to perform its obligations under this deed, and ensure that the State Works Contractor continues to perform its obligations under the State Works Deed, unless otherwise:
  - (i) directed by RMS;
  - (ii) ordered by a court or tribunal; or

- (iii) required by Law.
- (b) For the purposes of clause 9.10(a)(i), RMS may by written notice direct the Project Company to suspend any or all of its obligations under this deed, and cause the State Works Contractor to suspend any or all of its obligations under the State Works Deed, and the Project Company must comply, and ensure that the State Works Contractor complies, with that notice until such time as RMS gives the Project Company further written notice.
- (c) If the Project Company or the State Works Contractor are prevented from carrying out the Project Activities for a continuous period of more than 6 months as a result of a direction, order or requirement referred to in clause 9.10(a):
  - (i) RMS may in its absolute discretion terminate this deed by giving a notice to that effect to the Project Company, after which this deed will be terminated and clause 27.15 will apply; or
  - (ii) the Project Company may give RMS notice under clause 27.12(f).

## 9.11 Contamination

- (a) If the Project Company or the State Works Contractor discovers any Contamination in, on or under the Project Site, the Extra Land, the Motorway Site or the Licensed Maintenance Areas (whether or not the Project Company, the State Works Contractor or their respective Related Parties have caused or contributed to that Contamination), the Project Company must:
  - (i) notify RMS as soon as practicable, but nevertheless within 5 Business Days after the discovery of the Contamination; and
  - (ii) give any notice required by Law relating to the Environment.
- (b) The Project Company must comply, and ensure that the State Works Contractor and their respective Related Parties comply, with any Contamination Notice relating to Contamination referred to in clauses 9.11(e)(i) or (e)(ii) which is on, in, under, over or that emanated or is emanating from the Project Site, the Extra Land, the Motorway Site or the Licensed Maintenance Areas, regardless of whether:
  - (i) the Contamination Notice is addressed to RMS, the Project Company, the State Works Contractor or some other person; or
  - (ii) the Contamination occurred before or after the Project Company, the State Works Contractor or their respective Related Parties were given access to the relevant land.
- (c) If RMS, the Project Company, the State Works Contractor or any other person receives a Contamination Notice (other than a Contamination Notice relating to Contamination referred to in clauses 9.11(e)(i) or (e)(ii)), RMS must provide a copy of that Contamination Notice to the Project Company (if the Project Company or the State Works Contractor are not already in receipt of that notice) and RMS may:
  - (i) direct the Project Company to provide RMS and any person authorised by RMS with such access to the Project Site and the Extra Land as is required to enable RMS to comply with that Contamination Notice, in which case the Project Company must promptly comply, and procure that the State Works Contractor promptly complies, with RMS's direction; or

- (ii) propose a Change in accordance with paragraph 1 of the Change Procedure to require the Project Company to comply with that Contamination Notice.
- (d) Subject to their respective obligations at Law, the parties must not do anything with the intent, directly or indirectly, of causing or being likely to cause the service of a Contamination Notice.
- (e) In addition to the requirements of the Environmental Documents and without limiting clause 9.7, the Project Company bears the risk of all Contamination:
  - (i) on, in, over, under, about or migrating to or from the Project Site or any Extra Land which is disturbed by or interfered with in the carrying out of the Project Activities; or
  - (ii) which otherwise arises out of or in connection with the Project Activities,
 and, to the extent clauses 9.11(e)(i) or (ii) applies, the Project Company must or must procure the State Works Contractor to:
  - (iii) dispose of, or otherwise deal with, such Contamination in accordance with Law and the Environmental Documents;
  - (iv) remediate the Project Site and any Extra Land to the standard required by Law and the Environmental Documents to the extent to which:
    - A. it is in any way degraded by such Contamination; and
    - B. the Contamination is of such a nature that an Authority could issue a statutory notice requiring it to be remediated.
- (f) Except to the extent prohibited by Law, the Project Company must indemnify RMS from and against any claims against RMS, or Loss suffered or incurred by RMS, arising out of or in any way in connection with such Contamination referred to in clauses 9.11(e)(i) or (e)(ii)) or any failure by the Project Company to comply with its obligation under this clause 9.11, including any failure by the Project Company to procure that the State Works Contractor complies with any obligation under the State Works Deed, in connection with such Contamination.

## 9.12 Environmental Representative

- (a) The Environmental Representative is to be engaged by RMS, the Project Company, the State Works Contractor and the Contractor at the Project Company's cost on the terms of the Deed of Appointment of Environmental Representative.
- (b) The Project Company acknowledges that the Environmental Representative is:
  - (i) obliged to act independently of RMS, the Project Company, the State Works Contractor, the Contractor and any of their subcontractors;
  - (ii) required to discharge certain functions as identified in the Planning Approvals and in accordance with the Deed of Appointment of Environmental Representative;
  - (iii) required to monitor the implementation of all environmental management plans and monitoring programs required under the Planning Approvals and will advise RMS upon achievement of these plans/programs; and

- (iv) required to advise RMS and RMS's Representative on the Project Company's, the State Works Contractor's and the Contractor's compliance with the Planning Approvals.
- (c) The Project Company must provide, and must ensure that the State Works Contractor and the Contractor provide, the Environmental Representative with all information and documents and allow, and must ensure that the State Works Contractor and the Contractor allow, the Environmental Representative:
  - (i) to attend meetings; and
  - (ii) to access such premises,as may be:
  - (iii) necessary or reasonably required by the Environmental Representative or RMS's Representative to allow the Environmental Representative to perform its obligations under the Deed of Appointment of Environmental Representative; or
  - (iv) lawfully requested by the Environmental Representative or directed by RMS's Representative.
- (d) The Project Company must:
  - (i) comply, and ensure that the State Works Contractor and the Contractor comply, with the lawful requirements of the Environmental Representative, including so as to allow the Environmental Representative to discharge any functions of the Environmental Representative provided for in the Planning Approvals; and
  - (ii) not interfere with or improperly influence, and ensure that the State Works Contractor and the Contractor do not interfere with or improperly influence, the Environmental Representative in the performance of any of its functions in connection with this deed.
- (e) Nothing that the Environmental Representative does or fails to do pursuant to the purported exercise of its functions under the Deed of Appointment of Environmental Representative will entitle the Project Company, the State Works Contractor or the Contractor to make any Claim against RMS.
- (f) The parties acknowledge and agree that the Project Company has proposed that MCW Environmental Consulting Pty Limited ABN 31 155 105 552 be appointed as the Environmental Representative and that this appointment is subject to the approval of the Minister for Planning and Infrastructure (which approval has not been given as at the date of this deed).
- (g) RMS and the Project Company must, within 15 Business Days (or such other date as agreed by the parties) after the date on which the Minister for Planning and Infrastructure approves MCW Environmental Consulting Pty Limited ABN 31 155 105 552 (or some other person agreed by RMS and the Project Company) being appointed as the Environmental Representative, execute the Deed of Appointment of Environmental Representative (substantially in the form contained in Exhibit D).
- (h) To the extent that any material amendment is required to the Deed of Appointment of Environmental Representative from the form contained in Exhibit D, RMS must direct a Change in accordance with paragraph 1 of the Change Procedure in relation to the amended Deed of Appointment of Environmental Representative.

### 9.13 Remote Areas

RMS will provide the Project Company, the State Works Contractor and each of their respective Related Parties and invitees with access to the Remote Areas, provided that if required by RMS, the Project Company:

- (a) has first prepared, and submitted to the TMC, traffic management plans with respect to its access to and use of the Remote Areas in accordance with Good Industry Practice;
- (b) has obtained TMC's approval to the traffic management plan; and
- (c) complies with the traffic management plans approved by TMC.

In this clause 9.13, **Remote Areas** means:

- (a) the areas of land described in section 2.8.3 and Schedule 4 of Appendix 21 to the SWTC;
- (b) such other areas of land which are located within existing road reserves:
  - (i) identified in section 2.8.3 of Appendix 21 to the SWTC; or
  - (ii) otherwise agreed between the parties (acting reasonably) in writing; and
- (c) land for the specific purpose of complying with a condition of the Planning Approval where access to that area is necessary to comply with that condition.

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## 10. Quality

### 10.1 Quality Management System

- (a) The Project Company must implement a Quality Management System for the management of all aspects of the Project Company's obligations under this deed and the State Works Contractor's obligations under the State Works Deed in accordance with Schedule 10, including in accordance with the applicable requirements of the SWTC, including section 3.1.1 of the SWTC and the Quality Plan.
- (b) The Project Company must develop and implement a Quality Plan in accordance with this deed including the SWTC, including section 3.1.2 and Appendix 60 of the SWTC.

### 10.2 Independent Certifier

- (a) The Independent Certifier is to be engaged by RMS, the Project Company and the State Works Contractor on the terms of the Independent Certifier Deed at the Project Company's cost.
- (b) The Independent Certifier's role is to, amongst other things:
  - (i) without limiting the rights or obligations of the parties under this deed, independently certify in accordance with the Independent Certifier Deed that:
    - A. the Project Works and the Temporary Works; and



- B. the O&M Work,
- comply with the requirements of this deed and the State Works Deed;  
and
- (ii) make determinations on matters that this deed expressly requires be determined by the Independent Certifier.
- (c) The parties acknowledge and agree that:
- (i) without limiting the effect which the determinations of the Independent Certifier will have upon the rights and obligations of the parties under this deed, the Independent Certifier does not have any power to give any Directions to the Project Company or the State Works Contractor;
- (ii) the Independent Certifier is obliged to act independently of RMS, the Project Company, the State Works Contractor and any of their respective Related Parties, and is not an employee, agent or consultant of RMS, the Project Company or the State Works Contractor; and
- (iii) any determination by the Independent Certifier in respect of a matter required by this deed or the State Works Deed to be determined by the Independent Certifier will be final and binding upon the parties, except in the case of manifest error.
- (d) The Project Company must provide, and ensure that the State Works Contractor provides, the Independent Certifier with all information and documents and allow the Independent Certifier:
- (i) to attend design meetings;
- (ii) access to all premises where the Project Activities are being carried out;  
and
- (iii) to insert Hold Points in the Project Plans and designate the nominated authority to release the Hold Points,
- all as may be:
- (iv) necessary or reasonably required by the Independent Certifier or RMS's Representative, to allow the Independent Certifier to perform its obligations under the Independent Certifier Deed; or
- (v) reasonably requested by the Independent Certifier.
- (e) RMS's Representative may provide comments to the Independent Certifier in accordance with clause 9.6.
- (f) The Project Company and RMS acknowledge and agree that the Contractor shall be entitled to attend all meetings between RMS, the Project Company and the Independent Certifier in respect of the D&C Services (as defined in the Independent Certifier Deed), other than those relating to payment of the Fee (as defined in the Independent Certifier Deed) or the administration of the Independent Certifier Deed, provided that the Project Company and RMS are not obliged to invite the Contractor to, or provide the Contractor with advance notice of, such meetings.

### 10.3 Replacement of Independent Certifier

- (a) If the Independent Certifier Deed is terminated before its scheduled expiry, or if any incumbent Independent Certifier ceases to act as Independent Certifier, the Project Company, the State Works Contractor and RMS must, unless otherwise agreed by RMS, the Project Company and the State Works Contractor, prior to termination or cessation, and in any case within 10 Business Days after the termination of the Independent Certifier Deed or cessation, whichever is applicable, appoint another person to act as Independent Certifier.
- (b) If RMS, the Project Company and the State Works Contractor cannot agree such appointment, RMS, the Project Company and the State Works Contractor will request that the President of Engineers Australia (or its replacement or equivalent) nominate an Independent Certifier who has equivalent qualifications, experience and expertise to the incumbent Independent Certifier and is independent and such Independent Certifier will be appointed as soon as practicable in accordance with the previous Independent Certifier Deed.

### 10.4 No relief from obligations

The:

- (a) Project Company will not be relieved from any of its Liabilities or responsibilities under this deed (including under clause 15) or otherwise according to Law;
- (b) State Works Contractor will not be relieved from any of its Liabilities or responsibilities under the State Works Deed or otherwise according to Law; and
- (c) rights of RMS against:
  - (i) the Project Company, whether under this deed or otherwise according to Law; or
  - (ii) the State Works Contractor, whether under the State Works Deed or otherwise according to Law,

will not be limited or otherwise affected,

by or as a consequence of any of the following:

- (d) the implementation of, and compliance with, any quality system or the Quality Plan by the Project Company or the State Works Contractor;
- (e) compliance with any requirements of the Independent Certifier Deed;
- (f) any release, authorisation, approval or agreement by RMS's Representative, or any other person acting on behalf of RMS or RMS's Representative; or
- (g) any failure by RMS, RMS's Representative or any other person acting on behalf of RMS or engaged by RMS to detect any Defect; or
- (h) any monitoring or audit arranged by RMS's Representative under, or any discussions between the Quality Manager and RMS's Representative as contemplated under, Schedule 10.

## 11. Design and Design Documentation

### 11.1 Design development

- (a) Without limiting clause 5.2(d), the Project Company must hold regular meetings of its design team including its designers and the Independent Certifier.
- (b) The Project Company must give reasonable prior written notice to RMS's Representative of those meetings and of any other meetings at which design issues are to be discussed to enable RMS's Representative and its delegates to attend. RMS may request the Project Company to ensure the presence at the meeting of any relevant persons from the Contractor or any of the Project Company's Subcontractors or the Contractor's subcontractors or consultants involved in the design of any part of the Project Works.
- (c) The Project Company must give RMS's Representative:
  - (i) an agenda for each design meeting no less than 48 hours prior to each meeting (which must include an accurate schedule of all design issues as at the date of issue of the agenda); and
  - (ii) minutes of each design meeting within 48 hours after each meeting.

The Project Company agrees that no such agenda or minutes of meeting shall be relied upon by either party as a document constituting or evidencing the giving or receipt of a notice required to be given under or in accordance with this deed.

### 11.2 Design obligations

- (a) The Project Company acknowledges that prior to the date of this deed, it prepared the Concept Design. The Project Company agrees that it bears absolutely all risks howsoever they may arise as a result of the use by the Project Company or the State Works Contractor of, or the reliance by the Project Company or the State Works Contractor upon, the Concept Design in performing the Project Activities and that such use and reliance will not limit any of its obligations under this deed or any of the State Works Contractor's obligations under the State Works Deed.
- (b) The Project Company is responsible for, and assumes the risk of, any Loss it or the State Works Contractor suffers or incurs arising out of or in connection with:
  - (i) the design and construction of the Project Works and the Temporary Works in accordance with the Concept Design costing more, or taking longer, than anticipated; and
  - (ii) any differences between the Project Works and the Temporary Works which the Project Company or the State Works Contractor are required to design and construct (ignoring for this purpose any differences which are the subject of a Change Order or a notice issued by RMS under paragraph 2.3 of the Change Procedure) and the Concept Design including:
    - A. differences necessitated by any Site Conditions encountered;
    - B. differences required to ensure that the Project Works (other than the Third Party Works) and the Temporary Works will be and remain fit for their intended purposes and satisfy the requirements of this deed and the State Works Deed; and

C. differences required to ensure that each discrete part of the Third Party Works will be fit for their intended purposes and satisfy the requirements of this deed and the State Works Deed upon the provision of the certificate, statement or notice relevant to that part of the Third Party Works pursuant to clauses 9.4(a)(iii), 15.2(a)(ii) or 15.3(a)(ii) (as applicable),

and irrespective of any assumptions, projections, estimates, contingencies or otherwise that the Project Company and the State Works Contractor may have made in relation to any of the matters set out in clauses 11.2(b)(i) or (ii) above.

(c) The Project Company warrants to RMS that:

- (i) it remains responsible for ensuring that the Project Works and the Temporary Works will satisfy the requirements of this deed and the State Works Deed, despite the Concept Design (as further developed by the Project Company under this deed), and despite entry by RMS into the State Works Deed;
- (ii) if the Project Works and the Temporary Works are designed and constructed in accordance with the Concept Design, the Project Works and the Temporary Works will satisfy the requirements of this deed and the State Works Deed but nothing in this clause 11.2(c)(ii) affects or limits clauses 11.2(a) or (b), which will prevail to the extent of any inconsistency;
- (iii) it will carry out and complete the Project Company's Activities, and ensure that the State Works Contractor carries out and completes the SWC Activities, in accordance with the Concept Design but nothing in this clause 11.2(c)(iii) affects or limits clauses 11.2(a) or (b), which will prevail to the extent of any inconsistency;
- (iv) it will not make any adjustments to the Concept Design that will reduce the:
  - A. durability;
  - B. whole of life performance;
  - C. environment and sustainability performance;
  - D. functional performance; or
  - E. safety,
 of any part of the Project Works;
- (v) subject to clause 11.2(e), it has checked, examined, analysed and carefully considered the SWTC and the Environmental Documents and that:
  - A. it has satisfied itself as to the completeness, correctness, accuracy, appropriateness, suitability and adequacy of the SWTC;
  - B. it has satisfied itself that there are no omissions, ambiguities, discrepancies or inconsistencies in or between the SWTC and

Environmental Documents except for such omissions, ambiguities, discrepancies or inconsistencies addressed in Schedule 3;

- C. the SWTC is proper, adequate and fit for its intended purpose, including for the purpose of enabling:
- 1) the Project Company to carry out the Project Company's Activities in accordance with, and to ensure that the Project Company's Activities comply with, this deed; and
  - 2) the State Works Contractor to carry out the SWC Activities in accordance with, and to ensure that the SWC Activities comply with, the State Works Deed,
- including the other warranties in this clause 11.2;
- D. it will be fully and exclusively responsible and liable for the design of the Project Works and the Temporary Works (including the Design Documentation), including any submitted or re-submitted to the Independent Certifier or RMS's Representative in accordance with this deed;
- E. it will be fully and exclusively responsible and liable for all risks howsoever they may arise as a result of the use by the Project Company or the State Works Contractor of, or reliance upon, the SWTC; and
- F. the use of, or reliance upon, the SWTC does not affect any of its obligations under this deed or any of the State Works Contractor's obligations under the State Works Deed, or entitle the Project Company or the State Works Contractor to make any Claim against RMS arising out of or in any way in connection with the SWTC;

- (vi) the Design Documentation will:
- A. satisfy the requirements of the SWTC, the Third Party Agreements and the other requirements of this deed and the State Works Deed;
  - B. be and will remain at all relevant times fit for its intended purpose; and
  - C. be prepared, certified, verified, completed and used in accordance with the requirements of this deed and the State Works Deed;
- (vii) construction will be carried out in accordance with the Design Documentation which the Project Company and the State Works Contractor are entitled to use for construction purposes in accordance with clause 11.3(d);
- (viii) construction carried out in accordance with the Design Documentation which the Project Company and the State Works Contractor are entitled to use in accordance with clause 11.3(d) will satisfy the requirements of this deed and the State Works Deed; and

- (ix) the Project Works will:
  - A. be completed in accordance with, and satisfy the requirements of, this deed and the State Works Deed;
  - B. other than the Third Party Works, upon Completion, be fit for their intended purposes; and
  - C. other than the Third Party Works, thereafter remain at all relevant times fit for their intended purposes; and
- (x) in respect of each discrete part of the Third Party Works:
  - A. if the Third Party Works are Local Area Works or Utility Service Works, those Third Party Works will, upon RMS and the Independent Certifier being provided with a copy of the notice referred to in clause 15.2(a)(ii) or 15.3(a)(ii) (as applicable), be fit for their intended purpose; or
  - B. if the Third Party Works are Property Works, those Third Party Works will, upon RMS's Representative being provided with a certificate or statement referred to in clause 9.4(a)(ii), be fit for their intended purpose.
- (d) The Project Company agrees that its obligations under, and the warranties given in, this clause 11.2 will remain unaffected and that it will bear and continue to bear full Liability and responsibility for the design (including the Design Documentation), construction, commissioning, testing and completion of the Project Works and the Temporary Works notwithstanding:
  - (i) any design work carried out by others prior to the date of this deed and incorporated into the Concept Design, the Design Documentation or this deed;
  - (ii) any Change the subject of a Direction by RMS's Representative; or
  - (iii) the termination (for any reason) of this deed.
- (e) Notwithstanding anything to the contrary in this deed, the Project Company will not be required to satisfy itself as to, and does not warrant the completeness, the correctness and accuracy, appropriateness, suitability, fitness for intended purpose and adequacy of the Excluded Matters.

### 11.3 Preparation of Design Documentation

- (a) The Project Company must give, and procure that the State Works Contractor gives, the Independent Certifier and RMS, throughout the preparation of the Design Documentation, the opportunity to review, to comment on and to monitor the design performance of the Project Company and the State Works Contractor in accordance with this clause 11.3.
- (b) The Project Company must develop and complete, and procure that the State Works Contractor develops and completes, all Design Documentation in accordance with this deed and the Design Plan.
- (c) The Project Company must ensure that the Final Design Documentation for each discrete design element of the Project Company's Works, the Reviewable Temporary Works and the State Works is:

- (i) certified by the Project Company (in respect of the Project Company's Works and the Reviewable Temporary Works) and the State Works Contractor (in respect of the State Works) as:
  - A. being appropriate for construction;
  - B. complying with this deed (including the SWTC) or the State Works Deed (as applicable) and, in particular, the durability requirements in section 5.5 and the design life requirements of section 5.2 of the SWTC; and
  - C. not involving or constituting a Change which has not been the subject of a Change Order or a notice issued by RMS under section 2.3 of the Change Procedure or a notice under clause 12; and
- (ii) verified by the Independent Certifier as:
  - A. being appropriate for construction; and
  - B. complying with this deed (including the SWTC) or the State Works Deed (as applicable) and, in particular, the durability requirements in section 5.5 and the design life requirements of section 5.2 of the SWTC,

in accordance with the Design Review Schedule.

- (d) Without limiting clause 11.3(c), unless otherwise agreed in writing by RMS, the Project Company must only use, and procure that the State Works Contractor only uses, IFC Design Documentation for construction purposes to the extent that it has been:
  - (i) certified by the Project Company or the State Works Contractor under clause 11.3(c);
  - (ii) submitted to RMS for the opportunity to make comment; and
  - (iii) verified by the Independent Certifier, with any comments by RMS provided in the period contemplated by the Design Review Schedule addressed by the Independent Certifier as part of the verification,

in accordance with the Design Review Schedule.

- (e) RMS and the Project Company acknowledge and agree that:
  - (i) the receipt or review of, or any consultation or comments regarding, any Design Documentation by RMS is solely for the purpose of monitoring the design performance of the Project Company and the State Works Contractor;
  - (ii) RMS does not assume a duty or owe a duty to the Project Company or the State Works Contractor to review the SWTC, the Concept Design or the Design Documentation for errors, omissions or compliance with the requirements of this deed or the State Works Deed, or to consult with the Project Company or the State Works Contractor or make any comments regarding any Design Documentation; and
  - (iii) neither:

- A. any review of, or consultation or comments by RMS, nor any failure by RMS regarding any Design Documentation or any other Direction by RMS in respect of any Design Documentation; nor
- B. the certification of any Final Design Documentation by the Independent Certifier,

will lessen or otherwise affect:

- C. the Project Company's warranties under clause 11.2 or any of its other Liabilities or responsibilities under this deed or otherwise according to Law;
- D. the State Works Contractor's warranties under the State Works Deed or any of its other Liabilities or responsibilities under the State Works Deed or otherwise according to Law; or
- E. RMS's rights against:
  - 1) the Project Company, whether under this deed or otherwise according to Law; or
  - 2) the State Works Contractor, whether under the State Works Deed or otherwise according to Law.

#### 11.4 Change in Codes and Standards

- (a) Where there is a Change in Codes and Standards prior to the Date of Completion:
  - (i) the Project Company must give a written notice to RMS's Representative within 20 Business Days after the Change in Codes and Standards containing details of the Change in Codes and Standards; and
  - (ii) if a notice is given by the Project Company which complies with clause 11.4(a)(i), then within 10 Business Days after the notice having been given, RMS's Representative will either:
    - A. direct the Project Company to disregard the Change in Codes and Standards where doing so will not result in the Project Works not complying with the requirements of Law; or
    - B. direct a Change in respect of the Change in Codes and Standards.
- (b) If RMS's Representative gives a notice under clause 11.4(a)(ii)A, the Project Company will not be regarded as being in breach of this deed, and the State Works Contractor will not be regarded as being in breach of the State Works Deed, to the extent that it disregarded the relevant Change in Codes and Standards.
- (c) If RMS's Representative gives a notice under clause 11.4(a)(ii)B, the Project Company and the State Works Contractor will not have any Claim for Change Costs against RMS:
  - (i) except to the extent that the relevant Design Documentation, before the issue of a notice under clause 11.4(a)(ii)B complied, or would have complied, with the requirements of this deed and the State Works Deed,



including any requirement that the Design Documentation be fit for its intended purpose (or any similar reference); or

- (ii) to the extent that, notwithstanding the Change in Codes and Standards, the Project Company or the State Works Contractor would have had to make a change to the Project Works or the Temporary Works or a change to the methods of construction used in carrying out the Project Works or the Temporary Works, in order that the Project Works and the Temporary Works be fit for their intended purposes (or any similar reference).

## **12. Changes**

### **12.1 Either party may propose a Change**

- (a) Subject to clause 12.1(b), RMS may require the Project Company to carry out, or procure that the State Works Contractor carries out, a Change in accordance with paragraph 1 of the Change Procedure.
- (b) Subject to clause 12.2, the Project Company will not be obliged to carry out, or procure that the State Works Contractor carries out, any Change proposed by RMS if the proposed Change will adversely affect the use, patronage or capacity of the Motorway or the Project Company's ability to levy or collect tolls.
- (c) The Project Company may propose a Change to RMS in accordance with paragraph 2 of the Change Procedure.

### **12.2 Pre-Agreed Changes**

- (a) RMS's Representative may, in its absolute discretion and without being under any obligation to do so, direct by way of a Change any Pre-Agreed Change by giving written notice to the Project Company.
- (b) RMS and the Project Company agree that if a notice pursuant to clause 12.2(a) is given in respect of a Pre-Agreed Change by the relevant date specified in Schedule 13, this deed and/or the State Works Deed will be deemed to be amended in accordance with the relevant amendments set out in Schedule 13 from the date the Project Company receives such notice.
- (c) Where RMS's Representative directs a Pre-Agreed Change by giving written notice to the Project Company by the relevant date referred to in clause 12.2(b), the Project Company, in respect of that Pre-Agreed Change:
  - (i) must carry out its obligations under this deed, and/or ensure that the State Works Contractor carries out its obligations under the State Works Deed, as amended by clause 12.2(b); and
  - (ii) acknowledges that:
    - A. the Change Costs or Change Savings for each Pre-Agreed Change is as set out in Schedule 13 in the column entitled "Change Cost excluding GST";
    - B. the payment of the Change Costs set out in Schedule 13 in respect of a Pre-Agreed Change by RMS to the Project Company will be full compensation for any Loss or delay the Project Company and/or the State Works Contractor suffers or incurs arising out of or in connection with the issue of such

a notice and neither the Project Company nor the State Works Contractor will be entitled to be paid any amount in respect of the Pre-Agreed Change; and

C. neither the Project Company nor the State Works Contractor are entitled to make any Claim for:

- 1) any acceleration to the carrying out of the Project Activities which the Project Company and/or the State Works Contractor must perform at any time in order to achieve Completion by the Date for Completion; or
- 2) any delay to the carrying out of the Project Activities,

in connection with the issue of such a notice or the amendment of this deed or the State Works Deed pursuant to clause 12.2(b).

(d) Nothing in this clause 12.2 prevents RMS's Representative from issuing a Change Proposal or a Change Order pursuant to clause 12.1 or the Change Procedure that involves the same (or similar) changes to the Project Works as a Pre-Agreed Change after the relevant date for giving notice of the Pre-Agreed Change specified in Schedule 13.

(e) If RMS's Representative issues a Change Order pursuant to clause 12.1 which involves the same or similar changes to the Project Works as are required by a Pre-Agreed Change and which is issued or directed (as relevant) after the relevant date in Schedule 13 for that Pre-Agreed Change, the parties agree that the Change Costs or Change Savings of the Change will be determined in accordance with clause 12.1.

### 12.3 Payment for Changes

(a) If a Change directed by RMS in accordance with clause 12.1(a) or clause 12.2(e) results in Change Costs:

- (i) if RMS directed the Project Company to proceed to implement the Change under paragraph 1.4(b), paragraph 1.7(b) or paragraph 1.7(e) of the Change Procedure RMS must pay the Project Company the Change Costs progressively within 10 Business Days after each month in which the relevant work was undertaken unless otherwise agreed between the parties; and
- (ii) if RMS directed the Project Company to proceed to implement the Change under paragraph 1.7(d) or paragraph 1.8 of the Change Procedure, RMS must pay the Project Company the Change Costs:
  - A. pending determination by RMS pursuant to paragraph 1.8(b) or determination in accordance with the Dispute Resolution Procedure, as reasonably determined by RMS; and
  - B. following any determination referred to in clause 12.3(a)(ii)A (or agreement between the parties), as so determined (or agreed),

progressively within 10 Business Days after each month in which the relevant work was undertaken. If the Change Costs paid under clause 12.3(a)(ii)A are more or less than the Change Costs for the relevant month as subsequently determined or agreed, the difference must be paid by the relevant party to the other.

- (b) If a Change directed by RMS under clause 12.1(a), clause 12.2(e) or paragraph 1 of the Change Procedure results in Change Savings (or in the case of a Change directed by RMS under paragraph 2 of the Change Procedure, is expected to result in Change Savings, as advised by the Project Company under paragraph 2.2(a)(iii) of the Change Procedure), RMS and the Project Company agree that:
- (i) in the case of a Change directed by RMS under clause 12.1(a), clause 12.2(e) or paragraph 1 of the Change Procedure, RMS is entitled to receive % of the Change Savings; and
  - (ii) in the case of a Change directed by RMS under paragraph 2.3 of the Change Procedure, RMS is entitled to receive % of the greater of:
    - A. the actual Change Savings; and
    - B. the estimated Change Savings (as advised by the Project Company under paragraph 2.2(a)(iii) of the Change Procedure).
- (c) Where an amount is payable to RMS pursuant to clause 12.3(b) then:
- (i) to the extent that it relates to the Project Works, this may be:
    - A. set off against Change Costs in respect of the Project Works payable by RMS to the Project Company under clause 12.3(a); or
    - B. where this is not set-off it must be paid by the Project Company to RMS progressively within 10 Business Days after each month in which the relevant work which has been deleted or omitted would have been undertaken but for the Change; or
  - (ii) to the extent that it relates to the O&M Work, the Project Company must pay this to RMS in the manner and at the time as agreed between RMS and the Project Company.
- (d) If RMS and the Project Company are unable to reach the agreement required by clause 12.3(c)(ii) within 20 Business Days after the date of the relevant Change Order, either party may refer the matter for dispute resolution in accordance with the Dispute Resolution Procedure, with the dispute to be determined on the basis that timing of the payment must not have an adverse impact upon the ability which, prior to the change:

which, in respect of:

- (e) Except where the Project Company is directed to carry out a Change pursuant to a Change Order, RMS will not be liable to the Project Company or the State Works Contractor for any Loss or otherwise upon any Claim arising out of or in any way in connection with any Change.

#### **12.4 Project Company's entitlements**

This clause 12 is an exhaustive code of the Project Company's rights in any way in connection with any Change. The Project Company waives all rights at Law to make any Claim against RMS in any way in connection with any of the matters set out in this clause 12 otherwise than in accordance with the terms of this deed.

#### **12.5 Approvals for Changes**

- (a) Subject to clause 12.5(b), the Project Company must apply for and obtain, or procure that the State Works Contractor applies for and obtains, all:
  - (i) necessary amendments or modifications to any existing Approvals; and
  - (ii) new Approvals that may be,  
required for the execution of a Change.
- (b) Where the amendment or modification to any Approval required for the execution of the Change relates to the Planning Approval, the Project Company must:
  - (i) carry out and provide to RMS all surveys, investigations, reports and studies:
    - A. reasonably requested by RMS's Representative;
    - B. to the standard reasonably directed by RMS's Representative;  
and
    - C. within the time reasonably directed by RMS's Representative;  
and

- (ii) provide whatever other assistance and information RMS's Representative reasonably requests to allow it to obtain the necessary amendments or modifications to the Planning Approval.
- (c) The Project Company must implement, or procure that the State Works Contractor implements, the Change once the Approvals referred to in this clause 12.5 have been amended, modified or granted to permit the Change to be implemented.

## 12.6 Changes undertaken by the State Works Contractor

The parties acknowledge and agree that Changes under this clause 12 can be:

- (a) designed by the Project Company as a Change to the Project Company's Works; and
- (b) constructed by the State Works Contractor as a Change to the State Works,

to the extent agreed between the parties and the State Works Contractor.

## 12.7 Changes under the NWRL Deed

- (a) If the Project Company believes, acting reasonably, that any change requested or direction by Transport for NSW pursuant to the NWRL Deed (**TfNSW Request**) would, if implemented by the Project Company under the NWRL Deed, constitute or involve a Change, the Project Company must, within 10 Business Days after receiving the TfNSW Request and before commencing work on the subject matter of the TfNSW Request or otherwise complying with the TfNSW Request (unless, pursuant to the NWRL Deed, the Project Company is obliged to immediately commence work on the subject matter of the TfNSW Request or otherwise comply with the TfNSW Request), give a written notice to RMS's Representative that the Project Company considers that the TfNSW Request would, if implemented, constitute or involve a Change which sets out:
  - (i) details of the TfNSW Request; and
  - (ii) the details specified in paragraph 1.2 of the Change Procedure,
 failing which the Project Company will not be entitled to make any Claim against RMS under this clause 12.7 arising out of or in connection with the TfNSW Request.
- (b) Despite the fact that the Project Company considers that a TfNSW Request would, if implemented, constitute or involve a Change, the Project Company must continue to carry out the Project Company's Activities in accordance with this deed, and ensure that the State Works Contractor continues to carry out the SWC Activities in accordance with the State Works Deed, except to the extent that, in doing so, the Project Company would be in breach of the NWRL Deed.
- (c) If:
  - (i) the Project Company issues a written notice to RMS in accordance with clause 12.7(a); and
  - (ii) in the reasonable opinion of RMS's Representative, the TfNSW Request has not been made as a consequence of the Project Company's or the State Works Contractor's failure to comply with its obligations under a Project Document or the NWRL Deed,

RMS will promptly either:

- (iii) confirm that the TfNSW Request constitutes or involves a Change, in which case RMS will issue a Change Order in respect of that Change in accordance with paragraph 1 of the Change Procedure; or
  - (iv) procure that Transport for NSW withdraws the TfNSW Request and notify the Project Company that the TfNSW Request has been withdrawn (**Withdrawal Notice**).
- (d) If Transport for NSW withdraws a TfNSW Request in accordance with clause 12.7(c)(iv) after the Project Company has commenced work on the subject matter of the TfNSW Request or otherwise complied with the TfNSW Request, RMS will issue a Change Order in respect of the Project Company's carrying out of that work or complying with that TfNSW Request prior to the date of the Withdrawal Notice.

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## 13. Construction

### 13.1 Construction

- (a) The Project Company must construct the Project Company's Works and the Temporary Works, and ensure that the State Works Contractor constructs the State Works:
  - (i) in accordance with the requirements of this deed including:
    - A. the SWTC;
    - B. the Design Documentation which the Project Company and the State Works Contractor are entitled to use for construction purposes in accordance with clause 11.3(d); and
    - C. any Direction of RMS's Representative given or purported to be given under a provision of this deed, including any Change directed or approved by RMS in accordance with the Change Procedure or clause 12.2; and
  - (ii) using good workmanship and Materials which are:
    - A. free of Defects and other imperfections; and
    - B. of the quality specified in the SWTC; and
  - (iii) so that they:
    - A. are; and
    - B. other than the Third Party Works, will remain at all relevant times,

fit for their intended purposes.
- (b) The Project Company warrants that the Project Works (other than the Third Party Works) will, upon Completion, be fit for their intended purpose and remain, at all relevant times, fit for their intended purpose.
- (c) The Project Company warrants that in respect of each discrete part of the Third Party Works:

- (i) if the Third Party Works are Local Area Works or Utility Service Works, those Third Party Works will, upon RMS and the Independent Certifier being provided with a copy of the notice referred to in clause 15.2(a)(ii) or 15.3(a)(ii) (as applicable), be fit for their intended purpose; or
- (ii) if the Third Party Works are Property Works, those Third Party Works will, upon RMS's Representative being provided with a certificate or statement referred to in clause 9.4(a)(ii), be fit for their intended purpose.

### 13.2 Performance of Project Activities

- (a) Without limiting clause 13.1, in performing the Project Company's Activities, the Project Company must:
  - (i) act in a timely and expeditious manner, and ensure that the State Works Contractor acts in a timely and expeditious manner in performing the SWC Activities; and
  - (ii) once it has commenced any construction activities on the Project Site, regularly and diligently proceed with the construction of the Project Company's Works and the Temporary Works, and ensure that the State Works Contractor regularly and diligently proceeds with the construction of the State Works, in accordance with this deed and the State Works Deed.
- (b) Without limiting clause 13.1, the Project Company warrants that it will perform the Project Company's Activities using the workmanship and Materials required by this deed, and ensure that the State Works Contractor performs the SWC Activities using the workmanship and Materials required by this deed and the State Works Deed, and which are fit for their intended purposes.

### 13.3 Training management

The Project Company must satisfy its obligations, and ensure that the State Works Contractor satisfies its obligations, as a contractor under the Training Management Guidelines, including by:

- (a) ensuring that it has an Enterprise Training Management Plan (as referred to in the Training Management Guidelines) that complies with the requirements of the Training Management Guidelines;
- (b) preparing a Project Training Management Plan in accordance with the Training Management Guidelines and submitting the Project Training Management Plan to RMS;
- (c) complying with the Project Training Management Plan the Project Company is permitted to use in accordance with clause 7.5(c);
- (d) co-operating with and assisting, and ensuring that the State Works Contractor co-operates with and assists, RMS with any reviews undertaken by RMS of the Project Company's and the State Works Contractor's compliance with the Training Management Guidelines;
- (e) maintaining records evidencing the Project Company's and the State Works Contractor's compliance with the Training Management Guidelines; and
- (f) making available all records maintained in accordance with clause 13.3(e) to RMS.

### 13.4 Cleaning up

In carrying out the Project Works and the Temporary Works, the Project Company must keep, and ensure that the State Works Contractor keeps, the Project Site, Extra Land and the Project Works clean and tidy and regularly remove, and ensure that the State Works Contractor removes, from the Project Site, Extra Land and Project Works any waste or surplus material arising from such performance.

### 13.5 Signage

- (a) Subject to clause 13.5(b), the Project Company must not, and must ensure that the State Works Contractor does not, erect, install, paint or display any advertising, promotional or similar signage or material on, in or near any part of the Project Works, the Temporary Works or the Project Site (or permit any third party to do so) at any time prior to the Date of Completion.
- (b) Prior to the Date of Completion, the Project Company and the State Works Contractor may only (with the prior written approval of RMS) erect the following signage on or near the Project Site or Local Areas (as applicable):
  - (i) temporary directional signage to assist businesses in the vicinity of the Project Site, access to which has been, or is likely to be, adversely affected by the Project Activities;
  - (ii) signage required by Law or reasonably required for the safety and security of the Project Works and the Temporary Works;
  - (iii) project identification signage approved by RMS;
  - (iv) such directional signage as is reasonably required for the purposes of informing persons undertaking any part of the Project Activities; and
  - (v) directional and other signage necessary to inform, and direct the movement of, motorists, pedal cyclists and pedestrians in the vicinity of the Project Site.

### 13.6 Work methods

Whether or not this deed or the SWTC prescribes a particular work method or a work method is otherwise part of this deed or reviewed or approved (expressly or impliedly) by RMS or RMS's Representative, the fact that any work method that the Project Company or the State Works Contractor adopts or proposes to adopt is impractical or impossible or that the Project Company or the State Works Contractor, with or without the approval of RMS's Representative, uses another work method will:

- (a) not entitle the Project Company or the State Works Contractor to make any Claim against RMS arising out of or in any way in connection with the work method proving to be impractical or impossible or any change in the work method; and
- (b) not cause this deed or the State Works Deed to be frustrated.

### 13.7 As constructed documentation and reports

The Project Company must prepare and submit, and ensure that the State Works Contractor prepares and submits, to RMS's Representative and the Independent Certifier as constructed documentation and reports as required by and in accordance with the requirements of the Project Company Documentation Schedule or as otherwise reasonably requested by RMS's Representative.



### 13.8 Directions to suspend work under the NWRL Deed

If Transport for NSW gives the Project Company a written notice directing the Project Company to suspend any or all of its obligations under this deed, and cause the State Works Contractor to suspend any or all of its obligations under the State Works Deed (**TfNSW Direction**):

- (a) the Project Company must comply, and ensure that the State Works Contractor complies, with the TfNSW Direction; and
- (b) provided that Transport for NSW has not issued the TfNSW direction as a consequence of the Project Company's or the State Works Contractor's failure to comply with its obligations under a Project Document or the NWRL Deed, the Project Company may claim:
  - (i) an extension of time to the Sunset Date in accordance with Schedule 14 as if an Excusable Cause of Delay had occurred; and
  - (ii) if the Sunset Date is extended pursuant to clause 13.8(b)(i), compensation from RMS in accordance with clause 14.9 as if the Sunset Date had been extended due to a Compensation Event.

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## 14. Time and Completion

### 14.1 Start and progress

The Project Company must:

- (a) subject to clauses 2.1(a) and 3, start to perform the Project Company's Works and the Temporary Works, and ensure that the State Works Contractor starts to perform the State Works, from the date of this deed; and
- (b) regularly and diligently progress the Project Company's Works and the Temporary Works in accordance with this deed, and ensure that the State Works Contractor regularly and diligently progresses the State Works in accordance with the State Works Deed, to achieve Completion of the Project Works.

### 14.2 Date for Completion and Sunset Date

The Project Company must:

- (a) use its best endeavours, and ensure that the State Works Contractor uses its best endeavours, to achieve Completion by the earlier of the Date for Completion and the date that is after the Motorway Opening Date; and
- (b) achieve, and ensure that the State Works Contractor achieves, Completion by the Sunset Date.

### 14.3 Project Company's programming obligations

- (a) Within 10 Business Days after the date of this deed, the Project Company must prepare and submit to the Independent Certifier and RMS's Representative subsidiary programs for the Project Activities, including all design and construction activities (including the SWC Activities and procurement of Materials and Utility Services).
- (b) The Subsidiary D&C Programs must:

- (i) be based upon the Overall D&C Program; and
  - (ii) contain the details which RMS's Representative reasonably requires.
- (c) The Overall D&C Program and all Subsidiary D&C Programs must be:
- (i) reviewed and updated by the Project Company on a monthly basis to take into account changes to the Project Company's and the State Works Contractor's program for the Project Activities and delays which may have occurred, including any for which the Project Company or the State Works Contractor is granted an extension of time under clause 14.8; and
  - (ii) given to the Independent Certifier and RMS's Representative with the reports required by the Project Company Documentation Schedule in both hard copy form and in electronic form approved by RMS.
- (d) No submission of or Direction relating to, or review of or comment upon, a program (including the Overall D&C Program and any Subsidiary D&C Program) prepared by the Project Company or the State Works Contractor, by RMS or RMS's Representative in connection with the program, nor the inclusion of the Overall D&C Program as an exhibit to this deed, will:
- (i) relieve:
    - A. the Project Company from or alter its Liabilities or obligations under this deed; or
    - B. the State Works Contractor from or alter its Liabilities or obligations under the State Works Deed,

especially (without limitation) the obligations of the Project Company under clause 14.2;
  - (ii) evidence or constitute notification of a delay or the claiming of or the granting of, an extension of time to the Date for Completion or the Sunset Date, or a Direction by RMS's Representative to accelerate, disrupt, prolong or vary any, or all, of the Project Activities; or
  - (iii) affect the time for performance of RMS's or RMS's Representative's obligations under this deed or the State Works Deed, including obliging RMS or RMS's Representative to do anything earlier than is necessary to enable the Project Company and the State Works Contractor to achieve Completion by the Date for Completion or the Sunset Date.
- (e) If the Project Company or the State Works Contractor chooses to compress the Project Activities or otherwise accelerate progress:
- (i) neither RMS nor RMS's Representative will be obliged to take any action to assist or enable the Project Company or the State Works Contractor to achieve Completion before the Date for Completion or the Sunset Date; and
  - (ii) the time for the carrying out of RMS's or RMS's Representative's obligations will not be affected.

#### 14.4 Risk and notice of delay

- (a) Except as expressly provided for in clause 14.7, the Project Company accepts the risk of all delays in, and disruption to, the carrying out of the Project Activities and performance of its obligations, and the obligations of the State Works Contractor and their respective Related Parties, under the RMS Project Documents both before and after the Date for Completion and the Sunset Date.
- (b) The Project Company must within 5 Business Days of the commencement of an occurrence causing any delay or which is likely to cause delay to either the Project Company or the State Works Contractor, give RMS's Representative written notice of any delay or likely delay to the carrying out of the Project Activities, details of the cause and how the Date for Completion and the Sunset Date is likely to be affected (if at all).

#### 14.5 Delay

If:

- (a) the Project Company becomes aware of any matter which will, or is likely to, give rise to a delay in either the Project Company or the State Works Contractor achieving Completion; or
- (b) RMS reasonably believes that either the Project Company or the State Works Contractor will not achieve Completion by the Date for Completion or the Sunset Date and gives the Project Company a written notice to that effect,

the Project Company must:

- (c) in the case of clause 14.5(a), immediately give RMS a written notice setting out detailed particulars of the delay together with a detailed corrective action plan which the Project Company proposes to implement, and ensure that the State Works Contractor implements, to Mitigate the effects of the delay; and
- (d) in the case of clause 14.5(b), promptly provide RMS with a detailed corrective action plan showing how it proposes to Mitigate, and ensure that the State Works Contractor Mitigates, the effects of the delay.

#### 14.6 Corrective action plan

- (a) RMS may, within 5 Business Days of receipt of a corrective action plan under clause 14.5 or clause 14.6(b), give written notice to the Project Company that it does not believe that implementation of the corrective action plan will enable the Project Company and the State Works Contractor to Mitigate the effects of the delay.
- (b) If RMS gives the Project Company a notice under this clause 14.6 the Project Company must promptly (and in any event within 5 Business Days) amend and resubmit the corrective action plan to RMS after which this clause 14.6 will continue to apply until RMS does not issue a notice under this clause 14.6.
- (c) The Project Company must, upon the 5 Business Day period referred to in clause 14.6(a) expiring without RMS giving the Project Company written notice in accordance with that clause, diligently pursue, and ensure that the State Works Contractor diligently pursues, a corrective action plan for which RMS does not issue a notice under this clause 14.6.
- (d) The:

- (i) Project Company will not be relieved of any Liability or responsibility under this deed or otherwise at law; and
  - (ii) State Works Contractor will not be relieved of any Liability or responsibility under the State Works Deed or otherwise at law,
- arising out of or in connection with:
- (iii) any notice given by RMS under clause 14.5(b) or this clause 14.6; or
  - (iv) implementation of any corrective action plan in respect of which RMS has or has not issued a notice under this clause 14.6.

#### **14.7 Claim for extension of Sunset Date**

If the Project Company or the State Works Contractor is or will be delayed in achieving Completion by an Excusable Cause of Delay, the Project Company may claim an extension of time to the Sunset Date in accordance with Schedule 14.

#### **14.8 Extension of Sunset Date and Date for Completion**

- (a) The Sunset Date will be extended by the period (if any) determined in accordance with paragraph 3(a) of Schedule 14.
- (b) For the purposes only of clauses 14.5(b) and 27.1(e), the Date for Completion will be deemed to be extended by the same period (if any) by which the Sunset Date is extended in accordance with paragraph 3(a) of Schedule 14.

#### **14.9 Compensation Events**

- (a) If the Sunset Date is extended pursuant to paragraph 3(a) of Schedule 14 due to a Compensation Event, the Project Company is entitled to claim compensation from RMS in accordance with this clause 14.9.
- (b) If a Compensation Event occurs, the Project Company must:
  - (i) take all reasonable steps, and ensure that the State Works Contractor takes all reasonable steps, to Mitigate the consequences of the Compensation Event;
  - (ii) otherwise comply with, and ensure that the State Works Contractor complies with, all reasonable directions of RMS concerning the Compensation Event and the consequences thereof; and
  - (iii) ensure that its Related Parties, and the State Works Contractor's Related Parties, comply with the requirements of this clause 14.9(b).
- (c) Subject to clauses 14.9(b) and 14.9(d), RMS must pay the Project Company the Project Company's Delay Costs arising as a direct result of the delay caused by the Compensation Event for which the extension of time was granted for the period for which the extension of time was granted.
- (d) RMS's liability to the Project Company under clause 14.9(c) will not exceed the amounts set out below per day for the period for which the extension of time was granted:

- (i) from Financial Close until the commencement of any activity in Cost Item 3.5(c) (listed under Cost Centre 3 as set out in Schedule 30 to the D&C Deed): \$ (excluding GST);
  - (ii) from the day after the commencement of any activity in Cost Item 3.5(c) (listed under Cost Centre 3 as set out in Schedule 30 to the D&C Deed) until completion of all activities listed under Cost Centre 3 (other than completion of Cost Items 3.1, 3.2, 3.3 and 3.4 listed under Cost Centre 3 as set out in Schedule 30 to the D&C Deed): \$ (excluding GST); or
  - (iii) from the day after completion of all activities listed under Cost Centre 3 (other than completion of Cost Items 3.1, 3.2, 3.3 and 3.4 listed under Cost Centre 3 as set out in Schedule 30 to the D&C Deed) until the Date of Completion: \$ (excluding GST).
- (e) The Project Company's Delay Costs payable to the Project Company under clause 14.9(c) will be the Project Company's sole remedy for the recovery of any Loss which the Project Company or the State Works Contractor suffers or incurs arising out of or in any way in connection with any delay and disruption that:
- (i) the Project Company encounters in carrying out the Project Company's Works and the Temporary Works;
  - (ii) the State Works Contractor encounters in carrying out the State Works; and
  - (iii) arises out of, or in any way in connection with, a Compensation Event (including a breach of this deed or the State Works Deed by RMS).
- (f) Clauses 14.9(d) and 14.9(e) are a limitation upon RMS's liability to the Project Company, the State Works Contractor and their respective Related Parties for any Losses suffered or incurred by the Project Company, the State Works Contractor or their respective Related Parties arising out of or in any way in connection with any such delay or disruption and the Project Company waives, and must ensure that its Related Parties, the State Works Contractor and the State Works Contractor's Related Parties waive, all rights at Law to make any Claim against RMS, and RMS will not be liable to the Project Company, the State Works Contractor or their respective Related Parties in these circumstances other than in respect of the matters for which RMS may be liable under this clause 14.9.
- (g) Notwithstanding the occurrence of a Compensation Event, the Project Company must continue to perform, and ensure that the State Works Contractor continues to perform, all of its obligations under the Project Documents to the extent that the Project Company and the State Works Contractor are not prevented from performing those obligations by that Compensation Event.

#### 14.10 Completion process

- (a) The Project Company must give RMS's Representative and the Independent Certifier:
- (i) 6 months';
  - (ii) 3 months';
  - (iii) 1 month's; and

- (iv) 1 week's,  
prior written notice of the estimated Date of Completion.
- (b) Subject to clause 14.10(g), RMS's Representative, the Project Company and the Independent Certifier must, within 5 Business Days after receipt of the notice referred to in clause 14.10(a), jointly inspect the Project Activities at a mutually convenient time.
- (c) Within 2 Business Days of the joint inspection referred to in clause 14.10(b), the Independent Certifier must give the Project Company and RMS a notice either:
- (i) containing a list of items which it believes must be completed before Completion is achieved; or
  - (ii) stating that it believes that Completion is so far from being achieved that it is not practicable to issue a list as contemplated in clause 14.10(c)(i).
- (d) When the Project Company considers Completion has been achieved, the Project Company must notify RMS's Representative and the Independent Certifier in writing and provide them with an executed certificate in the form of Schedule 16.
- Thereafter, and subject to clause 14.10(g), RMS's Representative, the Project Company and the Independent Certifier must jointly inspect the Project Activities at a mutually convenient time.
- (e) Following the joint inspection under clause 14.10(d), the Independent Certifier must within 5 Business Days after receipt of a notice under clause 14.10(d), or of receipt of a notice under clause 14.10(f):
- (i) if Completion has been achieved, provide to RMS's Representative and the Project Company a document signed by the Independent Certifier in the form in Schedule 17; or
  - (ii) if Completion has not been achieved, issue a notice to the Project Company and RMS in which it states:
    - A. the items which remain to be completed before Completion is achieved; or
    - B. that Completion is so far from being achieved that it is not practicable to notify the Project Company of the items which remain to be completed as contemplated by clause 14.10(e)(ii)A.
- (f) If the Independent Certifier issues a notice under clause 14.10(e)(ii), the Project Company must proceed with the Project Company's Activities, and ensure that the State Works Contractor proceeds with the SWC Activities, and thereafter when it considers Completion has been achieved, it must give RMS's Representative and the Independent Certifier written notice to that effect after which clauses 14.10(d) and 14.10(e) will reapply.
- (g) The Project Company acknowledges and agrees that:
- (i) RMS's Representative may invite any other person to attend any joint inspection provided for by this clause 14.10; and

- (ii) RMS's Representative may provide comments to the Independent Certifier (with a copy to the Project Company) in relation to any non-compliance of the Project Activities with this deed or the State Works Deed.

#### 14.11 Effect of Notice of Completion

- (a) A Notice of Completion will not:
  - (i) constitute approval by RMS or RMS's Representative of the Project Company's performance of its obligations under this deed or the State Works Contractor's performance of its obligations under the State Works Deed;
  - (ii) be taken as an admission or evidence that the Project Works comply with this deed or the State Works Deed; or
  - (iii) prejudice any rights or powers of RMS or RMS's Representative.
- (b) Without limiting clause 14.11(a), the parties agree that, in the absence of manifest error by the Independent Certifier, the Independent Certifier's certification as set out in a Notice of Completion is final and binding on the parties for the purposes only of establishing that Completion has occurred.

#### 14.12 Defects or omissions

Notwithstanding that Completion may have occurred, the Project Company must as soon as practicable after Completion (and in any event within \_\_\_\_\_ after the Date of Completion) correct, and ensure that the State Works Contractor corrects, any Defects which existed at the time of the issue of the Notice of Completion.

#### 14.13 Operational Readiness Group

- (a) The Project Company must give:
  - (i) written notice to the Independent Certifier and RMS of the Project Company's good faith estimate of the date on which it anticipates the Opening Conditions Precedent will be satisfied at least 12 months before that date (**Operational Readiness Notice**); and
  - (ii) the Independent Certifier and RMS further written notice as soon as practicable if:
    - A. the estimated date specified in the Operational Readiness Notice changes; or
    - B. the Project Company considers that the Opening Conditions Precedent have been satisfied,

(each a **Further OR Notice**).
- (b) The Independent Certifier will:
  - (i) establish the Operational Readiness Group pursuant to clause 3A of the Independent Certifier Deed within 5 Business Days of the earlier of:
    - A. the date on which the Independent Certifier receives an Operational Readiness Notice; and

- B. the date that is 15 months prior to the Date for Completion;
- (ii) convene meetings of the Operational Readiness Group at monthly intervals (or such other intervals agreed between RMS and the Project Company), commencing on the date on which the Operational Readiness Group is established pursuant to clause 14.13(b)(i), to discuss the opening the Motorway (including the progress of the Project Activities and the satisfaction of the Opening Conditions Precedent);
- (iii) convene a meeting of the Operational Readiness Group to inspect the Project Activities within 10 Business Days after receiving an Operational Readiness Notice or a Further OR Notice; and
- (iv) within 10 Business Days after an inspection referred to in clause 14.13(b)(iii), give the Project Company a written notice informing the Project Company either:
  - A. that the Operational Readiness Group determines that the Opening Conditions Precedent have been satisfied;
  - B. containing a list of items which the Operational Readiness Group believes must be completed in order to satisfy the Opening Conditions Precedent; or
  - C. stating that the Operational Readiness Group believes that the Opening Conditions Precedent are so far from being achieved that it is not practicable to issue a list as contemplated in clause 14.13(b)(iv)B.
- (c) If the Independent Certifier issues a notice:
  - (i) pursuant to clause 14.13(b)(iv)A, clause 14.14 will apply; or
  - (ii) pursuant to clause 14.13(b)(iv)B or clause 14.13(b)(iv)C, the Project Company must proceed with the Project Company's Activities, and ensure that the State Works Contractor proceeds with the SWC Activities, and give the Independent Certifier and RMS a Further OR Notice when it considers that the Opening Conditions Precedent have been satisfied, in which case clauses 14.13(b)(iii) and 14.13(b)(iv) will re-apply.
- (d) The parties acknowledge that the:
  - (i) Operational Readiness Group will have responsibility for determining whether the Project Company has satisfied the Opening Conditions Precedent;
  - (ii) members of Operational Readiness Group other than the Independent Certifier will not have any legal responsibility to RMS, the Project Company or the Independent Certifier;
  - (iii) Operational Readiness Group must if requested make recommendations and provide advice to RMS, the Project Company and the Independent Certifier in connection with the opening of the Motorway, including with respect to the satisfaction of the Opening Conditions Precedent;
  - (iv) findings, determinations and recommendations of the Operational Readiness Group will be binding on RMS, the Project Company and the Independent Certifier, provided that such findings, determinations and



recommendations will not limit or affect the Independent Certifier's determination of whether Completion has been achieved pursuant to clause 14.10; and

- (v) Project Company must give the Operational Readiness Group such access to the Project Site, the Motorway, the Project Activities and any information, reports, records or documents reasonably required to enable the Operational Readiness Group to determine whether the Opening Conditions Precedent have been satisfied.

## 14.14 Opening of Motorway

- (a) The Motorway may not be opened for public use prior to the Motorway Opening Date.
- (b) The Project Company must open all traffic lanes of the Motorway to the public for the safe, efficient and continuous passage of vehicles as soon as practicable after the Motorway Opening Date and may then operate (or procure the operation of) the Toll Collection System and levy tolls in relation to the Motorway in accordance with clause 19.
- (c) The Project Company must:
  - (i) give notice to RMS of the date on which it intends to open the Motorway for public use at least 20 Business Days before the intended date of opening;
  - (ii) otherwise liaise with RMS to ensure the opening of the Motorway is managed effectively;
  - (iii) effect all insurances required in relation to the Motorway under clause 24 prior to opening any part of the Motorway for public use; and
  - (iv) do all things required to be done under this deed (including the SWTC) prior to opening the Motorway to public use.
- (d) The parties acknowledge that, notwithstanding any provision of this deed, the opening of the Motorway prior to the Date of Completion will not affect or limit:
  - (i) the Project Company's obligations to achieve Completion and rectify Defects in accordance with this deed;
  - (ii) any right or obligation of the Project Company under any Project Document which is conditional upon, or which arises as a consequence of, Completion; or
  - (iii) the calculation or payment of any amount which is conditional upon, or the right to payment of which arises as a consequence of, Completion.

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## 15. Defects Correction Periods

### 15.1 Correction of Defects

- (a) The Project Company must correct, and procure that the State Works Contractor corrects, all Defects in the Local Area Works, Utility Service Works or Property Works during the relevant Defects Correction Period.

- (b) Without limiting clause 15.1(a), if during a Defects Correction Period, RMS discovers or believes there is a Defect in the Local Area Works, Utility Service Works or Property Works, RMS may, without prejudice to any other rights which RMS may have under this deed, the State Works Deed or otherwise at law, give the Project Company a written direction specifying the Defect and requiring the Project Company to correct, or procure that the State Works Contractor corrects, the Defect (or a part of it) and specifying a reasonable time within which this must occur.
- (c) If the Project Company disagrees with any direction given by RMS under clause 15.1(b), it must within 5 Business Days after receipt of such a notice give notice of its disagreement to RMS. RMS and the Project Company must use reasonable endeavours to resolve the matter the subject of the disagreement. If the matter is not resolved within 10 Business Days after the date of the Project Company's notice, either RMS or the Project Company may, by notice to the other and the Independent Certifier, refer the matter for determination by the Independent Certifier, who must within 10 Business Days after receipt of the referral make a determination as to the matter and notify the parties in writing of its determination together with its reasons for making its determination.
- (d) If RMS directs the Project Company to correct a Defect under clause 15.1(b) prior to the expiration of the relevant Defects Correction Period and the Project Company does not give a written notice under clause 15.1(c) or, if it does, the Independent Certifier determines that a Defect exists, the Project Company must correct, or procure that the State Works Contractor corrects, the Defect (or the part of it):
  - (i) within the time specified in RMS's direction;
  - (ii) at times agreed with RMS and in accordance with the requirements of any other relevant Authority;
  - (iii) so as to minimise the impact on the use of the relevant part of the Local Area Works, Utility Service Works or Property Works; and
  - (iv) so as to minimise the inconvenience to possible users of the Motorway, any Local Area, a Utility Service, the Property Works or any access and the adjacent community.
- (e) The Project Company must give notice to RMS and the Independent Certifier that a Defect has been corrected promptly after the correction of the Defect.

## 15.2 Local Area Works

Each discrete part of the Local Area Works has:

- (a) a Defects Correction Period which begins when:

- (ii) RMS and the Independent Certifier have been provided with a copy of the relevant notice,

**15.3 Utility Service Works**

Each discrete part of the Utility Service Works has:

- (a) a Defects Correction Period which begins when:

; and

- (ii) RMS and the Independent Certifier have been provided with a copy of the relevant notice,

#### **15.4 Property Works**

Each discrete part of the Property Works has:

- (a) a Defects Correction Period which begins \_\_\_\_\_ ; and
- (b) a further Defects Correction Period of \_\_\_\_\_

#### **15.5 Failure by the Project Company to comply with direction**

If the Project Company fails to comply with a notice given under clause 15.1(b), RMS may (without limiting any other rights it may have including under clause 6.6) apply for a court order for specific performance.

#### **15.6 Rights not affected**

Neither:

- (a) RMS's rights, whether under this deed, the State Works Deed or otherwise according to law; nor
- (b) the liability of:
  - (i) the Project Company, whether under this deed or otherwise according to law; or
  - (ii) the State Works Contractor, whether under the State Works Deed or otherwise according to law,

in respect of Defects, whether before or after the expiration of any relevant Defects Correction Period or the Term, will be in any way affected or limited by:

- (c) the rights conferred upon RMS or the Independent Certifier by this clause 15 or any other provision of this deed or the State Works Deed;
- (d) the exercise of, or the failure by RMS or the Independent Certifier to exercise, any such rights; or

- (e) any direction of RMS under this clause 15.

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## 16. Motorway Site Lease

### 16.1 Motorway Site Lease

- (a) The parties acknowledge and agree that the Motorway Site Lease cannot be registered under the Real Property Act 1900 (NSW) in its present form.
- (b) The Project Company must procure surveys and other documents in accordance with Schedule 18.
- (c) RMS must grant the Project Company the Motorway Site Lease and a licence over the Licensed Maintenance Areas in accordance with Schedule 18.
- (d) From and including the earlier of the Motorway Opening Date and the Date of Completion until the date on which the Motorway Site Lease is registered in accordance with paragraph 3 of Schedule 18, the respective rights and obligations of RMS and the Project Company will be as set out in the draft Motorway Site Lease comprising Exhibit H and the parties will be bound by the provisions of the draft Motorway Site Lease comprising Exhibit H, even though the parties may not have executed the Motorway Site Lease or it may not have been completed in accordance with Schedule 18.

### 16.2 Easements

RMS:

- (a) may create the Easements referred to in Appendix A to Schedule 18 in accordance with Schedule 19; and
- (b) subject to Schedule 19, must create the Easements referred to in Appendix B of Schedule 19 in accordance with Schedule 19.

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## 17. Operation, maintenance and repair

### 17.1 General obligation

- (a) Without limiting the Project Company's obligations under this clause 17, the Project Company must operate, maintain and repair the Motorway throughout the Term so that:
- (i) subject to clause 17.2, all traffic lanes of the Motorway (including all on-ramps, off-ramps, exits and entries) are at all times during the Term open to the public for the safe, continuous and efficient passage of vehicles;
- (ii) the performance of each part of the Motorway meets the performance standards specified in the SWTC;
- (iii) the Motorway is in a condition which will satisfy the handover conditions in section 10 of the SWTC;
- (iv) the Motorway otherwise remains at all relevant times fit for its intended purposes and that Defects are corrected as soon as possible; and
- (v) the requirements of the Environmental Documents are at all times met.

- (b) The standards, tasks, obligations and other provisions contained in or referred to in section 9 of the SWTC (including in Appendix 9 of the SWTC) represent the minimum requirements which the Project Company must satisfy for the purpose of fulfilling the obligations specified in clause 17.1(a).
- (c) The Project Company bears the risk that:
- (i) compliance by it with the minimum requirements referred to in clause 17.1(b); and
  - (ii) without limiting clause 17.1(c)(i), the development of, and compliance with, maintenance standards of the kind referred to in section 9 of the SWTC,
- will not enable the obligations specified in clause 17.1(a) to be fulfilled.
- (d) Without limiting clause 17.1(c), the Project Company must, at its own cost, carry out all work in addition to that necessary or desirable to meet the minimum requirements referred to in clause 17.1(b) to enable the obligations specified in clause 17.1(a) to be fulfilled.

## 17.2 Obligation to keep Motorway open

- (a) During the Term, the Project Company must keep all traffic lanes of the Motorway (including all on-ramps, off-ramps, exits and entries) open to the public for the safe, efficient and continuous passage of vehicles (whether or not the Toll Collection System is operational) except to the extent:
- (i) it has been authorised to close the Motorway or a traffic lane of the Motorway under a road occupancy licence granted by RMS in accordance with Appendix 31 of the SWTC, or RMS otherwise consents in writing; or
  - (ii) it is necessary to close the Motorway or a traffic lane of the Motorway as a result of:
    - A. the requirements of any Law or relevant Authority which have the effect of Law and which necessitate the closing of the Motorway or a traffic lane of the Motorway;
    - B. the occurrence of a Force Majeure event which prevents the safe passage of vehicles;
    - C. a material threat to the health or safety of the public;
    - D. maintenance of and/or repairs to the Motorway carried out in accordance with this deed, including the SWTC;
    - E. access by RMS or any person authorised by RMS in accordance with clause 17.15 or 20.7; and
    - F. traffic management measures required to respond to congestion or Incidents in the road network surrounding the Motorway in accordance with protocols agreed in writing by the Project Company and RMS.

- (b) If the Project Company closes or proposes to close any part of the Motorway for any reason whatsoever, the Project Company must promptly notify RMS in writing specifying the reasons for such closure.

### 17.3 Performance of O&M Work

- (a) Without limiting clause 17.1, in performing the O&M Work, the Project Company must:
- (i) comply with O&M Best Practices and for this purpose develop, implement and continuously improve maintenance standards and systems to reflect O&M Best Practices, including performance and intervention standards, appropriate response times and management and control systems;
  - (ii) keep the Motorway and any maintenance plant clean and tidy and regularly remove from any place where the O&M Work is being performed any waste or surplus material arising from such performance;
  - (iii) act in a timely and expeditious manner;
  - (iv) once it has commenced any O&M Work, proceed with the O&M Work with due expedition and without delay and must take all steps reasonably available to it (including re-sequencing and re-scheduling the commencement of other O&M Work) to minimise any disruption to, or compromise of the safety of, the users of the Motorway;
  - (v) minimise the impact of the performance of the O&M Work on motorists and other users of the Motorway;
  - (vi) perform the O&M Work using good workmanship and materials which are fit for their intended purposes; and
  - (vii) if, in the performance of the O&M Work, it is required to replace any worn, failed or defective parts, use replacement parts which are:
    - A. of equal quality to those required under this deed; and
    - B. fit for their intended purpose.
- (b) If any damage is caused by the Project Company, its employees, agents or contractors or any employee of an agent or contractor in the performance of the O&M Work to any property or Utility Service, the Project Company must promptly make good the damage at its own cost and pay any compensation payable in connection with the damage.
- (c) Upon completion of any O&M Work, the Project Company must promptly and in a good and workmanlike manner remove all temporary protection measures installed in connection with it.
- (d) The parties acknowledge and agree that from:
- (i) the date of this deed, the Project Company's obligations in this deed and the State Works Contractor's obligations under the State Works Deed with respect to the Project Activities (to the extent they relate to the period prior to Completion and other than to the extent they relate to the Project Company's obligations under the TCM Operator's Side Deed and the TISA Side Deed), the Project Works and the Temporary Works do

not impose any obligations on Project Company or the State Works Contractor with respect to the Back Office System or the Tolling Services; and

- (ii) the GLIDe Go Live Date, the Project Company's obligations in this deed with respect to the O&M Works and Project Activities (to the extent they relate to the period after Completion and other than to the extent they relate to the Project Company's obligations under the TCM Operator's Side Deed and the TISA Side Deed) do not impose any obligations on the Project Company with respect to the Back Office System or the Tolling Services.

## 17.4 O&M Manuals

- (a) As a condition precedent to Completion, the Project Company must develop the O&M Manuals, and thereafter the Project Company must maintain the O&M Manuals, in accordance with the requirements of this deed including the Project Company Documentation Schedule.
- (b) The O&M Manuals must contain the contents required by the SWTC.
- (c) RMS owes no duty to the Project Company to review the O&M Manuals or any draft submitted by the Project Company for errors, omissions or compliance with this deed.
- (d) No review of, comments upon, notice given in respect of the O&M Manuals or any draft or any other act or omission of RMS in respect of the O&M Manuals or any draft will lessen or otherwise affect:
  - (i) the Project Company's Liabilities or responsibilities under this deed or otherwise according to law; or
  - (ii) RMS's rights against the Project Company, whether under this deed or otherwise according to law.
- (e) The Project Company warrants that:
  - (i) the O&M Manuals will be fit for their intended purposes; and
  - (ii) in addition to the warranties referred to in clause 7.5(e) for the Project Plans incorporated into the O&M Manuals under clause 7.5(e) compliance with the O&M Manuals will enable it, during the Term, to fulfil its obligations under this deed.
- (f) The Project Company:
  - (i) must comply with the O&M Manuals as submitted to RMS in accordance with the Project Company Documentation Schedule; and
  - (ii) agrees that compliance by it with the O&M Manuals will not in any way lessen or affect:
    - A. its Liabilities or responsibilities under this deed or otherwise according to law; or
    - B. RMS's rights against it, whether under this deed or otherwise according to law.



## 17.5 Failure to comply with O&M obligations

- (a) If, other than to the extent permitted or excused pursuant to this deed:
- (i) the O&M Manuals have not been maintained or complied with, as required by this deed;
  - (ii) the O&M Manuals are deficient as a mechanism for ensuring that at the end of the Term the Motorway will be in the handover condition required by the terms of this deed; or
  - (iii) the Project Company otherwise fails to comply with its obligations under clause 17.1,

RMS may, at any time during the Term, issue to the Project Company a notice requiring the Project Company to rectify any specified non-conformances within

- (b) If at the end of such                      period the non-conformances specified in a notice issued by RMS in accordance with clause 17.5(a) have not been rectified in full to the extent to which they can be rectified, RMS may issue to the Project Company a notice to that effect and the Project Company must provide to RMS an unconditional undertaking for an amount determined by RMS (which must be reasonable having regard to the nature of the non-conformances) up to \$ (Indexed) which complies with the requirements of clause 8.1, as security for the Project Company's performance of its obligations under clause 17.1.

## 17.6 *Not used*

## 17.7 Inspection

RMS, its employees and agents (including any subcontractors and their employees) may, at any time during the Term, enter during business hours or on reasonable notice (except in the case of an emergency, when the right of access will be immediate) the Maintenance Site, the Motorway and the Motorway Control Centre to inspect and observe the operation, maintenance and repair of the Motorway or to exercise any right or perform any obligation which RMS has under any Project Document.

## 17.8 Changes to Motorway

Subject to clause 12, the Project Company must:

- (a) not make (or permit to be made) any:
- (i) structural changes to the Motorway; or
  - (ii) changes to the Motorway which are inconsistent with or outside the requirements of the SWTC,

without RMS's prior written approval (which approval must be given to the extent that the change is required in order for the Project Company to comply with the Law); and

- (b) notify RMS of any other change made to the Motorway.

## 17.9 Advertising signage

Subject to clause 13.5(b), the Project Company must not (at any time during the Term) erect, install, paint or display any advertising, promotional or similar signage or material on, in or near any part of the Motorway (or permit any third party to do so).

However, this clause 17.9 will not prevent the Project Company from installing and maintaining operational directional signage which is specified in Appendix 29 of the SWTC (but on the basis that the Project Company obtains all other necessary Approvals in respect of such signage).

## 17.10 Fixtures, fittings and equipment

The Project Company must ensure that all fixtures and fittings comprised in the Motorway and all dedicated equipment used by it in connection with the Motorway will be:

- (a) owned by the Project Company; or
- (b) owned by the Project Company's Subcontractors with an option in favour of the Project Company to acquire title to them upon expiry or termination of the relevant Subcontract; or
- (c) be the subject of an agreement:
  - (i) with an option in favour of the Project Company to acquire title to them for nominal cost at the end of the term of such agreement; and
  - (ii) which includes a right for the Project Company to assign its rights and obligations under the agreement to RMS (or its nominee) prior to the end of the term of such agreement on an early termination of this deed.

## 17.11 Operating qualifications

- (a) The Project Company must:
  - (i) ensure that each Relevant Entity:
    - A. is reputable and has sufficient experience and expertise in successfully operating, maintaining and repairing (as applicable) tollways, freeways or other roads;
    - B. has in place arrangements for ensuring the availability of the appropriate skills and resources to perform its obligations to the standards required by this deed;
    - C. is of sufficiently high financial and commercial standing to perform its obligations to the standards required by this deed; and
    - D. is engaged on:
      - 1) commercial terms negotiated on an arm's length basis having regard to the obligations of the Project Company under this deed; or
      - 2) terms approved by RMS under clause 40.17; and

- (ii) if the Relevant Entity is a Key Relevant Entity, provide RMS with prior written details of the Relevant Entity and the terms and conditions of its appointment.
- (b) Subject to clause 17.12, the Project Company must not:
- (i) terminate the appointment of any Key Relevant Entity unless another person, in respect of which clause 17.11(a) has been complied with, is appointed to perform the obligations which were performed by that Key Relevant Entity; or
  - (ii) make, or consent to, any modification, variation or amendment of a material nature to the agreement under which a Key Relevant Entity is appointed, unless such modification, variation or amendment is on commercial terms and has been negotiated on an arm's length basis or the modification, variation or amendment is otherwise approved by RMS under clause 40.17 and prior written details have been given to RMS,
- unless RMS otherwise consents in writing, which consent must not be unreasonably withheld or delayed.
- (c) The engagement by the Project Company of any other Relevant Entity will not limit or affect the Project Company's Liabilities under this deed.

## 17.12 Replacement of Key Relevant Entity

If, at any time, the Project Company proposes to appoint a replacement Key Relevant Entity, the Project Company must first obtain prior written consent from RMS for the appointment or novation. RMS must not withhold such consent where:

- (a) RMS has been provided with written details of the proposed replacement Key Relevant Entity, the terms and conditions of the proposed appointment or novation and any other information reasonably requested by RMS;
- (b) the proposed replacement Key Relevant Entity is a reputable corporation;
- (c) where the Key Relevant Entity that the Project Company proposes to replace is the Operator, the Tolling and Customer Management Contractor or the Technology Operator, in RMS's reasonable opinion, the proposed replacement Key Relevant Entity (whether by itself or by way of support from its shareholders in a form acceptable to RMS acting reasonably):
  - (i) has sufficient expertise and ability; and
  - (ii) is of sufficiently high financial and commercial standing,
 to properly carry out the obligations of the Operator, the Tolling and Customer Management Contractor or the Technology Operator (as the case may be) under the relevant Project Documents;
- (d) all terms and conditions of the proposed appointment or novation are reasonably acceptable to RMS;
- (e) the proposed replacement Key Relevant Entity has agreed to be bound by the terms of the relevant Project Documents; and
- (f) a person other than RMS bears all reasonable costs and expenses (including legal costs and expenses) of and incidental to:

- (i) any enquiries which RMS may make for the purposes of determining whether to consent to the appointment or novation;
- (ii) the procurement of a replacement Key Relevant Entity; and
- (iii) the preparation, negotiation and execution of any relevant documentation and any stamp duty or similar charges in relation to such documentation,

and must notify the Project Company that RMS gives or withholds its consent no later than 20 Business Days after RMS has received the information referred to in clause 17.12(a).

### 17.13 Notice of damage and accidents

- (a) During the Term, the Project Company must promptly give RMS a detailed written report of:
  - (i) any material damage to or defect or disrepair in the Motorway of which it is aware;
  - (ii) the action which the Project Company proposes to take to correct that material damage, defect or disrepair, and the estimated time that correction will require; and
  - (iii) any Incidents or other accidents involving material damage or injury which occur on the Motorway of which it is aware.
- (b) If the Project Company provides or is required to provide a report to RMS in accordance with clause 17.13(a), the Project Company must thereafter take the action referred to in that report and provide any additional information reasonably requested by RMS in respect of the subject matter of such report.

### 17.14 Final Handover

- (a) The parties must, if required by RMS, carry out joint inspections of the Motorway at a mutually convenient time:
  - (i) 3 years prior to the Expiry Date; and
  - (ii) 18 months prior to the Expiry Date.
- (b) Following each inspection under clause 17.14(a), the parties will seek to reach agreement on:
  - (i) the maintenance and repair works required to achieve Final Handover which are in addition to the maintenance or repair works scheduled to be carried out by the Project Company between the date of the inspection and the Expiry Date as part of the O&M Work;
  - (ii) a programme for the carrying out of those works by the Project Company; and
  - (iii) an estimate of the cost of carrying out those works.

If the parties fail to reach agreement on any of the matters referred to in this clause 17.14(b) within 20 Business Days after the date of the relevant joint inspection then RMS may refer the matters in dispute for resolution in accordance with the Dispute Resolution Procedure.

- (c) The Project Company must carry out the works agreed or determined under clause 17.14(b) in accordance with the programme agreed or determined pursuant to clause 17.14(b); and
- (i) must either:
- A. progressively deposit into an account opened by RMS in RMS's name with an authorised deposit-taking institution (within the meaning of the *Banking Act 1959* (Cth)) (the **Escrow Account**) % of all revenue collected by the Toll Collection System during the last 3 years or 18 months of the Term (as the case may be) until such time as the balance of the Escrow Account equals or exceeds % of the total estimated cost of the works (as agreed or determined pursuant to clause 17.14(b)); or
- B. provide to RMS an unconditional undertaking which complies with the requirements of clause 8.1 for an amount equal to % of the estimated cost of the works (as agreed or determined pursuant to clause 17.14(b)),
- as security for the performance of such works and the Project Company's or Trustee's other obligations under this clause 17.14.
- (d) Subject to its rights to have recourse to the monies held in the Escrow Account,
- (e) As conditions precedent to Final Handover:
- (i) there must be:
- A. no immediate repair work required to any part of the Motorway; and
- B. otherwise no Defects in the Motorway;
- (ii) the Project Company must transfer ownership to RMS or its nominee of all plant and equipment owned by the Project Company, or in respect of which it has an option to acquire title, which is required for the O&M Work; and
- (iii) the Project Company must supply to RMS all spare parts and special tools necessary for the continued operation, maintenance and repair of the Motorway after the expiry of the Term for a period of
- (f) During the final of the Term, the Project Company must train RMS (or other) personnel as nominated by RMS in all aspects of the operation, maintenance and repair of the Motorway to a level of competency that will allow those personnel to manage, operate, maintain and repair the Motorway so that the obligations specified in clause 17.1 can be fulfilled after the expiry of the Term.
- (g) It is a condition precedent to Final Handover that the training referred to in clause 17.14(f) be completed to the reasonable satisfaction of RMS.
- (h) For a period of after the expiry of the Term, the Project Company must ensure that it has competent and experienced personnel available to consult with RMS on any aspect of the operation, maintenance and repair of the Motorway where required by RMS.

- (i) Within 60 Business Days after the Expiry Date, RMS will make determinations as to "residual design life", as defined in sections 10.2 and 10.3 of the SWTC, with respect to each:
- (i) Asset Element of the Motorway referred to in section 5.2 of the SWTC and, subject to clause 17.14(i)(ii), each Asset Type forming part of that Asset Element; and
  - (ii) Asset Type or Asset Sub-Type of the Motorway specified in Appendix 20 of the SWTC,

as at the Expiry Date, using methodology for the determination which is consistent with relevant industry practice at the time which may include using:

- (iii) any technology used at the time for the purpose of making such determinations; or
  - (iv) records kept by the Project Company during the Term as required by the SWTC.
- (j) If RMS believes that the "residual design life" of an Asset Element, Asset Type or Asset Sub-Type or any part thereof is less than the "specified residual design life", as defined in sections 10.2 and 10.3 of the SWTC for the relevant Asset Element, Asset Type or Asset Sub-Type, then RMS may give notice to this effect to the Project Company specifying:
- (i) the extent to which it believes the "residual design life" is less than the "specified residual design life"; and
  - (ii) the cost of the measures necessary to ensure that the Asset Element, Asset Type or Asset Sub-Type or any part thereof have a "residual design life" at least equal to the "specified residual design life".
- (k) The Project Company may within:
- (i) a reasonable time after receipt of RMS's notice under clause 17.14(j); or
  - (ii) in any event, 60 Business Days after receipt of RMS's notice under clause 17.14(j),

carry out all necessary work to ensure that the "residual design life" of the relevant Asset Element, Asset Type or Asset Sub-Type or part thereof is equal to the "specified residual design life" for the relevant Asset Element, Asset Type or Asset Sub-Type:

- (iii) within and at such time as may be required by RMS;
- (iv) in accordance with the requirements of any relevant Authority;
- (v) so as to minimise the impact on the use of the Motorway; and
- (vi) in a manner which causes as little inconvenience as possible to:
  - A. users of the Motorway;
  - B. users of any Utility Service or access; and
  - C. the adjacent community.

- (l) If the Project Company does not carry out the work referred to in clause 17.14(k) within the time specified, subject to clause 17.14(n), the Project Company must pay RMS (without limiting the provisions of clause 15) the cost determined by RMS under clause 17.14(j)(ii) as a debt due and payable by the Project Company to RMS.
- (m) Compliance by the Project Company with clauses 17.14(k) and 17.14(l) is a condition precedent to Final Handover.
- (n) Nothing in clause 17.14(l) will limit RMS's rights against the Project Company, whether under this deed or otherwise according to law in respect of any Defect.

## 17.15 Services conduits

- (a) The Project Company acknowledges that the Motorway must include conduits for the accommodation of RMS's cables in accordance with section 7.7.17 of the SWTC.
- (b) The Project Company must not use or permit the conduits to be used other than as directed by RMS.
- (c) RMS and any person authorised by RMS may enter the Maintenance Site, the Motorway and the Motorway Control Centre during business hours or on reasonable notice (except in the case of an emergency when no notice will be required) for the purposes of installing, maintaining, repairing and removing cables and associated equipment in or from the conduits, provided they use their best endeavours to minimise any disruption to the Project Company's operations and comply with the Project Company's or its contractor's reasonable occupational health and safety requirements.

## 17.16 Security

The Project Company must provide such security measures as are necessary for the protection and security of the O&M Work and the Motorway against theft, vandalism, unauthorised entry into the Motorway or the Maintenance Site and any other unlawful acts.

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## 17A. Integrated Operating Services

### 17A.1 Integrated Operations Services

- (a) RMS acknowledges and agrees that the Project Company may adopt a contractual structure for the performance of the Operating Services which includes any one or more of the following:
  - (i) the Project Company performing all or part of the Operating Services itself;
  - (ii) the Project Company engaging one or more subcontractors to perform all or part of the Operating Services; and
  - (iii) the integration of the performance of all or part of the Operating Services with the performance of equivalent services for other tollroads, by subcontracting the performance of all or part of the Operating Services to subcontractors (**Integrated Operation Service Providers**) which may at that time, or at any time in the future, also perform equivalent services for those other tollroads (referred to as **Integrated Operating Services**).

- (b) Without limiting the Project Company's rights to implement the Integrated Operating Services contemplated by clause 17A.7(a), the Project Company must not implement:
- (i) any other Integrated Operating Services unless:
    - A. an Integration Plan in respect of those Integrated Operating Services has been reviewed by RMS in accordance with clause 17A.4;
    - B. the Integrated Operation Service Provider meets the requirements of clause 17.11(a)(i) in respect of a Relevant Entity;
    - C. if the Integrated Operation Service Provider is an Associate of the Project Company, the Integrated Operating Services Provider has been engaged in accordance with clause 40.17; and
    - D. if required by RMS, the Project Company and the Integrated Operation Service Provider enter into an Integrated Operation Side Deed; or
  - (ii) an Integration Reversal unless:
    - A. an Integration Reversal Plan has been reviewed by RMS in accordance with clause 17A.4; or
    - B. clause 17A.5(c) applies.

## 17A.2 Implementation of Integrated Operating Services

Unless otherwise agreed by the parties, the implementation of Integrated Operating Services or an Integration Reversal (as applicable) must:

- (a) be carried out in a manner which complies with all Laws;
- (b) not prevent Performance Standards being met;
- (c) not limit or restrict RMS's ability or power to manage, develop, change, maintain or extend the Sydney road network;
- (d) not increase the costs or the risks borne by users of the Motorway above those which they would bear in the absence of the Integrated Operating Services or Integration Reversal (as applicable); and
- (e) not increase the costs or the risks borne by the State of New South Wales, including any statutory body representing the Crown in the right of the State of New South Wales, above those which it would bear in the absence of the Integrated Operating Services or Integration Reversal (as applicable).

## 17A.3 Integration Plans and Integration Reversal Plan

- (a) Prior to the implementation of:
  - (i) any Integrated Operating Services (other than the Integrated Operating Services contemplated by clause 17A.7(a)), the Project Company must, in accordance with clause 17A.4, develop and submit to RMS for RMS's



review and comment a plan that complies with the requirements of clause 17A.3(d) (**Integration Plan**); and

- (ii) an Integration Reversal, the Project Company must, in accordance with clause 17A.4, develop and submit to RMS for RMS's review and comment a plan that complies with the requirements of clause 17A.3(e) (**Integration Reversal Plan**).
- (b) Prior to submission of any Integration Plan in accordance with clause 17A.3(a)(ii) or any Integration Reversal Plan in accordance with clause 17A.3(a)(iii), the Project Company must procure that an independent reviewer acceptable to the parties (acting reasonably) (**Integration Reviewer**) undertakes a comprehensive risk assessment in accordance with clause 17A.3(c) in relation to the:
- (i) proposed implementation of Integrated Operating Services; or
  - (ii) proposed Integration Reversal,
- as applicable, for the purpose of determining the extent to which the proposed implementation of Integrated Operating Services or the proposed Integration Reversal (as applicable) will meet each of the requirements listed in clause 17A.2.
- (c) In carrying out the risk assessment contemplated by clause 17A.3(b), the Integration Reviewer must:
- (i) convene and undertake comprehensive risk assessment workshops to which both the Project Company and RMS must be invited to attend; and
  - (ii) provide to the parties a report which details;
    - A. the outcomes from the risk assessment and workshops conducted in accordance with clauses 17A.3(b) and 17A.3(c)(i) including an evaluation of the likelihood and consequences of each risk of non-compliance with the requirements listed in clause 17A.2 identified in the risk assessment workshops; and
    - B. the proposed mitigants of the risks identified, including a recommendation on the steps which should be taken by the Project Company to ensure that the proposed implementation of Integrated Operating Services or proposed Integration Reversal (as applicable) will meet each of the requirements listed in clause 17A.2.
- (d) An Integration Plan must:
- (i) identify the relevant Operating Services to which the Integrated Plan relates;
  - (ii) provide details of equipment, assets and infrastructure to be used for the purpose of providing the relevant Operating Services;
  - (iii) detail the outcome of the Integration Reviewer's risk assessment in respect of the proposed Integrated Operating Services;
  - (iv) detail the amendments (if any) to be made to the O&M Manual consequent upon the implementation of Integrated Operating Services;

- (v) detail the impact on this deed and the SWTC (if any) consequent upon the implementation of Integrated Operating Services;
  - (vi) demonstrate how the Project Company will implement the proposed mitigants contained in the report provided to RMS under clause 17A.3(c);
  - (vii) detail any proposed changes to the Performance Standards consequent upon implementation of the proposed Integrated Operating Services, provided that compliance with such Performance Standards must be capable of objective measurement and the Performance Standards must be no more or less onerous than the then current Performance Standards;
  - (viii) demonstrate that Integration Reversal could be undertaken if the Project Company elected to do so under clause 17A.5; and
  - (ix) address any comments made by RMS pursuant to clause 17A.4.
- (e) An Integration Reversal Plan must:
- (i) identify the relevant Operating Services to which the Integration Reversal Plan relates;
  - (ii) detail the measures to be put in place by the Project Company to enable the Project Company or RMS (in the event of RMS exercising its rights under clause 6.6 and upon termination of this deed) to continue operating the Motorway in compliance with the relevant Performance Standards in the event of an Integration Reversal;
  - (iii) demonstrate that the Integration Reversal will not have an adverse impact on the ability of the Project Company or RMS (in the event of RMS exercising its rights under clause 6.6 and upon termination of this deed) to meet the required Performance Standards;
  - (iv) detail the outcome of the Integration Reviewer's risk assessment in respect of the proposed Integration Reversal;
  - (v) detail the amendments (if any) to be made to the O&M Manual consequent upon the implementation of the Integration Reversal;
  - (vi) set out the details, time frame and steps to be taken to achieve Integration Reversal;
  - (vii) demonstrate how the Project Company will implement the proposed mitigants contained in the report provided to RMS under clause 17A.3(c)(ii); and
  - (viii) address any comments made by RMS pursuant to clause 17A.4.
- (f) The Project Company must, if the Integration Plan has been updated in accordance with this deed, submit the updated Integration Plan to RMS whenever reasonably required by RMS.

#### **17A.4 RMS Review**

- (a) Where required by clause 17A.3(a), the Project Company must submit plans and related documents to RMS for review in accordance with this clause 17A.4 (**Submitted Documents**).

- (b) RMS may review a Submitted Document submitted in accordance with clause 17A.4(a) and provide any comments in writing to the Project Company in accordance with this clause 17A.4, provided that RMS does so within:
- (i) 20 Business Days after the date on which a Submitted Document was first submitted to RMS under this clause 17A.4; and
  - (ii) where the Project Company is required to re-submit a Submitted Document in accordance with this clause 17A.4, within 10 Business Days after the date on which such Submitted Document was re-submitted to RMS,
- (being the **Review Periods**).
- (c) RMS and the Project Company must meet on the next Business Day after the expiry of the relevant Review Period to discuss and confer on RMS's comments or conditions (if any) provided within the Review Period in response to a Submitted Document.
- (d) The Project Company must, as soon as possible after a written request by RMS:
- (i) submit any further information, data or documents; and
  - (ii) make available appropriately qualified personnel,
- that RMS reasonably requires in order to review the Submitted Document and respond within a Review Period in accordance with this clause 17A.4.
- (e) Unless otherwise agreed, the Project Company must provide:
- (i) one electronic version in PDF format; and
  - (ii) if requested by RMS, one electronic copy in the format of the software in which the document was originally created which has been configured to allow the person to whom the electronic copy is provided to access and amend the information contained therein in the same manner as could the original creator of that document,
- of each Submitted Document submitted to RMS for review in accordance with this clause 17A.4.
- (f) The Project Company must maintain a register of the date of submission and content of each Submitted Document and must regularly update that register to record:
- (i) each Submitted Document to which it receives a response or comment from RMS, including a copy of that response or comment; and
  - (ii) each Submitted Document to which it receives no response or comment from RMS.
- (g) RMS may provide:
- (i) "comments" or "no comments"; or
  - (ii) "conditions",
- in respect of a Submitted Document if:

- (iii) the Submitted Document:
  - A. is incomplete, inaccurate, of poor quality, ambiguous, unclear or otherwise is not in a condition to allow RMS, in its reasonable opinion, to adequately review it; or
  - B. is otherwise not in accordance with, or is not submitted in accordance with, the requirements of this clause 17A; or
- (iv) RMS is of the view, acting reasonably, that implementing, or proceeding on the basis of the Submitted Document, is likely to:
  - A. prevent the Project Company or RMS (in the event of RMS exercising its rights under clause 6.6 and upon termination of this deed) from operating the Motorway in accordance with the Performance Standards;
  - B. have an adverse affect on RMS's rights under a Project Document or RMS's ability to enforce such rights;
  - C. adversely affect any of RMS's statutory functions or its ability to perform its obligations under a Project Document; or
  - D. result in an increase to RMS's Liabilities under a Project Document; or
- (v) if the Submitted Document is an Integration Plan or an Integration Reversal Plan, the Submitted Document does not accurately set out (or set out in sufficient detail) how the Integrated Operation Service Provider will deliver the Integrated Operating Services so as to meet the requirements of clause 17A.2.
- (h) If the Project Company does not agree with any comments or conditions provided by RMS in respect of a Submitted Document:
  - (i) the Project Company and RMS must meet within 5 Business Days after receipt of notice of that disagreement by RMS to try to resolve the difference of opinion in good faith; and
  - (ii) if, following good faith negotiations in accordance with clause 17A.4(h)(i) the Project Company still disputes that any amendments are required to the Submitted Document, either party may refer the matter to dispute resolution within 5 Business Days after those negotiations in accordance with the Dispute Resolution Procedure.
- (i) If RMS provides:
  - (i) "no comments" in respect of a Submitted Document, or otherwise fails to respond to any Submitted Document within the Review Period, the Project Company may proceed at its own risk in accordance with the Submitted Document;
  - (ii) "comments" in respect of the Submitted Document, the Project Company may not proceed with the Submitted Document unless it has addressed the "comments" in accordance with clause 17A.4(j); or
  - (iii) "conditions" in respect of the Submitted Document, the Project Company may proceed on the basis of the Submitted Document but must also

address the conditions provided in respect of the Submitted Document in accordance with clause 17A.4(k).

- (j) If RMS has comments on a Submitted Document it must indicate to the Project Company that its response is in the form of "comments" and the Project Company must, subject to clause 17A.4(h):
  - (i) amend the Submitted Document in accordance with the comments of RMS to the extent necessary to ensure that:
    - A. the Submitted Document meets the requirements of this clause 17A; and
    - B. the issues identified by RMS in RMS's comments are addressed; and
  - (ii) resubmit the revised Submitted Document to RMS, and the provisions of clauses 17A.4(a) to 17A.4(j) will reapply to the amended Submitted Document until the earlier of the date on which:
    - A. the amended Submitted Document is returned to the Project Company without any comment;
    - B. RMS only provides conditions in respect of the amended Submitted Document; or
    - C. the relevant Review Period expires without any response from RMS being received by the Project Company in respect of the amended Submitted Document.
- (k) If RMS considers that the Project Company may proceed to undertake the Integrated Operating Services in accordance with the Submitted Document but that certain conditions must be satisfied:
  - (i) RMS must indicate that its response to the Submitted Document is in the form of "conditions" and not "comments"; and
  - (ii) the Project Company may proceed with the implementation of the Integrated Operating Services in accordance with the Submitted Document but, subject to clause 17A.4(h), must otherwise satisfy the conditions within the time specified by RMS (acting reasonably) or if no time is specified, as soon as practicable.
- (l) If RMS provides the Project Company with comments or conditions in connection with the Submitted Document, RMS must provide sufficient detail to the Project Company to substantiate those comments or conditions.
- (m) The Project Company agrees that:
  - (i) RMS does not owe any duty of care to the Project Company to review a Submitted Document at all;
  - (ii) in reviewing, commenting or failing to comment on, or providing conditions in relation to, a Submitted Document, RMS does not owe any duty of care to the Project Company to detect defects, errors, omissions or non-compliances with a Project Document or any Law in a Submitted Document;

- (iii) where the words "review", "comment", "accept", "endorse", "approve", "consent", "condition" or "reject" (or other grammatical forms of those words) are used in this clause 17A.4 or in a Submitted Document, or where such words are used by RMS in connection with a Submitted Document, then those words, their use and the acts or omissions of RMS associated with them do not (unless otherwise agreed by RMS) in any way:
  - A. relieve the Project Company from, or alter, affect or reduce, the obligations and Liabilities of the Project Company in accordance with the Project Documents or at Law;
  - B. constitute any representation by RMS that any Submitted Document complies with the Project Documents;
  - C. prejudice RMS's rights against the Project Company, whether under the Project Documents or otherwise at Law; or
  - D. affect the time for performance of RMS's obligations in accordance with the Project Documents;
- (iv) the review of, acceptance, endorsement or approval of, comment or failure to comment on, provision of conditions in relation to or consent to, any Submitted Document by RMS will not be evidence that any Integrated Operating Services have been or will be undertaken or performed in accordance with the Project Documents;
- (v) the Project Company will not be entitled to make any Claim against RMS, whether under this deed or at Law, for any Liabilities incurred by the Project Company in connection with any review of, comment or failure to comment on, provision of conditions in relation to, or acceptance, approval, endorsement or rejection of, a Submitted Document by RMS; and
- (vi) without limiting clauses 17A.4(i) and 17A.4(j)(ii)C, the Project Company will not be entitled to make any Claim against RMS in connection with any delay in the review of a Submitted Document.

## 17A.5 Integration Reversal

- (a) The Project Company may, provided:
  - (i) it complies with this clause 17A; and
  - (ii) if it proposes to provide a stand-alone Back Office System, it complies with the Toll Collection System requirements as described in Appendix 15 to, the Scope of Works and Technical Criteria,

at any time undertake an Integration Reversal by developing and submitting an Integration Reversal Plan to RMS for review by RMS in accordance with clause 17A.4.
- (b) If the Project Company elects to implement an Integration Reversal pursuant to clause 17A.5(a), without limiting clauses 17.11 and 17.12, RMS may require that a person other than RMS bears the reasonable costs and expenses incurred by RMS in connection with:

- (i) any review of the Integration Reversal Plan pursuant to clause 17A.4; and
  - (ii) the preparation, negotiation and execution of any documentation required to implement the Integration Reversal Plan and, subject to clause 35.2, any stamp duty or similar charges in relation to such documentation.
- (c) If at any time after the Project Company has implemented Integrated Operating Services in respect of the Motorway:
- (i) RMS exercises its rights under clause 6.6; or
  - (ii) this deed is terminated or expires,
- the Project Company must, unless otherwise agreed by RMS, promptly (and, in any event, within 20 Business Days after receipt of a written notice from RMS to do so) submit an Integration Reversal Plan to RMS in relation to all of the relevant Operating Services (unless RMS has agreed in writing to consider an Integration Reversal Plan in relation to only parts of the relevant Operating Services).
- (d) Clause 17A.5(c) survives termination or expiry of this deed.

#### **17A.6 Order of priority**

- (a) The parties acknowledge and agree that, to the extent that any Integrated Operating Services are implemented in accordance with the applicable Integration Plan developed in accordance with clause 17A.4, the Project Company will not be in breach of those provisions of this deed other than clause 17A.2 which the Project Company cannot comply with as a direct and necessary consequence of the Integrated Operating Services being implemented in accordance with that plan.
- (b) The parties acknowledge and agree that, to the extent that an Integration Reversal is implemented in accordance with the Integration Reversal Plan developed in accordance with clause 17A.4, the Project Company will not be in breach of those provisions of this deed other than clause 17A.2 which the Project Company cannot comply with as a direct and necessary consequence of the Integration Reversal being implemented in accordance with that plan.
- (c) The parties acknowledge and agree that, with the exception of clause 17A.2, nothing in this deed requires the Project Company to amend an Integration Plan or an Integration Reversal Plan or incur material additional costs to enable it to comply with the provisions of this deed to which clause 17A.6(a) or clause 17A.6(b) applies.

#### **17A.7 Integrated Tolling arrangements**

- (a) RMS acknowledges that, on and from Financial Close, the Project Company intends to adopt a contractual structure whereby the performance of the Tolling Services for the Motorway will be integrated with the performance of equivalent services for other tollroads, by the Project Company subcontracting the performance of the Tolling Services to the Tolling and Customer Management Contractor under the Tolling and Customer Management Agreement and the Technology Operator under the Technology Implementation and Services Agreement, and by the Tolling and Customer Management Contractor and Technology Operator also performing equivalent services for other tollroads.
- (b) The parties acknowledge that they have each used their reasonable endeavours to ensure that this deed (including the SWTC) reflects the integration of the Tolling

Services as contemplated by clause 17A.7(a) and any impact such integration may have on:

- (i) the Project Company's ability to comply with its obligations, and exercise its rights, under this deed; and
  - (ii) RMS's ability to comply with its obligations, and exercise its rights, under this deed.
- (c) The parties acknowledge and agree that the Technology Implementation and Services Agreement and the Tolling and Customer Management Agreement meet the tolling and technology requirements set out in this deed (including the SWTC) and if, despite the use of their reasonable endeavours as acknowledged in clause 17A.7(b), it is subsequently discovered that a party is unable to comply with any other obligation or exercise any other right under this deed as a direct and necessary consequence of the integration of the Tolling Services as contemplated by clause 17A.7(a), the parties will negotiate in good faith the means of addressing such inability, which may include:
- (i) a waiver of compliance with the affected obligation;
  - (ii) amendment of the relevant provision of this deed; or
  - (iii) amendment of the Technology Implementation and Services Agreement or the Tolling and Customer Management Agreement.

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## **18. Reporting and notices**

### **18.1 Accounting and financial reporting**

- (a) The Project Company must keep proper books of account and all other records relating to the Project.
- (b) The Project Company must have its accounts audited annually.
- (c) The Project Company must ensure that its respective books of account and records referred to in clause 18.1(a) are available to RMS at all reasonable times for examination, audit, inspection, transcription and copying.
- (d) Without limiting its obligations under clause 30, if this deed is terminated, the Project Company must give RMS all books of account and records referred to in clause 18.1(a) which are necessary for the continued operation, maintenance and repair of the Motorway.
- (e) RMS must give the Project Company access to any books of account or records given to RMS by the Project Company for a period of 7 years after the date on which such books of account or records were given to RMS under clause 18.1(d).
- (f) The Project Company must, during the Term, give to RMS a Monthly Operational Management Report as soon as practicable and in any event not later than 10 Business Days after the end of each month.
- (g) Not later than 30 November in each year, the Project Company must give to RMS the audited financial statements (including all notes to and forming part of the financial statements) for the previous financial year for each member of the Project Company Group.



- (h) The Project Company must provide to RMS, in respect of each member of the Project Company Group:
- (i) as soon as practicable and in any event not later than 120 Business Days after the close of its financial year, a copy of its audited statement of financial position and statement of financial performance for that financial year; and
  - (ii) as soon as practicable and in any event not later than 40 Business Days after the first half of its financial year, a copy of its statement of financial position and statement of financial performance, certified as correct by a director and secretary of the relevant member of the Project Company Group.
- (i) The Project Company must give to RMS:
- (i) copies of all documents or information given to or received by it from the Australian Securities and Investments Commission or Australian Stock Exchange Limited (if applicable) promptly after the information is first given or received; and
  - (ii) such other information relating to the Project as RMS may reasonably require from time to time.
- (j) The Project Company must, during the Term, provide the following information to RMS either by way of a written report in the format reasonably required by RMS from time to time or by providing RMS with access to a web based database:
- (i) on a monthly basis:
    - A. the hourly, daily and monthly aggregate of vehicles using the Motorway by vehicle class (passenger or commercial) for each Tollable Section at the point of toll collection; and
    - B. the daily and monthly aggregate of tolls collected in accordance with clause 19 of this deed;
  - (ii) within 20 Business Days after the end of each financial year during the Term:
    - A. the number of vehicles using the Motorway each month by vehicle class (passenger or commercial) for each Tollable Section at the point of toll collection; and
    - B. the aggregate monthly and annual aggregate of tolls collected in accordance with clause 19 of this deed.

## 18.2 Copies of notices

Each party must provide to the other parties as soon as practicable certified copies of all material notices received by it under the Project Documents from any of its co-contracting parties in order that the other parties are kept informed at all times of any material developments which could have a serious effect upon a party's rights pursuant to any of the Project Documents.

### 18.3 Advice regarding rights

Each party undertakes to advise the other parties as soon as practicable after an event has occurred which to a parties actual knowledge could in any way materially prejudice the other parties' rights under this deed by reason of the legitimate exercise of significant rights available to third parties arising from the Project Documents.

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## 19. Payments and Revenue

### 19.1 Tolls

- (a) Subject to clause 19.1(b), the Project Company may levy tolls for the use of the Motorway (or part of it) for the passage of motor vehicles during the Term in accordance with the Toll Calculation Schedule.
- (b) The Project Company must not (and must ensure that any party with whom it contracts, including the Operator, does not) levy or impose any charge, toll or fee for or in connection with the use of the Motorway other than in accordance with the Toll Calculation Schedule.
- (c) The Project Company may only levy tolls by means of the Toll Collection System.
- (d) Without limiting any of the Project Company's obligations under this deed, the Project Company must comply with the Roads Regulation 2008 (NSW).

### 19.2 Entitlement to toll revenue

Subject to clause 2.2 of the Motorway Site Lease, the Project Company will be entitled to all revenue collected by the Toll Collection System during the Term.

### 19.3 Other revenue

- (a) The Project Company must not (without the prior written approval of RMS) engage in, or permit the Motorway or the Motorway Site to be used for, any business or revenue generating activity, other than the collection of tolls by the Project Company in accordance with this deed (**Non-toll Business**).
- (b) If the Project Company wishes to engage in a Non-toll Business (including permitting others to have access to the Motorway or the Motorway Site for the purpose of installing and operating Utility Services or service centres), it must provide full written details of the proposal to RMS for its written approval.
- (c) Any proposal put to RMS for approval under clause 19.3(b) must be consistent with clause 2.2 of the Motorway Site Lease.
- (d) In giving or withholding approval to a proposal submitted to RMS pursuant to clause 19.3(b), RMS must act reasonably.

### 19.4 Interoperability

The Project Company must ensure that, during the Term, it complies with the document entitled "Memorandum of Understanding - Electronic Toll Collection" dated 30 October 2009 (as amended or updated from time to time).

### 19.5 Differential (time of day) tolling

- (a) Subject to clause 19.5(b):

- (i) the parties acknowledge that the Project Company may propose an amendment to the Toll Calculation Schedule to provide for tolls that are less than the relevant Charge Toll to be levied for use of the Motorway during off-peak periods; and
  - (ii) RMS will act reasonably and in good faith in considering any amendment proposed by the Project Company pursuant to clause 19.5(a)(i).
- (b) The parties acknowledge that Ministerial approval will be required prior to RMS agreeing to make any amendment to the Toll Calculation Schedule proposed in accordance with this clause 19.5.

## **20. Transport network management**

### **20.1 No restrictions on RMS**

Nothing in this deed will in any way limit or restrict the ability or power of RMS or the NSW Government, directly or through any Authority to:

- (a) develop, construct, operate and/or maintain directly, by sub-contractors or otherwise, other tollways, tunnels, freeways and other roads in New South Wales;
- (b) maintain, manage, develop, change or extend the Sydney road and transport network or any traffic or transport system;
- (c) extend, alter, close or upgrade existing tollways, tunnels, freeways and other roads;
- (d) extend, alter or upgrade existing public transport routes or services;
- (e) construct new public transport routes or establish new transport services;
- (f) develop the transport and public transport network generally;
- (g) implement NSW Government policies; or
- (h) contract with any person for any of these things or to otherwise do anything which, subject to this deed, they are empowered to do by Law.

### **20.2 Eligible Truck Regulatory Measures**

- (a) RMS will use its best endeavours to implement PHR Truck Regulatory Measures that it considers appropriate to give effect to the objectives in Recital G, and in particular the objective in paragraph (g) of Recital G.
- (b) The Project Company acknowledges that the PHR Route is a public road and it is not anticipated that PHR Truck Regulatory Measures would seek to restrict access to the PHR Route by any of the following classes of vehicles:
  - (i) recreational or non-commercial vehicles such as vehicles towing caravans, boats and trailers (whether or not those vehicles could fall within the definition of Eligible Truck); and
  - (ii) any Eligible Truck that has a commencement point from, or a destination on, or a destination that can only reasonably be reached by, the PHR Route.
- (c) The Project Company acknowledges that the form and nature of any PHR Regulatory Measures may change from time to time over the Term.

## 20.3 Measurement Equipment

- (a) The Project Company must, at its cost:
- (i) procure, install and commission the Measurement Equipment by the Motorway Opening Date; and
  - (ii) maintain, monitor, update or modify the performance of the Measurement Equipment during the Term,
- to ensure that the Measurement Equipment:
- (iii) is capable of counting and recognising Eligible Trucks;
  - (iv) is capable of providing sufficient and suitable information to the standard that could be used for law enforcement;
  - (v) operates in a manner which provides auditable and verifiable data to allow RMS to assess any Project Company claims for PHR Truck Management Payments; and
  - (vi) complies with Appendix 15 of the SWTC as applicable and operates in a manner generally consistent with similar technology on other privately operated motorways in NSW, including as to privacy requirements.
- (b) The Project Company must obtain RMS's prior written consent to any installation or modification of the Measurement Equipment (other than Measurement Equipment for the Motorway). RMS will not unreasonably withhold or delay its consent. Works associated with the installation, maintenance and modification of the Measurement Equipment are to be carried out on the same terms as the Project Works, unless otherwise agreed in writing by the parties.
- (c) The Project Company must, at its cost, provide RMS with the data collected on a daily basis by the Measurement Equipment in accordance with clause 20.3(a).
- (d) RMS may, at its cost, audit:
- (i) the Project Company's compliance with this clause 20.3; and
  - (ii) the performance of the Measurement Equipment.
- (e) RMS may, at any time, give the Project Company a Change Proposal under clause 12.1 and paragraph 1.1 of Schedule 12 of this deed requiring a change to the Measurement Equipment. RMS and the Project Company must comply with the process for a Change Proposal under clause 12 and Schedule 12 of this deed in respect of such a Change Proposal.

## 20.4 PHR Truck Management Payments

- (b) If for any Applicable Period:
  - (i) the Project Company has complied with its obligations under clause 20.3;

In calculating the formulae in clauses 20.4(b)(v) and 20.4(b)(vi), the parties will exclude,

- (c) The Project Company will either refund to RMS, or credit against any future payment to which the Project Company is entitled under this clause 20.4, the amount of any payment received by the Project Company under this clause 20.4 which relates to
- (d) The Project Company acknowledges that PHR Regulatory Measures may have the effect of reducing (including to nil) any PHR Truck Management Payments and agrees that it will not be entitled to any amounts received by RMS or the State of New South Wales as a result of implementing any PHR Truck Regulatory Measure.
- (e) The parties agree that on each of the following dates:
- (i) 30 June 2018;
  - (ii) a date that is within 3 months after the first anniversary of the Motorway Opening Date; and
  - (iii) a date that is within 3 months after the end of each subsequent 5 year period, or any other date that is agreed by the parties,
- the parties will jointly undertake a survey of the PHR Route to determine:
- (iv) \_\_\_\_\_ ; and
  - (v) any adjustment to the time periods set out in Schedule 29 to ensure that such time periods continue to accurately reflect the peak, shoulder and off-peak times for weekdays and weekends.
- (f) The Project Company's entitlement to payment under this clause 20.4 will be the Project Company's sole remedy for the recovery of any Loss which the Project Company suffers or incurs arising out of or in any way in connection with:
- (i) any implementation, maintenance, removal or enforcement by RMS or the State of New South Wales of any PHR Truck Regulatory Measure or failure by RMS or the State of New South Wales to implement, maintain, remove or enforce any PHR Truck Regulatory Measure; or
  - (i) any claim in respect of any failure by RMS to comply with clause 20.2.

- (g) Clause 20.4(f) is a limitation upon RMS's liability to the Project Company and its Related Parties for any Losses suffered or incurred by the Project Company or its Related Parties arising out of or in any way in connection with any matter referred to in clause 20.4(f)(i) or 20.4(f)(i) and the Project Company waives, and must ensure that its Related Parties waive, all rights at Law to make any Claim against RMS, and RMS will not be liable to the Project Company or its Related Parties in relation to any of the matters referred to in clause 20.4(f)(i) or 20.4(f)(i) other than in respect of the matters for which RMS may be liable under this clause 20.4.
- (h) Any release of RMS or limitation upon RMS's liability under clause 20.4(f) or clause 20.4(g) applies equally to the State of New South Wales and RMS holds for itself and on trust for the State of New South Wales the benefit of each such release and limitation upon liability.

## 20.5 Traffic connections to Motorway

The parties acknowledge that the Project Company Group has prepared its Base Case Financial Model on the assumption that, subject to any traffic diversions, restrictions or road or lane closures which are necessary as a result of:

- (a) the occurrence of special events, including the transportation of visiting dignitaries;
- (b) the requirements of RMS, any relevant Authority or emergency service provider including in relation to the safe and efficient management of traffic or as a consequence of planned or unplanned incident management (in each case whether in relation to the Motorway or another part of the Sydney road and transport network);
- (c) the existence of a material threat to the health or safety of the public; or
- (d) maintenance and/or repairs of a road or lane,

the connections to the Motorway specified in Schedule 20 will not be closed (or materially reduced) during the Term.

## 20.6 Events causing Material Adverse Effect

Clause 21 will apply if any of the following events occur during the Term:

- (a) any of the connections to the Motorway specified in Schedule 20 are closed (or materially reduced) for reasons other than as contemplated by clause 20.5;
- (b) a new high capacity motorway or freeway which connects the M1 Motorway to the M7 Motorway is opened to traffic (other than a motorway or freeway which is owned or operated by a member of the Project Company Group or its Related Body Corporate).

## 20.7 Permitted RMS Activities

- (a) The Project Company acknowledges and agrees that, notwithstanding the terms of the Motorway Site Lease but subject to this clause 20.7, RMS and its nominees may do any one or more of the following activities (each a **Permitted RMS Activity**):
  - (i) connect any road or other means of vehicular access or pedestrian access to the Motorway;

- (ii) construct, operate and maintain any road or other means of vehicular access above or below the Motorway;
  - (iii) construct, operate and maintain Utility Services (in whole or in part) in the Motorway Site;
  - (iv) construct, operate and maintain any other infrastructure or improvement (in whole or in part) in the Motorway Site; and
  - (v) connect any such Utility Services or other infrastructure or improvements to the Motorway or to any other structures located within the Motorway Site.
- (b) RMS must not undertake a Permitted RMS Activity:
- (i) prior to the Date of Completion, without the consent of the Project Company; or
  - (ii) after the Date of Completion, which would, following completion of the work being carried out for or in connection with the Permitted RMS Activity:
    - A. prevent the Project Company from undertaking the Project in accordance with this deed;
    - B. materially adversely affect the workmanship, durability or functional integrity of any element of the Motorway;
    - C. materially adversely affect the Project Company's ability to achieve Final Handover of the Motorway in accordance with the requirements of this deed; or
    - D. without the consent of the Project Company (not to be unreasonably withheld) impede the safe and free flow of traffic along, onto or from the Motorway at its design speed and volume.
- (c) If RMS proposes to undertake a Permitted RMS Activity then:
- (i) RMS must give the Project Company reasonable notice of that fact; and
  - (ii) the Project Company must co-operate with RMS to enable RMS to undertake the Permitted RMS Activity.
- (d) If RMS decides to undertake a Permitted RMS Activity, then:
- (i) the Project Company must:
    - A. give, and ensure that the State Works Contractor gives, RMS and its nominees sufficient access to the Project Site and the Maintenance Site to enable RMS to carry out any investigatory work or pre-construction activity and to undertake the Permitted RMS Activity;
    - B. co-operate, and ensure that the State Works Contractor co-operates, with RMS to facilitate the Permitted RMS Activity, including permitting reasonable traffic adjustments within or adjacent to the Motorway; and



- C. take all reasonable steps to Mitigate any Loss suffered by it as a result of the Permitted RMS Activity including by:
  - 1) installing such equipment as is necessary to prevent untolled use of the Motorway; and
  - 2) opening the shoulder of the carriageway to traffic where a temporary lane closure is required;
- (ii) RMS must:
  - A. co-ordinate all activities associated with the Permitted RMS Activity;
  - B. minimise any interference with the operation and use of the Motorway;
  - C. ensure that its Related Parties comply with the requirements of this clause 20.7(d)(ii); and
  - D. pay to the Project Company the aggregate amount calculated in accordance with Schedule 21; and
- (iii) RMS will not be under any obligation to install or pay for the installation of equipment necessary to prevent untolled use of the Motorway.
- (e) Subject to clause 20.7(d)(ii), the Project Company acknowledges and agrees that RMS is not liable for any Claim in respect of Loss suffered or incurred by the Project Company or the State Works Contractor or any changes in toll revenue derived by the Project Company arising out of or in any way in connection with a Permitted RMS Activity.
- (f) Upon the completion of any works undertaken by RMS or its nominees pursuant to this clause 20.7 (other than works contemplated by clause 20.7(a)(ii)), the Project Company's maintenance and repair obligations under this deed will apply to the works as if the works formed part of the Motorway.

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## 21. Material Adverse Effect

### 21.1 Notice of Potential MAE Trigger

If:

- (a) at any time, an Uninsurable Force Majeure Event occurs; or
- (b) after the Date of Completion, a Potential MAE Trigger occurs,

the Project Company must give RMS notice of the Uninsurable Force Majeure Event or Potential MAE Trigger (as applicable) within 3 months after the occurrence of the Uninsurable Force Majeure Event or Potential MAE Trigger the subject of that notice.

### 21.2 Notice of Possible MAE Event

(a) If:

- (i) at any time, an Uninsurable Force Majeure Event occurs; or
- (ii) after the Date of Completion:

- A. a Planning Approval Change Event occurs which requires a Change to be made to the Motorway or to the O&M Work;
- B. an event or a circumstance referred to in clause 20.6 occurs;
- C. a Qualifying Change in Law occurs which causes a net increase in the cost of carrying out the O&M Work; or
- D. the offence of failing or refusing to pay the toll for the use of the Motorway is not enforced, or recovery procedures are not pursued, in each case in a manner which in substance achieves the same outcome as the enforcement and recovery procedures pursued by the State of New South Wales or its Authorities for other comparable tollway offences on private tollways as at the date of this deed,

which the Project Company reasonably believes may have a Material Adverse Effect (each a **Possible MAE Event**) the Project Company must give RMS notice of the Possible MAE Event.

- (b) A notice given under clause 21.2(a) will only be valid if it is given within 6 months after the occurrence of the Possible MAE Event the subject of that notice.

### 21.3 Occurrence of Possible MAE Event

- (a) If a notice is given under clause 21.2(a) then, as soon as possible, but no later than 20 Business Days after RMS has received that notice, the parties must negotiate in good faith and endeavour to agree on:
  - (i) whether or not the notice is valid; and
  - (ii) whether or not a Possible MAE Event has occurred.
- (b) If the parties do not reach agreement on the matters referred to in clause 21.3(a) within 20 Business Days after commencing the negotiations then either party may refer the matter for dispute resolution under the Dispute Resolution Procedure.
- (c) If a dispute the subject of clause 21.3(b) is not referred to dispute resolution under the Dispute Resolution Procedure within 18 months after the end of the 20 Business Day period referred to in clause 21.3(b), the Project Company will be deemed to have accepted that a Possible MAE Event has not occurred.

### 21.4 Notice of Material Adverse Effect

- (a) If it has been agreed or determined in accordance with clause 21.3 that a Possible MAE Event the subject of a notice given under clause 21.2(a) has occurred and the Project Company believes that the Possible MAE Event may have, has had or has started to have a Material Adverse Effect, the Project Company must:
  - (i) give RMS notice of the Material Adverse Effect; and
  - (ii) use all reasonable endeavours to Mitigate the adverse consequences of the Possible MAE Event.
- (b) A notice given under clause 21.4(a) will only be valid if it is given within 12 months after the Possible MAE Event the subject of that notice under clause 21.2(a) has had or has started to have a Material Adverse Effect.

## 21.5 Occurrence of MAE Event

- (a) If a notice is given under clause 21.4(a) then, as soon as possible, but no later than 20 Business Days after RMS has received that notice, the parties must negotiate in good faith and endeavour to agree on:
- (i) whether or not the notice is valid; and
  - (ii) whether or not the Possible MAE Event the subject of the notice has had or has started to have a Material Adverse Effect,

provided that, in determining whether an Uninsurable Force Majeure Event which arises prior to the Date of Completion may have, has had or has started to have a Material Adverse Effect:

- (iii) all prolongation costs; and
- (iv) all escalation costs arising from deferment of the Project Works and the Temporary Works,

incurred by any Related Party of the Project Company during the 12 month period immediately following the occurrence of that Uninsurable Force Majeure Event will be disregarded.

- (b) If the parties do not reach agreement on the matters referred to in clause 21.5(a) within 20 Business Days after commencing the negotiations then either party may refer the matter for dispute resolution under the Dispute Resolution Procedure.
- (c) If a dispute the subject of clause 21.5(b) is not referred to dispute resolution under the Dispute Resolution Procedure within 18 months after the end of the 20 Business Day period referred to in clause 21.5(b), the Project Company will be deemed to have accepted that the Possible MAE Event the subject of its notice under clause 21.4(a) has not had or started to have a Material Adverse Effect.

## 21.6 Good Faith Negotiations

- (a) As soon as practicable but no later than 20 Business Days after it has been agreed or determined in accordance with clause 21.5 that the Possible MAE Event the subject of a notice issued under clause 21.3(a) has had or started to have a Material Adverse Effect, the parties must enter into negotiations and thereafter negotiate in good faith in an endeavour to agree on a method of redress which will enable:

- (b) Subject to clause 21.7 and clause 21.6(c), the parties acknowledge that in any negotiations they will take a flexible approach, including giving consideration to:
- (i) amending the Project Documents;
  - (ii) varying the Term;
  - (iii) varying the financial or other contributions of the parties;
  - (iv) adjusting the Toll Calculation Schedule; and/or
  - (v) taking such other action as may be appropriate,
- having regard to any payments made by RMS under the RMS Project Documents, whether under an indemnity, in respect of any delay costs, or otherwise.
- (c) RMS will not be required to consider or provide any method of redress under clause 21.6(b) which requires RMS to make an up front payment to the Project Company in respect of the anticipated Material Adverse Effect of any Possible MAE Event.

## 21.7 Payment as a last resort

The method of redress involving a payment of money by RMS to the Project Company or any of its Related Parties will be considered as a measure of last resort and will, unless RMS requires otherwise, only apply to the extent that the other methods of redress cannot reasonably be used so as to achieve the relevant objectives referred to in clause 21.6(a).

## 21.8 Disputes

- (a) If the parties do not reach agreement on a method of redress so as to achieve the relevant objectives referred to in clause 21.6(a) within 90 Business Days after the parties commenced negotiations under clause 21.6(a), either party may refer the matter to dispute resolution in accordance with the Dispute Resolution Procedure.
- (b) In making a determination, the expert or arbitrator must ensure that the method of redress does not involve a method of redress other than those set out in clauses 21.6(b)(i) to 21.6(b)(iv) (inclusive) without the parties' consent and is otherwise consistent with this clause 21.

## 21.9 No over compensation

RMS will not be obliged under any circumstances to make available or be bound by a method of redress to the extent that:

- (a) it will achieve an outcome in excess of that which is necessary to achieve the relevant objectives referred to in clause 21.6(a);
- (b) the Possible MAE Event is caused or contributed to by a breach of a Project Document by the Project Company, the State Works Contractor or their respective Related Parties or is otherwise within the control of the Project Company, the State Works Contractor or their respective Related Parties; or
- (c) any other reasonable payment, compensation or redress has been made by RMS arising out of or in connection with the Possible MAE Event or the circumstances relating to the Possible MAE Event.

## 21.10 Implementation of redress

- (a) The Project Company must ensure that any redress afforded under this clause 21 is efficiently applied and structured (including so as not to create or increase any Liability for Taxes or Liability which need not be incurred or need only be incurred to a limited extent).
- (b) No method of redress will be implemented before the Possible MAE Event has had a Material Adverse Effect, unless RMS agrees otherwise.

## 21.11 M2 Integration Project

The parties acknowledge clause 1.13 of the M2 Interface Deed.

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## 22. Rates, Taxes and GST

### 22.1 Rates and Taxes

Subject to clause 23, and clause 35.2, the Project Company will be liable for:

- (a) all land-based rates, Taxes and charges, including municipal rates, water, sewerage and drainage rates and land tax in respect of the Motorway Site as from the Motorway Opening Date; and
- (b) subject to clause 22.2, all other Taxes levied in respect of the Project, whether in connection with the Motorway, the performance of the Project Company's obligations under this deed or the State Works Contractor's obligations under the State Works Deed, or the execution of this deed, the licence or lease of the Motorway Site and other Project Documents or otherwise.

## 22.2 GST

- (a) Notwithstanding any other provision of this deed, any amount payable for a supply made under this deed which is calculated by reference to a cost, expense or other amount paid or incurred by a party will be reduced by an amount equal to any input tax credits which that party is entitled to in respect of that cost, expense or other amount.
- (b) Subject to clause 22.2(e), if GST becomes payable on any supply made by a party (**Supplier**) under or in connection with this deed:
  - (i) any amount payable or consideration to be provided under any other provision of this deed for that supply (**Agreed Amount**) is exclusive of GST;
  - (ii) an additional amount will be payable by the party providing consideration for that supply (the **Recipient**), equal to the amount of GST payable on that supply as calculated by the Supplier in accordance with the GST law and payable at the same time and in the same manner as for the Agreed Amount; and
  - (iii) the Supplier will provide a tax invoice (or equivalent documentation which complies with the GST law) to the Recipient in respect of that supply, no later than the time at which the Agreed Amount for that supply is to be provided under this deed.
- (c) Subject to clause 22.2(e), if for any reason, the GST payable by the Supplier in respect of a supply it makes under this deed (incorporating any increasing adjustments or decreasing adjustments relating to that supply) varies from the additional amount it receives from the Recipient under clause 22.2(b) in respect of that supply, the Supplier will provide a refund or credit to or will be entitled to receive the amount of this variation from the Recipient (as appropriate). Where an adjustment event occurs in relation to a supply, the Supplier will issue an adjustment note to the Recipient in respect of that supply within 14 days after becoming aware of that adjustment event occurring.
- (d) If the Recipient is dissatisfied with any calculation to be made by the Supplier under this clause, the Recipient may, at its own expense and after notifying the Supplier accordingly, refer the matter to an independent expert nominated by the President of the Institute of Arbitrators and Mediators Australia for expert determination, which will be final and binding on all parties (absent manifest error). The expert will act as an expert and not as an arbitrator and will take into account the terms of this deed, the matters required to be taken into account by the Supplier under this clause and any other matter considered by the expert to be relevant to the determination. The parties must release the expert from any liability in acting as an expert, except in the case of fraud on the part of the expert. However, this clause 22.2(d) shall not apply to any supply dealt with under clause 22.2(e).

- (e) The parties acknowledge that this clause 22.2(e) applies to the extent each party is making supplies to the other party for consideration, and is the Recipient of all supplies from the other party. Where two parties (or entities on whose behalf those parties are acting) in accordance with this deed exchange non-monetary consideration:
- (i) notwithstanding clause 22.2(b), the additional amount payable on any supply by the Recipient to the Supplier shall be limited to an amount calculated as the monetary consideration provided by the Recipient for the taxable supply being made by the Supplier multiplied by the applicable GST rate; unless
  - (ii) it is determined, whether by agreement between the parties or by demand, assessment or private ruling issued by the Commissioner of Taxation that there is a disparity between:
    - A. the sum of the GST exclusive market value of the non-monetary consideration and the GST exclusive monetary consideration (if any) being provided by the Recipient to the Supplier; and
    - B. the sum of the GST exclusive market value of the non-monetary consideration and the GST exclusive monetary consideration (if any) being provided by the Supplier and having their nexus with the non-monetary consideration and monetary consideration being provided by the Recipient and referred to in clause 22.2(e)(ii)A.
  - (iii) Where clause 22.2(e)(ii) applies, the Supplier and the Recipient will use best endeavours to determine a mutually acceptable means of calculating additional amounts to be provided between the parties to ensure, as far as possible that neither the Supplier nor the Recipient suffers a net cost or loss. If within 30 Business Days of the determination under clause 22.2(e)(ii), the parties are unable to agree on a means of calculating the additional amounts payable, clause 22.2(b) shall apply without any limitation imposed by this clause 22.2(e), however:
    - A. the Supplier must only issue a tax invoice or an adjustment note to reflect the application of clause 22.2(e)(iii) after the parties have either reached an agreement under this clause 22.2(e)(iii) or have determined that they are unable to reach such an agreement; and
    - B. the additional amount payable pursuant to clause 22.2(e)(iii) will only be payable 5 Business Days after the receipt by the Recipient of the tax invoice or adjustment note issued by the Supplier in accordance with clause 22.2(e)(iii)A.
  - (iv) Where any party to this deed receives a demand, assessment or private ruling regarding the matters addressed in clause 22.2(e), it must notify the other parties to this deed of that fact and provide them with a copy of the demand, assessment or private ruling within 10 Business Days of receiving it. Before any party to this deed applies for a private ruling regarding the matters addressed in clause 22.2(e), it must provide the other parties to this deed with a copy of the private ruling request it intends to lodge with the Commissioner of Taxation no less than 20 Business Days prior to its lodgement of same.

## 22.3 Consolidation

- (a) The Project Company must ensure that, while the Project Company, the Borrower, Sub HoldCo, each Sponsor Entity or the State Works Contractor is a member of a tax consolidated group, the Project Company, the Borrower, Sub HoldCo, each Sponsor Entity or the State Works Contractor, as the case may be:
- (i) must be a party to a tax sharing agreement (within the meaning of that term in Division 721 of the Income Tax Assessment Act 1997) and tax funding agreement (within the meaning of these terms in Part 3-90 of the Income Tax Assessment Act 1997) for the consolidated group, each of which has terms reasonably acceptable to RMS; and
  - (ii) must not amend, vary or terminate the tax sharing agreement or tax funding agreement referred to in clause 22.3(a)(i) in a way that may directly or indirectly lead to an impact to the Project Company, the Borrower, Sub HoldCo, each Sponsor Entity or the State Works Contractor, as the case may be, without RMS's consent. Without limitation, the following changes will not be considered an amendment, variation or a termination for the purposes of this clause 22.3(a)(ii):
    - A. any additions or deletions to the entities party to the tax sharing agreement and tax funding agreement (other than the deletion of the Project Company, the Borrower, Sub HoldCo, each Sponsor Entity or the State Works Contractor, as the case may be); and/or
    - B. *not used*; and/or
    - C. changes to the tax sharing agreement to ensure that it continues to comply with the requirements of Division 721 of the Income Tax Assessment Act 1997.
- (b) RMS must not unreasonably withhold or delay its consent where such consent is sought by all or any of the Project Company, the Borrower, Sub HoldCo, each Sponsor Entity or the State Works Contractor under this clause 22.3.

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## 23. Changes in Law

### 23.1 No claim unless Qualifying Change in Law

- (a) Subject to clauses 12, 14.8(a), 14.9 and 21 and this clause 23, the Project Company will be liable for the consequences of, and will have no Claim against RMS arising out of or in any way in connection with, any changes in Law.
- (b) If a Qualifying Change in Law occurs, the Project Company must:
- (i) within 40 Business Days after the occurrence of the Qualifying Change in Law, give a written notice to RMS and RMS's Representative containing details of the Qualifying Change in Law; and
  - (ii) subject to clause 14.9, 21 and this clause 23, comply with the Qualifying Change in Law at its own cost.

### 23.2 Change in Law prior to Completion

- (a) If, prior to the Date of Completion, a Qualifying Change in Law occurs which:



- (i) has a direct effect on the D&C Work and/or the O&M Work (which may include a direct effect on the method or means by which the Project Company and/or the State Works Contractor carries out the D&C Work and/or the O&M Work) such that a Change is required as a consequence of the occurrence of the Qualifying Change in Law; and
- (ii) results in an increase in the Project Company's and/or the State Works Contractor's direct costs of carrying out the D&C Work and/or the O&M Work,

and the Project Company wishes to make a Claim for Change Costs under this clause 23 on account of the Qualifying Change in Law then, without limiting clause 14.9 of this deed, the Project Company must, within 20 Business Days after the occurrence of the Qualifying Change in Law, give a written notice to RMS's Representative:

- (iii) containing details of the Qualifying Change in Law; and

including sufficient information to support the estimate.

- (b) If the Project Company issues a notice complying with the requirements of clause 23.2(a) and otherwise complies with the requirements of this clause 23, clauses 12.1 and 12.3 will apply as if RMS had given a Change Order in respect of the Change which is required as a consequence of the occurrence of the Qualifying Change in Law provided that any Change Costs payable to the Project Company in respect of the Qualifying Change in Law will be

- (ii) in accordance with clause 23.2(c).
- (c) RMS will only be liable to pay a portion of the Change Costs determined in accordance with clause 23.2(b) as follows:
  - (i) where the Change Costs,
  - (ii) where the Change Costs,
  - ; and
  - (iii) where the Change Costs,

### **23.3 Qualifying Change in Law after Completion**

Clause 21.2 will apply if a Qualifying Change in Law occurs after the Date of Completion.

### **23.4 Beneficial Change in Law**

If a Beneficial Change in Law occurs:

- (a) RMS must, within 20 Business Days after the occurrence of the Beneficial Change in Law, give a written notice to the Project Company containing details of the Beneficial Change in Law; and
- (b) provided that RMS has complied with its obligations under clause 23.4(a), the Project Company must pay an amount to RMS in accordance with clause 12.3(b)(i) as if the Beneficial Change in Law had resulted in a Change directed by RMS under paragraph 1 of the Change Procedure and that Change had resulted in Change Savings.

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## **24. Loss or damage and insurance**

### **24.1 Risk of loss or damage**

- (a) The Project Company must, and must ensure that the State Works Contractor, in carrying out the Project Activities, take all reasonable precautions to avoid destruction and damage to any property (including any property of RMS).

- (b) From the date of this deed until the Date of Completion, the Project Company bears the risk of Loss or damage to the Project Works (other than the Third Party Works) and the Temporary Works.
- (b1) In respect of each discrete part of the Third Party Works, the Project Company bears:
  - (i) if the Third Party Works are Local Area Works or Utility Service Works, the risk of Loss or damage to those Third Party Works from the date of this deed until RMS and the Independent Certifier have been provided with a copy of the notice referred to in clause 15.2(a)(ii) or 15.3(a)(ii); or
  - (ii) if the Third Party Works are Property Works, the risk of Loss or damage to those Third Party Works from the date of this deed until RMS's Representative has been provided with a certificate or statement referred to in clause 9.4(a)(ii).
- (c) From the Date of Completion, the Project Company bears the risk of Loss or damage to the Motorway until the end of the Term.
- (d) Subject to clauses 24.1(b) and 24.1(b1), the Project Company must in accordance with clause 24.10, promptly make good any Loss or damage to the Project Works, the Temporary Works or the Motorway (as applicable) which occurs during the period it bears the risk of Loss or damage.

## 24.2 Liability and indemnity

- (a) Subject to clause 24.2(d), the Project Company must indemnify RMS and its Related Parties (each an **Indemnified Party**) from and against any Loss suffered or incurred by an Indemnified Party and any Claim against an Indemnified Party, in respect of:
  - (i) any injury to, or disease or death of, persons;
  - (ii) the loss of, loss of use or access to (whether total or partial), or destruction of or damage to, any real or personal property;
  - (iii) any economic loss arising out of such loss, loss of use or access to destruction, damage, injury, disease or death; or
  - (iv) Pure Economic Loss,
 caused by, arising out of, or in any way in connection with:
  - (v) the Project Activities, including the Temporary Works and the Project Works or the Project;
  - (vi) RMS's ownership of the Motorway Site, the Local Area Works Site, the Temporary Areas or the Maintenance Site; or
  - (vii) the use or occupation of the Motorway Site, the Local Area Works Site, the Temporary Areas or the Maintenance Site by the Project Company, the State Works Contractor or the Contractor.
- (b) Clause 24.2(a) does not lessen or otherwise affect the Project Company's other obligations under this deed or the State Works Contractor's obligations under the State Works Deed.

- (c) The Project Company has the same responsibilities to third parties in respect of persons, property and all other aspects of the Project which it would have if it held the freehold title to the Maintenance Site.
- (d) The Project Company's and the State Works Contractor's maximum aggregate liability to RMS and its Related Parties under clauses 24.2(a)(iii) and 24.2(a)(iv) is caused by, or arising out of or in any way in connection with the event in clause 24.2(a)(vi) is \$

### 24.3 Certain third party claims

- (a) The Project Company and the State Works Contractor will have no liability to RMS or its Related Parties, nor will RMS and its Related Parties be entitled to make any Claim against the Project Company or the State Works Contractor under clause 24.2(a)(iv), in respect of any Liability of RMS or its Related Parties to a third party for Pure Economic Loss arising directly as a result of:
  - (i) the decision by RMS to proceed with the Project; or
  - (ii) the existence or location of the Motorway.
- (b) Subject to clause 24.3(c), the Project Company and the State Works Contractor will have no liability to RMS and its Related Parties, nor will RMS and its Related Parties be entitled to make any Claim against the Project Company or the State Works Contractor, for RMS's Consequential Loss to the extent to which such RMS's Consequential Loss exceeds \$
- (c) Clause 24.3(b) does not operate to exclude or limit the Project Company's or the State Works Contractor's liability to RMS and its Related Parties:
  - (i) for Loss to the extent such Loss is an Insured Liability;
  - (ii) for Loss in respect of death or personal injury;
  - (iii) for Loss arising from any criminal acts, fraud or wilful misconduct on the part of the Project Company, the State Works Contractor or their respective Related Parties;
  - (iv) for Loss which is the subject of the indemnities in clauses 5.2(c), 7.8(d), 7.19(b), 9.8(d), 9.11(f), 25.2(a), 25.3(e) and 30.4(b);
  - (v) subject to clause 24.3(a), in respect of any Liability of RMS or its Related Parties to a third party (including to another Indemnified Party);
  - (vi) for Loss or a Liability to the extent that the Project Company or the State Works Contractor has:
    - A. recovered an amount from a third party (including any Subcontractor and whether by way of indemnity or otherwise); or
    - B. would have recovered an amount from a third party, had it diligently pursued a claim against the third party,
 in respect of that Loss or Liability; or
  - (vii) any Liability which, by law, the parties cannot limit or contract out of.

## 24.4 Insured Liability

Nothing in this deed operates to exclude or limit the liability of the Project Company or the State Works Contractor to RMS or its Related Parties for any Loss to the extent to which such Loss is an Insured Liability.

For the purposes of this clause 24, "Insured Liability" means:

- (a) where the Project Company, the State Works Contractor or any of their respective Related Parties or RMS or any of its Related Parties has an entitlement to recover or be indemnified in respect of such Loss under a Project Insurance:
  - (i) the amount or amounts actually recovered by the Project Company, the State Works Contractor or their respective Related Parties or RMS or its Related Parties (as applicable) from; and
  - (ii) the amount or amounts for which the Project Company, the State Works Contractor or their respective Related Parties or RMS or its Related Parties is otherwise actually indemnified by,

the insurer or insurers of such Project Insurance; and
- (b) where, but for:
  - (i) the failure of the Project Company to comply with its obligations under this clause 24 to obtain a Project Insurance;
  - (ii) the insolvency of the insurer or insurers of such Project Insurance; or
  - (iii) any act or omission by the Project Company, the State Works Contractor or a Related Party of either of them (including, without limitation, any misrepresentation, non-disclosure, breach of a duty to the insurer, breach of the terms and conditions of any Project Insurance or failure to comply with those terms or conditions) not caused or contributed to by any act or omission of RMS or its Related Parties which has resulted in a loss of or reduction of the recovery or indemnity under a Project Insurance,

the Project Company, the State Works Contractor or a Related Party of either of them or RMS or its Related Party would have been entitled to recover from, or be indemnified by, an insurer or insurers of such Project Insurance in respect of Loss, the amount or amounts which the Project Company, the State Works Contractor or a Related Party of either of them or RMS or its Related Party (as applicable) would have been entitled to recover from, or be indemnified by, an insurer or insurers of such Project Insurance.

## 24.5 Damage to third party property

- (a) Without limiting clause 24.2, where any Loss of or damage to real or personal property (other than the Project Works, the Temporary Works or the Motorway) occurs which arises out of, or in any way in connection with:
  - (i) any failure by the Project Company to comply with its obligations under this deed, or the State Works Contractor to comply with its obligations under the State Works Deed, the Project Company must, at its cost, promptly repair any such Loss or damage; and

- (ii) the Project Activities or the Project, the Project Company must, at its cost, promptly repair such Loss or damage (where the Project Company or the State Works Contractor has a Liability to do so), or if the affected person agrees, reasonably compensate the affected person for that Loss or damage (where the Project Company or the State Works Contractor has a Liability to do so).
- (b) Without limiting clause 6.6(a)(i)B, if the Project Company fails to carry out, or ensure that the State Works Contractor carries out, any repair work or to pay reasonable compensation under clause 24.5(a), RMS may, after giving reasonable prior notice to the Project Company, carry out such work or pay any such reasonable compensation and any Loss suffered or incurred by RMS will be a debt due and payable from the Project Company to RMS.

## 24.6 Project Insurances

- (a) The Project Company must on and from Financial Close effect and maintain the Project Insurances (or cause the Project Insurances to be effected and maintained on and from Financial Close) in accordance with Schedule 4.
- (b) The Project Company must:
  - (i) not do or permit, or omit to do, anything which prejudices any Project Insurance;
  - (ii) rectify anything which might, if not rectified, prejudice any Project Insurance;
  - (iii) reinstate a Project Insurance if it lapses;
  - (iv) not cancel, vary or allow any Delivery Insurance to lapse without the prior consent of RMS (such consent not to be unreasonably withheld or delayed);
  - (v) not cancel, materially vary or allow any Operations Insurance to lapse without the prior consent of RMS (such consent not to be unreasonably withheld or delayed);
  - (vi) as soon as reasonably practicable notify RMS of any fact, circumstance or change in circumstances which could reasonably be expected to prejudice a Project Insurance;
  - (vii) in respect of each Project Insurance, comply with its duty of disclosure to all relevant insurers, including where failure to do so would breach, prejudice or invalidate the relevant policy;
  - (viii) as soon as reasonably practicable notify RMS when it receives or gives a notice in connection with the cancellation of any Delivery Insurance;
  - (ix) do all things reasonably required by RMS or any other person in whose name a Project Insurance is effected to enable RMS or that other person to claim, collect or recover moneys due under any Project Insurance; and
  - (x) comply at all times with the terms of each Project Insurance.

## 24.7 Premiums

- (a) The Project Company must punctually pay all premiums in respect of all insurance policies effected in accordance with this clause 24 and give RMS copies of receipts for payment of premiums if and when requested by RMS.
- (b) If the Project Company fails to effect or maintain any insurance policy referred to in this clause 24 or to pay a premium or other amount payable to the insurer in respect of such insurance, RMS may effect such insurance or pay such premium or other amount and any costs so incurred by RMS will be a debt due and payable by the Project Company to RMS.

## 24.8 Dealing with claims

In addition to the obligations to notify the insurer under any Project Insurance, the Project Company must:

- (a) notify RMS of any occurrence or circumstances of which the Project Company is aware, or should reasonably have been aware, that could reasonably be expected to give rise to a claim in excess of \$ (Indexed) under any Identified Insurance (**Notifiable Claim**);
- (b) keep RMS fully informed of subsequent developments concerning the Notifiable Claim;
- (c) not compromise, settle or enforce a Notifiable Claim without the prior written consent of RMS (which must not be unreasonably withheld or delayed); and
- (d) diligently pursue any Notifiable Claim.

## 24.9 Insurance proceeds

- (a) The parties agree that the proceeds in excess of \$ (Indexed) of any claim made under any Project Insurance, to the extent such proceeds are received in respect of physical loss or damage to the Project Works, the Temporary Works or the Motorway, must be deposited into a special purpose account in the joint names of the Project Company and RMS with a financial institution notified to RMS in writing by the Project Company and approved by RMS (which approval will not be unreasonably withheld or delayed), the details of which account must be notified to RMS in writing by the Project Company upon the establishment of that account, until such time as the proceeds are applied in accordance with clause 24.9(b).
- (b) The parties agree that if any member of the Project Company Group receives proceeds of claims made under the Project Insurances, to the extent such proceeds are received in respect of physical loss or damage to the Project Works, the Temporary Works or the Motorway, such proceeds are to be applied for the repair, reinstatement or replacement of the Project Works, the Temporary Works and/or the Motorway (as applicable).
- (c) RMS consents to the Project Company releasing to the Contractor on a progressive basis the insurance proceeds contemplated in clause 24.9(b) for reinstatement work carried out by the Contractor, to the extent such proceeds are received in respect of physical loss or damage to the Project Works, the Temporary Works or the Motorway, and the Project Company procures that such proceeds are to be applied for the repair, reinstatement or replacement of the Project Works, the Temporary Works and/or the Motorway (as applicable).

## 24.10 Reinstatement

If any physical loss or damage occurs:

- (a) subject to clause 24.10(c), to any part of the Project Works, the Temporary Works or the Motorway, the Project Company must (without limiting its other obligations under this clause 24):
  - (i) subject to allowing reasonable time for inspection by insurers and to the terms and conditions of any relevant Project Insurance policy, take immediate steps to clear any debris and begin initial repair work;
  - (ii) promptly consult with RMS and carry out such steps as are necessary to ensure:
    - A. the prompt repair or replacement of the physical loss or damage so that:
      - 1) it complies with the SWTC; and
      - 2) there is minimal disruption to the Project Works, the Temporary Works and the Motorway; and
    - B. that, to the greatest extent possible, the Project Company continues to comply with its obligations under the Project Documents;
  - (iii) manage all repair and replacement activities so as to minimise, to the extent reasonably practicable having regard to the repair and reinstatement activities to be undertaken, the impact on the Project Works, the Temporary Works or the Motorway;
  - (iv) keep RMS fully informed of the progress of the repair and replacement activities; and
  - (v) apply all relevant insurance proceeds in the repair or reinstatement of the Project Works, the Temporary Works or the Motorway;
- (b) subject to the Financiers Tripartite Deed (from the date the Financiers Tripartite Deed comes into effect), as a result of an Uninsurable Force Majeure Event and clause 21 applies, the Project Company's obligation to carry out repair and reinstatement is suspended until the parties have agreed an outcome in accordance with clause 21.6 or, if the parties are unable to come to an agreement, a determination has been made in accordance with clause 21.8 which is final and binding on the parties; and
- (c) in respect of each discrete part of the Third Party Works, the Project Company will only be obliged to comply with its obligations under clause 24.10(a) in respect of each part of the Third Party Works until the certificate, statement or notice referred to in clause 9.4(a)(ii), 15.2(a)(ii) or 15.3(a)(ii) (as applicable) has been provided in accordance with that clause.

## 24.11 O&M Insurance Review

- (a) RMS and the Project Company will meet:
  - (i) 6 months prior to the expected Date of Completion; and



- (ii) 6 months prior to every 5th anniversary of the Date of Completion,
- (each an **Insurance Review Commencement Date**) to review the minimum limits of liability, sub-limits of liability and deductibles for those insurance policies referred to in paragraph 2 of Schedule 4 which must be effected and/or maintained during the ensuing 5 year period with a view to reaching agreement upon the limits, sub-limits and deductibles which will apply during that ensuing 5 year period. To the extent that RMS and the Project Company are able to reach agreement within 2 months after the Insurance Review Commencement Date on the limits, sub-limits and deductibles to apply during the ensuing 5 year period, the Project Company must, from the commencement and for the duration of the relevant 5 year period, cause the relevant limits, sub-limits and deductibles to be adjusted to those agreed.
- (b) To the extent that RMS and the Project Company are unable to reach the agreement required by clause 24.11(a) within 2 months after the Insurance Review Commencement Date then:
- (i) those limits, sub-limits and deductibles which have not been agreed will be referred for dispute resolution in accordance with the Dispute Resolution Procedure;
- (ii) if the relevant limits, sub-limits and deductibles have not been agreed or determined pursuant to the Dispute Resolution Procedure before the commencement of the relevant 5 year period, then the Project Company must, pending the outcome of the Dispute Resolution Procedures, cause the then current levels of the relevant limits, sub-limits and deductibles to be Indexed from the date the relevant limit, sub-limit or deductible was last set or adjusted; and
- (iii) as soon as practicable after the outcome of the Dispute Resolution Procedure (and notwithstanding any decision to appeal any determination of the arbitrator), the Project Company must cause the relevant limits, sub-limits and deductibles to be adjusted to those agreed or determined pursuant to the Dispute Resolution Procedure, for the balance of the relevant 5 year period.
- (c) The Project Company and RMS agree that the limits, sub-limits and deductibles pursuant to clause 24.11(a) are to be agreed or determined (as the case may be) having regard to:
- (i) the nature of the Project;
- (ii) the insurances which the Project Company have effected, or caused to be effected, at that time and the risks covered under those insurances;
- (iii) the risks required to be insured by this clause 24;
- (iv) the risks which a prudent insured in the position of the Project Company would seek to insure;
- (v) the terms on which insurance is available;
- (vi) the commercial reasonableness of those terms;
- (vii) the insurances and risk management practices generally applying in the tollroad industry; and
- (viii) any other factors which RMS and the Project Company may agree to be appropriate.

- (d) Any approval by RMS to the terms of any insurances pursuant to clauses paragraphs 3(a)(ii) or 3(a)(iii) of Schedule 4 will not constitute evidence that, or estop RMS from denying that, any event falls within the definition of "Uninsurable Force Majeure Event".

## 24.12 Uninsurable Risks

- (a) If the Project Company believes that any risk required to be insured under the Project Insurances is or becomes Uninsurable, then:
- (i) the Project Company must notify RMS within 5 Business Days after it believes that the risk has become Uninsurable; and
  - (ii) clauses 24.12(b), (c) and (e) will apply if the parties agree, or it is determined in accordance with the Dispute Resolution Procedure, that the risk is Uninsurable.
- (b) The Project Company is not obliged to effect or maintain a particular Project Insurance to the extent that, and only for so long as the risk against which Project Insurance has been effected is Uninsurable (and did not become Uninsurable as a result of an act or omission of the Project Company, the State Works Contractor or a Related Party of either of them).
- (c) If a risk is Uninsurable, the Project Company must approach the insurance market on a regular basis (such regularity being satisfactory to RMS, acting reasonably) to establish whether that risk remains Uninsurable and must advise RMS accordingly.
- (d) If, in RMS's opinion (acting reasonably) a risk which is required to be insured against under a Project Insurance is no longer Uninsurable, RMS may give written notice to the Project Company.
- (e) If:
- (i) the Project Company believes that a risk which is required to be insured against under a Project Insurance is no longer Uninsurable, the Project Company must notify RMS and promptly effect the relevant Project Insurance; or
  - (ii) RMS gives the Project Company a notice pursuant to clause 24.12(d) and the parties agree, or it is determined in accordance with the Dispute Resolution Procedure, that a risk which is required to be insured against under a Project Insurance is no longer Uninsurable, the Project Company must promptly effect the relevant Project Insurance.

## 24.13 Works in proximity to NWRL Project

The parties acknowledge and agree that, if RMS enters into an agreement or other arrangement with Transport for New South Wales in relation to the NWRL Interface Deed, then notwithstanding RMS's entry into such agreement or arrangement, the liabilities and obligations of the Project Company under this deed and the liabilities and obligations of the State Works Contractor under the State Works Deed will be determined as if such agreement or arrangement did not exist

## 25. Intellectual property

### 25.1 Licence of Intellectual Property Rights

The Project Company (irrevocably for all time and despite any termination of this deed for any reason) grants (or must procure the grant of), and must procure that the State Works Contractor grants (or procures the grant of), to RMS an irrevocable, non-exclusive, royalty free, perpetual and fully assignable licence to use (and to sublicense others to use) all Intellectual Property Rights in or relating to:

- (a) the Design Documentation; and
- (b) the materials, documents, images, photographs, software, processes and methods relevant to the Project Works, the Temporary Works and the Project Activities (including processes and methods of working),

in each case excluding the software source code for the NorthConnex Motorway Control System - SCADA Interface - Infrastructure Control and Monitoring System (ICMS) (together the **Contract Documentation and Materials**) for:

- (c) the purposes of completing the construction, commissioning and testing of, using, operating, duplicating, extending, maintaining, upgrading, altering or otherwise dealing with the whole or any part of the Project Activities or the Project Works and the Temporary Works;
- (d) any purpose associated with further development of the Project Site; and
- (e) except in relation to the Third Party Software, any other purpose,

which licence is, subject to clause 25.1(g), effective immediately and will survive termination of this deed, provided that in respect of:

- (f) software that is commercially available off-the-shelf third party software, the obligation of the Project Company and the State Works Contractor is to license that item of software to RMS to the extent to which the Project Company and the State Works Contractor are permitted to do so pursuant to the terms of the licence granted to the Project Company and the State Works Contractor by the third party licensor and on the terms of that licence; and
- (g) customised third party software relating to tolling, customer management, operation or maintenance, the obligation on the Project Company and the State Works Contractor is to license or to procure the licensing of that item of software (or software that has substantially equivalent functionality) to RMS at the time and to the extent that it is required by RMS to enable RMS to operate, maintain and toll the Motorway in accordance with this deed, unless the Project Company or the State Works Contractor can demonstrate to the satisfaction of RMS (acting reasonably) that any such licence cannot reasonably be obtained for a reasonable cost.

Notwithstanding any other provision in this deed, this clause 25 does not apply to any intellectual property rights in the Back Office System.

### 25.2 Warranty

- (a) The Project Company:
  - (i) warrants that RMS's use (to the extent of the licences referred to in clause 25.1), as contemplated by clause 25.2(b), of the Contract Documentation and Materials, or any other work provided by the Project

Company under this deed or the State Works Contractor under the State Works Deed, will not infringe any author's moral rights under the Copyright Act 1968 (Cth) or similar legislation in any jurisdiction;

- (ii) warrants that there are no Security Interests, and that it will not allow any Security Interests to be created, over any Intellectual Property Rights referred to in clause 25.1; and
  - (iii) must indemnify RMS to the extent any Claims, or costs, expenses, Losses or damages are suffered or incurred by RMS arising out of, or in any way in connection with, any actual or alleged infringement of any author's moral rights under the Copyright Act 1968 (Cth) or similar legislation in any jurisdiction in connection with the Project Works, the Temporary Works, the Project Activities or the Contract Documentation and Materials.
- (b) For the purposes of clause 25.2(a), RMS's use (to the extent of the licences referred to in clause 25.1) of the Contract Documentation and Materials includes RMS's right to reproduce, publish, copy, adapt, communicate to the public, materially distort, destroy, mutilate or in any way change any part of the Contract Documentation and Materials or any part of the Project Works or the Temporary Works to which the Contract Documentation and Materials or any other work provided by the Project Company under this deed or by the State Works Contractor under the State Works Deed relates:
- (i) with or without attribution of authorship;
  - (ii) in any medium; and
  - (iii) in any context and in any way it sees fit.

### **25.3 Project Company to procure for RMS**

- (a) The Project Company agrees to, and agrees to procure the cooperation of the State Works Contractor and any other third parties (to the full extent required to give effect to clauses 25.1 and 25.2) to:
- (i) execute such further documents and do such further things (including assisting in relation to any litigation commenced by or brought against RMS, its Related Parties or its licensees, assignees or successors and their licensees, or any other person authorised by it) as reasonably requested by RMS to give full effect to the provisions of clause 25; and
  - (ii) allow or assist RMS (and its Related Parties, licensees, assignees and successors and their licensees, and any other person authorised by it) to obtain, perfect, assert, enforce or defend its (or their) interest in, rights and consents to the assigned or licensed Intellectual Property Rights (as the case may be) or any adaptation of it (or any part of the assigned or licensed Intellectual Property Rights (as the case may be) or of any such adaptation) or to prevent or obtain other remedies from others infringing any of those rights, interests and consents anywhere in the world.
- (b) The Project Company irrevocably appoints, and must procure that the State Works Contractor appoints, RMS as its attorney to execute any document and do any act or thing which may be necessary to comply with the provisions of this clause 25.3 if the Project Company or the State Works Contractor fails to execute the document or do the relevant act or thing within 5 Business Days of a written request by RMS's Representative.

- (c) The Project Company warrants, and must procure that the State Works Contractor warrants, that:
- (i) the use of the Intellectual Property Rights licensed under this clause 25 pursuant to the terms of this deed does not and will not infringe the Intellectual Property Rights of any party; and
  - (ii) the Project Company and the State Works Contractor are able to grant the licence granted in clause 25.1.
- (d) Without limiting clause 25.3(c), if any action or Claim for infringement or alleged infringement of any Intellectual Property Rights granted under this deed results in the use or enjoyment by RMS, its Related Parties or its licensees, assignees or successors or their licensees, or other person authorised by it, of the Contract Documentation and Materials, the Project Activities or the Project Works or any part of them, being materially disrupted, impaired or adversely affected, the Project Company must at its own expense and at RMS's option:
- (i) procure for the benefit of RMS, its Related Parties and its licensees, assignees and successors and their licensees and any other person authorised by it the right to continue to use and exploit the Intellectual Property Rights licensed pursuant to clause 25.1, in accordance with this deed; or
  - (ii) modify or replace the Contract Documentation and Materials, the Project Activities or the Project Works or relevant part of them, in respect of which Intellectual Property Rights are licensed pursuant to clause 25.1, so that no further infringement will occur and so that the modified or replaced Contract Documentation and Materials, the Project Activities or the Project Works or relevant part of them in respect of which Intellectual Property Rights are licensed pursuant to clause 25.1 will:
    - A. comply with the requirements of this deed; and
    - B. not limit or otherwise affect RMS's rights, or the Project Company's ability to comply with its obligations, under this deed or otherwise according to Law.
- (e) The Project Company indemnifies, and agrees to keep indemnified, RMS from and against any Claims against RMS, or Loss suffered or incurred by RMS, arising out of or in any way in connection with:
- (i) a breach by the Project Company or the State Works Contractor of any warranty set out in this clause 25; or
  - (ii) any actual or alleged infringement of an Intellectual Property Right in connection with the Contract Documentation and Materials, the Project Activities or the Project Works or any part of them.

## 25.4 Moral rights

The Project Company, in respect of the Intellectual Property Rights set out in this clause 25:

- (a) to the extent permitted by Law, will not, and will take reasonable steps to ensure that the State Works Contractor and their respective Related Parties do not, sue, enforce any Claim, bring any action or exercise any cure in respect of any breach or alleged breach of any person's Moral Rights (whether before or after the date of this deed) in respect of any Intellectual Property Rights against:

- (i) RMS;
  - (ii) RMS's Related Parties; or
  - (iii) any third party to whom RMS sub-licences (whether express or implied), or grants any other right to use, possess, modify, vary or amend any Intellectual Property Right;
- (b) will take reasonable steps to procure (without coercion) that all individuals who are, or are to be, or may be, authors of any Intellectual Property Right, sign, date and return to the Project Company a Moral Rights Consent (in consideration for the payment of \$1 to that individual) prior to those individuals commencing work on the creation of any Intellectual Property Rights, or as soon as practicable thereafter, in which each such individual becomes bound by the obligations to RMS as set out in the Moral Rights Consent, and to pay each such individual the sum of \$1 on behalf of RMS;
- (c) will within 5 Business Days after a request by RMS, provide to RMS any Moral Rights Consent which is obtained pursuant to clause 25.4(b) as requested by RMS; and
- (d) will maintain an up-to-date record of the names and contact details of each person who is an author of any Intellectual Property Right and the Intellectual Property Right of which such person is an author, and provide a copy of any updated records to RMS upon request.

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## **26. Confidentiality and publicity**

### **26.1 General restriction**

Subject to clause 26.2, no party will, without the written consent of the other party, divulge or suffer or permit its servants, consultants or agents to divulge to any person (other than to the State Works Contractor, the Borrower, Investor FinCo, the Sponsor Entities, the Contractor, the Operator, the Tolling Equipment Works Contractor, the Technology Operator, the Tolling and Customer Management Contractor, the Independent Certifier and the Debt Financiers and their officers, employees, consultants, advisers and agents who require such reports, studies, information and data to enable them properly to carry out their duties):

- (a) any of the contents of this deed or the other Project Documents;
- (b) any information relating to the negotiations concerning the same; or
- (c) any information 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.

### **26.2 Exceptions**

The restrictions imposed by clause 26.1 shall not apply to the disclosure of any information:

- (a) which is now or after the date of this deed comes into the public domain (other than by breach of this clause) 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) as required for any legitimate NSW Government purpose or process;

- (d) pursuant to the contract summary required to be published in accordance with Premier's Memorandum No. 2007-01 dated 8 January 2007 or the NSW Public Private Partnership Guidelines published by the NSW Government and dated August 2012;
- (e) 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 any determination by him to which the disclosing party is a party;
- (f) which, in the reasonable opinion of the disclosing party, is required to be disclosed to:
  - (i) any actual or prospective investor in or lender to or holder of bonds, notes or similar instruments issued or to be issued in the domestic or international capital markets by (or trustee therefor) a member of the Project Company Group (or assignee, novatee or transferee of a lender or holder);
  - (ii) any actual or prospective insurer in respect of the Project;
  - (iii) that party's officers, employees, professional advisers, auditors or consultants;
  - (iv) any person to whom disclosure is reasonably necessary to enable that person to comply with the Project Documents to which it is a party and any subcontractors of the Subcontractors; or
- (g) by RMS that is not Commercially Sensitive Information.

### **26.3 Obligations preserved**

Where disclosure is permitted under clause 26.2, other than clauses 26.2(a), 26.2(b), 26.2(c), 26.2(d) and 26.2(e), 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.

### **26.4 Publicity**

- (a) The Project Company must not, and must ensure that the State Works Contractor does not, issue any information, publication, document or article for publication concerning the Project or the Project Activities to any media (or permit any third party to do so) without the prior written approval of RMS's Representative (acting reasonably) and only in a manner approved by RMS's Representative (acting reasonably).
- (b) If the Project Company, the State Works Contractor or any of their Subcontractors receives a direct request from the media for comment in respect of any aspect of the Project or the Project Activities, the Project Company must promptly provide details of such request to RMS's Representative.
- (c) The Project Company must not announce, promote or hold any event, function or party on the Project Site, the Motorway or the Motorway Site (or permit the State Works Contractor or any third party to do so) without the prior written approval of RMS (acting reasonably).

## 26.5 Disclosure by RMS

- (a) Notwithstanding the other provisions of this clause 26 but subject to clause 26.5(b), the parties acknowledge that:
- (i) the Project Documents will be made available to the Auditor-General in accordance with the Public Finance and Audit Act 1983 (NSW);
  - (ii) information concerning the Project Documents may be tabled in parliament of the State of New South Wales by or on behalf of RMS and will be published in accordance with applicable government policies and guidelines;
  - (iii) the Project Documents and information concerning the Project Documents will be published on RMS's contracts register in accordance with the GIPA Act (subject to the prior redaction of Commercially Sensitive Information which is not required to be disclosed in the contracts register under the GIPA Act); and
  - (iv) RMS and RMS's Representative may make the Project Documents or any of them available to any person as required by any applicable Law.
- (b) The parties acknowledge that:
- (i) by entering into this deed, RMS has consulted with the Project Company in relation to the disclosure of all information concerning the Project Documents that is not Commercially Sensitive Information;
  - (ii) RMS will notify the Project Company, the Borrower and the Debt Financiers (as applicable) of any proposed disclosure of any information that RMS considers (acting reasonably) may be Commercially Sensitive Information by RMS under the GIPA Act no later than 20 Business Days before the proposed date of disclosure;
  - (iii) following notification by RMS in accordance with clause 26.5(b)(ii), RMS will take reasonable steps to consult with the Project Company, the Borrower and the Debt Financiers (as applicable) before disclosing the information referred to in clause 26.5(b)(ii); and
  - (iv) if, following:
    - A. notification by RMS in accordance with clause 26.5(b)(ii); or
    - B. consultation between RMS, the Project Company, the Borrower and the Debt Financiers (as applicable) in accordance with clause 26.5(b)(iii),
 the Project Company, the Borrower or the Debt Financiers (as applicable) objects to disclosure of some or all of the information referred to in clause 26.5(b)(ii) on the basis that it is Commercially Sensitive Information, the Project Company, the Borrower or the Debt Financiers (as relevant) must provide details of any such objection within 5 Business Days of the date the Project Company, the Borrower or the Debt Financiers received notification from RMS or the date on which the consultation process concluded (as relevant).
- (c) RMS may take into account any objection received from the Project Company, the Borrower or the Debt Financiers pursuant to clause 26.5(b)(iv) in determining



whether the information identified by the Project Company, the Borrower or the Debt Financiers as Commercially Sensitive Information should be disclosed.

- (d) Nothing in this clause 26.5 will limit or otherwise affect the discharge of RMS's obligations under the GIPA Act.

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## 27. Default and termination

### 27.1 Events of Default

Each of the following events is an Event of Default:

- (a) the Project Company fails to commence, or ensure that the State Works Contractor commences, or to expeditiously and diligently progress, or ensure that the State Works Contractor expeditiously and diligently progresses, the Project Activities as required by clause 14.1 or the Project Company or the State Works Contractor displays an intention to permanently abandon the Project;
- (b) the Project Company fails to achieve, or ensure that the State Works Contractor achieves, Completion of the Project Works by the Sunset Date;
- (c) after the Motorway Opening Date, the Project Company closes or permits the closure of one or more traffic lanes of the Motorway, other than in accordance with clause 17.2 (an **Unauthorised Closure Default**);
- (d) the Project Company fails in a material respect to operate, maintain, repair or insure the Motorway in accordance with this deed (an **Operating Default**);
- (e) any member of the Project Company Group defaults in a material respect in the due observance and performance of any of its other obligations under this deed or any other RMS Project Document (other than a failure to diligently pursue a corrective action plan in accordance with clause 14.6(c) during the period commencing on Financial Close and ending on the date which is 18 months prior to the Date for Completion);
- (f) an Insolvency Event occurs in relation to any member of the Project Company Group, whether or not the Project Company is then in breach of this deed (a **Project Company Group Insolvency Default**);
- (g) an Insolvency Event occurs in relation to the Contractor, the Operator, the Tolling and Customer Management Contractor, the Contractor Guarantor or the Operator Guarantor (in each case whether or not the Project Company is then in breach of this deed) and that Contractor, Operator, Tolling and Customer Management Contractor, Contractor Guarantor or Operator Guarantor is not replaced:
- (i) if the Insolvency Event has occurred in relation to the Contractor or the Contractor Guarantor, within 180 days after the occurrence of the Insolvency Event; or
- (ii) if the Insolvency Event has occurred in relation to the Operator or the Operator Guarantor, within 30 days after the occurrence of the Insolvency Event (an **Operator Insolvency Default**); or
- (iii) if the Insolvency Event has occurred in relation to the Tolling and Customer Management Contractor, within 60 days after the occurrence of the Insolvency Event,

by a party which is:

- (iv) reputable, solvent and has the resources and experience to perform its obligations under the D&C Deed, the O&M Deed or the Tolling and Customer Management Contract (or in the case of the Contractor Guarantor or the Operator Guarantor, the Contractors' obligations under the D&C Deed or the Operator's obligations under the O&M Deed, as the case may be); and
  - (v) otherwise acceptable to RMS;
- (g1) an Insolvency Event occurs in relation to the Technology Operator (whether or not the Project Company is then in breach of this deed) and the Project Company has not demonstrated to the satisfaction of RMS (acting reasonably) within 60 days of the Insolvency Event occurring that it is able to continue levying and collecting tolls in accordance with clause 19.1; or
- (h) the Project Company breaches in a material respect a representation or warranty given by it under this deed or any other undertaking given by it in a RMS Project Document, or the State Works Contractor breaches in a material respect a representation or warranty given by it under the State Works Deed or any other undertaking given by it in a RMS Project Document.

Any failure by the Project Company to comply with its obligations under clause 20.3 will not give rise to an Event of Default.

## 27.2 Notice of default

- (a) Upon the occurrence of an Event of Default, RMS may, by notice in writing to the Project Company, require the Project Company to Remedy the Event of Default within such period (subject to clause 27.2(b)) specified in the notice as is in the opinion of RMS (acting reasonably) required to Remedy the Event of Default (the **Remedy Period**).
- (b) The parties agree that if an Event of Default is:
- (i) a failure to pay money, the Remedy Period to be specified by RMS is 20 Business Days;
  - (ii) an Unauthorised Closure Default, the Remedy Period to be specified by RMS is 5 days; or
  - (iii) a Project Company Group Insolvency Default which occurs prior to the Date of Completion, the Remedy Period to be specified by RMS is 5 days.
- (c) If RMS gives the Project Company a notice referred to in clause 27.2(a) (a **Remedy Notice**):
- (i) the Project Company must comply, and must procure that each other member of the Project Company Group complies, with the Remedy Notice; and
  - (ii) unless urgent action is necessary or the relevant Event of Default is a failure to pay money:
    - A. the Project Company must give RMS a program and plan (a **Remedy Plan**) to Remedy the Event of Default in accordance with the terms of the Remedy Notice;

- B. RMS must consult with the Project Company in good faith to develop and settle that Remedy Plan; and
  - C. the Project Company must thereafter comply, and must procure that each other member of the Project Company Group complies, with that Remedy Plan.
- (d) If, at any time (even if the Project Company has previously given RMS a notice under clause 27.2(d)(i)), the Project Company considers, in good faith, that a Remedy Period is not reasonable:
- (i) the Project Company must immediately give RMS written notice of that fact, including details of its reasons and extension to the Remedy Period which it believes (acting reasonably) is required to Remedy the Event of Default; and
  - (ii) subject to clause 27.2(e), RMS must, as soon as practicable after receiving a notice under clause 27.2(d)(i), review the Remedy Period.
- (e) If the Project Company has given a notice to RMS under clause 27.2(d)(i) and:
- (i) the Project Company Group or members of the Project Company Group are diligently pursuing the Remedy of the Event of Default, including by implementing a Remedy Plan; and
  - (ii) if the Event of Default the subject of the Remedy Notice occurred after the Motorway Opening Date, the Motorway is open to the public to the extent that it is safe to do so (unless permitted otherwise in accordance with clause 17.2),
- the relevant Remedy Period will be extended by such period as is, in the opinion of RMS (acting reasonably), required to Remedy the Event of Default as notified by RMS to the Project Company in writing.
- (f) If the Project Company considers in good faith that a Remedy Period extended by RMS pursuant to clause 27.2(e) is not reasonable, it may refer the matter for resolution in accordance with the Dispute Resolution Procedure.

### 27.3 RMS elections on Pre-Completion Event of Default

- (a) Subject to clauses 27.3(ab) and 27.3(c), if, at any time prior to Completion:
- (i) an Event of Default occurs which is not Remedied within the relevant Remedy Period (as extended if at all in accordance with clause 27.2(e) or clause 27.2(f)); or
  - (ii) at any time after RMS has given a Remedy Notice, the Project Company or members of the Project Company Group are not diligently pursuing or have not diligently pursued the Remedy of the Event of Default, including implementing the Remedy Plan,

RMS may, within a period not exceeding 6 months after the end of the relevant Remedy Period (as extended if at all in accordance with clause 27.2(e) or clause 27.2(f)), give written notice to the Project Company of its election to terminate this deed with effect from the date of the notice and either:

- (iii) **(Abandon):** abandon the Project (an **Abandonment Notice**); or

- (iv) **(Carry Out)** endeavour to complete the construction of the Motorway after this deed has been terminated (a **Pre-Completion Termination Notice**),

in which case this deed will terminate on the date of the Abandonment Notice or Pre-Completion Termination Notice.

If RMS has not given a notice under clause 27.3(a)(iii) or (iv) within 6 months after the end of the relevant Remedy Period (as extended if at all in accordance with clause 27.2(e) or clause 27.2(f)) then RMS will be deemed to have given an Abandonment Notice on the day which is 6 months after the end of the relevant Remedy Period (as extended if at all in accordance with clause 27.2(e) or clause 27.2(f)).

- (aa) RMS may, at any time after issuing a Pre-Completion Termination Notice, give written notice to the Project Company that it no longer proposes to complete the construction of the Motorway and issue an Abandonment Notice under clause 27.3(a)(iii).
- (ab) RMS may not give an Abandonment Notice or a Pre-Completion Termination Notice pursuant to clauses 27.3(a)(iii) or (iv) if, at the time RMS proposes to give the relevant notice, the Event of Default has been Remedied.
- (b) The Project Company must, and must procure the State Works Contractor to, while an Event of Default to which clause 27.3(a) applies subsists up until RMS gives the Project Company a notice, or is deemed to have given the Project Company a notice, pursuant to clause 27.3(a):
- (i) upon written notice by RMS, provide RMS with any:
- A. information relating to the Project that is within the custody or control of the Project Company or any of its Related Parties; or
- B. access to the Project Site, any Extra Land and any other land upon which the Project Activities are being carried out,
- which RMS, acting reasonably, considers is necessary to enable RMS to make any election which RMS is entitled or required to make under clause 27.3(a); and
- (ii) continue to (and procure the Project Company Group and members of the Project Company Group to) diligently pursue the Remedy of the Event of Default and implement any Remedy Plan.
- (c) Clause 27.3(a) will not apply to an Unauthorised Closure Default, an Operating Default or an Operator Insolvency Default.

#### **27.4** *Not used*

#### **27.5** *Not used*

#### **27.6** **Reinstatement**

- (a) If an Event of Default to which clause 27.3(a) applies has occurred prior to the Date of Completion and RMS has given the Project Company an Abandonment Notice pursuant to clause 27.3(a)(iii), then, without limiting RMS's rights, powers and duties under Law, RMS may (or may procure a third party to):

- (i) reinstate to the condition it was in prior to the commencement of the Project Activities or otherwise make safe the Project Site, any Extra Land and any road or structure in existence prior to the commencement of the Project Activities which has been altered or damaged; and
- (ii) carry out any works required to be carried out by RMS under the M2 Interface Deed and the M7 Interface Deed,

**(Reinstatement).**

- (b) Reinstatement does not include reinstatement or making safe:

- (i) Utility Services and other services that have been permanently relocated;
- (ii) Property Works which have been consented to by the owner or owners of the Unowned Parcel; or
- (iii) buildings that have been demolished,

each in the course of undertaking the Project Activities.

- (c) Subject to clause 27.6(d), the costs of carrying out a Reinstatement will be borne by RMS and the Project Company as follows:

- (i) RMS will bear the costs and expenses incurred by RMS in carrying out (or procuring the carrying out of) a Reinstatement, except to the extent to which clause 27.6(c)(ii) requires the Project Company to bear such costs and expenses; and

The Project Company will not be liable for the costs and expenses of RMS to the extent such costs and expenses arise from a breach of this

deed, the M2 Interface Deed or the M7 Interface Deed by RMS or the negligence or wilful misconduct of RMS or its Related Parties.

- (d) To the extent RMS and the Project Company are unable to agree the costs to be borne by the Project Company under clause 27.6(c)(ii), either party may refer the matter for dispute resolution in accordance with the Dispute Resolution Procedure.

**27.7 Termination by RMS**

- (a) In respect of an Event of Default to which clause 27.3(a) does not apply, if:
  - (i) the relevant Event of Default is not Remedied within the relevant Remedy Period (as extended if at all in accordance with clause 27.2(e) or clause 27.2(f)); or
  - (ii) at any time during the relevant Remedy Period (as extended if at all in accordance with clause 27.2(e) or clause 27.2(f)):
    - A. the Project Company Group or members of the Project Company Group are not diligently pursuing a Remedy of the Event of Default, including by implementing the Remedy Plan; or
    - B. the Motorway is not open to the public to the extent that it is safe to do so (unless permitted otherwise in accordance with clause 17.2),

RMS may give the Project Company 20 Business Days' prior written notice of its intention to terminate this deed. During this 20 Business Day period the Project Company will have a right to Remedy, or procure the Remedy of, the Event of Default.

- (b) If at the expiration of the 20 Business Day period following the written notice under clause 27.7(a) the Event of Default has not been Remedied by the Project Company, RMS may thereafter terminate this deed by, and with effect from, written notice to the Project Company.

**27.7A Consequences of termination generally**

- (a) Upon termination of this deed (other than termination under clauses 9.10(c), 27.11, 27.12, 27.13 or 27.14(c)(i)), RMS will not be liable to pay any compensation or other moneys to the Project Company or the State Works Contractor by reason of that termination (including, where RMS does not exercise the right to require novation of a Subcontract, any amounts payable by the Project Company or the State Works Contractor to the relevant Subcontractor following termination of that Subcontract).
- (b) Upon termination of this deed by RMS:
  - (i) RMS may require a novation of:
    - A. if this deed is terminated prior to the Date of Completion, the D&C Deed (in accordance with the D&C Side Deed) and the Tolling Equipment Works Contract; or
    - B. if this deed is terminated after the Date of Completion:

- 1) the O&M Deed, in accordance with the O&M Side Deed;
  - 2) the Tolling and Customer Management Agreement, in accordance with the TCM Operator's Side Deed;
  - 3) the Technology Implementation and Services Agreement, in accordance with the TISA Side Deed (save that, in the event of such a novation, the parties agree that clauses 18.3 and 18.4 of the Technology Implementation and Services Agreement will not apply); and
  - 4) any other Subcontract agreed between RMS and the Project Company (acting reasonably);
- (ii) the Project Company must:
- A. execute, and must procure that each member of the Project Company Group executes, all documentation required to effect a transfer to RMS of its interests in the Project;
  - B. hand over, and must procure each member of the Project Company Group hands over, books of account and all other records relating to the Project;
  - C. hand over the Contract Documentation and Materials;
  - D. procure the assignment of the Project Company's rights under the insurance policies maintained by the Project Company under clause 24;
  - E. hand over any other documentation relating to the Project within the custody or control of the Project Company, the State Works Contractor and their respective Subcontractors; and
  - F. do all other acts and things to enable RMS or any person engaged by RMS to complete the construction of the Project Works and the Temporary Works or to operate, maintain and repair the Motorway; and
- (iii) the Project Company must peaceably surrender and yield up to RMS, the Project Site, any Extra Land and any other land upon which the Project Activities are being carried out (including any right, title or interest in them).
- (c) The Project Company acknowledges that nothing in this clause 27 obliges RMS to require or consent to the novation of any Subcontract to RMS.
- (d) The parties acknowledge and agree that RMS may terminate this deed under this clause 27 in circumstances where an Insolvency Event only relates to or involves one member of the Project Company Group and notwithstanding that the other members of the Project Company Group are not then in default or the subject of an Insolvency Event.

## 27.8 Right to damages

- (a) Subject to clauses 27.7A(a) and 27.9(g), any termination of this deed under clause 9.10(c) or this clause 27 will not in any way prejudice any party's rights to claim and recover damages for any breach of contract by any other party.
- (b) Subject to clauses 24.3(b) and 27.9(g), any termination of this deed by RMS under this clause 27 (other than clauses 9.10(c), 27.11 or 27.13) will entitle RMS to recover all Loss that RMS may suffer or incur arising out of or in any way in connection with the termination of this deed.

## 27.9 RMS cost recovery

- (a) **(Project Company Liability):** If RMS issues a Pre-Completion Termination Notice or an Abandonment Notice to the Project Company, the Project Company will be liable to RMS for the following:
  - (i) subject to clause 27.9(d), in the case of a Pre-Completion Termination Notice, the

and the Project Company must pay such amounts to RMS in accordance with this clause 27.9.

- (b) **(Interim Claims):** On issuing a Pre-Completion Termination Notice or an Abandonment Notice to the Project Company, RMS may make a claim or claims against the Project Company for:
  - (i) without limiting clause 27.9(d), if RMS has issued a Pre-Completion Termination Notice,
  - ); or
  - (ii) if RMS has issued an Abandonment Notice,





- A. construction of the Motorway such that the Motorway is open to the public for the safe, continuous and efficient passage of vehicles; or
- B. Reinstatement,

(g) **(Remedy):** Notwithstanding anything else in this deed, the parties agree that this clause 27.9 and clause 38 and Schedule 16 of the M7 Motorway Project Deed are RMS's sole remedies for the recovery of Loss arising from an Event of Default to which clause 27.3(a) applies, other than:

- (i) Loss arising in connection with the Project Company's breach of clause 15; or
- (ii) Loss referred to in clause 24.5.

provided that the Loss referred to in clauses 27.9(g)(i) and (ii) will not include any Loss arising solely from or solely in connection with the termination of this deed or the State Works Deed.

## 27.11 Termination for Final Determination

- (a) Notwithstanding any other provision of this deed, if a court makes a Final Determination and RMS fails to procure that the effect of the Final Determination is overcome within 18 months of the Project Company giving written notification to RMS of the Final Determination, RMS may in its absolute discretion terminate this deed at any time after that 18 month period by giving a notice to that effect to the Project Company, in which case clause 27.15 will apply.
- (b) RMS acknowledges and agrees that the Project Company will not be in breach of this deed, and the State Works Contractor will not be in breach of the State Works Deed, to the extent the Project Company or the State Works Contractor (as applicable) is prevented from undertaking the Project in accordance with this deed or the State Works Deed (as applicable) as a consequence of a Final Determination.

## 27.12 Termination by the Project Company

Subject to clause 27.14, the Project Company may terminate this deed by giving RMS 30 Business Days' prior written notice if:

- (a) the NSW Government enacts legislation (including any rules, regulations or by-laws under that legislation) which prohibits or has the effect of prohibiting a member of the Project Company Group from undertaking the Project substantially in accordance with the Project Documents;
- (b) an Authority resumes any part of the Motorway Site and as a result any member of the Project Company Group is prevented from undertaking the Project substantially in accordance with the Project Documents;
- (c) RMS breaches clause 9.1 or clause 9.3 and such breach:
  - (i) prevents any member of the Project Company Group from undertaking the Project substantially in accordance with the Project Documents; and
  - (ii) is not remedied (or its effects overcome) within 12 months after written notice from the Project Company to RMS specifying the breach;
- (d) RMS breaches clause 5.1 of the State Works Deed;
- (e) a court makes a Final Determination and RMS fails to procure that the effect of the Final Determination is overcome within 18 months of the Project Company giving written notification to RMS of the Final Determination;
- (f) the Project Company or the State Works Contractor are prevented from carrying out the Project Activities for a continuous period of more than 6 months as a result of a direction, order or requirement referred to in clause 9.10(a); or
- (g) prior to the Date of Completion, the M7 Project Deed is terminated pursuant to clause 25.5 of that deed (subject to completion of any period of suspension under clause 25.6 of that deed).

If an event referred to in clause 27.12(c)(i) occurs, then in respect of the 12 month period referred to in clause 27.12(c)(ii),

had the event referred to in clause 27.12(c) not occurred.

Without limiting clauses 20.4(f) and 20.4(g), any failure by RMS to comply with clause 20.2 will not be a breach of this deed and will not entitle the Project Company to terminate this deed.

### **27.13 Termination for Uninsurable Force Majeure Event**

Notwithstanding any other provision of this deed, if an Uninsurable Force Majeure Event exists, or the consequences of the Uninsurable Force Majeure Event exist, for a continuous period of more than 12 months:

- (a) RMS may in its absolute discretion terminate this deed at any time after that 12 month period by giving a notice to that effect to the Project Company, after which this deed will terminate and clause 27.15 will apply; or
- (b) the Project Company may terminate this deed by giving RMS 30 Business Days' prior written notice, after which, subject to clause 27.14, this deed will terminate and clause 27.15 will apply.

### **27.14 Suspension of termination notice**

- (a) If the Project Company issues a notice of termination under clause 27.12 or clause 27.13(b), RMS may suspend that right to terminate by giving the Project Company written notice within 25 Business Days after receipt of the Project Company's notice.
- (b) RMS's suspension of that right to terminate expires:
  - (i) upon notice to that effect from RMS;
  - (ii) 12 months after the date of the Project Company's notice under clause 27.12 or clause 27.13(b) (as applicable); or
  - (iii) when the relevant event is remedied by RMS or no longer exists,
 whichever is earlier.
- (c) If RMS's suspension of that right to terminate expires:
  - (i) under clause 27.14(b)(i) or 27.14(b)(ii), this deed automatically terminates under clause 27.12 or clause 27.13(b) (as applicable) on the date RMS's suspension of the Project Company's right to terminate expires; or
  - (ii) under clause 27.14(b)(iii), this deed continues in force.
- (d) The Project Company must continue to perform its obligations under this deed, and ensure that the State Works Contractor continues to perform its obligations under the State Works Deed, while its right to terminate is suspended if:
  - (i) it is lawfully able to do so; and
  - (ii) it is practicable to do so.

If RMS suspends that right to terminate,

the basis of which the notice under clause 27.12 or clause 27.13(b) was issued not occurred.

## 27.15 Termination Amounts

- (a) Without prejudice to clause 27.8, if this deed is terminated under clause 9.10(c), 27.11 or 27.12 RMS must within 30 Business Days after the date of termination:
  - (i) pay the Early Termination Amount to the Project Company; and
  - (ii) release any undertaking and Letters of Credit provided to RMS under clause 8.
- (b) Without prejudice to clause 27.8, if this deed is terminated under clause 27.13, RMS must within 30 Business Days after the date of termination:
  - (i) pay the Uninsurable FM Termination Amount to the Project Company; and
  - (ii) release any undertaking and Letters of Credit provided to RMS under clause 8.
- (c) The Project Company agrees that in calculating:
  - (i) the Early Termination Amount, there will be no double counting of  
 ; and
  - (ii) the Uninsurable FM Termination Amount,

## 27.16 Termination of Motorway Site Lease

- (a) Notwithstanding the provisions of the Motorway Site Lease as to the term of the Motorway Site Lease, the Project Company acknowledges and agrees that the tenancy created by the Motorway Site Lease will automatically and simultaneously be determined upon the termination of this deed without the necessity of notice and all estates and interests derived or dependent upon the Motorway Site Lease will be determined for all time with effect from the date this deed is terminated.
- (b) The parties expressly acknowledge and agree that, upon the termination of this deed in accordance with this deed:
  - (i) the Motorway Site Lease is intended to and will expire by effluxion of time despite any Law;
  - (ii) the non-exclusive licence to use the Licensed Maintenance Areas granted under Schedule 2 of the Motorway Site Lease will automatically and simultaneously be determined; and
  - (iii) the Project Company will not, and will not be entitled to, bring an action against RMS for relief against forfeiture (whether pursuant to section 130

of the Conveyancing Act 1919 (NSW) or otherwise) of the Motorway Site Lease.

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## 28. Dispute resolution

Any dispute or difference arising out of, relating to, or in connection with this deed or the conduct of the parties in relation to this deed, or its subject matter (including any question regarding the existence, validity or termination of this deed) (**Dispute**), must be resolved in accordance with the Dispute Resolution Procedure.

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## 29. Force Majeure

### 29.1 Force Majeure notice

- (a) If the Project Company alleges or wishes to claim that Force Majeure has occurred the Project Company must give RMS prompt written notice of the Force Majeure once it becomes aware of the same and the obligations affected together with full particulars of all relevant matters including:
- (i) details of the Force Majeure;
  - (ii) details of the obligations affected;
  - (iii) details of the action that the Project Company or the State Works Contractor has taken and/or proposes to take to remedy the situation;
  - (iv) an estimate of the time during which the Project Company or the State Works Contractor will be unable to carry out its obligations due to the Force Majeure;
  - (v) an estimate of the costs that the Project Company or the State Works Contractor will incur to remedy the situation; and
  - (vi) details of all insurance moneys upon which the Project Company or the State Works Contractor will be able to rely in making good damage caused by the Force Majeure.
- (b) After giving notice under clause 29.1(a) the Project Company must continue to provide to RMS all relevant information pertaining to the Force Majeure.

### 29.2 Meeting

The parties must meet within 5 Business Days of service of a notice of a Force Majeure event to determine the estimated length of time for which the Force Majeure will continue.

### 29.3 Suspension of obligations

- (a) Subject to clause 29.3(d), if a Force Majeure occurs the Project Company's obligations under this deed (other than under this clause 29), and the State Works Contractor's obligations under the State Works Deed, which are affected by the Force Majeure will be suspended but only to the extent and for so long as such obligations are affected by the Force Majeure.
- (b) If a Force Majeure occurs and a notice under clause 29.1(a) is issued, no party will be in default of its obligations under this deed, and neither RMS nor the State Works Contractor will be in default of its obligations under the State Works Deed, in so far as the failure or delay in the observance or performance of those obligations

by that party is caused by the Force Majeure specified in the notice under clause 29.1(a).

- (c) Upon the Project Company or the State Works Contractor (as applicable) becoming able to recommence performing its obligations which were suspended under clause 29.3(a), the Project Company must recommence, and ensure that the State Works Contractor recommences, the performance of those obligations.
- (d) Clause 29.3(a) will only apply to suspend the Project Company's obligation under clause 17.2 to keep all traffic lanes of the Motorway open where the occurrence of the Force Majeure event prevents the safe passage of vehicles.

## **29.4 Duty to remedy Force Majeure**

The Project Company must remedy and Mitigate, and ensure that the State Works Contractor remedies and Mitigates, the effects of a Force Majeure promptly in accordance with clause 24.10.

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## **30. Expiration**

### **30.1 Expiration of the Term**

Subject to the other provisions of this deed, upon the Expiry Date, the Project Company acknowledges and agrees that it must:

- (a) peaceably surrender and yield up to RMS, the Motorway and the Motorway Site (including any right, title or interest in them) in a fully functional condition which complies with the SWTC and the O&M Manuals;
- (b) deliver to RMS:
  - (i) the then current versions of the O&M Manuals; and
  - (ii) all furniture, fittings, plant and equipment required to operate, maintain and repair the Motorway;
- (c) subject to the Financiers Tripartite Deed (from the date the Financiers Tripartite Deed comes into effect), pay to RMS any insurance proceeds from any insurances for reinstatement or replacement of the Project Works, the Temporary Works or the Motorway (as applicable) to the extent not already reinstated or replaced and assign to RMS any rights available to the Project Company under those insurances; and
- (d) do all other reasonable acts and things to enable RMS to operate the Motorway at a level at least equal to that in effect immediately before the termination of this deed with minimum disruption to its use as a toll road.

### **30.2 Final Handover**

- (a) When the Project Company consider it has achieved Final Handover, the Project Company must notify RMS in writing.
- (b) Within 5 Business Days after receipt of a notice under clause 30.2(a), RMS must notify the Project Company in writing:
  - (i) if RMS believes that Final Handover has been achieved, of the date on which RMS believes the Project Company achieved Final Handover; or

- (ii) if RMS believes that Final Handover has not been achieved, the reasons why it believes Final Handover has not been achieved.

Notwithstanding anything else in this deed, RMS acknowledges and agrees that its rights under this deed upon the end of the Term (including in respect of Final Handover) in connection with the Tolling Services and the Back-Office System will be limited to the rights that are exercisable by RMS under the TCM Operator's Side Deed and the TISA Side Deed in the relevant circumstances.

### 30.3 Effect of notice of Final Handover

A notice issued under clause 30.2(b)(i) will not:

- (a) constitute approval by RMS of the Project Company's performance of its obligations under this deed;
- (b) be taken as an admission or evidence that the Motorway comply with this deed; or
- (c) prejudice any rights or powers of RMS.

### 30.4 Design Life

- (a) The Project Company waives any and all rights it may have under sections 14 and 16 of the Limitation Act 1969 (NSW) and section 109ZK of the EP&A Act in respect of the design lives of the asset components referred to in section 5.2 of the SWTC where those design lives are for periods longer than those provided for in those Acts.
- (b) If the waiver referred to in clause 30.4(a) is held to be without effect or otherwise unenforceable, or if it is severed from this deed, the Project Company must indemnify RMS and keep RMS indemnified at all times from and against all Loss that RMS may suffer or incur arising out of or in connection with RMS's loss of the benefit of the waiver.
- (c) The indemnity in clause 30.4(b) is to continue and remain in full force and effect until the expiration of the last of the design lives referred to in section 5.2 of the SWTC.
- (d) The parties agree that any action by RMS on the indemnity in clause 30.4(b) is not a "building action" for the purposes of section 109ZI of the EP&A Act.
- (e) Nothing in this clause 30.4 limits the operation of any other indemnity in this deed.
- (f) Other than as provided for in clause 30.4(a), neither the Project Company nor the State Works Contractor waives any rights it may have under the Limitation Act 1969 (NSW) or section 109ZK of the EP&A Act.

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## 31. Representations, warranties and covenants

### 31.1 Representations and warranties by the Project Company

The Project Company makes the following continuing representations and warranties for the benefit of RMS:

- (a) it has in full force and effect all authorisations necessary to enter into and perform its obligations under each Project Document to which it is expressed to be a party;



- (b) it has power to enter into and perform its obligations under each Project Document to which it is expressed to be a party, to carry out the transactions which those documents contemplate will be carried out by it and to carry on its business, and the entry into of each such document is a proper exercise of power;
- (c) its obligations under each Project Document to which it is expressed to be a party are valid and binding and are enforceable against it and in accordance with their respective terms subject to the availability of equitable remedies and, to the extent applicable, laws relating to the enforcement of creditors' rights;
- (d) it subsists and is properly constituted;
- (e) it is not a trustee or responsible entity of any trust nor does it hold any property subject to or impressed by any trust;
- (f) it is not in default of its material obligations under any RMS Project Document;
- (g) it is not involved in, and does not conduct, any business other than the business related to the Project and will not do so without the prior written approval of RMS;
- (h) except as contemplated by the Financiers Tripartite Deed (from the date the Financiers Tripartite Deed comes into effect), its obligations under the RMS Security will rank ahead of, and its obligations under this deed and each Project Document to which it is expressed to be a party (other than the RMS Security) will rank at least equally with, all its other unsecured indebtedness, other than indebtedness preferred by law;
- (i) the execution, delivery and performance of each Project Document to which it is expressed to be a party and the transactions under each of them do not:
  - (i) violate its constituent documents or any law, regulation, treaty, judgment, ruling, order or decree of any court or official directive which is binding on it;
  - (ii) violate any other document or agreement to which it is a party or which is binding on it or any of its assets; or
  - (iii) cause a limitation on its powers or the powers of its directors or other officers to be exceeded;
- (j) it does not 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);
- (k) no litigation (which has not been disclosed to RMS in writing prior to the date of this deed), arbitration, tax claim, dispute or administrative or other proceeding has been commenced or, to its knowledge, threatened against it which is likely to have a material adverse effect upon it or its ability to perform its financial or other obligations under any Project Document to which it is expressed to be a party; and
- (l) except as contemplated under a Project Document or in connection with a transaction which is contemplated by a Project Document, it will not trade or incur any Liabilities or carry on any business or enter into any document or agreement other than the Project Documents without RMS's prior written approval.

## 31.2 Representations and warranties by RMS

RMS makes the following continuing representations and warranties for the benefit of the Project Company:

- (a) it is a statutory body validly constituted and existing under the *Transport Administration Act 1988 (NSW)*;
- (b) it has in full force and effect all authorisations necessary under its constituent legislation to enter into and perform its obligations under each Project Document to which it is expressed to be a party;
- (c) it is legally entitled and has all statutory power to enter into and perform its obligations under each Project Document to which it is expressed to be a party, to carry out the transactions contemplated by those documents, and the entry into of each such document is a proper exercise of power;
- (d) its obligations under each Project Document to which it is expressed to be a party are valid and binding and are enforceable against it in accordance with their respective terms subject to the availability of equitable remedies and, to the extent applicable, laws relating to the enforcement of creditors' rights; and
- (e) the execution, delivery and performance of each Project Document to which it is expressed to be a party and the transactions under each of them does not violate any law to which RMS is subject.

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## 32. Amendments to other Project Documents

### 32.1 Variations to this deed

Subject to clause 12.2, this deed may only be varied by a deed executed by or on behalf of both RMS and the Project Company.

### 32.2 Amendments to other Project Documents

- (a) The Project Company must not at any time after the execution of this deed:
  - (i) make any modification, variation or amendment of a material nature to, or terminate or surrender; or
  - (ii) permit the novation, assignment or substitution of any counterparty's right, obligation or interest in,
 

any one or more of the Project Documents to which it is a party, other than this deed or the Motorway Site Lease (**Amendment**) without first obtaining the consent of RMS.
- (b) In the event that the Project Company desires an Amendment it must submit to RMS a written request seeking RMS's consent. The request must set out:
  - (i) the Amendment and the relevant reasons therefore;
  - (ii) the response or anticipated response of any other party to the Project Documents regarding the Amendment;
  - (iii) the response or anticipated response of any assignee of the Project Documents to the Amendment; and

- (iv) copies of any documents relevant to the Project Company's request.
- (c) RMS must advise the Project Company, within 20 Business Days after receiving the Project Company's written request under clause 32.2(b), that:
  - (i) it consents to the Amendment;
  - (ii) the Amendment is unacceptable to it and the reasons why the Amendment is unacceptable; or
  - (iii) it requires additional information from the Project Company regarding the Amendment, in which event:
    - A. the Project Company must provide the additional information sought by RMS within a further period of 10 Business Days; and
    - B. this clause 32.2(c) will reapply as if the additional information were the written request under clause 32.2(b).
- (d) Should RMS fail to respond for any reason within the period required by clause 32.2(c), it will be deemed to have given its consent to the Amendment.
- (e) This clause 32.2 does not apply to the Deed of Appointment of Environmental Representative until after the date that it is executed by each party to the Deed of Appointment of Environmental Representative.

### **32.3 Amendments to Equity Documents after Completion**

RMS must not unreasonably withhold or delay its consent under clause 32.2 to an Amendment to an Equity Document after the Date of Completion which does not result in RMS's position under any of the Project Documents being materially worse than it would have been had the relevant Equity Document not been amended.

### **32.4 Amendments to the Equity Participation Deed**

The Project Company must, within 20 Business Days after:

- (a) any modification, variation or amendment of; or
- (b) the novation, assignment or substitution of any counterparty's right, obligation or interest in,

the Equity Participation Deed, provide RMS with written notice of that modification, variation, amendment, novation, assignment or substitution and a copy of the amended Equity Participation Deed.

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## **33. Financing and Refinancing**

### **33.1 Pre Completion financing**

The Project Company must not (and must not allow the Borrower to), prior to Completion:

- (a) incur any Financial Indebtedness or enter into any financing agreements (including in respect of present or contingent indebtedness, deferred purchase or leasing arrangements or similar obligations); or

- (b) undertake a Refinancing, other than an Approved Financing Transaction.

### 33.2 Post Completion financing

- (a) The parties agreed that the Project Company or the Borrower may, at any time after Completion, undertake a Refinancing, provided that the Project Company complies with its obligations under this clause 33 and:
  - (i) the Refinancing is a No Consent Refinancing; or
  - (ii) the Refinancing is a Consent Refinancing or an Abridged Consent Refinancing and RMS has consented under clause 33.6 (Abridged Consent Refinancing) or clause 33.7 (Consent Refinancing).
- (b) The parties acknowledge and agree that:
  - (i) any Upfront Costs may be capitalised and added to the amount of Project Debt upon any Refinancing to the extent that the aggregate of such costs capitalised under this clause for all Refinancings does not exceed the Maximum Upfront Costs Cap; and
  - (ii) pursuant to any Refinancing, the Project Company or the Borrower may raise any form of financial accommodation including, without limitation, by way of the issuance of bonds, notes or other instruments in the domestic or international capital markets (whether denominated in either Australian dollars or foreign currencies) or by way of bank debt or a combination of the foregoing other than Exotic Swaps or Accreting Instruments.

### 33.3 Financiers Tripartite Deed

The Project Company must not (and must not allow the Borrower to) execute any Debt Financing Documents unless, no later than the time at which the Debt Financing Documents are executed:

- (a) in the case of the Initial Debt Financing Documents, any Debt Financiers, through their Agent, Security Trustee or other Representative, have executed a deed with RMS substantially in the form of the Financiers Tripartite Deed;
- (b) in the case of any subsequent Refinancing, any new Debt Financiers are bound by the Financiers Tripartite Deed then in effect (through their Agent, Security Trustee or other Representative being an existing party to that document) or become party thereto (either directly or through their Agent, Security Trustee or other Representative becoming a party to that document) in the manner specified in Financiers Tripartite Deed; and
- (c) to the extent required, any retiring Debt Financier not represented by an Agent, Security Trustee or other Representative, has executed any documents reasonably requested by RMS to terminate its rights under the Financiers Tripartite Deed.

### 33.4 Refinancing - notice and details

- (a) The Project Company must cause the Borrower to promptly, and in any event:
  - (i) in relation to an Abridged Consent Refinancing or a Consent Refinancing, no later than 90 days prior to the Proposed Refinancing

Date for the proposed Abridged Consent Refinancing or Consent Refinancing; or

- (ii) in relation to a No Consent Refinancing, no later than 45 days prior to the Proposed Refinancing Date for the proposed No Consent Refinancing,

provide RMS with full details of the proposed Refinancing, including:

- (iii) a copy of the then current Base Case Financial Model as adjusted in accordance with clause 33.11 for the proposed Refinancing (the **Refinancing Model**);
  - (iv) all material information in relation to the proposed Refinancing, including the nature of the financial accommodation to be raised, the proposed terms and conditions of the Refinancing and any proposed derivative transactions;
  - (v) the aggregate Upfront Costs incurred to date for all Refinancings (including the proposed Refinancing) in nominal terms and as a percentage of the Maximum Upfront Costs Cap; and
  - (vi) whether the Borrower considers that the Refinancing is an Abridged Consent Refinancing, a Consent Refinancing or a No Consent Refinancing and, if the Borrower considers that it is a No Consent Refinancing, full details of the reasons why it considers that the requirements of clause 33.5 have been satisfied.
- (b) RMS may, within 10 Business Days after receiving details of the proposed Refinancing referred to in clause 33.4(a), request from the Project Company any further information which RMS reasonably requires from the Borrower regarding the proposed Refinancing. If such further information is available to the Borrower, the Project Company must cause the Borrower to provide it to RMS as soon as reasonably practicable but no later than 5 Business Days after RMS' request.
  - (c) Within 20 Business Days after the later of RMS receiving details of the proposed Refinancing referred to in clause 33.4(a) or receipt by RMS of the further information requested by it under clause 33.4(b) (such period being the **RMS Response Period**), RMS must confirm in writing to the Project Company whether the proposed Refinancing is or is not a No Consent Refinancing.
  - (d) If RMS does not respond to the Project Company within the RMS Response Period, RMS will be deemed to have confirmed that the Refinancing is a No Consent Refinancing.
  - (e) If RMS confirms in writing, or is deemed to have confirmed under this clause, that the proposed Refinancing is a No Consent Refinancing, the Project Company or the Borrower may proceed with that Refinancing.

### 33.5 No Consent Refinancing

Subject to the Project Company or the Borrower having provided the information as required by clause 33.4 and RMS having confirmed in writing to the Project Company under clause 33.4(c) (or being deemed to have given such confirmation under clause 33.4(d)) that a proposed Refinancing is a No Consent Refinancing, RMS acknowledges and agrees that the Project Company or the Borrower may enter into a Refinancing without any consent from RMS if:

- (a) the Refinancing will be effected on an arm's length basis;
- (b) the Refinancing will not have the effect of deferring the amount or timing of amortisation of the Project Debt as against the NorthConnex Debt Profile;
- (c) the Refinancing does not constitute or involve the entry by the Project Company or the Borrower into an Exotic Swap or an Accreting Instrument;
- (d) either:
  - (i) both prior to and, as a result of the terms of the Refinancing, a Trigger Event has not occurred and will not occur following the Refinancing; or
  - (ii) in the case of a Refinancing which takes place after the occurrence of the first Trigger Event, the Refinancing will not cause an increase in the principal amount of Project Debt (including as a result of the inclusion in Project Debt of swap break costs incurred in relation to or arising from the Refinancing), other than by an amount equal to any Upfront Costs associated with that Refinancing to the extent permitted to be capitalised under clause 33.2(b)(i);
- (e) the Refinancing will not result in the ICR being less than       ;
- (f) the Refinancing will not result in any DSCR being less than       ; and
- (g) the Refinancing is not an amendment, restatement, replacement, waiver or consent to cure any actual event of default or review event under any Debt Financing Document.

### 33.6 Abridged Consent Refinancing

The Project Company or the Borrower may enter into a Refinancing not permitted by clause 33.5 with the prior written consent of RMS, which must not be unreasonably withheld or delayed, provided:

- (a) the Refinancing is supported by a Refinancing Model prepared in accordance with clause 33.11;
- (b) the Refinancing will be effected on an arm's length basis;
- (c) either:
  - (i) the first Trigger Event has occurred and the Refinancing results in an increase in the principal amount of Project Debt but Qualifying Additional Debt after the Refinancing is completed (including any swap break costs incurred in relation to or arising from the Refinancing) will not exceed \$                   ; or
  - (ii) the Refinancing would result in NorthConnex Debt (including any swap break costs incurred in relation to or arising from the Refinancing) exceeding the amount of \$                    but does not result in a Trigger Event occurring;
- (d) the Refinancing does not constitute or involve the entry by the Project Company or the Borrower into an Exotic Swap or an Accreting Instrument;
- (e) the Refinancing will not be entered into earlier than 2 years after the date of financial close of the last Abridged Consent Refinancing or Consent Refinancing;

- (f) the Refinancing will not result in the ICR being less than ;
- (g) the Refinancing will not result in any DSCR being less than ;
- (h) the Refinancing is not an amendment, restatement, replacement, waiver or consent to cure any actual event of default or review event under any Debt Financing Document; and
- (i) the parties have agreed on the amount and timing of payment of RMS's share of any Refinancing Gain in accordance with clause 33.8.

### 33.7 Consent Refinancing

- (a) The Project Company must not enter (and must not allow the Borrower to enter into) into any Refinancing, other than a No Consent Refinancing or an Abridged Consent Refinancing, without obtaining the prior written consent of RMS in accordance with this clause 33.7 which may be given or withheld in its absolute discretion.
- (b) RMS will not be required to consider any request for its consent under this clause 33.7 more often than 2 years after the date of financial close of the last Abridged Consent Refinancing or Consent Refinancing.
- (c) The granting of any consent under this clause 33.7 by RMS shall be without prejudice to RMS' right to any RMS Refinancing Share under clause 33.8.

### 33.8 Refinancing Gain sharing

- (a) For each proposed Refinancing that causes or occurs after the occurrence of the first Trigger Event (other than a Refinancing which occurs after the occurrence of the first Trigger Event and does not involve the incurrence of any additional Qualifying Additional Debt or deferral of the amortisation of existing debt), the Refinancing Gain must be calculated by the Project Company in accordance with this clause 33.8 and clause 33.11.
- (b) For the purposes of this deed, Refinancing Gain will be calculated pursuant to clause 33.8(c) below on the basis that the relevant gain is only in respect of the impact of the Refinancing on Distributions which are attributable to the incurrence of the incremental principal amount of, or delayed amortisation of, Project Debt the subject of the Refinancing or which occurs as a result of the Refinancing.
- (c) For the purposes of this clause, a **Refinancing Gain** occurs when the value calculated in accordance with the below

- (d) In calculating the Refinancing Gain:

- (i) the values of A and B will be expressed as an aggregate amount as at the Proposed Refinancing Date and will be calculated using the Post Completion Equity Return; and
  - (ii) otherwise than as otherwise agreed under clause 33.11(a)(vi), it will be assumed that the terms of the Refinancing will only apply for the actual tenor of that Refinancing and not the balance of the Term.
- (e) Subject to clause 33.8(f), RMS will be entitled to receive a payment, or a series of payments agreed in accordance with clause 33.8(f) below, that will result in RMS receiving \_\_\_\_\_ of any Refinancing Gain (the **RMS Refinancing Share**). It is acknowledged that if RMS and the Project Company agree that the Refinancing Gain will be paid to RMS over time that the sum of the actual amounts paid to RMS may differ from the actual Refinancing Gain amount due to the time value of money.
- (f) Unless otherwise agreed by RMS, the amount of any RMS Refinancing Share will be a debt due from the Project Company to RMS, payable in the amounts and at the times agreed between RMS and the Project Company.
- (g) If the parties, after negotiating in good faith for a period of 15 Business Days with a view to agreeing any RMS Refinancing Share, cannot reach agreement either party may refer the matter to determination by an independent expert under the Dispute Resolution Procedure.

### **33.9 Refinancing cost**

The Project Company must pay to RMS its reasonable costs incurred in relation to considering a proposed Refinancing or consenting to a Refinancing.

### **33.10 Copies of Debt Financing Documents**

The Project Company must procure the Borrower to deliver to RMS' Representative a certified complete copy of each agreement entered into by the Borrower in respect of and including each amendment to, or waiver, variation or change of any provision of, the Debt Financing Documents, in each case within 15 Business Days after its execution.

### **33.11 Preparation of the Refinancing Model**

- (a) To prepare the Refinancing Model the Project Company must ensure that only the following adjustments are made to the Base Case Financial Model in the following order:



- (vi) further required adjustments (if any) as otherwise agreed between RMS and the Project Company;
- (b) In preparing the Refinancing Model, the Project Company must also ensure that the Refinancing Model:
- (i) outlines the basis for any changes to assumptions used in the Refinancing Model;
  - (ii) outlines the Proposed Refinancing Date;
  - (iii) contains full details of the principal amount of any Qualifying Additional Debt that will be outstanding immediately prior to, and proposed to be outstanding immediately after, the proposed Refinancing; and
  - (iv) does not contain any other adjustments unless otherwise agreed between RMS and the Project Company.
- (c) No later than 10 Business Days after financial close of a Refinancing, the Project Company must provide RMS with a final Refinancing Model updated to show the actual outcomes of the implementation of that Refinancing (including the financial impact of material changes to the Borrower's and the Project Company's obligations to the Debt Financiers in a format that meets the requirements of this clause).
- (d) The parties acknowledge and agree that the final Refinancing Model agreed under this clause in connection with a Consent Refinancing or an Abridged Consent Refinancing that has been approved by RMS will become the Base Case Financial Model (until that model is further revised or updated in accordance with this deed).
- (e) The Project Company must ensure that the Refinancing Model Outputs Schedule records in clearly identifiable form all information which this deed contemplates will be identifiable from the Refinancing Model Outputs Schedule.

### **33.12 Notices under the Funding Default Deed**

- (a) The Project Company must notify RMS of the occurrence prior to the Date of Completion of any "Funding Default" (as that term is defined in the Funding Default Deed) and must give RMS a copy of any notice issued under the Funding Default Deed in respect of that Funding Default.

- (b) A notice required under clause 33.12(a) must be provided by the Project Company to RMS as soon as practicable after, and in any event within 2 Business Days after, the occurrence of a Funding Default to which the notice relates.

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## **34. Assignment**

### **34.1 Entitlement to assign**

- (a) Subject to the Debt Financing Documents and the Financiers Tripartite Deed (from the date on which the Financiers Tripartite Deed comes into effect), the Project Company must not sell, transfer, assign, mortgage, charge or otherwise dispose of, deal with, or encumber its interest in the Motorway or in any of the Project Documents without the prior written consent of RMS and compliance with this clause 34.
- (b) In granting its consent under clause 34.1(a):
- (i) prior to Completion, RMS may withhold its consent in its absolute discretion; or
  - (ii) after Completion, RMS must not unreasonably withhold its consent.
- (c) RMS may sell, transfer or assign or otherwise dispose of or deal with its interest in the Project Documents without the prior written consent of the Project Company provided either:
- (i) the transferee is supported by a guarantee from the Crown in right of the State of New South Wales on terms no less favourable than those contained in the PAFA Act Guarantee; or
  - (ii) subject to clause 34.1(d), following reasonable consultation with the Project Company over a period of not more than 10 Business Days, RMS is selling, transferring, assigning, sub-participating or otherwise disposing of or dealing with all or any part of its rights and benefits under this deed or any Project Document in relation to its entitlement to any rent under the Motorway Site Lease.
- (d) The parties acknowledge and agree that a failure by RMS to undertake the consultation referred to in clause 34.1(c)(ii) will not invalidate or otherwise affect the validity of the sale of, transfer of, assignment of, sub-participation in or other disposing of or dealing with all or any part of RMS's rights and benefits under this deed or any Project Document in relation to its entitlement to any rent under the Motorway Site Lease under clause 34.1(c)(ii).

### **34.2 Change of Control prior to Completion**

- (a) The Project Company undertakes to RMS that the direct legal and beneficial owners of the Project Company, Borrower, Investor FinCo and Sub Holdco will remain unchanged until Completion.
- (b) Subject to clause 34.2(c), the Project Company must not permit (and must procure that an Ultimate Shareholder does not permit):
- (i) any Change of Control of the Project Company, Borrower, Investor FinCo, Sub HoldCo, a Sponsor Entity or the State Works Contractor; or
  - (ii) a person:

- A. who is not an Ultimate Shareholder, or
- B. who is an Ultimate Shareholder but which is an entity managed by an Ultimate Shareholder (and not ultimately owned by an Ultimate Shareholder) which does not at the date of this deed or following any event which is approved by RMS under this clause 34, have an economic interest in the shares or units of a Sponsor Entity or the State Works Contractor,

to acquire any shares, units or an economic interest in shares or units in any Sponsor Entity or the State Works Contractor,

prior to Completion without the prior written consent of RMS (which may not be unreasonably withheld).

- (c) RMS's consent is not required for a change in, or the appointment of, the responsible entity, trustee or custodian of an entity where there is no change in the ultimate beneficial owner of the entity concerned.
- (d) RMS will be deemed to be acting reasonably under clause 34.2(b) if it withholds its consent where RMS is of the reasonable opinion that:
  - (i) the Project Company has not provided it with full details of the proposed change and any further information reasonably requested by RMS; or
  - (ii) the new person:
    - A. is not in compliance with applicable anti-money laundering laws and anti-terrorism laws;
    - B. does not provide RMS with a letter of support in respect of any unpaid funding obligation of the transferring Ultimate Shareholder (which must be in a form and substance equivalent to the letters of support provided to RMS at Financial Close); and
    - C. does not demonstrate to the reasonable satisfaction of RMS that it is both a fit and proper person to be an investor in the Project and is of sufficient financial standing to meet its, and to put the Project Company in funds to meet its, funding obligations in relation to the Project.

### **34.3 Change of Control after Completion**

For the purposes of clause 34.1, any Change of Control of the Project Company, the Borrower, Investor FinCo, Sub HoldCo, a Sponsor Entity or the State Works Contractor after Completion will be deemed to be an assignment by the Project Company of its interest in this deed and the other Project Documents and such change will be subject to the terms and conditions of this clause 34.

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## **35. Expenses and stamp duties**

### **35.1 Expenses**

Each party must bear its own costs, including professional costs and disbursements, associated with the preparation and execution of this deed and any subsequent consent, agreement, approval or waiver hereunder or amendment thereto.

## 35.2 Stamp duties

- (a) RMS must, in accordance with this clause 35.2, either reimburse to the Project Company or pay:
- (i) all stamp, registration and similar taxes, other than "mortgage duty" as defined in the *Duties Act 1997* (NSW), payable to, or required to be paid by, or determined to be payable by any or all members of the Project Company Group, any or all NCX Group Entities and any or all of the Sponsors to any appropriate NSW Government Authority (**Stamp Duty**); and
  - (ii) interest, fines and penalties payable to, or required to be paid by, or determined to be payable by any or all members of the Project Company Group, any or all NCX Group Entities and any or all of the Sponsors to any appropriate NSW Government Authority in connection with Stamp Duty (except to the extent arising from a breach of Law by any member of the Project Company Group, any of the NCX Group Entities or any of the Sponsors),
- (together, **Aggregate Stamp Duty Amounts**) assessed in connection with:
- (iii) the execution, stamping and registration of any Project Document executed on or around Financial Close (which will be deemed to include the Deed of Appointment of Environmental Representative irrespective of the date of its execution);
  - (iv) the performance or enforcement of this deed or any Project Document and each transaction effected by or made under any Project Document to the extent such transaction is contemplated to occur on or around Financial Close;
  - (v) the implementation of the Project on or around Financial Close;
  - (vi) subject to clause 35.2(b), the implementation of the Proposed Westlink Motorway Group Restructure;
  - (vii) the execution of the M7 Amending Deeds and each transaction effected by or made under the M7 Amending Deeds, to the extent such transaction is contemplated to occur on or around Financial Close;
  - (viii) the use or occupation of the Project Site, any Extra Land, the Motorway and the Maintenance Site, including:
    - A. the registration of any leases entered into in connection with that use or occupation; and
    - B. in relation to any transfer to the Project Company of any part of the "M2 Leased Area" (as defined in the M2 Interface Deed) to give effect to clause 3.10 of the M2 Interface Deed or any transfer by the Project Company of any "M2 Handover Assets" (as defined in the M2 Interface Deed) to give effect to clause 3.11 of the M2 Interface Deed; and
  - (ix) any payment receipt or other transaction contemplated by any Project Document to occur on or around Financial Close,

(being the **Dutiable Transactions**). The parties agree that the implementation of the Proposed Westlink Motorway Group Simplification is not a Dutiable Transaction.

- (b) RMS will have no liability under clause 35.2(a) for any Aggregate Stamp Duty Amounts assessed in connection with the implementation of the Proposed Westlink Motorway Group Restructure to the extent that such Aggregate Stamp Duty Amounts are assessed solely as a consequence of the Proposed Westlink Motorway Group Restructure being implemented at a time other than immediately prior to, or as part of, Financial Close.
- (c) Subject to clause 35.2(d), any amount payable by RMS under clause 35.2(a) will be paid by RMS within 20 Business Days after submission by the Project Company to RMS of a notice of assessment, together with copies of receipts or other documentation, satisfactory in all respects to RMS, evidencing the payment of the Aggregate Stamp Duty Amounts in respect of Dutiable Transactions.
- (d) If RMS notifies the Project Company within 10 Business Days after execution of this deed that RMS will attend to the payment of the Aggregate Stamp Duty Amounts in respect of the Dutiable Transactions, the Project Company must promptly:
  - (i) deliver all executed counterparts of the documents in the possession of the Project Company Group, the NCX Group Entities and the Sponsors to RMS; and
  - (ii) otherwise cooperate with RMS in respect of any other arrangement reasonably necessary,

to enable RMS to arrange stamping and payment of any Aggregate Stamp Duty Amounts assessed to be payable or to dispute such an assessment.

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## 36. Notification of Claims

### 36.1 Notice of Change

- (a) If the Project Company believes that any Direction of RMS's Representative, other than the issuing of a Change Order, constitutes or involves a Change it must, if it wishes to make a Claim against RMS arising out of, or in any way in connection with, the Direction:
  - (i) within 5 Business Days after receiving written notice of the Direction and before commencing work on the subject matter of the Direction or otherwise complying with the Direction, give notice to RMS's Representative that sets out:
    - A. that it considers the Direction constitutes or involves a Change;
    - B. details of the relevant Direction; and
    - C. details of why it considers the Direction constitutes or involves a Change; and
  - (ii) within 30 Business Days after giving the notice under clause 36.1(a)(i) or such longer period as RMS's Representative may direct, submit a written Claim to RMS's Representative which includes detailed particulars of:
    - A. why the Project Company believes the Direction constitutes or involves a Change;

- B. the details specified in paragraph 1.2 of the Change Procedure;
- C. the Direction, including the date or dates of the Direction and any related event, circumstance, act, omission, fact, matter or thing upon which the Claim is based;
- D. the provisions of this deed or other legal basis upon which the Claim is based; and
- E. the amount claimed and how it has been calculated,

failing which the Project Company will not be entitled to make any Claim against RMS arising out of or in connection with RMS's Representative's Direction.

- (b) Despite the fact that the Project Company considers that a Direction by RMS's Representative constitutes or involves a Change, the Project Company must continue to carry out the Project Company's Activities in accordance with this deed, and ensure that the State Works Contractor continues to carry out the SWC Activities in accordance with the State Works Deed, including any work connected with the Direction of RMS's Representative in respect of which notice has been given under clause 36.1(a).
- (c) If the Project Company issues a notice under clause 36.1(a), RMS may:
  - (i) confirm that the Direction constitutes or involves a Change, or entitles the Project Company to make a Claim, by the giving of a notice under this clause 36.1(c)(i), in which case the Project Company must comply with the Direction;
  - (ii) deny that the Direction constitutes or involves a Change, or entitles the Project Company to make a Claim, by the giving of a notice under this clause 36.1(c)(ii), in which case the Project Company:
    - A. may within 10 Business Days after the receipt of the notice issue a notice of dispute under the Dispute Resolution Procedure; and
    - B. unless otherwise directed by RMS's Representative, must comply with the Direction irrespective of any Claim or Dispute in relation to the Direction or any part of it; or
  - (iii) withdraw the Direction by giving a notice under this clause 36.1(c)(iii).
- (d) If within 20 Business Days after first receipt of the notice under clause 36.1(a)(i), RMS's Representative has not taken any action under clause 36.1(c), RMS's Representative will be deemed to have given a notice under clause 36.1(c)(ii).

## 36.2 Notice of other Claims

- (a) If the Project Company or the State Works Contractor wishes to make a Claim against RMS in respect of any Direction of RMS or RMS's Representative or other event, circumstance, act, omission, fact, matter or thing (including a breach of this deed or the State Works Deed by RMS) under, arising out of, or in any way in connection with, this deed, the State Works Deed or the Project Activities, including anything in respect of which:

- (i) the Project Company is otherwise given an express entitlement under this deed or the State Works Contractor is otherwise given an express entitlement under the State Works Deed; or
- (ii) this deed expressly provides that an amount is to be paid to the Project Company or the State Works Deed expressly provides that an amount is to be paid to the State Works Contractor,

the Project Company must give RMS's Representative the notice required by clause 36.3(a) and a Claim in accordance with clause 36.3(b).

- (b) Clause 36.2(a) does not apply to any Claim made by the Project Company or the State Works Contractor pursuant to clause 21.

### 36.3 Prescribed notices

- (a) Any written notice referred to in clause 36.2 must:
  - (i) be provided not later than 15 Business Days after the later of:
    - A. the first occurrence of; or
    - B. when the Project Company first became aware of, or ought reasonably to have first become aware of,

the Direction, event, circumstance, act, omission, fact, matter or thing which gave rise to the alleged entitlement; and
  - (ii) expressly specify:
    - A. that the Project Company proposes to make a Claim; and
    - B. the Direction, event, circumstance, act, omission, fact, matter, or thing, which gave rise to the alleged entitlement in the Claim.
- (b) Any written Claim referred to in clause 36.2 must:
  - (i) be provided not later than 20 Business Days after giving the written notice under clause 36.3(a); and
  - (ii) include:
    - A. detailed particulars, including the date or dates, of the Direction, event, circumstance, act, omission, fact, matter or thing upon which the Claim is based;
    - B. the legal basis for the Claim, whether based on a term of this deed or otherwise, and if based on a term of this deed, clearly identifying the specific term;
    - C. the facts relied upon in support of the Claim in sufficient detail to permit verification; and
    - D. details of the amount claimed and how it has been calculated.

## 36.4 Continuing events

If the Direction, event, circumstance, act, omission, fact, matter or thing upon which the Claim referred to in clause 36.2 is based, is continuing, or if the consequences of the Direction, event, circumstance, act, omission, fact matter or thing are continuing, the Project Company must continue to give the information required by clause 36.3(b) every 35 Business Days after the written Claim under clause 36.3(b) was submitted or given, until after the Direction, event, circumstance, act, omission, fact, matter or thing upon which the Claim is based has, or the consequences thereof have, ceased.

## 36.5 Bar

If the Project Company fails to comply with clauses 9.11(a)(i), 11.4, 14.7, 14.9, 23.2, 29.1, 36.1, 36.2, 36.3 or 36.4:

- (a) RMS will not be liable upon any Claim (insofar as is permitted by Law) by the Project Company; and
- (b) the Project Company will be barred from making any Claim against RMS,

arising out of or in any way in connection with the relevant Direction, event, circumstance, act, omission, fact, matter or thing (as the case may be) to which those clauses apply.

## 36.6 Other provisions unaffected

Nothing in clauses 36.1 to 36.5 will apply to or limit the operation or effect of any provision of this deed (other than those provisions referred to in clause 36.5) which requires the Project Company to give notice to RMS's Representative in order to preserve an entitlement to make a Claim against RMS.

## 37. NSW Code of Practice

### 37.1 NSW Code and NSW Guidelines

In addition to terms defined in this deed, terms used in this clause 37 have the same meaning as is attributed to them in the NSW Guidelines. The NSW Code and NSW Guidelines are available at [www.industrialrelations.nsw.gov.au](http://www.industrialrelations.nsw.gov.au).

### 37.2 Primary Obligation

- (a) The Project Company must, in carrying out the Project Company's Activities:
  - (i) assume sole responsibility for and manage all aspects of industrial relations for the Project Company's Activities, and ensure that the State Works Contractor assumes sole responsibility for and manages all aspects of industrial relations for the SWC Activities;
  - (ii) keep RMS's Representative fully and properly informed of industrial relations problems or issues which affect or are likely to affect the carrying out of the Project Company's Activities, and ensure that the State Works Contractor keeps RMS's Representative fully and properly informed of industrial relations problems or issues which affect or are likely to affect the carrying out of the SWC Activities; and
  - (iii) comply, and ensure that the State Works Contractor complies, with the Construction Plan.



- (b) The Project Company must at all times comply with, and meet, and ensure that the State Works Contractor complies with and meets, any obligations imposed by, the NSW Code and NSW Guidelines.
- (c) The Project Company must notify, and ensure that the State Works Contractor notifies, the Construction Compliance Unit (CCU) and RMS of any possible non-compliance with the NSW Code and NSW Guidelines and of remedial action taken, within 24 hours of becoming aware of the possible non-compliance.
- (d) Where the Project Company or the State Works Contractor engages a Subcontractor, the Project Company must ensure that the contract with the Subcontractor imposes on the Subcontractor equivalent obligations to those in this clause 37, including that the Subcontractor must at all times comply with, and meet any obligations imposed by, the NSW Code and the NSW Guidelines.
- (e) The Project Company must not, and must ensure that the State Works Contractor does not, appoint or engage another party in relation to the Project Activities where that appointment or engagement would breach a sanction imposed on the other party in relation to the NSW Code or NSW Guidelines.

### 37.3 Access and information

- (a) The Project Company must maintain, and ensure that the State Works Contractor maintains, adequate records of compliance with the NSW Code and NSW Guidelines by it, its Subcontractors and related entities.
- (b) The Project Company must allow, and take reasonable steps to facilitate, and ensure that the State Works Contractor allows and takes reasonable steps to facilitate, authorised personnel (including personnel of the CCU) to:
  - (i) enter and have access to sites and premises controlled by the Project Company or the State Works Contractor, including the Project Site;
  - (ii) inspect any work, material, machinery, appliance, article or facility;
  - (iii) access information and documents;
  - (iv) inspect and copy any record relevant to the project;
  - (v) have access to personnel; and
  - (vi) interview any person,

as is necessary for the authorised personnel to monitor and investigate compliance with the NSW Code and NSW Guidelines by the Project Company and the State Works Contractor, their respective Subcontractors and related entities.
- (c) The Project Company and its related entities must agree to, and comply with, any request from authorised personnel (including personnel of the CCU) for the production of specified documents by a certain date, whether in person, by post or electronic means.

### 37.4 Sanctions

- (a) The Project Company warrants that at the time of entering into this deed, neither it, nor any of its related entities, are subject to a sanction in connection with the NSW Code or NSW Guidelines that would have precluded it from responding to a procurement process for work to which the NSW Code and NSW Guidelines apply.

- (b) If the Project Company does not comply with, or fails to meet any obligation imposed by, or does not ensure that the State Works Contractor complies with, the NSW Code or NSW Guidelines, a sanction may be imposed against the Project Company in connection with the NSW Code or NSW Guidelines.
- (c) Where a sanction is imposed:
  - (i) it is without prejudice to any rights that would otherwise accrue to the parties; and
  - (ii) the State of NSW (through its agencies, Ministers and the CCU) is entitled to:
    - A. record and disclose details of non-compliance with the NSW Code or NSW Guidelines and the sanction; and
    - B. take them into account in the evaluation of future procurement processes and responses that may be submitted by the Project Company, or its related entities, in respect of work to which the NSW Code and NSW Guidelines apply.

### 37.5 Compliance

- (a) The Project Company bears the cost of ensuring compliance by it and the State Works Contractor with the NSW Code and NSW Guidelines, including in respect of any positive steps it or the State Works Contractor is obliged to take to meet its obligations under the NSW Guidelines. The Project Company and the State Works Contractor are not entitled to make, and RMS and the State of NSW will not be liable upon, any Claim against RMS or the State of NSW arising out of or in any way in connection with the Project Company's or the State Works Contractor's compliance with the NSW Code and the NSW Guidelines.
- (b) Compliance with the NSW Code and NSW Guidelines does not relieve the Project Company from responsibility to perform the Project Company's Activities or any other obligation under this deed, or relieve the State Works Contractor from responsibility to perform the SWC Activities or any other obligation under the State Works Deed, or from liability for any Defect in the Project Works or the Temporary Works or from any other legal liability, whether or not arising from its compliance with the NSW Code and NSW Guidelines.
- (c) Where a change to this deed, the State Works Deed, the Project Works or the Temporary Works is proposed, and that change may, or may be likely to, affect compliance with the NSW Code and NSW Guidelines, the Project Company must immediately notify RMS (or nominee) of the change, or likely change and specify:
  - (i) the circumstances of the proposed change;
  - (ii) the extent to which compliance with the NSW Code and NSW Guidelines will be, or is likely to be, affected by the change; and
  - (iii) what steps the Project Company proposes to take to Mitigate any adverse impact of the change (including any amendments it proposes to a workplace relations management plan or work health and safety management plan).

RMS will direct the Project Company as to the course it must adopt within 10 Business Days of receiving notice.

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## 38. Building Code

- (a) The Project Company must comply, and ensure that the State Works Contractor complies, with the Building Code 2013 (Building Code) Copies of the Building Code are available at [www.comlaw.gov.au](http://www.comlaw.gov.au).
- (b) Compliance with the Building Code shall not relieve the Project Company from responsibility to perform this deed, or the State Works Contractor from responsibility to perform the State Works Deed, or the Project Company or the State Works Contractor from liability for any defect in the works arising from compliance with the Building Code.
- (c) Where a change in this deed or the State Works Deed is proposed and that change would affect compliance with the Building Code, the Project Company must submit a report to the Commonwealth specifying the extent to which the compliance by the Project Company and/or the State Works Contractor with the Building Code will be affected.
- (d) The Project Company must maintain adequate records of the compliance with the Building Code by:
  - (i) the Project Company and the State Works Contractor;
  - (ii) the Subcontractors of the Project Company and the State Works Contractor;
  - (iii) the consultants of the Project Company and the State Works Contractor; and
  - (iv) the Related Entities of the Project Company and the State Works Contractor (refer Section 8 of the Building Code).
- (e) If the Project Company does not comply with the requirements of the Building Code in the performance of this deed, or the State Works Contractor does not comply with the requirements of the Building Code in the performance of the State Works Deed, such that a sanction is applied by the Minister for Employment and Workplace Relations, the Code Monitoring Group or the Commonwealth, without prejudice to any rights that would otherwise accrue, those parties shall be entitled to record that non-compliance and take it, or require it to be taken, into account in the evaluation of any future tenders that may be lodged by the Project Company, the State Works Contractor or a related entity of either of them in respect of work funded by the Commonwealth or its agencies.
- (f) While acknowledging that value for money is the core principle underpinning decisions on Government procurement, when assessing tenders, the Project Company may give preference, and may require the State Works Contractor to give preference, to Subcontractors and consultants that have a demonstrated commitment to:
  - (i) adding and/or retaining trainees and apprentices;
  - (ii) increasing the participation of women in all aspects of the industry; or
  - (iii) promoting employment and training opportunities for Indigenous Australians in regions where significant indigenous populations exist.
- (g) The Project Company must not, and must ensure that the State Works Contractor does not, appoint a Subcontractor or consultant in relation to the Project where:

- (i) the appointment would breach a sanction imposed by the Minister for Employment and Workplace Relations; or
  - (ii) the Subcontractor or consultant has had an adverse court or tribunal decision (not including decisions under appeal) for a breach of workplace relations law, work health and safety law, or workers' compensation law and the tenderer has not fully complied, or is not fully complying, with the order.
- (h) The Project Company agrees to require that it, the State Works Contractor and their respective Subcontractors or consultants and related entities provide the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Fair Work Building Industry Inspectorate, with access to:
- (i) inspect any work, material, machinery, appliance, article or facility;
  - (ii) inspect and copy any record relevant to the Project the subject of this deed; and
  - (iii) interview any person
- as is necessary to demonstrate its compliance with the Building Code.
- (i) Additionally, the Project Company agrees that the Project Company, the State Works Contractor and their related entities will agree to a request from the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Fair Work Building Industry Inspectorate, to produce a specified document within a specified period, in person, by fax or by post.
- (j) The Project Company must ensure that all Subcontracts of it or the State Works Contractor impose obligations on Subcontractors equivalent to the obligations under this clause 38.
- (k) The Project Company:
- (i) acknowledges and agrees that it and the State Works Contractor are accredited under the OHS Accreditation Scheme; and
  - (ii) must comply, and ensure that the State Works Contractor complies, with all of the requirements of, and maintain accreditation under, the OHS Accreditation Scheme while building work (as defined in section 5 of the Fair Work (Building Industry) Act 2012 (Cth)) is carried out.

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## 39. Notices

### 39.1 How to give a notice

A notice or consent under this deed (**Notice**) 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;

- (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; or
  - (iii) subject to clause 39.1(d), sent by email in the form of a .pdf file of a letter (with or without attachments) to that person's email address; and
- (d) in the case of Notices which have been sent in accordance with clause 39.1(c)(iii) under clauses 3, 4.4, 4.5, 9.9, 9.10, 11.4, 12, 14.6, 21, 23.2, 24, 27, 28, 29, 32 or 33, in addition to the Notice sent pursuant to clause 39.1(c)(iii), a copy of the Notice must also be printed and delivered or posted to the person's address or sent to the person's facsimile number in accordance with clauses 39.1(c)(i) or 39.1(c)(ii).

### 39.2 Effectiveness of notices

- (a) A Notice referred to in clause 39.1(d) will not be effective unless it is delivered in accordance with clause 39.1(c)(i) or clause 39.1(c)(ii).
- (b) A Notice issued pursuant to clause 39.1(c)(iii) and a Notice issued pursuant to clause 39.1(c)(i) or clause 39.1(c)(ii) must be identical, and in the event that they are not identical, neither Notice will constitute a valid Notice.

### 39.3 When a notice is given

A Notice that complies with this clause 39 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;
- (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;
- (c) subject to clause 39.3(d), if it is sent by email:
  - (i) by 5:00pm (local time in the place of receipt) on a Business Day - at the time in the place to which it is sent equivalent to the time shown on the automatic receipt notification received by the party (as applicable) sending the email from the recipient; or
  - (ii) after 5:00pm (local time in the place of receipt) on a Business Day, or a day that is not a Business Day - on the Business Day following the date on which it is sent equivalent to the date shown on the automatic receipt notification received by the party (as applicable) sending the email from the recipient; and
- (d) where clause 39.1(c)(iii) applies, the relevant Notice will be taken to have been received on the later of:
  - (i) the date determined in accordance with clause 39.3(c); and

- (ii) the date determined in accordance with clause 39.3(a) or 39.3(b) (as the case may be).

### 39.4 Address for notices

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

#### RMS

Address: Level 9  
101 Miller Street  
North Sydney  
NSW 2060  
Email address: [NorthConnex@rms.nsw.gov.au](mailto:NorthConnex@rms.nsw.gov.au)  
Attention: General Manager, Motorway Projects

#### The Project Company

Address: 101 Wallgrove Road, Eastern Creek, NSW 2766  
Email address: [ncx@westlinkm7.com.au](mailto:ncx@westlinkm7.com.au)  
Attention: Chief Executive Officer  
Fax number: 02 9834 9211

and, prior to expiry of the last Defects Correction Period, with a copy to:

Address: Level 9, 1 Chifley Square, Sydney 2000  
Email address: [programdirector@northconnex.com.au](mailto:programdirector@northconnex.com.au)  
Attention: Program Director  
Fax: 02 9254 4990

### 39.5 Communications by email

With respect to communications sent by email:

- (a) only the letter in .pdf format attached to the email and, subject to clause 39.5(b), any attachments to such letter which are referred to in the letter, will form part of the communication under this clause 39. Any text in the body of the email or the subject line will not form part of the communication;
- (b) an attachment to an email referred to in clause 39.1(c)(iii) will only form part of a communication under this clause 39 if it is in .pdf, .jpeg, .xls, .doc, .vsd, .mpp, .mdb, .xer or .ppt format, or such other format as may be agreed between the parties from time to time; and
- (c) the parties agree, with respect to any communications under or in connection with this deed:
- (i) to ensure that their respective firewall and/or mail server (as applicable):
- A. allows messages of up to 20 MB (or such greater size as may be agreed between the parties from time to time) to be received;
- B. does not trap any messages in the spam filter which:

- 1) in the case of notices sent by RMS to the Project Company, have been sent from rms.nsw.gov.au; and
  - 2) in the case of notices sent by the Project Company to RMS, have been sent from westlinkm7.com.au or such other domain as is notified to RMS in writing by the Project Company; and
- C. automatically sends a receipt notification to the sender upon receipt of a message; and
- (ii) to use reasonable endeavours to ensure that their respective systems automatically send a notification message to each of the sender and the recipient when a message is received by the recipient's domain but cannot or will not be delivered to the recipient.

## **40. General**

### **40.1 Governing Law and Jurisdiction**

- (a) This deed is governed by and must be construed according to the law applying in New South Wales.
- (b) Each party irrevocably:
  - (i) submits to the non-exclusive jurisdiction of the courts of New South Wales and the courts competent to determine appeals from those courts, with respect to any action or proceedings which may be brought at any time relating in any way to this deed; and
  - (ii) waives any objection it may now or in the future have to the venue of any action or proceedings, and any claim it may now or in the future have that any action or proceedings have been brought in an inconvenient forum, if that venue falls within clause 40.1(b)(i).

### **40.2 Cost**

A party which has an obligation to do anything under this deed must perform that obligation at its cost, unless expressly provided for otherwise.

### **40.3 Taxes**

- (a) Subject to clause 35.2, but without limiting clause 4.1, the Project Company must pay all Taxes which may be payable in respect of the Project Company's Activities, including any customs duty, tariffs and primage applicable to imported materials (including Materials) or Construction Plant.
- (b) The Project Company must indemnify RMS in respect of any Loss or Claim brought against, suffered or incurred by RMS arising out of or in connection with Taxes which may be payable in respect of the SWC Activities, including any customs duty, tariffs and primage applicable to imported materials (including Materials) or Construction Plant.

### **40.4 Indemnity**

- (a) The Project Company must indemnify RMS from and against:

- (i) any Liability to or claim by any other person; and
- (ii) any Loss suffered or incurred by RMS,

arising out of, or in any way in connection with, breach of a term of an RMS Project Document by the Project Company or the State Works Contractor.

- (b) Where under the terms of this deed or the Motorway Site Lease:
  - (i) the Project Company indemnifies RMS or RMS's Related Parties from and against any Liability, Claim or Loss, the Project Company's liability to indemnify RMS or RMS's Related Parties (as applicable) will be reduced to the extent that any breach of this deed or the other RMS Project Documents or other act or omission (including any negligence) of RMS, including an act or omission (including any negligence) of RMS's Related Parties contributed to the Liability, Claim or Loss;
  - (ii) RMS indemnifies the Project Company, the State Works Contractor or the Related Parties of either of the Project Company or the State Works Contractor from and against any Liability, Claim or Loss, RMS's liability to indemnify the Project Company, the State Works Contractor or the Related Parties of either of the Project Company or the State Works Contractor will be reduced to the extent that any breach of this deed or the other RMS Project Documents or other act or omission (including any negligence) of the Project Company, including an act or omission (including any negligence) of the Project Company, the State Works Contractor or the Related Parties of the Project Company or the State Works Contractor contributed to the Liability, Claim or Loss;
  - (iii) a party is obligated to pay an amount in respect of any Loss suffered or incurred by the other party, it excludes Loss as a result of the negligence or wilful default of the payee party, its employees or agents; and
  - (iv) a party:
    - A. is obligated to pay an amount in respect of any Loss suffered or incurred by the other party; or
    - B. indemnifies the other party against any Liability, Claim or Loss,

that other party must (notwithstanding such obligation or indemnity) in each case take all reasonable steps to Mitigate that Loss, Liability or Claim and the cost of taking those steps will be recoverable from that party.
- (c) Clauses 40.4(b)(i) and (b)(iii) will not apply to reduce either the Project Company's liability to indemnify or pay RMS to the extent that RMS is held to be vicariously liable at Law for any acts or omissions of the Project Company or its employees, agents or contractors.
- (d) Clause 40.4(b)(i) will not apply to reduce the Project Company's liability to indemnify RMS to the extent that the act or omission of RMS is an act or omission in the exercise of its rights or powers under this deed or the Motorway Site Lease.
- (e) Each indemnity in this deed is a continuing obligation, separate and independent from the other obligation of the parties, and survives termination, completion or expiration of this deed.



- (f) It is not necessary for a party to incur expense or make any payment before enforcing a right of indemnity conferred by this deed.
- (g) A party must pay on demand any amount it must pay under an indemnity in this deed.
- (h) Where clause 24.2 applies as a result of a Claim made against RMS by a third party (**Third Party Claim**), then RMS agrees (and must procure that its Related Parties agree):
  - (i) to notify the Project Company about the Third Party Claim promptly;
  - (ii) to keep the Project Company informed of the progress of the Third Party Claim;
  - (iii) to regularly consult with the Project Company in relation to the manner in which proceedings relating to the Third Party Claim are conducted and implement reasonable instructions of the Project Company as to the manner in which such proceedings should be conducted; and
  - (iv) to not settle or pay the Third Party Claim, other than a Third Party Claim which:
    - A. RMS is obliged by Law to pay;
    - B. is settled for an amount which is less than or equal to the amount RMS would otherwise have been liable to pay to the relevant third party,
 without the Project Company's prior written consent (which must not be unreasonably withheld or delayed).
- (i) If a Third Party Claim is settled or paid without the prior written consent of the Contractor and any other Subcontractor affected by the settlement of the Third Party Claim (other than a Third Party Claim referred to in clause 40.4(h)(iv)A or clause 40.4(h)(iv)B) neither the Project Company nor the State Works Contractor shall be liable to indemnify RMS or its Related Parties in respect of such Third Party Claim to the extent that the liability is greater than it would otherwise have been but for such settlement or payment.
- (j) Notwithstanding anything to the contrary in this deed but except in respect of the indemnity in clause 30.4(b), the last date upon which RMS's cause of action in respect of each indemnity in this deed may accrue is the last day of the Term for the purposes of sections 14 and 16 of the Limitation Act 1969 (NSW) and RMS will have no right to make a demand on any indemnity in this deed 12 years after the last day of the Term.

#### 40.5 Vienna Convention

The United Nations Convention on Contracts for the International Sale of Goods does not apply to this deed.

#### 40.6 Non reliance

Without limiting clauses 9.7 and 9.8, the Project Company:

- (a) warrants that it did not in any way rely upon any information, representation, statement or documentation (other than this deed) made by or provided to the

Project Company by RMS or anyone on behalf of RMS for the purposes of entering into this deed;

- (b) warrants that it enters into this deed based on its own investigations, interpretations, deductions, information and determinations; and
- (c) acknowledges that it is aware that RMS has entered into this deed relying upon the warranties in clauses 40.6(a) and (b).

#### **40.7 Entire agreement**

To the extent permitted by Law, this deed and the other Project Documents:

- (a) embody the entire understanding of the parties and constitute the entire terms agreed upon between the parties; and
  - (b) supersede any prior written or other agreement of the parties,
- in relation to the subject matter of this deed.

#### **40.8 Counterparts**

This deed may be executed in any number of counterparts and by the parties on separate counterparts. Each counterpart constitutes the deed of each party who has executed and delivered that counterpart.

#### **40.9 Unlimited discretion**

- (a) Except as expressly otherwise provided in this deed (including in clause 40.9(c)), no procedural or substantive limitation or requirement (including any which may otherwise be implied by Law) is intended to be imposed upon the manner in which RMS or RMS's Representative may exercise any discretion, power or entitlement conferred by this deed.
- (b) Without limiting clause 40.9(a):
  - (i) except as expressly provided in this deed (including in clause 40.9(c)), neither RMS nor RMS's Representative will be:
    - A. constrained in the manner in which it exercises; or
    - B. under any obligation to exercise,

any discretion, power or entitlement conferred by this deed because of the operation of any legal doctrine which in any way limits or otherwise affects the construction or effect of express words used in the provision of this deed which confers the discretion, power or entitlement;
  - (ii) any approval or consent referred to in, or required under, this deed from RMS or RMS's Representative may be given or withheld, or may be given subject to any conditions, as RMS or RMS's Representative (in their absolute discretion) thinks fit, unless this deed expressly provides otherwise;
  - (iii) a Direction (including an absolute or sole discretion) or power of RMS's Representative is validly and properly exercised or made for the purposes of this deed if exercised or made (or if it is not exercised or made) by RMS's Representative whether it is exercised or made:

- A. independently;
  - B. after consultation with RMS and its advisers; or
  - C. as directed by RMS;
- (iv) any control or influence exercised by RMS over RMS's Representative does not:
- A. affect the valid and proper exercise of any power or Direction (including an absolute or sole discretion) by RMS's Representative; or
  - B. entitle the Project Company to make any Claim against RMS's Representative or RMS, or to challenge the effect or validity of the Direction (including an absolute or sole discretion) or power; and
- (v) subject to any express provision in this deed to the contrary, a provision of this deed which says that RMS or RMS's Representative "may" do or not do something is not to be construed as imposing an obligation on RMS or RMS's Representative to do or not do that thing.
- (c) Nothing in this clause 40.9 will prevent the implication of a term into this deed where the implication of the term is required to ensure that this deed (or a part of this deed) is not void or voidable due to uncertainty or any other legal principle.

#### **40.10 Joint and several liability**

- (a) The obligations of the Project Company, if more than one person, under this deed, are joint and several and each person constituting the Project Company acknowledges and agrees that it will be causally responsible for the acts and omissions (including breaches of this deed) of the other as if those acts or omissions were its own and RMS may proceed against any one or all of them.
- (b) The rights of the Project Company, if more than one person, under this deed (including the right to payment) jointly benefit each person constituting the Project Company (and not severally or jointly and severally).
- (c) Any payment by RMS under this deed to any account nominated in writing by the Project Company, or failing such nomination, to any one or more persons constituting the Project Company, will be deemed to be payment to all persons constituting the Project Company.
- (d) The Project Company may not exercise any right under this deed unless that right is exercised concurrently by all persons constituting the Project Company.

#### **40.11 No agency, partnership, joint venture or other fiduciary relationship**

Nothing in this deed will be construed or interpreted as:

- (a) conferring a right in favour of either RMS or the Project Company to enter into any commitment on behalf of the other or otherwise to act as the other's agent; or
- (b) constituting the relationship between RMS on one hand and the Project Company on the other hand as that of partners, joint venturers or any other fiduciary relationship.

#### 40.12 Waiver

- (a) Failure to exercise or enforce or a delay in exercising or enforcing or the partial exercise or enforcement of any right, power or remedy provided by Law or under this deed by any party to this deed will not in any way preclude, or operate as a waiver of, any exercise or enforcement, or further exercise or enforcement of that or any other right, power or remedy provided by Law or under this deed.
- (b) Any waiver or consent given by a party under this deed will only be effective and binding on that party if it is given or confirmed in writing by that party.
- (c) No waiver by a party of:
  - (i) a breach of any term of this deed; or
  - (ii) any other failure by the other party to comply with a requirement of this deed, including any requirement to give any notice which it is required to give in order to preserve its entitlement to make any Claim,
 will operate as a waiver of:
  - (iii) another breach of that term or of a breach of any other term of this deed; or
  - (iv) another failure to comply with that requirement or of a failure to comply with any other requirement of this deed.

#### 40.13 Further acts and documents

Each party must promptly do all further acts and execute and deliver all further documents (in a form and content reasonably satisfactory to that party) required by Law or reasonably requested by the other party or parties to give effect to this deed.

#### 40.14 Provisions limiting or excluding liability

Any provision of this deed which seeks to limit or exclude a liability of RMS or the Project Company, is to be construed as doing so only to the extent permitted by Law.

#### 40.15 Survival of certain provisions

Without limiting clause 40.4(e):

- (a) clauses 1, 3, 7.3(d), 7.8(d), 7.14, 7.19(b), 7.20(b), 7.21(b), 7.21(c), 8 (other than 8.1(h)), 9.8, 9.11(f), 11.2(c), 17.14, 18, 22, 24.2, 24.3, 24.4, 25.2(a)(iii), 26, 27, 28, 30, 36, 39 and 40 and any other provisions of this deed which are expressed to survive termination (together the **Surviving Clauses**) will survive rescission, termination or expiration of this deed;
- (b) if this deed is rescinded or terminated, no party will be liable to any other party except:
  - (i) under the Surviving Clauses; or
  - (ii) in respect of any breach of this deed occurring before such rescission or termination;
- (c) no right or obligation of any party will merge on completion of any transaction under this deed, and all rights and obligations under this deed survive the execution and

delivery of any transfer or other document which implements any transaction under this deed; and

- (d) no provision of this deed which is expressed to survive the termination of this deed will prevent any other provision of this deed, as a matter of interpretation, also surviving the termination of this deed.

#### 40.16 PPS Act

The Project Company acknowledges and agrees that:

- (a) if and to the extent that RMS at any time forms a belief on reasonable grounds that RMS is, or will become, a secured party arising out of or in connection with this deed or the State Works Deed, or any transaction contemplated by this deed or the State Works Deed, RMS may at the Project Company's expense take all steps that RMS considers advisable to:
- (i) perfect, protect, record, register, amend or remove the registration of, RMS's Security Interest in any relevant personal property that is the subject of this Security Interest ("relevant personal property"); and
  - (ii) better secure RMS's position in respect of the relevant personal property under the PPS Act;
- (b) it will do, and ensure that the State Works Contractor does, all things reasonably necessary to assist RMS to take the steps described in clause 40.16(a);
- (c) it irrevocably and unconditionally waives, and will ensure that the State Works Contractor irrevocably and unconditionally waives, its right to receive any verification statement in respect of any financing statement or financing change statement relating to any Security Interests of RMS in the relevant personal property;
- (d) if, and only if, RMS is or becomes a secured party in relation to relevant personal property, and to the extent only that Chapter 4 of the PPS Act would otherwise apply to an enforcement of a Security Interest in relevant personal property, the Project Company and RMS agree, and the Project Company will ensure that the State Works Contractor agrees, that, pursuant to section 115 of the PPS Act, the following provisions of the PPS Act do not apply in relation to those Security Interests to the extent, if any, mentioned in section 115: section 117, section 118, section 120, subsection 121(4), section 125, section 129, section 130, subsection 132(3)(d), subsection 132(4), section 142, and section 143;
- (e) subject to section 275(7) of the PPS Act, it will not, and it will ensure that the State Works Contractor does not, disclose the contents of this deed, the amount or performance obligation secured by RMS's Security Interest in relevant personal property and the other information mentioned in section 275(1) of the PPS Act pursuant to section 275(4) of the PPS Act;
- (f) it must immediately notify RMS if the Project Company or the State Works Contractor becomes aware of any person other than RMS taking steps to register, or registering, a financing statement in relation to relevant personal property; and
- (g) it must arrange, and ensure that the State Works Contractor arranges, for the removal or cessation of any registration of any Security Interest that affects the priority of RMS's interest in relevant personal property.

For the purposes of this clause 40.16, "registration", "secured party", "verification statement", "financing statement", "personal property" and "financing change statement" each have the meaning given to those terms in the PPS Act.

#### 40.17 Ring Fencing

- (a) Subject to clause 40.17(d), the Project Company must not (and must procure that the Borrower, Sub HoldCo, each Sponsor Entity and the State Works Contractor do not) without RMS's consent enter into any transactions or arrangements, which includes any amendment, variation or waiver of a provision under any transaction or arrangement, with any Associate of the Project Company (**Associate Entity**) which are:
- (i) not on an arm's length and commercial basis; or
  - (ii) unnecessary for, or of a scale and nature beyond that required for, the efficient and effective carrying out of the obligations of the Project Company and the State Works Contractor under the Project Documents, provided that whether a particular transaction or arrangement is on an arm's length and commercial basis must be determined objectively having regard to:
    - (iii) whether the Project Company, the Borrower, Sub HoldCo, the Sponsor Entity or the State Works Contractor (as applicable) would have entered into the transaction or arrangement if they were:
      - A. unrelated to the Associate Entity;
      - B. free from undue influence or pressure by the Associate Entity;
      - C. through their relevant decision-makers, sufficiently knowledgeable about the circumstances of the transaction or arrangement, sufficiently experienced in business and sufficiently well advised to be able to form a sound judgment as to what is in their interests; and
      - D. concerned only to achieve the best available commercial result for themselves in all of the circumstances;
    - (iv) whether the Project Company, the Borrower, Sub HoldCo, the Sponsor Entity or the State Works Contractor (as applicable) acted with the interests of any Associate Entity in mind;
    - (v) whether the Project Company, the Borrower, Sub HoldCo, the Sponsor Entity or the State Works Contractor (as applicable) on the one hand and the Associate Entity on the other hand dealt with each other as arm's length parties would normally do, so that the outcome of their dealing is a matter of real bargaining; and
    - (vi) whether the transaction or arrangement represents an equivalent or better commercial outcome for the Project Company, the Borrower, Sub HoldCo, the Sponsor Entity or the State Works Contractor (as applicable) than would be available from an entity other than the Associate Entity.
- (b) The Project Company must bear RMS's reasonable costs and expenses (including legal costs and expenses) of and incidental to:

- (i) any enquiries which RMS may make for the purposes of determining whether to consent to the transaction or arrangement the subject of a request for consent under clause 40.17(a); and
  - (ii) the preparation, negotiation and execution of any documentation required to give effect to such transaction or arrangement, and any stamp duty or similar charges in relation to such documentation.
- (c) The Project Company must include with its annual reporting provided under clause 18.1(h)(i) and its half-yearly financial report provided under clause 18.1(h)(ii), a report describing all transactions or arrangements entered into by the Project Company, the Borrower, Sub HoldCo, each Sponsor Entity or the State Works Contractor with an Associate Entity in the immediately prior six month reporting period, including, as a minimum, the following details:
- (i) a statement as to whether or not the Project Company considers the transactions or arrangements required consent from RMS under clause 40.17(a);
  - (ii) information as to the procurement process (if any) followed in respect of the relevant transaction or arrangement;
  - (iii) the nature of the work or services to be provided under each relevant transaction or arrangement and the fees paid or other consideration provided in respect of each transaction or arrangement in the reporting period; and
  - (iv) such other details and information regarding the relevant transactions or arrangements as may reasonably be requested by RMS.
- (d) If an emergency situation occurs in connection with the Motorway and a transaction or arrangement (within the meaning of clause 40.17(a)) with an Associate Entity is urgently required to:
- (i) provide access to emergency services or emergency traffic control;
  - (ii) prevent any occurrence that is likely to cause damage to the Motorway or compromise the safety of any person; or
  - (iii) address significant unforeseen congestion on the Motorway,
- and there is not already a transaction or arrangement (within the meaning of clause 40.17(a)) in place in accordance with the Project Documents to respond to or remedy such an emergency situation, then the Project Company, the Borrower, Sub HoldCo, each Sponsor Entity and/or the State Works Contractor may, without RMS's consent, enter into the relevant transaction or arrangement for a period not exceeding 24 hours duration after the time that the relevant emergency situation commences, provided that the Project Company must:
- (iv) immediately notify RMS of the relevant transaction or arrangement and the emergency situation to which it relates and provide such details and information regarding the relevant transaction or arrangement as may reasonably be requested by RMS; and
  - (v) as soon as reasonably practicable after entering into the relevant transaction or arrangement and in any event no later than 7 days after the commencement of the relevant emergency situation, demonstrate to the reasonable satisfaction of RMS that the relevant transaction or arrangement:

- A. was the best commercial outcome available in the circumstances; and
  - B. does not result in a lesser commercial outcome for the Project Company than would be available from an entity other than the Associate Entity; and
  - C. was free from undue influence or pressure by the Associate Entity and was not entered into with the interests of the Associate Entity in mind; and
  - D. was necessary for, and was not of a scale or nature beyond what was required to respond to or remedy the relevant emergency situation; and
- (vi) as soon as reasonably practicable after entering into the relevant transaction or arrangement and in any event no later than 7 days after the commencement of the relevant emergency situation, provide such details, documents and information in connection with the relevant transaction or arrangement as may reasonably be requested by RMS including, without limitation:
- A. information and records of the Project Company, the Borrower, Sub HoldCo, each Sponsor Entity and the State Works Contractor in connection with all procurement processes relating to the relevant transaction or arrangement; and
  - B. the steps taken by the Project Company, the Borrower, Sub HoldCo, each Sponsor Entity and the State Works Contractor to ensure that there are appropriate processes in place to respond to or remedy any continuation or recurrence of the emergency situation; and
- (vii) at the end of the quarter in which the relevant transaction or arrangement was entered into, provide a written report to RMS setting out the aggregate expenditure, commitment or forgiveness required or provided under the relevant transaction or arrangement; and
- (viii) ensure that the aggregate expenditure, commitment or forgiveness required or provided under the relevant transaction or arrangement is reported in the next occurring half-yearly financial reports for the Project Company.
- (e) The reference to variation in clause 40.17(a) includes a variation to or under a transaction or arrangement and including a variation, expansion or contraction of the scope of services and any instruction for the performance of any additional services whether contemplated under the transaction or arrangement or not.
- (f) The parties acknowledge and agree that by entering into this deed, RMS is deemed to have consented to the following agreements to the extent such agreements require consent under clause 40.17(a):
- (i) the O&M Deed;
  - (ii) the Tolling and Customer Management Agreement;
  - (iii) the Technology Implementation and Services Agreement;



- (iv) the State Works Contractor Facility Deed;
- (v) the
- (vi) the WSO Co Funding Facility Deed;
- (vii) the M7 Concession Enhancement Payment Deed;
- (viii) the Management Services Agreement;
- (ix) the M7 Interface Deed; and
- (x) the Intercompany Funding and Payment Directions Deed.

#### **40.18 Exclusion of proportionate liability scheme**

To the extent permitted by Law, Part 4 of the Civil Liability Act 2002 (NSW) (and any equivalent statutory provision in any other state or territory) is excluded in relation to all and any rights, obligations or Liabilities of either party under this deed whether such rights, obligations or Liabilities are sought to be enforced in contract, tort or otherwise.

Without limiting the above, the rights, obligations and Liabilities of RMS and the Project Company under this deed with respect to proportionate liability are as specified in this deed and not otherwise, whether such rights, obligations or Liabilities are sought to be enforced by a claim in contract, in tort or otherwise.

#### **40.19 Project Company not to apply proportionate liability scheme**

To the extent permitted by Law:

- (a) the Project Company must not, and must ensure that the State Works Contractor does not, seek to apply the provisions of Part 4 of the Civil Liability Act 2002 (NSW) in relation to any claim by RMS against the Project Company or the State Works Contractor (whether in contract, tort or otherwise); and
- (b) if any of the provisions of Part 4 of the Civil Liability Act 2002 (NSW) are applied to any claim by RMS against the Project Company or the State Works Contractor (whether in contract, tort or otherwise), the Project Company will indemnify RMS against any Loss which RMS is not able to recover from the Project Company or the State Works Contractor because of the operation of Part 4 of the Civil Liability Act 2002 (NSW).

#### **40.20 Subcontracts**

The Project Company must:

- (a) in each Subcontract into which it or the State Works Contractor enters for the carrying out of the Project Activities, include a term that (to the extent permitted by Law) excludes the application of Part 4 of the Civil Liability Act 2002 (NSW) in relation to all and any rights, obligations or Liabilities of either party under or in any way in connection with each Subcontract whether such rights, obligations or Liabilities are sought to be enforced by a claim in contract, tort or otherwise;
- (b) require, and ensure that the State Works Contractor requires, each Subcontractor to include, in any further contract that it enters into with a third party for the carrying out of design activities in connection with the Project Activities, a term that (to the extent permitted by Law) excludes the application of Part 4 of the Civil Liability Act 2002 (NSW) in relation to all and any rights, obligations or Liabilities of either party

under or in any way in connection with each further agreement whether such rights, obligations or Liabilities are sought to be enforced by a claim in contract, tort or otherwise; and

- (c) require, and ensure that the State Works Contractor requires, each Subcontractor to use reasonable endeavours to include in any further contract that it enters into with a third party for the carrying out of the Project Activities that is not covered by clause 40.20(b), a term that (to the extent permitted by Law) excludes the application of Part 4 of the Civil Liability Act 2002 (NSW) in relation to all and any rights, obligations or Liabilities of either party under or in any way in connection with each further agreement whether such rights, obligations or Liabilities are sought to be enforced by a claim in contract, tort or otherwise.

#### **40.21 Moratorium legislation**

Unless application is mandatory by Law, any present or future Law will not apply to this deed so as to abrogate or otherwise prejudicially affect any rights, powers, remedies or discretions given or accruing to RMS.

#### **40.22 Interest**

If a party does not pay any money payable by it to any other party under this deed by the due date, the first mentioned party must pay interest on that amount on demand by the other party or parties. Interest is:

- (a) payable from the due date until payment is made by the first mentioned party before and, as an additional and independent obligation, after any judgment or other thing into which the liability to pay the money payable becomes merged;
- (b) calculated on daily balances at the rate of \_\_\_\_\_ per annum; and
- (c)

#### **40.23 Approvals not to affect obligations**

The giving of any approval or the making of any direction or appointment or the exercise of any authority or discretion or the exercise, giving or making of any other matter or thing of any nature hereunder by RMS will not, except where this deed or the State Works Deed expressly provides to the contrary, relieve the Project Company from its obligations under this deed or the State Works Contractor from its obligations under the State Works Deed.