



Transport
Roads & Maritime
Services

EXECUTION VERSION

WestConnex M4 Widening Project Deed

Roads and Maritime Services

ABN 76 236 371 088

and

WCX M4 Pty Limited

ABN 92 602 963 806

2014

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Schedule 55A Additional Interim Compensation Events

PART E - TECHNICAL

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Schedule 60 Baseline Conditions

Schedule 61 Master Access Deed

Schedule 62 Retained Responsibilities

Schedule 63 Rail Corridor Works and RailCorp's Technical Conditions

EXHIBITS

Exhibit A – Overall D&C Program

Exhibit B – Not Used

Exhibit C – Electronic Files

Exhibit D –Draft Motorway Stratum Lease

THIS DEED is made on

2014

BETWEEN:

- (1) **Roads and Maritime Services** ABN 76 236 371 088 of 101 Miller Street, North Sydney, New South Wales (**RMS**); and
- (2) **WCX M4 Pty Limited** ABN 92 602 963 806 of Level 18, 101 Miller Street North Sydney NSW 2060 (the **Project Company**).

RECITALS:

- (A) RMS is a statutory body representing the Crown in the right of the State of New South Wales.
- (B) WDA is a statutory corporation constituted as a public subsidiary corporation of RMS formed for the purpose of delivering the WestConnex Program of Works.
- (C) WDA has developed the WestConnex M4 Widening project as part of the WestConnex Program of Works.
- (D) RMS and the Project Company now enter into this deed in relation to the WestConnex M4 Widening project to set out the terms on which the Project Company carries out:
 - (1) financing, funding, planning, design and construction, and commissioning of the Project Works and the Temporary Works;
 - (2) the integration, interface and co-ordination of the Project Company's Activities with the other elements of the WestConnex Program of Works;
 - (3) the ownership, operation, maintenance and repair of the Motorway;
 - (4) the handover of the Motorway to RMS at the end of the Term; and
 - (5) the levying and collection of tolls.
- (E) The overall strategic objectives of the NSW Government and RMS for the Project are:
 - (1) to provide a high standard access controlled motorway that integrates with the regional transport network;
 - (2) to minimise adverse social and environmental impacts in the local area during construction and operation;
 - (3) to ensure the Motorway is safe and reliable for road users;
 - (4) that the Project will demonstrate excellence in design and environmental sustainability; and
 - (5) 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:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

The following definitions apply in this deed:

Account Bank means Westpac Banking Corporation ABN 33 007 457 141.

Account Bank Deed Poll means the deed so titled provided by the Account Bank in favour of RMS and entered into on or about the date of this deed.

Act of Prevention means:

- (a) a breach of this deed by RMS;
- (b) an act or omission by RMS or any of 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 any negligent or unlawful act or omission of the Project Company or any of its 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 section 2.3 of the Change Procedure.

Additional Interim Compensation Event means the events so described in clause 1 of Schedule 55A.

Additional Project Deed Requirements means Part B of the SWTC.

Agreed Amount has the meaning given to that term in clause 24.2(b)(i).

Amendment has the meaning given to that term in clause 36.2.

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 Company's Activities;
- (b) in connection with the Project, the Construction Site, any Extra Land, the Motorway, the Motorway Stratum and the Maintenance Site;
- (c) for the use and occupation of the Project Works 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 Company's 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.

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 Item has the meaning given to that term in the SWTC.

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

Asset Sub-Type has the meaning given to that term in the SWTC.

Asset Type has the meaning given to that term in 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 Shareholder Loan Agreement or any Project Documents.

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 Company's 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.

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 4 of Schedule 1, as updated from time to time in accordance with this deed.

Baseline Conditions means the indicative conditions of Planning Approval set out in Schedule 60.

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.

Building Code means the Building Code 2013 issued under the *Fair Work (Building Industry) Act 2012* (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 M4 West Construction Period Maintenance, the O&M Work or the Project Company's 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 M4 West Construction Period Maintenance or the O&M Work:

- (a) the direct costs and associated on-site overheads reasonably arising out of or in connection with the Change including any increased construction costs, operating costs, maintenance costs and financing costs (to the extent that those financing costs are reasonable and incurred on an arms' length basis);
- (b) a reasonable amount on account of the off-site overheads and profit margin of (as applicable):
 - (i) the Contractor (which, if the Change Order in respect of the Change is issued prior to the Date of Completion, will be no greater than the D&C Margin); and/or
 - (ii) the Operator (which will be no greater than the O&M Margin),not including an amount on account of the off-site overheads and profit margin of the Project Company; and
- (c) if the proposed Change will delay the Date of Completion beyond the Date for Completion, an amount calculated to ensure the return to the Equity Investors equals the Projected Equity Return calculated upon their contributed amount of equity for the period of that delay beyond the Date for Completion, if any,

after deducting Change Savings arising from the Change.

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 other than a change in Codes and Standards that, on or before the date of this deed:

- (a) has been published or publicly notified; or
- (b) a contractor experienced and competent in the financing, design, construction, operation and maintenance of works and services similar to the Project Works or the Temporary Works would have foreseen or anticipated.

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.

Change of Control means, in relation to the Project Company:

- (a) if the Project Company comes under the Control of a person (acting alone or together with its Associates) who did not Control the Project Company as at the date of this deed or following any event which is approved by RMS under clause 37; or
- (b) if a person (acting alone or together with its Associates) who was in Control of the Project Company as at the date of this deed or following any event which is approved by RMS under clause 37 stops having Control of the Project Company,

other than as a result of a Permitted Dealing.

Change Order means a notice given by RMS under section 1.4(b), section 1.7(b), section 1.7(d), section 1.7(e) or section 1.9 of the Change Procedure.

Change Procedure means the procedure in Schedule 34.

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

Change Savings means:

- (a) the cost savings arising out of or in connection with the Change (including any savings in relation to construction costs and associated on-site overheads, operating costs, maintenance costs or financing costs); and
- (b) a reasonable amount on account of off-site overheads and profit margin of (as applicable):
 - (i) the Contractor (which, if the Change Order in respect of the Change is issued prior to the Date of Completion, will be no greater than the D&C Margin); and/or
 - (ii) the Operator (which, if the Change Order in respect of the Change is issued prior to the Date of Completion, will be no greater than the O&M Margin);

not including an amount on account of the off-site overheads and profit margin of the Project Company.

Claim includes any claim, action, demand or proceeding for payment of money (including damages) or for a Qualifying Delay:

- (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 Company's Activities or any 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 all 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 cost structure or profit margins;
- (c) any information relating to any of the Project Company'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 or the Project Company's shareholders, financiers or Subcontractors,

which, in respect of the information contained in the Project Documents, is the information described in Schedule 3.

Commonwealth means the Commonwealth of Australia.

Community Involvement Plan has the meaning given to that term in section 11(b) of the SPR.

Compensable Site Conditions means:

- (a) the inability of the existing pavement to properly connect along the longitudinal joint to new pavement, except to the extent that that inability could reasonably have been anticipated from the condition studies being undertaken by RMS or WDA and provided to the Project Company;
- (b) (except as set out at (a) above) defects in the existing pavement and subgrade or earthworks directly beneath the existing pavement;
- (c) defects in existing signs which the Project Company is required to relocate;
- (d) defects in other Existing Structures where those Existing Structures are not referred to in (a) to (c) above;
- (e) Aboriginal heritage items;
- (f) European heritage items; and

(g) Contamination, other than Contamination which is described in clause 11.11(e).

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

- (a) an Act of Prevention described in paragraphs (a) and (b) of the definition of "Act of Prevention";
- (b) a Legal Challenge occurs and, as a consequence of that Legal Challenge, the Project Company receives an order by a court or direction by RMS's Representative pursuant to clause 7.5(a) or clause 7.5(d) which requires that the Project Company suspend or cease to perform any or all of its obligations under this deed, other than due to:
 - (i) the Project Company's failure to comply with its obligations under a Project Document;
 - (ii) a breach of the Project Company's warranties under clause 7.3;
 - (iii) a wrongful act or omission of the Project Company or its Related Parties; or
 - (iv) a failure by the Project Company or any of its Related Parties to comply with the EP&A Act or the EPBC Act or any other applicable legislation;
- (c) a Native Title Claim is made and, as a consequence of that Native Title Claim, the Project Company receives an order by a court or a direction by RMS's Representative pursuant to clause 11.10(a) or clause 11.10(b), or is required at Law, to suspend or cease to perform any or all of its obligations under this deed; or
- (d) the Planning Approval has not been granted by the Minister for Planning by 1 June 2015.

Completion means the stage in the execution of the Project Company's Activities when the Project Company has satisfied all the conditions precedent to completion set out in Schedule 37.

Concept Design means the concept design prepared by the Project Company and included in Appendix D11 of SPR.

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

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, loss of production or failure to realise anticipated savings (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) 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
 - (ii) 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 Compliance Unit (CCU) has the meaning given to that term in clause 40.2(c).

Construction Period means the period commencing on the date of this deed and ending on the Date of Completion.

Construction Plan has the meaning given to that term in Appendix J06 of SPR.

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

Construction Site means the Project Site and the Temporary Areas.

Consumer Price Index or **CPI** has the meaning given in Schedule 42.

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 Deliverables has the meaning given to that term in clause 29.1.

Contractor means The Rizzani Leighton Joint Venture, being an unincorporated joint venture comprising Rizzani de Eccher Australia Pty Ltd (ABN 80 147 862 897) and Leighton Contractors.

Contractor Guarantor means:

- (a) in respect of Rizzani de Eccher Australia Pty Ltd, Rizzani de Eccher S.p.A; and
- (b) in respect of Leighton Contractors, Leighton Holdings Limited (ABN 57 004 482 982).

Contractor's Side Deed Poll means the deed poll so titled dated on or about the date of this deed between the Project Company, the Contractor, WDA and RMS, substantially in the form set out in Schedule 10.

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 50% 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 50% 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 50% 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 50% 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.

Controller means a person who has Control of another entity.

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).

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

D&C Deed means the deed so titled dated on or about the date of this deed between the Project Company and the Contractor.

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

D&C Independent Certifier means the independent certifier engaged by the Project Company and the Contractor in accordance with the D&C Deed.

D&C Independent Certifier Side Deed Poll means the side deed poll executed by the D&C Independent Certifier in favour of RMS, WDA and other persons substantially in the form set out the D&C Deed.

D&C Margin means the amount identified as the D&C Margin in the Model Output Schedule as at Financial Close.

Data for the purposes of the definition of "Emissions and Energy Data" and Schedule 16, includes data, information, records and reports.

Date for Completion means 22 December 2016.

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 34.2(b)(i) as the date Final Handover was achieved.

Day 1 Clauses means clauses 1, 5, 7, 11.8, 14, 26.5, 30, 32, 35, 36, 36A, 37, 39, 42 and 43 and any other clauses or schedules required to have commenced in order to give effect to those clauses.

Deed of Appointment of D&C Independent Certifier means the deed so titled entered into between the Contractor, the Project Company and the D&C Independent Certifier on or about the date of this deed, substantially in the form set out in the D&C Deed.

Deed of Appointment of Environmental Representative means the deed so titled entered into between the Project Company, the Contractor and the Environmental Representative on or about the date of this deed, substantially in the form set out in the D&C Deed.

Deed of Disclaimer means the Deed of Disclaimer to be signed by the Contractor in favour of WDA, RMS, the State of NSW and the Project Company substantially in the form contained in Schedule 14 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 Company's 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 clauses 17.2, 17.3, 17.4 or 17.5.

Deliverable means the Project Works and any other deliverable required to be delivered or goods and services required to be provided by or for the Project Company to RMS under this deed (or any part of them).

Delivery Insurance means the Project Insurances referred to in Part 1 of Schedule 43.

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 Temporary Works or the Project Company's Activities), samples, prototypes, calculations, drawings, shop 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 Company's Activities or which the Project Company or any other person creates in performing the Project Company's Activities (including the design of the Temporary Works); 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 Company's Activities.

Design Plan has the meaning given to that term in Appendix J05 of the SPR.

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, 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.

Dispute has the meaning given to that term in clause 32.

Dispute Resolution Procedure means the procedure for resolving Disputes set out in Schedule 4.

Early Termination Amount means on any date, the total of:

- (a) the amounts which the Project Company must, subject to clause 9.2(e), pay as a consequence of the termination, including to its Subcontractors but excluding any amount payable to the Subcontractors which relates to any amount payable by a Subcontractor to any "related entity" (as defined in the Corporations Act) of a Subcontractor other than where the related entity is engaged on an arm's length basis and on commercial terms; and
- (b) an amount equal to either:
 - (i) on any date on or prior to the Date of Completion, an amount sufficient to give the Project Company the ability to give the Equity Investors the Projected Equity Return on the Equity Contributions to the date of termination; or
 - (ii) on any date after the Date of Completion, the amount set out in the Model Outputs Schedule for the Quarter in which termination occurs (such amount being recalculated and updated in accordance with the formula in the Model Output Schedule for the date of termination), being an amount sufficient to give the Project Company the ability to give the Equity Investors the Projected Equity Return on the Equity Contributions to the date of termination.

Early Works has the meaning given to that term in the D&C Deed (as at the date of this deed).

Early Works Sum means:

- (a) where termination as contemplated by clause 6.8 occurs on or before 27 January 2015, the sum of [REDACTED]; or
- (b) where termination as contemplated by clause 6.8 occurs after 27 January 2015, the sum of [REDACTED].

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 Stratum or any Additional Land (as defined in Schedule 19A) and which may be created pursuant to clause 18.2 of this deed.

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.

Entity means a natural person, body corporate, partnership or trust and includes, in the case of a trust, a reference to the trustee of the trust.

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 C01 of the SPR .

Environmental Management System means the system referred to in section 10.6 of the SPR.

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 under the Deed of Appointment of Environmental Representative and any person appointed as a replacement in accordance with the Deed of Appointment of Environmental Representative from time to time.

Environmental Representative Side Deed Poll means the side deed poll executed by the Environmental Representative in favour of RMS, WDA and other persons in the form set out Schedule 31.

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

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

EPBC Act Approval means:

- (a) the approval granted by the Minister for the Environment under the EPBC Act, including all conditions to such approval and documents incorporated by reference;
- (b) any modification to the approval referred to in paragraph (a) of the 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 the 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.

Equity means all equity capital in, or the subordinated debt which is, in substance, equivalent to ordinary equity of, the Project Company, as set out in the Base Case Financial Model and includes amounts advanced under the Shareholder Loan Agreement.

Equity Contributions means the aggregate of:

- (a) the amounts drawn down from time to time by the Project Company, including under the Shareholder Loan Agreement; and

- (b) the share capital subscribed to the Project Company as at the date of Financial Close.

Equity Documents means:

- (a) the constitution of the Project Company; and
- (b) the Shareholder Loan Agreement.

Equity Investor means each person who has been issued shares in the Project Company.

Equity Return means a nominal after tax internal rate of return on the Equity Contribution (which, for the avoidance of doubt, excludes any tax paid or payable by the Equity Investors).

Event of Default means any event specified in clause 31.1.

Excusable Cause of Delay means:

- (a) an Act of Prevention;
- (b) a Compensation Event;
- (c) the discovery of an Artefact to the extent that the discovery of that Artefact results in the Project Company 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 Company's 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 which is not a result of:
 - (i) the Project Company's failure to comply with its obligations under a Project Document;
 - (ii) a breach by the Project Company of its warranties under a Project Document;
 - (iii) a wrongful act or omission of the Project Company or its Related Parties; or
 - (iv) a failure by the Project Company or any of its Related Parties to comply with any Law.

Existing Motorway means the M4 motorway described in item 6 of Schedule 1 of the D&C Deed (as at the date of this deed), including all physical changes to it in connection with the Project Company's Activities.

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 Construction 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;
- (h) Sydney Water Corporation ABN 49 776 225 038; and
- (i) Jemena Gas Networks (NSW) Ltd ABN 87 003 004 442,

and any of their Related Bodies Corporate.

Existing Structure means any man-made physical element of the Existing Motorway (including reinforced concrete elements, bridges, drainage, sign gantries, guardrails, bridge rails, expansion joints, ITS, shared cableway and pavements) existing on, above or adjacent to, or under the surface of the Construction Site prior to the date of this deed.

Expiry Date means, subject to the operation of clause 16.11 and clause 16.12, 31 December 2022.

Extra Land means the land referred to in clause 11.5(a).

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 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 from undertaking the Project in accordance with this deed.

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;
- (b) the requirements in the SWTC have been satisfied;
- (c) the Project Works and Third Party Works are:

- (i) fit for their intended purposes; and
 - (ii) in a condition and state of repair equivalent to that which was required as at the Date of Completion, subject to fair wear and tear; and
- (d) those parts of the Motorway which do not comprise the Project Works are, subject to clause 4.2, fit for their intended purposes.

Financial Close means the date on which the Conditions Precedent have been satisfied or waived in accordance with clause 5.2.

Financial Indebtedness means any indebtedness, present or future, actual or contingent, in respect of moneys borrowed or raised, or any financial accommodation whatsoever, including under or in respect of any bill, acceptance, guarantee, discounting arrangement, redeemable share or stock, hedging/swap arrangements, finance or capital lease, hire purchase agreement, the deferred purchase cost of any asset or service, or any obligation to deliver goods or provide services paid for in advance by any financier or in respect of any financing transaction. It does not include any liability or indebtedness under a tax funding agreement and/or tax sharing agreement to which the Project Company is a party or the Shareholder Loan Agreement.

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 any other event arising directly as a consequence of a breach of a Project Document by the Project Company; or
 - (B) an event the risk of which is not otherwise specifically allocated under a Project Document,

which is beyond the reasonable control of the parties and their Related Parties and which is an event which, or an event the effects of which both:

- (c) prevents or delays the Project Company from performing an obligation under the Project Documents; and
- (d) could not have been Mitigated, prevented, avoided, remedied or overcome by the Project Company or its Related Parties taking those steps which a prudent,

experienced and competent concessionaire, designer, constructor or operator would have taken.

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

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 or its Related Parties, as the case may be, under the same or similar circumstances as the performance of the Project Company's Activities.

GST, GST law and other terms used in clause 24.2 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 24.2) 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.

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

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.

Incident means any of the following incidents or events arising out of or in connection with the Project Company's 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 Construction Site, Extra Land, Motorway, Motorway Stratum 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 Construction Site, Extra Land, Motorway, Motorway Stratum or Maintenance Site;
 - (viii) a non-compliance with an Approval; or
 - (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 WDA, or such other person(s) as may be engaged by RMS and the Project Company from time to time to fulfil the role of the Independent Certifier under this deed.

Independent Certifier Deed means:

- (a) where the Independent Certifier is WDA:
 - (i) the Project Management Deed between WDA and the Project Company dated on or about the date of this deed, to the extent that document relates to WDA performing the role of the Independent Certifier; and
 - (ii) the "Supplement to WestConnex Road Integration Partnership Memorandum of Understanding, WDA Independent Certifier Services – Operational Protocol" between RMS and WDA in respect of the WestConnex Program of Works; or
- (b) where the Independent Certifier is any other person, the deed titled "Independent Certifier Deed" entered into between RMS, the Project Company and the Independent Certifier.

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 Schedule 57;
- (b) issued or made available by, or on behalf of, WDA, RMS or the NSW Government, to the Project Company in connection with the Project, the Project Works or the Project Company's 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.

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 26.3.

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.

Key Relevant Entity means:

- (a) the Operator; and
- (b) any Relevant Entity engaged by the Project Company or the Operator under a contract or contracts with an aggregate contract value of equal to or greater than \$5 million.

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).

Legal Challenge has the meaning given to that term in clause 7.5(a).

Leighton Contractors means Leighton Contractors Pty Limited (ABN 98 000 893 667).

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 A04 of the SPR.

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 must design and construct and hand over to RMS or the relevant Authority in accordance with this deed and the SWTC including Appendix B03 of the SPR (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, which for the avoidance of doubt includes Consequential Loss.

M4 East Project Works means the proposed works to construct the M4 east motorway, which is generally referred to as Stage 1B (M4 East) of the WestConnex Program of Works.

M4 West Construction Period Maintenance means the services described in clause 19.1A.

Maintenance Contractor means the contractor engaged by the Project Company to perform its maintenance and repair obligations under this deed.

Maintenance Plan means the Project Plan referred to as the Maintenance Plan in the SWTC.

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 Stratum;
- (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.

Master Access Deed or **MAD** means the master access deed in respect of rail corridor works between RailCorp and RMS dated 5 March 2012.

Material Adverse Effect means an adverse effect that is a Qualifying Adverse Effect on the ability of the Project Company to give to the Equity Investors the Projected Equity Return.

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.

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 Company's Activities (including by changing the sequencing or timing of, or the construction methodologies used by the Project Company in carrying out, the Project Company's 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 7.3(a)(ii).

Monthly Operational Management Report means a report which satisfies the requirements of Schedule 32A.

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 5.

Motorway means:

- (a) **(Existing M4 Motorway and roads within Construction Site)** on and from Financial Close and until the Date of Completion under this deed, the roads and other physical works, facilities, systems and Utility Services including all plant, machinery, equipment, fixtures, furniture, fittings, landscaping, spare parts and other improvements, on or in the Construction Site; and
- (b) **(Widened M4 West Motorway)** on and from the Date of Completion, the road and other physical works, facilities, systems and Utility Services, including all plant, machinery, equipment, fixtures, furniture, fittings, landscaping, spare parts and other improvements, on or in the Motorway Site or Motorway Stratum,

and to be called the M4 Motorway or such other name as may be determined by RMS.

Motorway Opening Date means the date of a notice issued by RMS pursuant to clause 16.15A(c)(i).

Motorway Operator means the Traffic Management Centre, a division of Transport for New South Wales, or such other person engaged by the Project Company to carry out the Motorway Operator Services (as contemplated by clause 19.5A).

Motorway Operator Services means that part of the Project Company Activities that relate to the services to be undertaken by the Motorway Operator:

- (a) in the ordinary course of the Motorway Operator's activities;
- (b) any additional activities specifically agreed between the Motorway Operator and the Project Company; and
- (c) includes those services set out in section 5 of the Additional Project Deed Requirements.

Motorway Site means the land more particularly described in Schedule 26C.

Motorway Stratum means the stratum (limited in height and depth) of real property from the Motorway Site to be the subject of the Motorway Stratum Lease as determined in accordance with Schedule 19A.

Motorway Stratum Lease means a lease of the Motorway Stratum granted in accordance with clause 18 on the terms specified in Exhibit D.

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.

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

Non-RMS 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.

Non-toll Business has the meaning given to that term in clause 21.3.

Notice of Completion means a notice in the form of Schedule 39 issued by the Independent Certifier pursuant to clause 16.13(e)(i).

Notifiable Claim has the meaning given to that term in clause 26.7(a).

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).

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 Project Company's obligations under this 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) operation, maintenance and repairs are performed to ensure availability of the Motorway and reliable long-term and safe operation and are performed by trained and experienced personnel utilising proper equipment, tools and procedures;
- (d) sufficient operation and maintenance personnel are available and are adequately experienced and trained;
- (e) adequate materials, resources and supplies are available to ensure compliance with the requirements of this deed under normal conditions and reasonably anticipated abnormal conditions;
- (f) 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

- (g) 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 any agreement to be entered into after the date of this deed between the Project Company and an Operator, including as contemplated by clause 19.1B and clause 19.5A.

O&M Guarantee means a deed of guarantee to be given after the date of this deed given by an Operator Guarantor to the Project Company in respect of the obligations of an Operator under an O&M Deed.

O&M Manuals means the manuals developed in accordance with clause 19.4 including the Project Plans incorporated into them as required by clause 9.5(e), which describe the policy, practices and procedures for the operation, maintenance and repair of the Motorway and the maintenance of the Third Party Works.

O&M Margin means the amount identified as the O&M Margin in the Model Output Schedule as at Financial Close.

O&M Plan has the meaning given to that term in section 5.1(c) of the Additional Project Deed Requirements.

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 37, 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 37; and
- (b) that the Motorway (including those parts described in paragraph (b) of the definition of "Motorway", notwithstanding that the Date of Completion has not yet occurred) is capable of being operated for the safe, efficient and continuous passage of vehicles.

Operational Readiness Group means the group referred to in clause 16.15A.

Operations Insurance means the Project Insurances referred to in Part 2 of Schedule 43.

Operator means:

- (a) in respect of the Project Company's maintenance and repair obligations under this deed after the Date of Completion, the Maintenance Contractor;
- (b) in respect of the Motorway Operator Services under this deed, the Motorway Operator; and
- (c) such other person approved by RMS.

Operator Guarantor means the party identified as the guarantor of an Operator in an O&M Guarantee, or such other person approved by RMS.

Operator's Side Deed means a document to be obtained from the Maintenance Contractor as a condition precedent to completion between the Project Company, an Operator, an Operator Guarantor (if applicable) and RMS.

Overall D&C Program means the overall program for design and construction activities which is contained in Exhibit A, as updated in accordance with clause 16.3(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.

Permitted Dealing means:

- (a) a restructure of a Holding Company (other than an Ultimate Shareholder) of the Project Company;
- (b) a transfer or issue of any securities in an Ultimate Shareholder listed on any recognised stock or securities exchange;
- (c) the listing of any securities in the Project Company, or any Holding Company (other than the Ultimate Shareholders) of the Project Company on any recognised stock or securities exchange;
- (d) any of the Ultimate Shareholders transferring shares, units or an economic interest in shares or units between them where:
 - (i) the Ultimate Shareholder whose shares, units or interest increases assumes a corresponding proportion of any remaining funding obligation owed to the transferee Ultimate Shareholder by the transferring Ultimate Shareholder and provides RMS with a letter of support which reflects its increased funding obligation (which must be in a form and substance equivalent to the letters of support provided to RMS at Financial Close);
 - (ii) prior to Completion no Ultimate Shareholder acquires an aggregate economic interest in the Project Company of more than 50%, unless the transfer of shares, units or an economic interest is occurring in connection with (or pursuant to) a default in funding obligations owed to the transferring Ultimate Shareholder; and
 - (iii) the transfer is not to any managed (but not ultimately owned) entity who does not, at the date of this deed or following any event which is approved by RMS under clause 37, have an economic interest in the shares of the Project Company; or
- (e) a change in the responsible entity, trustee or custodian of an entity where there is no change in the ultimate beneficial owner.

Permitted RMS Activity has the meaning given to that term in clause 22.3.

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

Personal Information has the meaning given to that term in the *Privacy Act 1988* (Cth).

Planning Application Documents has the meaning given to that term in clause 6.1(a).

Planning Approval means:

- (a) the approval granted by the Minister for Planning 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 as submitted by RMS to the Minister for Planning, being Application Number SSI 13_6148.

Planning Approval Change means:

- (a) the Planning Approval is modified under the EP&A Act; or
- (b) the Minister for Planning 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) the Project Company's failure to comply with its obligations under a Project Document;
- (b) a breach by the Project Company of its warranties under clause 7.3;
- (c) a wrongful act or omission of the Project Company or its Related Parties; or
- (d) a failure by the Project Company or any of its Related Parties to comply with the EP&A Act or the EPBC Act or any other applicable legislation.

Potential MAE Trigger means:

- (a) a Planning Approval Change Event occurs;
- (b) an event or circumstance referred to in clause 23A.2(a)(ii)(B) or 23A.2(a)(ii)(D) 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.

PPS Register has the meaning given to the term "Register" in the PPS Act.

Pre-Agreed Change means any of the Changes described in Schedule 35.

Principal Contractor has the meaning given to the term "principal contractor" in the WHS Legislation.

Principal Contractor Deed means the deed titled "Deed of Engagement of Principal Contractor" entered into between RMS, the Project Company and Leighton Contractors on or about the date of this deed substantially in the form of Schedule 13.

Privacy Laws means:

- (a) the *Privacy Act 1988* (Cth);
- (b) the *Privacy and Personal Information Protection Act 1998* (NSW); and
- (c) any other current or future legislation, mandatory codes and policies (where such codes and policies have been notified by an affected party to the other parties) relating to the handling of Personal Information which may apply from time to time to a party or to any other recipient of Personal Information permitted under this deed.

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 Company Documentation Schedule means Appendix J03 of the SPR.

Project Company Group means the Project Company and any of its wholly owned subsidiaries, 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 Works, the Temporary Works and the O&M Work.

Project Company's Controlling Corporation means Sydney Motorway Corporation Pty Limited in its capacity as a "controlling corporation" within the meaning of the NGER Legislation.

Project Company's Delay Costs means, in relation to a Compensation Event, the extra costs reasonably incurred and payable by the Project Company to the Contractor or the Tolling Equipment Works Contractor, excluding:

- (a) any related Change Costs; and
- (b) any amounts payable by the Contractor to a member of the Project Company Group, a Related Party of the Project Company, a Related Body Corporate of a member of the Project Company Group or a Related Body Corporate of the

Contractor, to the extent that the Related Party, member of the Project Company Group or Related Body Corporate is not engaged by the Contractor on an arm's length basis and on commercial terms.

Project Company's Emissions and Energy Data means any Emissions and Energy Data relating to any aspect of the Project Company's Activities, or the activities of any Subcontractors engaged by the Project Company, in connection with the Project Company's Activities under this 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;
- (b) the Project Company 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 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 Representative means:

- (a) the person or persons appointed by the Project Company under clause 8.3(a) or clause 8.3(b); or
- (b) any other person appointed from time to time by the Project Company under clause 8.3(c).

Project Documents means:

- (a) this deed;
- (b) the D&C Deed;
- (c) the D&C Guarantee;
- (d) the Contractor's Side Deed Poll;
- (e) from date of execution of an Operator's Side Deed, any Operator's Side Deed;
- (f) the RMS Security;
- (g) from date of execution of an O&M Deed, any O&M Deed;
- (h) from date of execution of an O&M Guarantee, any O&M Guarantee;
- (i) the Equity Documents;
- (j) the Independent Certifier Deed;
- (k) Deed of Appointment of D&C Independent Certifier;
- (l) D&C Independent Certifier Side Deed Poll;
- (m) the Deed of Appointment of Environmental Representative;
- (n) the PAFA Act Guarantee;
- (o) the Motorway Stratum Lease;

- (p) the Tolling Equipment Works Contract;
- (q) the Tolling Contract (Back Office);
- (r) the Tolling Maintenance Contract;
- (s) the Tolling Interface Deed;
- (t) the Principal Contractor Deed;
- (u) Account Bank Deed Poll; and
- (v) 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 26.

Project Management Agreement means the deed so titled between the Project Company and WDA dated on or about the date of this deed.

Project Plan means any plan of the kind referred to in clause 9.5(a), as that plan may be updated, amended and further developed under clause 9.5 and Schedule 32.

Project Site means the land described as the "Site" in Appendix A02 in the SPR.

Project Training Management Plan has the meaning given to that term in Appendix J10 of the SPR.

Project WHS Management Plan has the meaning given to that term in Appendix J09 of the SPR.

Project Works means the physical works which the Project Company must design, construct and complete under this deed (including, to the extent relevant to such works, Changes directed in accordance with this deed) including:

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

but excluding the Temporary Works.

Projected Equity Return means, at any time, the nominal before tax internal rate of return described as such in the Model Outputs Schedule.

Property Works means all works required to existing buildings and infrastructure or to and within properties arising out of the Project Company's Activities as described or specified in the SWTC, including in section B02 of the SPR (and including, to the extent relevant to such works, Changes directed in accordance with this deed).

Proprietary Software has the meaning given to that term in clause 29.1A(a).

Pure Economic Loss means Consequential Loss other than Consequential Loss arising from:

- (a) any injury to, or disease or death of, persons; or

- (b) the loss of, loss of use or access to (whether total or partial), or destruction of or damage to, any real or personal property.

Qualifying Adverse Effect means an adverse effect on the cashflows projected to be generated from the Project from the date of the occurrence of the relevant event, omission or circumstance until the end of the Term, the net present value of which exceeds [REDACTED]. In calculating the net present value for the purposes of this definition:

- (a) the nominal adverse effect on the Project cashflows will be calculated by comparing:
 - (i) the cashflows projected by the Base Case Financial Model (at Financial Close) to be generated from the Project from the date of the occurrence of the relevant event, omission or circumstance until the end of the Term as if the relevant event, omission or circumstance had not occurred, with:
 - (ii) the cashflows projected to be generated from the Project from the date of the occurrence of the relevant event, omission or circumstance until the end of the Term taking into account the impact of the relevant event, omission or circumstance; and
- (b) a discount rate equal to the Projected Equity Return will be applied.

Qualifying Change in Law means:

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

Qualifying Delay means an Excusable Cause of Delay which meets the requirements of Schedule 36.

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

Quality Manager means [REDACTED] or such other person engaged as Quality Manager from time to time.

Quality Plan has the meaning given to that term in Appendix J01 of the SPR.

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.

Rail Agreement means the Master Access Deed together with the document issued by RailCorp with respect to the Project Works, Temporary Works and Project Company's Activities and referred to in clause 23.3 as an 'Access Authority Instrument'.

Rail Corridor Works means that part of the Works, as that term is used in the Master Access Deed, that is within the scope of, or forms part of, the Project Works, Temporary Works or Project Company's Activities under this deed, and includes the principal items of infrastructure identified in Schedule 63.

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

RailCorp Maintenance Plan means a Maintenance Plan within the meaning of the Master Access Deed (including, where relevant, a draft of such a Maintenance Plan) and as contemplated under each of clauses 4.6, 4.7, 15.2(a)(i) and 20 of the Master Access Deed.

RailCorp's Technical Conditions means the design, technical and engineering conditions and other requirements of RailCorp in respect of the Rail Corridor Works identified and listed in Schedule 63, as those conditions and other requirements may be varied by RailCorp from time to time.

Recipient has the meaning given to that term in clause 24.2(b)(ii).

Refinancing means any of the following:

- (a) the entry into any debt financing document, or any amendment or variation to, or restatement, novation, supplement or replacement of, any debt financing document; or
- (b) any other step or arrangement or contractual or financing arrangement that has a substantially similar effect to that described in paragraph (a),

that changes or is reasonably likely to change the type, amount, pricing, tenor, terms for payment or repayment or hedging of the financial accommodation in connection with the Project.

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

Related Parties means:

- (a) in respect of RMS:
 - (i) RMS's Representative and any of the respective employees, agents, contractors or officers of RMS and RMS's Representative; and
 - (ii) WDA and any of the employees, agents, contractors or officers of WDA,but excludes:
 - (iii) the Independent Certifier;
 - (iv) the Environmental Representative;
 - (v) the Project Company and its Subcontractors;
 - (vi) WDA, when acting in its capacity as a subcontractor of the Project Company under the Project Management Deed between WDA and the Project Company dated on or about the date of this deed; and
 - (vii) employees, agents, consultants and officers of the persons listed in paragraphs (a)(iii) to (vi) of this definition; and
- (b) in respect of the Project Company:

(i) the Project Company's Representative and any of the respective employees, agents, contractors (in their capacity as contractors for the Project) or officers of the Project Company and the Project Company's Representative;

(ii) WDA and any of the employees, agents, contractors or officers of WDA,

but excludes:

(iii) the Independent Certifier;

(iv) the D&C Independent Certifier;

(v) the Environmental Representative;

(vi) WDA, other than when acting in its capacity as a subcontractor of the Project Company under the Project Management Deed between WDA and the Project Company dated on or about the date of this deed;

(vii) employees, agents, consultants, contractors (of any tier) and officers of the persons listed in paragraphs (b)(iii) to (vi) of this definition.

Relevant Entity means the Operator 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 A- 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 4.

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.

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

(a) toll and other revenue from use of the Motorway, including all tolls, fees and charges that the Project Company is entitled to charge in accordance with the Toll Calculation Schedule;

(b) any liquidated damages or compensation payable under or in respect of the D&C Deed;

(c) any proceeds from business interruption insurance policies which will be applied in accordance with this deed; and

(d) non-toll revenue (including interest) and receipts otherwise arising or derived from or paid or payable in respect of the Project,

but excluding:

(e) insurance proceeds (other than those referred to in paragraph (c) above);

(f) proceeds of any Equity; and

- (g) any prepaid money which is held in a segregated account on trust for the persons providing it, until toll revenue has been earned from it.

RMS Project Documents means those Project Documents to which RMS is a party.

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'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 8.1(a)(i); or
- (b) any other person appointed from time to time by RMS under clause 8.1(a)(ii),
- and includes any appointee under clauses 8.1(b) or 8.1(d).

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

Road Occupancy Licence or **ROL** has the meaning given to that term in clause 9.6(a)(ii)(B).

Scope and Performance Requirements or **SPR** means Part A of the SWTC.

Securities means shares, units, interests in a partnership and any other interests which would constitute "securities" as defined in the Corporations Act.

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.

Senior Project Group means the group referred to in clause 8.5.

Shareholder Loan Agreement means the shareholder loan agreement between Sydney Motorway Corporation Pty Limited and the Project Company dated on or about the date of this deed.

Site Access Schedule means Schedule 26.

Site Conditions means any physical conditions and characteristics of, upon, above, below or over the surface, or in the vicinity of, the Construction 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 Construction Site and Extra Land, ground surface conditions and geology, including rock and sub-surface conditions or other materials encountered at the Construction 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;
- (k) any latent conditions; and
- (l) any Compensable Site Conditions.

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

Subcontract means a contract between the Project Company and a Subcontractor and includes the D&C Deed, an O&M Deed, the Tolling Equipment Works Contract and an 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 includes the Contractor, the Operator and a supplier of goods or services (including professional services and Construction Plant hire) or both but does not include RMS in its capacity as the Tolling Contractor (Back Office).

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.

Subsidiary D&C Program means a subsidiary program for design and construction activities of the kind referred to in clause 16.3(a) as updated under clause 16.3.

Supplier has the meaning given to that term in clause 24.2(b).

Surviving Clauses has the meaning given to that term in clause 43.15(a).

SWTC or Scope of Works and Technical Criteria means Schedule 56 which includes the Scope and Performance Requirements and the Additional Project Deed Requirements.

Sydney Trains means Sydney Trains ABN 38 284 779 682.

Target Financial Close Date means 30 June 2015.

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.

Temporary Areas means the land described as the "Temporary Works Area" in Appendix A02 of the SPR.

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 Works including any such works specified in section 2.3.5 of SPR 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.

Third Party Agreements means any agreement between RMS and an Authority or other entity arising out of, in connection with, or for the purposes of enabling the Project Company's Activities.

Third Party Claim has the meaning given to that term in clause 26.11(a).

Third Party Rights has the meaning given to that term in clause 29.1A(b).

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

Toll Calculation Schedule means Schedule 41A.

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 Additional Project Deed Requirements.

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

Tolling Contract (Back Office) means the deed between the Project Company and the Tolling Contractor (Back Office) developed in accordance with the Tolling Services Development Agreement (Back Office) executed after the date of this deed.

Tolling Contractor (Back Office) means the contractor engaged by the Project Company to carry out the Tolling Work (Back Office), which at the date of this deed is RMS.

Tolling Equipment Works Contract means the deed between the Project Company and the Tolling Equipment Works Contractor executed on or about the date of this deed.

Tolling Equipment Works Contractor means the contractor engaged by the Project Company to carry out the Tolling Equipment Works.

Tolling Equipment Works means the tolling equipment work to be carried out by the Tolling Equipment Works Contractor under the Tolling Equipment Works Contract.

Tolling Interface Deed means the deed so titled entered into between the Tolling Equipment Works Contractor, the Contractor and the Tolling Contractor (Back Office).

Tolling Maintenance Contract means the deed titled "M4 Toll Maintenance Contract" between the Project Company and the Tolling Maintenance Contractor on or about the date of this deed.

Tolling Maintenance Contractor means the contractor engaged by the Project Company to carry out the tolling maintenance work.

Tolling Services Development Agreement (Back Office) means the deed so titled between the Project Company and RMS dated on or about the date of this deed.

Tolling Work (Back Office) means the back office tolling work to be carried out by the Tolling Contractor (Back Office) under the Tolling Contract (Back Office).

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

Traffic Management Plan has the meaning given to that term in clause 9.6.

Ultimate Shareholder means Sydney Motorway Corporation Pty Limited (as the case may be) or any entity ultimately owned, directly or indirectly, or managed by Sydney Motorway Corporation Pty Limited or any of its Associates.

In this definition an entity is considered to be "ultimately owned" by a person if that person owns (directly or indirectly, as applicable) greater than 50% of the capital in that entity.

Unforeseeable PA Requirement means requirements or conditions of the Planning Approval as described in clause 6.3(a).

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 means on any date, the total of:

- (a) the amounts which the Project Company must, subject to clause 9.2(e), pay as a consequence of the termination, including to its Subcontractors but excluding any amount payable to the Subcontractors which relates to any amount payable by a Subcontractor to any "related entity" (as defined in the Corporations Act) of a

Subcontractor other than where the related entity is engaged on an arm's length basis and on commercial terms; and

- (b) an amount equal to either:
 - (i) on any date on or prior to the Date of Completion, an amount sufficient to give the Project Company the ability to give the Equity Investors half of the Projected Equity Return on the Equity Contributions to the date of termination; or
 - (ii) on any date after the Date of Completion, the amount set out in the Model Outputs Schedule for the Quarter in which termination occurs (such amount being recalculated and updated in accordance with the formula in the Model Output Schedule for the date of termination), being an amount sufficient to give the Project Company the ability to give the Equity Investors a return equal to half the Projected Equity Return on the Equity Contributions to the date of termination.

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 the Project Company is not insured and which is Uninsurable.

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 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 2.3.4 of the SPR (and including, to the extent relevant to such works, Changes directed in accordance with this deed).

WDA means WestConnex Delivery Authority a body corporate constituted under section 51B of the *Transport Administration (General) Regulation 2013* (NSW).

WestConnex Program of Works means the 33-km motorway that will link Sydney's west with the airport and Port Botany precinct, and will include the M4 extension and duplication of the M5 East to King Georges Road, as described at <http://www.westconnex.com.au/index.html>.

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 Company's Activities, the Project Works or the Temporary Works.

Wilful Misconduct means an act or failure to act by the relevant party or its Related Parties that was intended to cause, or was in reckless disregard of or wanton indifference to, harmful consequences, excluding any innocent act, omission, mistake or error of judgement.

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) 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) not used;
- (m) "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) not used;
- (s) any reference to:
 - (i) the Project Works;
 - (ii) Third Party Works;
 - (iii) the Temporary Works;
 - (iv) the M4 West Construction Period Maintenance;
 - (v) the Project Plans;
 - (vi) the SWTC;
 - (vii) the Design Documentation; or
 - (viii) any other document or thing,
 or any part of any of them:
 - (ix) being fit for its purpose or for its intended purpose; or
 - (x) 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:
 - (A) this deed, including:
 - (aa) the SWTC; and
 - (bb) the requirement that the Project Works, when completed, will be designed and constructed in compliance with all applicable requirements of the WHS Legislation; or

- (B) any Project Document provided by RMS to the Project Company or to which the Project Company is a party; or
- (C) (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);
- (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 9.5 in respect of which RMS's Representative has not given a notice under section 2(a)(ii) of Schedule 32.

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 considers, that there is an omission, ambiguity, discrepancy, inadequacy or inconsistency in, or between, the documents comprising this deed (including in any schedules, annexures or exhibits), RMS's Representative must, subject to clause 1.7, direct the interpretation of this deed which the Project Company 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 the Project Company from or alter its liabilities or obligations under this deed or otherwise according to Law;

- (ii) will not entitle the Project Company 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 the Project Company, whether under this 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
 - (ii) the schedules;
- (b) not used; and
- (c) to the extent that clause 1.7(a) does 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 C.

2. **GRANT OF CONCESSION**

2.1 **Term of concession**

- (a) In consideration for the Project Company agreeing to perform its obligations under this deed, RMS:
 - (i) grants the Project Company a right to carry out the Project; and
 - (ii) leases the operation of the Motorway to the Project Company, subject to, and in accordance with, this deed.
- (b) The Term will end on the earlier of:
 - (i) the date on which this deed is terminated under clause 31; and
 - (ii) the Expiry Date.

3. **STAGED PROCUREMENT AND RMS CONTRACT ADMINISTRATION COSTS**

3.1 **Staged procurement of the Motorway**

- (a) RMS and the Project Company acknowledge and agree that Stage 1 of the WestConnex Program of Works is intended to be investigated, designed, constructed and commissioned in the following stages:
 - (i) **(M4 Widening)** the investigation, design, construction and commissioning of the Project Works; and
 - (ii) **(M4 East)** subject to a further agreement between RMS and the Project Company, the investigation, design, construction and commissioning of the M4 East Project Works.
- (b) It is the intention of RMS and the Project Company that the further agreement between RMS and the Project Company will, if agreed, amend the terms of this deed, such that:
 - (i) the investigation, design, construction and commissioning of the Project Works will continue to be undertaken in accordance with the terms of this deed (as amended);
 - (ii) the investigation, design, construction and commissioning of the M4 East Project Works will be undertaken in accordance with the terms of this deed (as amended);
 - (iii) the ownership, operation, maintenance and repair of the entire Motorway (including the Project Works and the M4 East Project Works) will be undertaken in accordance with the terms of this deed (as amended); and
 - (iv) the commercial terms and risk profile of this deed can be amended as appropriate, including by:

- (A) making amendments to reflect the increased investment made by the Project Company and facilitate the Project Company's intended financing structure (for example, extending the concession term and permitting debt financing);
- (B) making amendments to allow RMS to allocate typical long-term asset owner risks to the Project Company (for example, removing the Interim Compensation Event regime in clause 16.12); and
- (C) making such other amendments as RMS and the Project Company may agree.

3.2 RMS Contract Administration Costs

In consideration of RMS's obligations under this deed, the Project Company must pay to RMS:

- (a) _____, not later than 5 Business Days after the date of Financial Close;
- (b) _____ not later than 5 Business Days after the first anniversary of the date of Financial Close; and
- (c) _____ not later than 5 Business Days after the second anniversary of the date of Financial Close.

4. PROJECT RISKS

4.1 Project risks

The Project Company:

- (a) subject to the express provisions of this deed, accepts all risks associated with the Project;
- (b) without limiting the generality of clause 4.1(a), the Project Company 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 Company's Activities;
 - (ii) the performance of Subcontractors;
 - (iii) obtaining access to all areas other than the Construction Site;
 - (iv) the occupation and use of the Construction Site, the Motorway Site and the Motorway by the Project Company;
 - (v) the Site Conditions encountered;
 - (vi) all information provided or not provided by RMS and WDA about the Project Works, the Temporary Works, the Motorway and the Construction Site;
 - (vii) Contamination of any land upon or within which the Project is undertaken;
 - (viii) traffic conditions on approach roads to the Construction Site and any other difficulties with obtaining access to and from the Construction 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 Company's 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 Company's Activities;
 - (xiii) industrial relations issues;
 - (xiv) foreign exchange movements in any currencies adverse to the Project Company;
 - (xv) damage to the Project Company's Activities, Project Works, Temporary Works, Construction 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;
 - (xix) Liability for Taxes, including the risk that Liability for Taxes is greater than estimated by the Project Company Group or its advisers; and
 - (xx) the conditions and requirements of the EPBC Act Approval; and
- (c) acknowledges that RMS and WDA have not made any representation or given any warranty in respect of the traffic usage of the Motorway or any other road.

4.2 **Existing Motorway asset condition**

Subject to clause 14 and without limiting the Project Company's maintenance and repair obligations under this deed, RMS and the Project Company acknowledge and agree that this deed does not require the Project Company to upgrade any Existing Structures unless such upgrade work forms part of the Project Works or Third Party Works to be carried out under this deed.

5. **CONDITIONS PRECEDENT**

5.1 **Commencement of obligations**

The rights and obligations of the parties under this deed (other than Day 1 Clauses which commence on the date of this deed) will commence on Financial Close.

5.2 **Satisfaction of Conditions Precedent**

- (a) RMS must use all reasonable endeavours to satisfy the Conditions Precedent referred to in paragraphs 6, 6A, 7, and 8 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 5 (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 2, 4, 5, 6A and 7 of Schedule 1;
 - (ii) the Project Company may waive in writing any of the Conditions Precedent referred to in paragraphs 6 and 8 of Schedule 1; and
 - (iii) RMS and the Project Company may together waive the Conditions Precedent referred to in paragraph 1 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 referred to in paragraphs 1, 2, 4 or 5 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, 6, 6A, 7 or 8 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.

5.3 Target Financial Close Date

- (a) If a Condition Precedent has not been satisfied (or waived under clause 5.2) 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 5.3(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 5.2) within that period.
- (c) If this deed is terminated pursuant to this clause 5.3:
 - (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 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.

6. PLANNING APPROVAL

6.1 Planning Approval Application

- (a) The parties acknowledge and agree that:

- (i) RMS is the proponent under the EP&A Act in respect of the Planning Approval and submission of any applications, documentation, plans or reports required to be prepared in respect of the Planning Approval Application process (including any environmental impact statement required under the EP&A Act) (**Planning Application Documents**); and
 - (ii) as at the date of this deed, RMS has prepared the Planning Approval Application, including all associated plans and specifications.
- (b) At any time upon request from RMS, the Project Company must:
- (i) not used;
 - (ii) provide reasonable assistance to RMS and WDA in relation to the Planning Approval Application, including by attending any relevant meeting as required by RMS's Representative and providing any information available to the Project Company, at the Project Company's cost; and
 - (iii) co-operate with RMS and WDA in relation to the Planning Approval Application.
- (c) Except to the extent expressly stated otherwise in this clause 6, 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 the Planning Approval Application, any Unforeseeable PA Requirements or any Early Works.
- (d) The parties acknowledge and agree that:
- (i) while the Baseline Conditions constitute conditions and requirements that might be imposed under the Planning Approval, the terms of any Planning Approval which the Minister for Planning may issue arise from the exercise of a statutory discretion in accordance with the terms of the EP&A Act; and
 - (ii) the exercise of the statutory discretion under the EP&A Act rests with the Minister for Planning whose decision will be informed by a detailed environmental impact assessment.
- (e) The Project Company must use its best endeavours to assist RMS to ensure that the conditions of the Planning Approval are, in substance, as close as possible to the Baseline Conditions, having regard to the degree of control the parties and RMS have over this outcome.

6.2 **Lodgement of the Planning Approval Application and issue of the Planning Approval**

- (a) The parties acknowledge that RMS has submitted the Planning Approval Application to the Minister for Planning.
- (b) RMS will give notice to the Project Company, together with a copy of the Planning Approval, within 1 Business Day of the Planning Approval being issued by the Minister for Planning.
- (c) Within 5 Business Days of the Planning Approval being issued by the Minister for Planning, RMS must give notice to the Project Company that it has considered the requirements of clause 6.3(a):
 - (i) confirming that RMS considers that there are no Unforeseeable PA Requirements; or

- (ii) confirming that RMS considers that there are Unforeseeable PA Requirements and that RMS intends to exercise its rights to:
 - (A) proceed with the Project and require a Change, in which case clauses 6.7 and 6.7A will apply; or
 - (B) terminate this deed, in which case clause 6.8 will apply.

6.3 Unforeseeable PA Requirements

- (a) For the purposes of this deed, Unforeseeable PA Requirements of the Planning Approval are requirements and conditions of the Planning Approval which are not part of the Baseline Conditions.
- (b) Subject to clause 6.7A, to the extent that any requirement or condition of the Planning Approval:
 - (i) is not an Unforeseeable PA Requirement; and
 - (ii) requires a Change,

that Change will be treated as a Change proposed by the Project Company in accordance with clause 14.1(b) and the parties must comply with paragraph 2 of the Change Procedure set out in Schedule 34 in relation to the Change.
- (c) If RMS and the Project Company are unable to agree on whether any requirement of the Planning Approval is an Unforeseeable PA Requirement, such disagreement will be treated as a Dispute in accordance with clause 32.

6.4 Not contesting the Planning Approval

Where the Minister for Planning grants the Planning Approval containing Unforeseeable PA Requirements RMS will not, under any circumstances, commence legal proceedings to challenge the relevant conditions or requirements.

6.5 Restriction on work

Prior to RMS's notice issued under clause 6.2(c), the Project Company may only carry out the Early Works and must not carry out any other Project Works, Temporary Works or Project Company's Activities without the prior written approval of RMS.

6.6 Not used

6.7 Direction to Proceed

- (a) Without limiting clauses 6.7A or 6.8, if:
 - (i) the Minister for Planning grants, or indicates that it will grant, the Planning Approval subject to an Unforeseeable PA Requirement; or
 - (ii) RMS, acting reasonably and after having consulted with the Project Company, considers that a Change is required to ensure that:
 - (A) the Planning Approval is granted; or
 - (B) the Planning Approval is granted without being subject to an Unforeseeable PA Requirement,

RMS:

(iii) may, in its absolute discretion and without being under any obligation to do so, within a reasonable period of time issue a Change Proposal in accordance with clause 14; and

(iv) must within a reasonable period of time issue a Change Order,

to the Project Company setting out the details of a proposed Change to enable the Planning Approval to be granted, or granted without being subject to an Unforeseeable PA Requirement, or to enable the Project Company to comply with the Unforeseeable PA Requirement.

(b) Except in relation to an Unforeseeable PA Requirement referred to in clause 6.7A, in respect of any Change Proposal or Change Order pursuant to clause 6.7(a), that Change will be treated as a Change proposed by the Project Company in accordance with clause 14.1(b) and the parties must comply with paragraph 2 of the Change Procedure set out in Schedule 34 in relation to the Change.

6.7A Funding and completion of property acquisition

If:

(a) the Minister for Planning grants the Planning Approval subject to an Unforeseeable PA Requirement which expressly requires the acquisition of real property by the proponent of the Planning Approval; and

(b) RMS has given the notice to the Project Company under clause 6.2(c)(ii)(A),

RMS must, within a reasonable time after giving notice under clause 6.2(c)(ii)(A), fund and complete the acquisition of the relevant real property as required by the Unforeseeable PA Requirement.

6.8 Termination

(a) Despite any other provision of this clause 6, if:

(i) the Minister for Planning grants, or indicates that it will grant, the Planning Approval subject to an Unforeseeable PA Requirement; or

(ii) the Planning Approval is not granted by 1 June 2015,

RMS may terminate this deed by written notice to the Project Company and this deed will then be without further effect, except in relation to rights and obligations arising before such termination and the Project Company's sole entitlement to payment shall be as set out in clause 6.8(b).

(b) If RMS terminates this deed under clause 6.8(a), without prejudice to any of the Project Company's other rights, entitlements or powers under this deed, the Project Company will be entitled to payment of the following amounts:

(i) for work carried out prior to the date of termination, the amount which the Project Company is required to pay the Contractor under the D&C Deed for such work;

(ii) the cost of goods or materials or other items reasonably ordered by the Project Company for the Project Company's Activities and for which it is legally bound to pay provided that:

(A) the value of the goods, materials and other items have not been previously paid or included in the amount payable under clause 6.8(b)(i); and

(B) title in the goods or materials will vest in RMS upon payment;

(iii) the reasonable cost of removing from the Construction Site, the Local Areas and the Temporary Areas and the Project Works all plant and equipment and other things used in the performance of the Project Company's Activities; and

(iv) costs reasonably incurred by the Project Company in the expectation of completing the Project Company's Activities and not included in any other payment by RMS,

(such amounts to be as stated by RMS's Representative), provided that such payment together with all payments made to the Project Company up to that point shall not exceed the amount of the Early Works Sum.

6.9 **Revised Schedule 15**

Within 15 Business Days of:

(a) RMS's notice under clause 6.2(b); or

(b) not used,

RMS's Representative will provide to the Project Company a revised version of Schedule 15 (with such revisions as are reasonable and necessary to reflect the terms of the Planning Approval) with which the Project Company must comply.

As soon as practicable after RMS's notice under clause 6.2(b), the Project Company must procure the execution of the Deed of Appointment of Environmental Representative and the Environmental Representative Side Deed Poll.

7. **COMPLIANCE WITH LAW AND APPROVALS**

7.1 **Compliance with Law**

The Project Company must:

(a) in carrying out the Project Company's Activities, comply with;

(b) ensure that its Related Parties, in carrying out the Project Company's Activities, comply with; and

(c) ensure that the Project Works, the Temporary Works and the Motorway comply with,

all:

(d) applicable Laws, including any change in Law after the date of this deed; and

(e) NSW Government Policies,

and must not engage in, and must ensure that its Related Parties, in carrying out the Project Company's Activities, do not engage in, any fraud, bribery or corruption.

7.2 Consents and Approvals

- (a) In relation to any document required to be prepared pursuant to the Planning Approval which relates to the Project Company's Activities and which is also required to be submitted to an Authority, the Project Company must promptly:
- (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.
- (b) The Project Company must:
- (i) expeditiously apply for and obtain from each relevant Authority all Approvals required to perform the Project Company's Activities (other than the Planning Approval, the EPBC Act Approval and the Approvals specified in Part A of Schedule 15);
 - (ii) comply 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 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) to the extent relevant to the Project Company's Activities, subject to the terms of Part B of Schedule 15;
 - (iv) in respect of any Approval relating to the Project Company's Activities, 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 clause 7.1.

7.3 Modification Application Documents

- (a) The parties agree that, subject to the terms of Part B of Schedule 15, the Project Company must:
- (i) 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 7.2(a) and any other documents required to be submitted with the application for modification);
 - (ii) carry out and provide to RMS all surveys, investigations, reports and studies reasonably requested by RMS's Representative, to such standard and within such time as reasonably directed by RMS's Representative, together with the documents referred to in clause 7.3(a)(i), (**Modification Application Documents**); and

- (iii) 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.
- (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 submission of any Modification Application Documents; and
 - (ii) acknowledges that RMS will rely upon the Project Company's warranties in this clause 7.3.

7.4 **Modifications to the Planning Approval**

- (a) Without limiting clause 7.4(b), clause 14.1 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 to Mitigate the cost of the Change;
 - (ii) for this purpose, comply with all reasonable directions of RMS concerning the Change, and its consequences; and
 - (iii) ensure that its Subcontractors comply with this clause 7.4(b),

and RMS's liability under clause 7.4(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 7.4, 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 or a Planning Approval Change Event.
- (d) The Project Company:
 - (i) acknowledges and agrees that:
 - (A) as between RMS and the Project Company, only RMS is permitted to make or apply for modifications to the Planning Approval;

- (B) RMS may 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 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;
 - (ii) must not make, seek 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, such modification.

7.5 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 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 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 7.5(c), as between RMS and the Project Company RMS is responsible for dealing with the Legal Challenge as it sees fit in its absolute discretion.
- (c) 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.
- (d) For the purposes of clause 7.5(a), RMS's Representative may by written notice direct the Project Company to suspend any or all of its obligations under this deed until such time as RMS gives the Project Company further written notice and the Project Company must comply with that notice.
- (e) RMS will have no liability to the Project Company 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 as a result of a Legal Challenge to the extent that the Legal Challenge:
 - (i) is initiated or upheld, or the court order is made, due to:
 - (A) the Project Company's breach of, or failure to comply with its obligations under, a Project Document;
 - (B) a breach of the Project Company's warranty given under clause 7.3;

- (C) a wrongful act or omission of the Project Company or its Related Parties; or
 - (D) a failure by the Project Company or any of its Related Parties to comply with the EP&A Act or any other Law; or
- (ii) relates to or arises out of or in connection with any Change proposed by the Project Company in accordance with section 2.2 of the Change Procedure or otherwise carried out by the Project Company without RMS having issued a Change Order in respect of that Change.

7.6 Roads Act declarations and directions

- (a) If the Project Company waives the Condition Precedent referred to in paragraph 6 of Schedule 1 (in accordance with clause 5.2(c)(ii)), RMS must recommend to the Minister to make, and ensure that the Minister makes a declaration under section 52 of the Roads Act that such part of the Motorway as is shown on the plan which is Schedule 26C is declared to be a tollway (as contemplated by paragraph 6 of Schedule 1) the earlier of:
 - (i) the date which is 6 months after RMS acquires all land required to enable the declaration to be made; or
 - (ii) the Motorway Opening Date.
- (b) If RMS waives the Condition Precedent referred to in paragraph 6A of Schedule 1 (in accordance with clause 5.2(c)(i)), RMS must recommend to the Minister to make, and ensure that the Minister makes a direction under section 63 of the Roads Act that all of the functions of a road authority in respect of that part of the Motorway as is shown on the plan which is Schedule 26C are the responsibility of RMS (as contemplated by paragraph 6A of Schedule 1) no later than the Motorway Opening Date.
- (c) RMS must ensure that the declaration and direction referred to in paragraphs 6 and 6A of Schedule 1 and clauses 7.6(a) and 7.6(b) are effective from the date on which they are made until the end of the Term.

8. RELATIONSHIP OF RMS AND THE PROJECT COMPANY

8.1 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 8.1(a)(i) and 8.1(a)(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 8.1(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 8.1(b).
- (d) An appointee of RMS's Representative under clause 8.1(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 8.1(d)(i) by notice in writing to the Project Company.
- (e) The parties 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 8.1 is not obliged to review, or comment upon, any documentation or information which the Project Company gives to RMS in respect of the Project.

8.2 Not used

8.3 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.

8.4 Authorities

- (a) This deed will not in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of RMS or WDA to exercise any of its functions and powers pursuant to any Law.
- (b) The Project Company acknowledges and agrees that, without limiting clause 8.4(a), anything which RMS or WDA 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 8.4(a) and 8.4(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 8.4(a) and 8.4(b).
- (d) The Project Company acknowledges and agrees that:

- (i) there are Authorities (other than RMS and WDA) with jurisdiction over aspects of the Project Company's Activities, parts of the Construction Site and other areas affected by the Project Company's 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 Company's 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 or the Project Management Agreement, RMS and WDA are 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 8.4(d)(ii) and will not be entitled to make, and RMS and WDA will not be liable upon, any Claim arising out of or in any way in connection with such occurrences.

8.5 **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 31A.
- (b) The parties may agree to establish additional project management groups.

8.6 **RMS action**

- (a) If:
 - (i) the Project Company:
 - (A) fails to perform an obligation under this deed, including the rectification of Defects; 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 17.1(b), taken steps to remedy the failure, or

having taken or procured such steps, fails to remedy or procure the remedy of 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 Construction Site, any Extra Land, the Maintenance Site, the Motorway Stratum and any other land upon which the Project Company's Activities are being carried out.

- (b) Any Loss suffered or incurred by RMS in taking action referred to in clause 8.6(a) will be a debt due and payable from the Project Company to RMS.

8.7 Document management and transmission

- (a) The Project Company must manage and transmit documents (other than Notices referred to in clause 42) including using an electronic medium 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 will 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 Company's Activities.
- (c) The Project Company must keep all the Project Company's records relating to the Project Company's 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 8.7.
- (e) The Project Company must ensure that any documentation that it 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.

9. PROJECT COMPANY'S FUNDAMENTAL OBLIGATIONS

9.1 Project Company's general obligations

The Project Company:

- (a) must carry out the Project Company's Activities, including:
 - (i) investigating, financing, funding, planning, designing, constructing and commissioning the Project Works and the Temporary Works;
 - (ii) 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;
 - (iii) undertaking the O&M Work;
 - (iv) operating, maintaining and repairing the Motorway;
 - (v) unless otherwise expressly permitted by this deed, 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
 - (vi) yielding up possession of the Motorway to RMS in accordance with clause 34 at the end of the Term,

in accordance with this deed;

- (b) warrants that:
 - (i) the Project Works will:
 - (A) be completed in accordance with, and satisfy the requirements of, this deed;
 - (B) upon Completion be fit for their intended purposes; and
 - (C) thereafter, at all relevant times during the Term (assuming no early termination), remain fit for their intended purposes;
 - (ii) the Temporary Works will at all relevant times be fit for their intended purposes;
 - (iii) the Motorway will be capable of achieving Final Handover at the end of the Term;
 - (iv) the M4 West Construction Period Maintenance will be completed in accordance with, and satisfy the requirements of, this deed;
 - (v) upon Completion, the design life of each part of the Project Works will meet or exceed the design life standards specified in section 4.7 of the SPR; and
- (c) 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.

9.2 Subcontracts

- (a) The engagement by the Project Company of the Contractor to perform some or all of the Project Company's obligations under this deed will not limit or affect the Project Company'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 (excluding RMS) in performing the Project Company's 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 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 \$50,000 (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 \$10 million (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 \$10 million or more includes a clause providing that if the Project Deed is terminated for any reason or RMS takes over the Project Company's Activities:
 - (i) subject to the Contractor's Side Deed Poll or the Operator's Side Deed (as applicable), the Project Company and the Subcontractor must, after RMS's Representative has given a Direction to the Project Company 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 may terminate the Subcontract and pay to the Subcontractor an early termination amount equal to the amount determined by the Independent Certifier 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:
 - (aa) contract value of the work properly executed in accordance with the Subcontract;
 - (bb) reasonable costs and expenses properly incurred in expectation of completing the work under the Subcontract;
 - (cc) Liabilities to third parties (excluding any "related entity" (as defined in the Corporations Act)) for termination; and
 - (dd) of the unpaid balance of the contract sum on account of profit foregone,less the total amounts paid up to and including the date of termination on account of the contract sum; and
 - (B) in respect of an O&M Deed or any other Subcontract entered into in connection with the O&M Work, the aggregate of:
 - (aa) the amounts which have accrued to the Subcontractor under the Subcontract but which remain unpaid by the Project Company;

- (bb) reasonable costs and expenses properly incurred in expectation of performing the services under the Subcontract;
 - (cc) Liabilities to third parties (excluding any "related entity" (as defined in the Corporations Act)) for termination; and
 - (dd) 2% of the sum of the amounts that would otherwise be payable to the Subcontractor under the Subcontract in the 2 years after the date of termination on account of profit foregone.
- (f) The Project Company must ensure that the Contractor and the Operator include an equivalent clause to clause 9.2(e)(ii) in each contract which has a contract value of \$10 million or more entered into by the Contractor or the Operator (respectively) with any subcontractor, supplier or consultant.

9.3 Utility Services

- (a) The Project Company:
- (i) must obtain and pay for any Utility Services and all connections for all Utility Services the Project Company needs to perform their obligations under the Project Documents;
 - (ii) must investigate, protect, relocate, remove, modify, support, reinstate and provide for Utility Services necessary for the Project Company to comply with its obligations under the Project Documents;
 - (iii) must ensure there are no unplanned disruptions to the Utility Services in carrying out the Project Company's 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 Company's Activities;
 - (iv) 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:
 - (A) 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 any act or omission of the Project Company or its Related Parties; or
 - (B) a failure by the Project Company to comply with any obligation under this deed, with respect to the Utility Services or the Utility Service Works including the obligations under the SWTC;
 - (v) 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 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 Company's Activities; and
 - (vi) must enter into any agreement required by any Authority in connection with the matters set out in clause 9.3(a).
- (b) Where:

- (i) an Authority requires an agreement to be entered into dealing with the matters set out in clause 9.3(a); and
- (ii) the Authority:
 - (A) refuses to enter into such an agreement with the Project Company; or
 - (B) requires such an agreement to be signed by RMS instead of the Project Company,

the Project Company must immediately notify RMS of that requirement and RMS may then enter into such an agreement with the Authority and the provisions of clause 9.18 will apply.

9.4 Long service levy

Before any construction work commences under this 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 Company's 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 9.4(a).

9.5 Project Plans

- (a) The Project Company must prepare and develop the Project Plans specified in Appendix J02 of the SPR in accordance with Schedule 32.
- (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 section 5 of Schedule 32) about any Project Plan will lessen or otherwise affect:
 - (i) the Liabilities or responsibilities of the Project Company 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.
- (c) The Project Company:
 - (i) must comply with each Project Plan which has been submitted to RMS's Representative under this clause 9.5 and in respect of which RMS's Representative has not given a notice under section 2(a)(ii) of Schedule 32; and
 - (ii) agrees that compliance with any Project Plan will not in any way lessen or affect:
 - (A) the Liabilities or responsibilities of the Project Company under this deed or otherwise according to Law; or
 - (B) RMS's rights against the Project Company, whether under this deed or otherwise according to Law.

- (d) The Project Company must comply with the restrictions upon the carrying out of the Project Company's Activities specified in the SWTC.
- (e) To the extent they are relevant to operation, maintenance, repair and reinstatement of the Motorway or the maintenance and repair of the Third Party Works during the Term, all Project Plans must be incorporated into the O&M Manuals.

9.6 Control of traffic

- (a) Before the Project Company undertakes any Project Works, Temporary Works or M4 West Construction Period Maintenance which would have the effect of restricting, closing, interfering with or obstructing the free flow of traffic on any road, the Project Company must undertake all activities necessary to carry out such Project Works, Temporary Works or M4 West Construction Period Maintenance including, but not limited to:
 - (i) obtaining all relevant Approvals (subject to clause 7.2);
 - (ii) preparing and submitting:
 - (A) to the Transport for NSW Transport Management Centre and RMS, traffic management plans (**Traffic Management Plans**); and
 - (B) to the Transport for NSW Transport Management Centre, applications for a Road Occupancy Licence (**ROL**) in accordance with the requirements of section 5.18 of the SPR;

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 must not be less than the time specified in the SWTC) to consider, amend (if necessary) and agree);
 - (iii) not used;
 - (iv) complying with road occupancy requirements, including all Traffic Management Plans and ROLs; and/or
 - (v) accepting and implementing the reasonable requirements of the parties who have input into the approval of the Traffic Management Plans (once approved, the **Approved Traffic Management Plans**) and ROLs.
- (b) The Project Company:
 - (i) is responsible for the control, direction and protection of all road, cyclist and pedestrian traffic in any way affected by the carrying out of the Project Company's 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 construction traffic management plan prepared in accordance with the Planning Approval and the requirements of the SWTC 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.
- (c) The Project Company must give the public sufficient notice of the arrangements agreed under clause 9.6(a) and in designing and implementing the Traffic Management Plans and all aspects of the Project Company's Activities, seek to minimise delays and disruption to traffic to the extent consistent with the performance of the Project Company's Activities in accordance with this deed.
- (d) Despite any ROL issued for any lane or shoulder closure, RMS's Representative may at any time direct the Project Company to temporarily suspend any Project Company's Activities and to re-open the lane or shoulder.

9.7 **Principal contractor**

- (a) In this clause 9.7 and clause 9.8, the terms "relevant entity", "principal contractor", "workplace", "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 and this deed, the Project Works and the Temporary Works are taken to be part of the same "construction project".
- (b) RMS and the Project Company acknowledge and agree that:
- (i) RMS, the Project Company and Leighton Contractors are parties to the Principal Contractor Deed;
 - (ii) pursuant to the Principal Contractor Deed, RMS has engaged the Contractor as the principal contractor in respect of the Project Works and the Temporary Works; and
 - (iii) without limiting the Principal Contractor Deed, Leighton Contractors has undertaken to discharge the duties imposed on a principal contractor by the WHS Legislation in respect of the Project 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 Leighton Contractors 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 Works and the Temporary Works; or
 - (ii) the Principal Contractor Deed is terminated for any reason before the Project Works or the Temporary Works are complete:
- then:
- (iii) to the extent that the Project Works or the Temporary Works includes Construction Work, RMS:

- (A) engages the Project Company as the principal contractor in respect of the Project Works and the Temporary Works on and from the date on which RMS's engagement and authorisation of Leighton Contractors as principal contractor is terminated; and
 - (B) authorises the Project Company to have management and control of each workplace at which the Project Works and the Temporary Works are to be carried out and to discharge the duties of a principal contractor under 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 9.7(c) will continue:
- (i) subject to clause 9.7(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 the relevant discrete part of the Third Party Works has been determined by the Independent Certifier to have been completed in accordance with clauses 17.3, 17.4 or 17.5 (as applicable); and
 - (D) in respect of the areas specified in the Site Access Schedule, the termination or expiry of the rights referred to in clause 11.1(a),
(unless sooner revoked by RMS); and
 - (ii) in respect of any rectification work carried out under clause 17.1 that is construction work (other than any defect rectification work for which the Contractor 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 (other than the maintenance work described in clause 19.1A); and
 - (ii) any other work carried out pursuant to clause 17 or the Change Procedure after the date referred to in clause 9.7(c),
- (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;
 - (i) the Project Company acknowledges that clause 18.1 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;

- (ii) 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
 - (iii) the Project Company's engagement and authorisation as principal contractor pursuant to this clause 9.7(e) will continue until the termination of this deed (unless sooner revoked by RMS).
- (f) The Project Company must:
- (i) ensure that if any Law, including in the State or Territory in which the Project Works or the Temporary Works are situated or being carried out (as the case may be) requires that:
 - (A) a person:
 - (aa) 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
 - (bb) 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 design), or work (or class of 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 9.7(f)(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 before the Project Company 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 9.7(b) or 9.7(e) (as applicable).

9.8 **Work health and safety**

- (a) The Project Company must carry out the Project Works and the Temporary 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 to minimise that risk; and
 - (ii) the Project Company must, at its cost, comply with any direction by RMS's Representative under clause 9.8(b)(i).
- (c) The Project Company must:
- (i) ensure that in carrying out the Project Company's Activities under this deed:
 - (A) it complies with all Laws and other requirements of this deed for work, health, safety and rehabilitation management;
 - (B) ensures that all Subcontractors engaged by the Project Company and all subcontractors and consultants engaged by the Contractor comply with their respective obligations under the WHS Legislation; and
 - (C) it complies with its 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 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) exercise and fulfil 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 Construction 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 Company's Activities;
 - (v) institute 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 RMS's Representative with the written assurances referred to in clause 9.8(c)(v), together with written assurances from the Project Company about the Project Company'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 9.7 and 9.8) or any other relevant matters as RMS's Representative may reasonably require from time to time, including a summary of the Project Company's 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 in carrying out the Project Company's 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 that would cause RMS to be in breach of the WHS Legislation; and
 - (xi) ensure that each Subcontract includes provisions equivalent to clause 9.8.
- (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) the failure of the Project Company to exercise or fulfil the functions and responsibilities of the principal contractor under WHS Legislation; or
 - (ii) the Project Company's failure to otherwise comply with clauses 9.7 or 9.8,
- 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 failure by the Project Company referred to in clause 9.8(d)(i) or 9.8(d)(ii) before that revocation).

9.9 **Project WHS Management Plan**

- (a) The Project Company acknowledges that preparation of the Project WHS Management Plan in accordance with clause 9.5 is a condition precedent to the commencement of RMS's obligations to provide access under clause 11.1(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 will implement to manage the Project Works and the Temporary Works from a work health and safety perspective;
 - (ii) describe how the Project Company proposes 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 9.5, 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 9.5 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 the Project Works and the Temporary Works in accordance with, and otherwise implement, the latest Project WHS Management Plan.

9.10 **Site induction**

- (a) Without limiting the Project Company's obligations under clause 7.2(b) to comply 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 Construction Site and for all personnel directly or indirectly engaged by the Project Company and requiring access to the Construction Site, any Extra Land and any other land upon which the Project Company's 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.

9.11 **Community relations**

The Project Company:

- (a) acknowledges that the areas where the Project Company's 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 Involvement Plan; or
 - (iii) reasonably required by RMS from time to time.

9.12 **Environmental requirements**

The parties must comply with the requirements of Schedule 16.

9.13 **Liability under the NGER Legislation**

- (a) Without limiting any other clause in this deed, the Project Company acknowledges and agrees that, if the Project Company's 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 with any obligations arising in respect of the Project Company's Activities or the Project Works and the Temporary Works under the NGER Legislation.
- (b) If, despite the operation of clause 9.13(a), RMS incurs, or but for this clause 9.13 would incur, a Liability under or in connection with the NGER Legislation as a result of or in connection with the Project Company's 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.

9.14 **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 any inaccuracy or omission in information provided to RMS under clause 9.13 and sections 4 and 5 of Schedule 16.

9.15 **Aboriginal participation in construction**

- (a) The Project Company must comply 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 commencing any Project Company's Activities on the Construction 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 the Project Aboriginal Participation Plan.
- (c) The Project Company must systematically manage its Aboriginal participation processes in accordance with the Project Aboriginal Participation Plan.
- (d) The Project Company must demonstrate to RMS whenever requested, that it has met and is meeting at all times its obligations under clauses 9.15(a) to 9.15(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 Company's Activities on the Construction Site; and
 - (ii) periodically during the course of the carrying out of the Project Company's 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.

9.16 **Management of customers, stakeholders and other affected parties**

- (a) The Project Company must in carrying out the Project Company's Activities:
- (i) do all things necessary to minimise the disturbance, nuisance or inconvenience to the occupants of land adjoining the Construction Site, Extra Land, Maintenance Site or Motorway Stratum or located in the vicinity of the Construction Site, Extra Land, Maintenance Site or Motorway Stratum (including Existing Operations and Utility Services);
 - (ii) to the extent reasonably possible in performing the Project Company's Activities, not interfere with the free movement of traffic into and out of, adjacent to, around, on or about the Construction Site or block or impair access to any premises, carparks, roadways, 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 Company's Activities using best practices so as to minimise the effect of the Project Company's Activities on occupants of land adjoining the Construction Site, Extra Land, Maintenance Site or Motorway Stratum or located in the vicinity of the Construction Site, Extra Land, Maintenance Site or Motorway Stratum (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 Company's 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 Construction Site, Extra Land, Maintenance Site or Motorway Stratum) against the Project Company or any of its Related Parties in respect of any aspect of the carrying out of the Project Company's Activities, including:
- (iv) Contamination, noise or vibration arising out of, or in any way in connection with, the Project Company's Activities;

- (v) the Project Company'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 Construction Site or any Extra Land; or
 - (vii) Loss or damage of the kind referred to in clause 26.2.
- (d) Without limiting the Project Company's obligations under 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 9.16(b) and 9.16(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 9.16(c), which:
 - (A) contains full details of:
 - (aa) each complaint, proceedings, letter of demand, order and direction; and
 - (bb) 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 Company's Activities before the relevant work is carried out including notification of:
- (i) the likely duration of that work; and
 - (ii) the 24 hour telephone number, postal address and email address established by RMS, in case any person wishes to make a complaint.

9.17 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 Company's Activities; and
 - (ii) the access ways to the Construction Site are used by other persons (including in connection with the Existing Operations) and will not be available exclusively to the Project Company.

- (b) The Project Company bears the risk of coordinating its access to the Construction Site with any other relevant party (including Existing Operators) that uses the access ways to the Construction Site.
- (c) Without limiting any other obligations of the Project Company under the Project Documents, the Project Company must:
 - (i) comply with RMS's reasonable directions in connection with:
 - (A) the Existing Operations (including access to and use of the Construction Site); 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 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 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 Construction Site;
 - (iv) ensure that, in carrying out and completing the Project Company's Activities, 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 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 Company's Activities; and
 - (B) when directed by RMS's Representative, take such action as is required to ensure that its obligations in this clause 9.17(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 Construction 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 Company's 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 Construction Site.
- (e) The Project Company must ensure that its Related Parties at all times comply with this clause 9.17.

9.18 **Third Party Agreements**

The Project Company:

- (a) acknowledges that:
 - (i) RMS may enter into Third Party Agreements after the date of this deed and the Project Company agrees to comply with the Third Party Agreements; and
 - (ii) any agreement entered into by RMS pursuant to clause 9.3(b) will be deemed to be a Third Party Agreement; and
- (b) must comply with its obligations in Schedule 20.

10. **NOT USED**

11. **ACCESS AND CONSTRUCTION SITE**

11.1 **Access**

- (a) Subject to clause 9.9(a), Schedule 17 and any other provision of this deed , the Planning Approval, the EPBC Act Approval or other Approval affecting access to land, RMS must:
 - (i) give, or ensure the Project Company and its Related Parties and invitees have access to each area of the Construction Site specified in the Site Access Schedule by the relevant dates set out in the Site Access Schedule (and if a period is specified in relation to access to a part of the Construction Site, then by the last day of that period); and
 - (ii) thereafter continue to allow, or ensure that the Project Company and its Related Parties and invitees continue to be allowed, access to each such area of the Construction Site specified in the Site Access Schedule.
- (b) The rights under clause 11.1(a) in respect of the areas of the Construction Site (or any part of them) specified in the Site Access Schedule will expire upon the later of:
 - (i) the dates specified in the Site Access Schedule;
 - (ii) not used;
 - (iii) not used; and
 - (iv) otherwise, the Date of Completion.
- (c) The Project Company acknowledges and agrees that access to the Construction Site or any part of it in accordance with the Site Access Schedule pursuant to this clause 11.1 and Schedule 17 will confer on the Project Company a right to such management and control as is necessary to:

- (i) enable the Project Company to execute the Project Company's Activities in accordance with this deed; and
 - (ii) discharge its responsibilities under the WHS Legislation, including to discharge its responsibilities as principal contractor.
- (d) The Project Company acknowledges and agrees that it is responsible, at its own cost, for securing all rights of ingress to and egress from the Construction Site as required to allow the Project Company to carry out the Project Company's Activities.
- (e) The Project Company acknowledges that the Construction Site incorporates motorways and other roads that will (subject to the terms of this deed) remain open to traffic at all times.

11.2 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 Construction Site in accordance with the Site Access Schedule pursuant to clause 11.1, including making any reasonable changes to the sequencing or timing of, or the construction methodologies used in, the Project Company's Activities and, where reasonably practicable, changing the Overall D&C Program or the Subsidiary D&C Programs to reflect this.

11.3 Not used

11.4 Property Works

- (a) The Project Company must:
- (i) carry out the Property Works:
 - (A) in accordance with the SWTC; and
 - (B) so that they are, upon Completion, fit for their intended purpose;
 - (ii) after completion of the Property Works with respect to a Non-RMS Parcel, including the work described in clause 11.4(f), provide to RMS's Representative:
 - (A) a certificate in the form of Schedule 18, duly executed by the owner or owners of any part of the Non-RMS 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 18 within 15 Business Days of it being provided by the Project Company to the owner or owners following completion of the Property Works including the work described in clause 11.4(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 a Non-RMS Parcel where:
 - (A) such owner or owners have not duly signed a certificate in the form of Schedule 18; 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 11.4(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 11.4.
- (c) Where any Property Works are required to be carried out on a Non-RMS 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 with sufficient access to carry out the Property Works from either:
 - (i) the date notified in the notice under clause 11.4(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 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 11.4(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 those Property Works in a manner which minimises inconvenience and disruption to the owners, occupiers and users of the Non-RMS Parcel.
- (f) The Project Company must:
 - (i) rehabilitate any part of a Non-RMS Parcel to the state agreed with the owner of such Non-RMS Parcel prior to commencing the work or, if no such agreement is reached, the state it was in immediately prior to the Project Company obtaining access; and
 - (ii) otherwise repair 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 11.4.

11.5 **Extra Land**

- (a) The Project Company must:

- (i) procure for itself, at its own cost, the occupation or use of or relevant rights over any land or buildings in addition to the Construction Site which are necessary or which it requires for the execution of the Project Company's Activities (which may include additional land or buildings required for the Third Party Works); and
 - (ii) 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 18; and
 - (B) the claim or Loss arises out of or in connection with the Project Company's Activities.
- (b) 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 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 Company's Activities related to the ability of the Project Company or its Subcontractors to obtain access to Extra Land.

11.6 Access and inspection by RMS

- (a) The Project Company must 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 Construction Site), the Environmental Representative, the Independent Certifier and the personnel referred to in clause 40.3(b):
- (i) subject to reasonable safety and security constraints (including compliance with the Contractor's reasonable access rules, site induction requirements and safety and security procedures), have 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 Construction Site and Extra Land;
 - (B) the Project Works and the Temporary Works;
 - (C) the Motorway, Maintenance Areas and Motorway Stratum;
 - (D) all other areas relevant to the Project Company's Activities; and
 - (E) the Design Documentation and any other documentation created for the purposes of the Project Company's Activities; and
 - (ii) be entitled to exercise this right of access for the purposes of:

- (A) observing progress in and inspecting the Project Company's Activities and monitoring compliance by the Project Company with its obligations under this deed;
 - (B) seeking comments from others in respect of the Project Company's Activities; and
 - (C) exercising any right or performing any obligation which RMS has under any Project Document.
- (b) The Project Company must provide RMS, RMS's Representative, WDA and the Independent Certifier with every reasonable facility necessary for the inspection of the Project Company's 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).
 - (d) If RMS believes that the Project Works or the Temporary Works are not being constructed, or the Project Company's Activities are not being carried out, in accordance with the requirements of this 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 11.6(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 11.6(d) and the Project Company does not give a notice under clause 11.6(e) (or if the Project Company does give a notice under clause 11.6(e) and the Independent Certifier determines that the Project Works or the Temporary Works are not being constructed, or the Project Company's Activities are not being carried out, in accordance with the requirements of this deed), the Project Company must correct the non-conformance or the Defect the subject of the notice under clause 11.6(d).
 - (g) Neither RMS nor RMS's Representative, WDA nor any person authorised by RMS under clause 11.6(a) owes any duty to the Project Company to:
 - (i) inspect the Project Company's 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 Company's Activities or of any construction, maintenance or repair by RMS, RMS's Representative, WDA or any person authorised by RMS under clause 11.6(a) will in any way lessen or otherwise affect:
 - (i) the obligations or warranties of the Project Company 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.

11.7 Physical conditions

- (a) Without limiting clause 11.8(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, the Project Company has:
- (i) examined the RMS Project Documents, the Construction Site and its surroundings, and any other information that was made available in writing by RMS, WDA or any other person on RMS's or WDA's behalf, to the Project Company for the purpose of submitting a proposal for the Project;
 - (ii) 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;
 - (iii) 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 Company's Activities;
 - (iv) informed itself of:
 - (A) all matters relevant to the employment of labour at the Construction Site; and
 - (B) all industrial matters relevant to the Construction Site, the Maintenance Site and the Project Company's Activities;
 - (v) 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;
 - (vi) 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
 - (vii) 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.
- (b) Without limiting or otherwise affecting clauses 11.7(c), 11.7(d) or 11.8, RMS makes no representation and gives no warranty to the Project Company in respect of:
- (i) the Site Conditions likely to be encountered during the execution of the Project Company's Activities or otherwise in respect of the condition of:
 - (A) the Construction Site, Extra Land or their surroundings; or

- (B) any structure or other thing on, under, above or adjacent to the Construction 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 Construction Site or Extra Land.
- (c) Subject to clause 11.11A, the Project Company accepts:
 - (i) the Construction Site and any Extra Land; and
 - (ii) any structures or other things on, above or adjacent to, or under the surface of, the Construction Site and any Extra Land,

in their present condition subject to all defects and Site Conditions and agrees that it is responsible for, and assumes 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 Company's Activities.
- (d) The Project Company must investigate, design and construct the Project Works and the Temporary Works in accordance with this deed and acknowledges that it will not be relieved of its obligations under this deed, irrespective of:
 - (i) the Site Conditions encountered in performing the Project Company's Activities;
 - (ii) whatever may be the condition or characteristics (including all sub-surface conditions) of:
 - (A) the Construction 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 Construction Site or any Extra Land, the Environment or their surroundings; and
 - (iii) any assumptions, projections, estimates, contingencies or otherwise that the Project Company may have made in relation to the Site Conditions or the conditions or the characteristics of any of the matters referred to in clause 11.7(d)(ii).

11.8 Information Documents

- (a) The parties acknowledge that, on the date of this deed, the Contractor is to sign the Deed of Disclaimer and provide it to RMS or WDA in respect of information (including Information Documents) provided by RMS or WDA to the Contractor.
- (b) Without limiting or otherwise affecting clause 11.8(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 a schedule 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 11.8(c) applies to the Information Document or part thereof; and
 - (B) where an Information Document or any part thereof forms a schedule 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 and WDA will not be liable upon any Claim by the Project Company or the Contractor 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 by WDA or RMS to provide any information to the Project Company.
- (c) The Project Company:
 - (i) warrants that it did not in any way rely upon:
 - (A) any information, data, representation, statement or document made by, or provided to the Project Company, by WDA, RMS or anyone on behalf of WDA or RMS or any other information, data, representation, statement or document for which RMS is responsible or may be responsible whether or not obtained from WDA, RMS or anyone on behalf of WDA or 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 Company's Activities but nothing in this clause 11.8(c)(i) will limit or otherwise affect the Project Company's obligations under this 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 11.8(c)(i) and 11.8(c)(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 11.8(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 or any other person to whom the Information Documents are disclosed by the Project Company or a failure by RMS or WDA to provide any information to the Project Company; or
- (iv) the Information Documents being relied upon or otherwise used by the Project Company or its 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.

11.9 **Artefacts**

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

The Project Company must upon the discovery of any Artefact on or under the surface of the Construction 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 the Project Company's Activities except to the extent otherwise:
 - (i) directed by RMS's Representative;
 - (ii) ordered by a court or tribunal; or
 - (iii) required by Law.

11.10 **Native Title Claim**

- (a) If there is a Native Title Claim with respect to the Construction Site or the Maintenance Site, or any part of it, the Project Company must continue to perform its obligations under this 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 11.10(a)(i), RMS may by written notice direct the Project Company to suspend any or all of its obligations under this deed and the Project Company must comply with that notice until such time as RMS gives the Project Company further written notice.

11.11 Contamination

- (a) If the Project Company discovers any Contamination or potential Contamination in, on or under the Construction Site, the Extra Land, the Motorway Stratum or the Licensed Motorway Stratum (whether or not the Project Company or its Related Parties have caused or contributed to that Contamination), it must:
 - (i) notify RMS immediately of the discovery of the Contamination or potential Contamination; and
 - (ii) give any notice required by Law relating to the Environment.
- (b) The Project Company must comply, and ensure that its Related Parties comply, with any Contamination Notice relating to Contamination referred to in clauses 11.11(e)(i) or (e)(ii) which is on, in, under, over or that emanated or is emanating from the Construction Site, the Extra Land, the Motorway Stratum or the Licensed Motorway Stratum, regardless of whether:
 - (i) the Contamination Notice is addressed to RMS, the Project Company or some other person; or
 - (ii) the Contamination occurred before or after the Project Company or its Related Parties were given access to the relevant land.
- (c) If RMS, the Project Company or any other person receives a Contamination Notice (other than a Contamination Notice relating to Contamination referred to in clauses 11.11(e)(i) or 11.11(e)(ii)), RMS may:
 - (i) direct the Project Company to provide RMS and any person authorised by RMS with such access to the Construction 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 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 11.7, the Project Company bears the risk of all Contamination on, in, over, under, about or migrating to or from the Construction Site or any Extra Land:
 - (i) which is not pre-existing and is introduced, caused or contributed to by the Project Company and its Subcontractors; or
 - (ii) is:
 - (A) pre-existing and is excavated by the Project Company or its Subcontractors in the performance of the Project Works and Temporary Works; or
 - (B) pre-existing (unless it is not necessary to excavate the Contamination in order to achieve those elements of Completion set out in paragraph 1 of Schedule 37 by the Date for Completion),

and, to the extent clauses 11.11(a)(i) or 11.11(a)(ii) applies, the Project Company must:

- (iii) dispose of, or otherwise deal with, such Contamination in accordance with Law and the Environmental Documents;
- (iv) remediate the Construction Site and any Extra Land to the standard required by Law and the Environmental Documents 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 11.11(e)(i) or 11.11(e)(ii) or any failure by the Project Company to comply with its obligations under this clause 11.11.
- (g) If any Contamination constitutes or involves a Compensable Site Condition under clause 11.11A, then the Project Company's rights and entitlements in complying with clause 11.11 in respect of that Contamination will be determined in accordance with clause 11.11A.

11.11A Compensable Site Conditions

- (a) Compensable Site Conditions are physical conditions or characteristics of the Project Site which satisfy all of the following criteria:
 - (i) which consist of one or more objects or substances that:
 - (A) it is reasonable to conclude were introduced and positioned by deliberate human intervention on the Project Site; and
 - (B) are specified in the definition of "Compensable Site Conditions" in clause 1.1, subject to satisfaction of the other requirements of this clause 11.11A(a); and
 - (ii) which were:
 - (A) in existence as at the date of this deed on the Project Site; or
 - (B) in existence as at the date of this deed on the surroundings to the Project Site and which migrated after the date of this deed to the Project Site and the Local Areas, except to the extent that the migration could have been prevented or minimised by the Project Company or any of its Subcontractors by the implementation of measures that would have been taken by a prudent and competent person in the position of the Project Company or its Subcontractors (as the case may be); and
 - (iii) (subject to clause 11.11A(b)) which:
 - (A) were not known, or substantially known, to the Project Company;
 - (B) differ materially in nature or scope from the physical conditions or characteristics that could have been reasonably anticipated by a

prudent and competent person in the position of the Project Company, who had examined:

- (aa) all information made available in writing by RMS, WDA or by anyone on behalf of RMS or WDA to the Project Company up to the date of this deed;
 - (bb) all information relevant to the risks, contingencies and other circumstances having an effect on this deed and obtainable by the making of reasonable enquiries; and
 - (cc) the Project Site; and
- (iv) which unavoidably:
 - (A) necessitate a Change; and/or
 - (B) delay achievement of Construction Completion of the Project Works.
- (b) The requirements of clause 11.11A(a)(iii) only apply to those Compensable Site Conditions set out in paragraphs (b), (e), (f) and (g) of the definition of "Compensable Site Conditions" in clause 1.1.
- (c) If during the execution of the Project Company's Activities the Project Company becomes aware of a Compensable Site Condition, the Contractor must:
 - (i) notify RMS's Representative of the existence and possible scope of the Compensable Site Condition as soon as practicable and in any event within two days of so becoming aware;
 - (ii) except to the extent necessary pursuant to clauses 9.7, 9.8 and 9.9, not disturb the Compensable Site Condition without the approval of RMS's Representative; and
 - (iii) within seven days of so becoming aware, provide a Compensable Site Condition Notice to RMS's Representative.
- (d) A Compensable Site Condition Notice is a notice in writing which includes:
 - (i) detailed particulars of why the Project Company believes the relevant condition or characteristic constitutes or involves a Compensable Site Condition;
 - (ii) the alternative measures that the Project Company considers are necessary and practicable to deal with the Compensable Site Condition, including a preliminary estimate of the extent to which each such alternative has a resourcing, cost, disruption or delay impact; and
 - (iii) any other information that the Project Company considers is relevant in the circumstances.
- (e) Following receipt of a Compensable Site Condition Notice, RMS's Representative may request any additional information it reasonably requires from the Project Company to assess the Compensable Site Condition Notice (**Additional Project Company Information**).
- (f) If the condition referred to in the Compensable Site Condition Notice constitutes or involves a Compensable Site Condition, the provisions of clause 14 will be applied (as if RMS had given a Change Order under clause 14.1(a)) except that no regard

will be had to the value of, and the Project Company waives any entitlement in respect of, any additional work carried out, constructional plant used or costs incurred in respect of the Compensable Site Condition earlier than seven days before the date on which the Project Company gives the written notice under clause 11.11A(c)(iii).

- (g) The entitlements referred to in clause 11.11A(f) will be the Project Company's sole remedy, and the Project Company will have no entitlement to and RMS will not be liable for any other Claim arising out of or in connection with a Compensable Site Condition.
- (h) Within four days of receipt of:
 - (i) the Compensable Site Condition Notice; and
 - (ii) the Additional Project Company Information (if any),whichever is later, RMS's Representative must state whether it believes the condition referred to in the Compensable Site Condition Notice constitutes or involves a Compensable Site Condition and notify the Project Company accordingly.
- (i) If RMS's Representative does not give a notice under clause 11.11A(h) within the time period stated in clause 11.11A(h), RMS's Representative is deemed to have stated that the condition referred to in the Compensable Site Condition Notice does not constitute or involve a Compensable Site Condition.

11.12 Environmental Representative

- (a) The Environmental Representative is to be engaged by the Project Company and the Contractor at the Contractor's cost on the terms of the Deed of Appointment of Environmental Representative.
- (aa) The Project Company must procure that the Environmental Representative will perform the functions of the Environmental Representative or the ER under the Planning Approval and this deed.
- (b) The Project Company acknowledges that the Environmental Representative is:
 - (i) obliged to act independently of the Project Company and 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 oversee the implementation of all environmental management plans and monitoring programs required under the Planning Approvals and will advise the Project Company upon achievement of the outcomes contemplated in the Planning Approvals; and
 - (iv) required to advise the Project Company on the Contractor's compliance with the Planning Approvals.
- (c) The Project Company must provide, and must ensure that the Contractor provides, the Environmental Representative with all information and documents and must allow, and must ensure that the Contractor allows, the Environmental Representative:
 - (i) to attend such 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 Contractor complies, 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 Contractor does 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 or the Contractor to make any Claim against RMS.

12. **QUALITY**

12.1 **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 in accordance with Schedule 33, including in accordance with the applicable requirements of the SWTC, including section 10.5 and Appendices J01 and J02 of the SPR and the Quality Plan.
- (b) The Project Company must develop and implement a Quality Plan in accordance with this deed, including the SWTC.

12.2 **Access to Information**

- (a) Without limiting any other provision of this deed:
 - (i) RMS may at any time notify the Project Company that it requires access to any information held by the Project Company which relates to the Project Company's Activities;
 - (ii) upon receipt of a notice under clause 12.2(a)(i), the Project Company must immediately provide RMS (and any person authorised by RMS) with access to, or a copy of, the required information, except to the extent that the information is subject to legal professional privilege; and
 - (iii) RMS (and any person authorised by RMS) may review, copy, retain or otherwise deal with such information.

- (b) The Project Company acknowledges that RMS may require information pursuant to this clause 12.2 to facilitate the procurement of other contracts as part of the WestConnex Program of Works, or to provide to an existing or prospective financier or equity investor.

12.3 Independent Certifier

- (a) The Independent Certifier is to be engaged by RMS and the Project Company 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
 - (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;
 - (ii) the Independent Certifier, when acting in its role as Independent Certifier, is obliged to act independently of RMS, the Project Company and any of their respective Related Parties, and is not an employee, agent or consultant of RMS or the Project Company; and
 - (iii) any determination by the Independent Certifier in respect of a matter required by this 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 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 Company's 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 11.6.
- (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 Project Works, other than those relating to the 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.

12.4 Not used

12.5 Replacement of Independent Certifier

- (a) If an Independent Certifier Deed is terminated before its scheduled expiry, or if any incumbent Independent Certifier ceases to act as Independent Certifier, the Project Company and RMS must, unless otherwise agreed by RMS and the Project Company, prior to termination or cessation, and in any case within 10 Business Days after the termination of an Independent Certifier Deed or cessation, whichever is applicable, appoint another person to act as Independent Certifier.
- (b) If RMS and the Project Company cannot agree such appointment, RMS and the Project Company 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.

12.6 No relief from obligations

The Project Company will not be relieved from any of its Liabilities or responsibilities under this deed (including under clause 17) or otherwise according to Law nor will the rights of RMS against the Project Company, whether under this deed or otherwise according to Law be limited or otherwise affected by or as a consequence of any of the following:

- (a) the implementation of, and compliance with, any quality system or the Quality Plan by the Project Company;
- (b) compliance with any requirements of the Independent Certifier Deed;
- (c) any release, authorisation, approval or agreement by RMS's Representative, or any other person acting on behalf of RMS or RMS's Representative; or
- (d) 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
- (e) 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 33.

13. DESIGN AND DESIGN DOCUMENTATION

13.1 Design development

- (a) 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 2 Business Days 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 2 Business Days 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.

13.2 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 of, or the reliance by the Project Company upon, the Concept Design in performing the Project Company's Activities and that such use and reliance will not limit any of the Project Company's obligations under this deed.
- (b) The Project Company is responsible for, and assumes the risk of, any Loss it 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 is 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; and
 - (B) differences required to ensure that:
 - (aa) the Project Works will:
 - (a) upon Completion be fit for their intended purposes; and
 - (b) thereafter, at all relevant times during the Term (assuming no early termination), remain fit for their intended purposes;
 - (bb) the Temporary Works will at all relevant times be fit for their intended purposes;

- (cc) the Motorway will be capable of achieving Final Handover at the end of the Term;
- (dd) the M4 West Construction Period Maintenance will be completed in accordance with; and
- (ee) upon Completion, the design life of each part of the Project Works will meet or exceed the design life standards specified in section 4.7 of the SPR,

and satisfy the requirements of this deed, irrespective of any assumptions, projections, estimates, contingencies or otherwise that the Project Company may have made in relation to any of the matters set out in clauses 13.2(b)(i) or 13.2(b)(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, despite the Concept Design (as further developed by the Project Company under this 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 but nothing in this clause 13.2(c)(ii) affects or limits clauses 13.2(a) or 13.2(b), which will prevail to the extent of any inconsistency;
- (iii) it will carry out and complete the Project Company's Activities in accordance with the Concept Design but nothing in this clause 13.2(c)(iii) affects or limits clauses 13.2(a) or 13.2(b), which will prevail to the extent of any inconsistency;
- (iv) it will not make any adjustments to the Concept Design without the prior written approval of RMS's Representative;
- (v) 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;
 - (C) the SWTC is proper, adequate and fit for its intended purpose, including for the purpose of enabling 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, including the other warranties in this clause 13.2;
 - (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 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 entitle the Project Company 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 and the other requirements of this 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;
 - (vii) construction will be carried out in accordance with the Design Documentation which the Project Company is entitled to use for construction purposes in accordance with clause 13.3(d);
 - (viii) construction carried out in accordance with the Design Documentation which the Project Company is entitled to use in accordance with clause 13.3(d) will satisfy the requirements of this deed; and
 - (ix) the Project Works will:
 - (A) be completed in accordance with, and satisfy the requirements of, this deed;
 - (B) upon Completion, be fit for their intended purposes; and
 - (C) thereafter, at all relevant times during the Term (assuming no early termination), remain fit for their intended purposes;
 - (x) subject to clause 4.2, the Motorway will be capable of achieving Final Handover at the end of the Term;
 - (xi) the M4 West Construction Period Maintenance will be completed in accordance with, and satisfy the requirements of, this deed; and
 - (xii) upon Completion, the design life of each part of the Project Works will meet or exceed the design life standards specified in section 4.7 of the SPR.
- (d) The Project Company agrees that its obligations under, and the warranties given in, this clause 13.2 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.

13.3 Preparation of Design Documentation

- (a) The Project Company must give 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 in accordance with this clause 13.3.
- (b) The Project Company must develop and complete all Design Documentation in accordance with this deed and the Design Plan.
- (c) The Project Company must ensure that the Design Documentation for each discrete design element of the Project Works and the Temporary Works must be certified by the Project Company and verified by the Independent Certifier as:
 - (i) being appropriate for construction;
 - (ii) complying with this deed including the SWTC and, in particular, the durability requirements in section 4.8 of the SPR and the design life requirements of section 4.7 of the SPR; and
 - (iii) certified by the Project Company as not involving or constituting a Change which has not been the subject of a Change Order or a notice issued by RMS under paragraph 2.3 of the Change Procedure or a notice under clause 14,

in accordance with the Project Company Documentation Schedule.

- (d) Unless otherwise agreed in writing by RMS, the Project Company must not use for construction purposes any Design Documentation to the extent that it has not been:
 - (i) certified by the Project Company under clause 13.3(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 Project Company Documentation Schedule addressed by the Independent Certifier as part of the verification,

in accordance with the Project Company Documentation 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 performance of the Project Company;
 - (ii) RMS does not assume a duty or owe a duty to the Project Company to review the SWTC, Concept Design or Design Documentation for errors, omissions or compliance with the requirements of this deed, or to consult with the Project Company, or make any comments regarding any Design Documentation; and
 - (iii) neither:

- (A) any review or rejection 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 Design Documentation by the Independent Certifier,
- will lessen or otherwise affect:
- (C) the Project Company's warranties under clause 13.2 or any of its other Liabilities or responsibilities under this deed or otherwise according to Law; or
 - (D) RMS's rights against the Project Company, whether under this deed or otherwise according to Law.

13.4 **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 13.4(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 13.4(a)(ii)(A), the Project Company will not be regarded as being in breach of this deed to the extent that it disregarded the relevant Change in Codes and Standards.
- (c) If RMS's Representative gives a notice under clause 13.4(a)(ii)(B), the Project Company 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 13.4(a)(ii)(B) complied, or would have complied, with the requirements of this 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 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).

14. CHANGES

14.1 Either party may propose a Change

- (a) RMS may require the Project Company to carry out a Change in accordance with section 1 of the Change Procedure set out in Schedule 34.
- (b) The Project Company may propose a Change to RMS in accordance with paragraph 2 of the Change Procedure set out in Schedule 34.

14.2 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 14.2(a) is given in respect of a Pre-Agreed Change by the relevant date specified in Schedule 35, this deed will be deemed to be amended in accordance with the relevant amendments set out in Schedule 35 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 14.2(b), the Project Company, in respect of that Pre-Agreed Change:
 - (i) must carry out its obligations under this deed as amended by clause 14.2(b); and
 - (ii) acknowledges that:
 - (A) the Change Costs for each Pre-Agreed Change is as set out in Schedule 35;
 - (B) the payment of the Change Costs set out in Schedule 35 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 suffers or incurs arising out of or in connection with the issue of such a notice and the Project Company will not be entitled to be paid any amount in respect of the Pre-Agreed Change; and
 - (C) the Project Company is not entitled to make any Claim for:
 - (aa) any acceleration to the carrying out of the Project Company's Activities which the Project Company must perform at any time in order to achieve Completion by the Date for Completion; or
 - (bb) any delay to the carrying out of the Project Company's Activities,in connection with the issue of such a notice or the amendment of this deed pursuant to clause 14.2(b).
- (d) Nothing in this clause 14.2 prevents RMS's Representative from issuing a Change Proposal or a Change Order pursuant to clause 14.1 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 35.

- (e) If RMS's Representative issues a Change Order pursuant to clause 14.1 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 35 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 14.1.

14.3 Payment for Changes

- (a) If a Change directed by RMS in accordance with clause 14.1(a) or clause 14.2(e) results in Change Costs:
 - (i) if RMS directed the Project Company to proceed to implement the Change under section 1.4(b), section 1.7(b) or section 1.7(e) of the Change Procedure the Project Company may claim 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 section 1.7(d) or section 1.9 of the Change Procedure, RMS must pay the Project Company the Change Costs:
 - (A) pending determination by RMS pursuant to section 1.7(d) of the Change Procedure or determination in accordance with the Dispute Resolution Procedure, as reasonably determined by RMS; and
 - (B) following any determination referred to in clause 14.3(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 14.3(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 14.1(a), clause 14.2(e) or section 1 of the Change Procedure results in Change Savings (or in the case of a Change directed by RMS under section 2 of the Change Procedure, is expected to result in Change Savings, as advised by the Project Company under section 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 14.1(a), clause 14.2(e) or section 1 of the Change Procedure, RMS is entitled to receive 100% of the Change Savings; and
 - (ii) in the case of a Change directed by RMS under section 2.3 of the Change Procedure, RMS is entitled to receive 50% of the greater of:
 - (A) the actual Change Savings; and
 - (B) the estimated Change Savings (as advised by the Project Company under section 2.2(a)(iii) of the Change Procedure).
- (c) Where an amount is payable to RMS pursuant to clause 14.3(b) then to the extent that it relates to the Project Works, this may be:
 - (i) set off against Change Costs in respect of the Project Works payable by RMS to the Project Company under clause 14.3(a); or

- (ii) 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
 - (iii) 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 14.3(c)(iii) 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, the Project Company had to give the Equity Investors the lower of the:
- (i) Equity Return they would have received if the Change had not been made; and
 - (ii) Projected Equity Return.
- (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 for any Loss or otherwise upon any Claim arising out of or in any way in connection with any Change.

14.4 **Project Company's entitlements**

This clause 14 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 14 otherwise than in accordance with the terms of this deed.

14.5 **Approvals for Changes**

- (a) Subject to clause 14.5(b), the Project Company must apply for and obtain 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, clauses 7.3 and 7.4 will apply.
- (c) The Project Company must implement the Change once the Approvals referred to in this clause 14.5 have been amended, modified or granted to permit the Change to be implemented.

15. **CONSTRUCTION**

15.1 **Construction**

- (a) The Project Company must construct the Project Works and the Temporary Works:
- (i) in accordance with the requirements of this deed including:

- (A) the SWTC;
 - (B) the Design Documentation which the Project Company is entitled to use for construction purposes in accordance with clause 13.3(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 14.2; 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 the Temporary Works will at all relevant times be fit for their intended purposes;
 - (iv) so that the Project Works will:
 - (A) upon Completion be fit for their intended purposes; and
 - (B) thereafter, at all relevant times during the Term (assuming no early termination), remain fit for their intended purposes;
 - (v) the Motorway will be capable of achieving Final Handover at the end of the Term; and
 - (vi) upon Completion, the design life of each part of the Project Works will meet or exceed the design life standards specified in section 4.7 of the SPR.
- (b) The Project Company warrants that the Project Works will:
 - (i) upon Completion, be fit for their intended purpose; and
 - (ii) thereafter, at all relevant times during the Term (assuming no early termination), remain fit for their intended purpose.
 - (c) In carrying out the Project Company's Activities, the Project Company must:
 - (i) provide all things and take all measures necessary to protect people and property;
 - (ii) avoid unnecessary or unreasonable interference with the passage of people and vehicles; and
 - (iii) prevent nuisance and unreasonable noise and disturbance.

15.2 Performance of Project Company's Activities

- (a) Without limiting clause 15.1, in performing the Project Company's Activities, the Project Company must:
 - (i) act in a timely and expeditious manner; and

- (ii) once it has commenced any construction activities on the Construction Site, regularly and diligently proceed with the construction of the Project Works and the Temporary Works in accordance with this deed.
- (b) Without limiting clause 15.1, the Project Company warrants that it will perform the Project Company's Activities using the workmanship and Materials required by this deed and which are fit for their intended purposes.

15.3 Training management

The Project Company must satisfy 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 9.5(c);
- (d) co-operating with and assisting RMS with any reviews undertaken by RMS of the Project Company's compliance with the Training Management Guidelines;
- (e) maintaining records evidencing the Project Company's compliance with the Training Management Guidelines; and
- (f) making available all records maintained in accordance with clause 15.3(e) to RMS.

15.4 Cleaning up

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

15.5 Signage

- (a) Subject to clause 15.5(b), the Project Company must 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 Construction 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 may only (with the prior written approval of RMS) erect the following signage on or near the Construction Site or Local Areas (as applicable):
 - (i) temporary directional signage to assist businesses in the vicinity of the Construction Site, access to which has been, or is likely to be, adversely affected by the Project Company's 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 Company's 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 Construction Site.

15.6 **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 adopts or proposes to adopt is impractical or impossible or that the Project Company, with or without the approval of RMS's Representative, uses another work method will:

- (a) not entitle the Project Company 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 to be frustrated.

15.7 **As constructed documentation and reports**

The Project Company must prepare and submit 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.

16. **TIME AND COMPLETION**

16.1 **Start and progress**

The Project Company must:

- (a) subject to clause 5, start to perform the Project Works and the Temporary Works from the date of this deed; and
- (b) regularly and diligently progress the Project Works and the Temporary Works in accordance with this deed to achieve Completion of the Project Works.

16.2 **Date for Completion**

The Project Company must use its best endeavours to achieve Completion by the Date for Completion.

16.3 **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 Company's Activities, including all design and construction activities (including the 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 program for the Project Company's Activities and delays which may have occurred; 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, by RMS or RMS's Representative in connection with the program, nor the inclusion of the Overall D&C Program as a schedule to this deed, will:
 - (i) relieve the Project Company from or alter its Liabilities or obligations under this deed, especially (without limitation) the obligations of the Project Company under clause 16.2;
 - (ii) evidence or constitute notification of a delay or the claiming of, or the granting of, any relief relating to a Qualifying Delay, or a Direction by RMS's Representative to accelerate, disrupt, prolong or vary any, or all, of the Project Company's Activities; or
 - (iii) affect the time for performance of RMS's or RMS's Representative's obligations under this deed, including obliging RMS or RMS's Representative to do anything earlier than is necessary to enable the Project Company to achieve Completion by the Date for Completion.
- (e) If the Project Company chooses to compress the Project Company's 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 to achieve Completion before the Date for Completion; and
 - (ii) the time for the carrying out of RMS's or RMS's Representative's obligations will not be affected.

16.4 Risk and notice of delay

- (a) The Project Company accepts the risk of all delays in, and disruption to, the carrying out of the Project Company's Activities and performance of its obligations, and the obligations of its Related Parties, under the RMS Project Documents both before and after the Date for Completion.
- (b) The Project Company must within 8 Business Days of when the Project Company first became aware, or should reasonably have first become aware, of an occurrence causing any delay or which is likely to cause delay to the Project Company's Activities, give RMS's Representative written notice of any delay or likely delay to the carrying out of the Project Company's Activities, details of the cause and how the Date for Completion is likely to be affected (if at all).

16.5 Delay

If:

- (a) the Project Company becomes aware of any matter which will, or is likely to, give rise to a delay in the Project Company achieving Completion; or
- (b) on or after the date which is 18 months after Financial Close, the Independent Certifier reasonably believes that the Project Company will not achieve Completion by the Date for Completion and gives the Project Company a written notice to that effect,

then:

- (c) in the case of clause 16.5(a), the Project Company must 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, to Mitigate the effects of the delay; and
- (d) in the case of clause 16.5(b), promptly provide RMS with a detailed corrective action plan showing how it proposes to Mitigate the effects of the delay.

16.6 **Corrective action plan**

- (a) RMS may within 5 Business Days of receipt of a corrective action plan under clause 16.5 give written notice to the Project Company that it does not believe that implementation of the corrective action plan will enable the Project Company to Mitigate the effects of the delay.
- (b) If RMS gives the Project Company a notice under this clause 16.6 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 16.6 will continue to apply until RMS does not issue a notice under this clause 16.6.
- (c) The Project Company must thereafter diligently pursue a corrective action plan for which RMS does not issue a notice under this clause 16.6.
- (d) The Project Company will not be relieved of any Liability or responsibility under this deed or otherwise at law arising out of or in connection with:
 - (i) any notice given by the Independent Certifier under clause 16.5(b) or given by RMS under this clause 16.6; or
 - (ii) implementation of any corrective action plan in respect of which RMS has or has not issued a notice under this clause 16.6.

16.7 **Not used**

16.8 **Not used**

16.9 **Not used**

16.10 **Qualifying Delays**

If the Project Company is or will be delayed in achieving Completion by an Excusable Cause of Delay, the Project Company may claim a Qualifying Delay in accordance with Schedule 36.

16.11 **Compensation Events**

- (a) If a Qualifying Delay is granted due to a Compensation Event, the Project Company is entitled to claim compensation from RMS in accordance with this clause 16.11.

- (b) If a Compensation Event occurs, the Project Company must:
 - (i) take all reasonable steps to Mitigate the consequences of the Compensation Event;
 - (ii) otherwise comply with all reasonable directions of RMS concerning the Compensation Event and the consequences thereof; and
 - (iii) ensure that its Related Parties comply with the requirements of this clause 16.11(b).
- (c) Subject to clauses 16.11(b), RMS must pay the Project Company:
 - (i) in respect of the Compensation Event described in paragraph (d) of the definition of "Compensation Event", the Project Company's Delay Costs incurred by the Project Company from 1 June 2015; or
 - (ii) in the case of any other Compensation Event, the Project Company's Delay Costs,

arising as a direct result of the Qualifying Delay caused by the Compensation Event for the period for which the Qualifying Delay was granted.
- (d) The Project Company's Delay Costs payable to the Project Company under clause 16.11(c) 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 any delay and disruption that:
 - (i) the Project Company encounters in carrying out the Project Works and the Temporary Works; and
 - (ii) arises out of, or in any way in connection with, a Compensation Event (including a breach of this deed by RMS).
- (e) Clause 16.11(d) 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 such delay or disruption 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 these circumstances other than in respect of the matters for which RMS may be liable under this clause 16.11.
- (f) Notwithstanding the occurrence of a Compensation Event, the Project Company must continue to perform all of its obligations under the Project Documents to the extent that the Project Company is not prevented from performing those obligations by that Compensation Event.

16.12 Additional Interim Compensation Events

- (a) RMS and the Project Company acknowledge and agree that in consideration for the Project Company entering into this deed and agreeing, pursuant to clause 3, to the staged procurement of the M4 West and the M4 East, RMS and the Project Company have agreed to the additional interim compensation event regime set out in this clause 16.12.
- (b) If an Additional Interim Compensation Event occurs, RMS must:
 - (i) reimburse the Project Company; or

- (ii) extend the Expiry Date,
- subject to and in accordance with Schedule 55A.

16.13 Completion process

- (a) The Project Company must give RMS's Representative and the Independent Certifier both:
 - (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 16.13(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 16.13(a), jointly inspect the Project Company's Activities at a mutually convenient time.
- (c) Within 2 Business Days of the joint inspection referred to in clause 16.13(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 16.13(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 38.

Thereafter, and subject to clause 16.13(g), RMS's Representative, the Project Company and the Independent Certifier must as soon as reasonably practicable jointly inspect the Project Company's Activities at a mutually convenient time.

- (e) Following the joint inspection under clause 16.13(d), the Independent Certifier must within 5 Business Days after receipt of a notice under clause 16.13(d), or of receipt of a notice under clause 16.13(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 39; 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 16.13(e)(ii)(A).

- (f) If the Independent Certifier issues a notice under clause 16.13(e)(ii), the Project Company must proceed with the Project Company's 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 16.13(d) and 16.13(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 16.13; 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 Company's Activities with this deed.

16.14 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;
 - (ii) be taken as an admission or evidence that the Project Works comply with this deed; or
 - (iii) prejudice any rights or powers of RMS or RMS's Representative.
- (b) Without limiting clause 16.14(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.

16.15 Defects or omissions

Notwithstanding that Completion may have occurred, the Project Company must as soon as practicable after Completion (and in any event within 6 months after the Date of Completion) correct any Defects which existed at the time of the issue of the Notice of Completion.

16.15A 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 3 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) RMS and the Project Company will:
 - (i) establish the Operational Readiness Group 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 6 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 16.15A(b)(i), to discuss the opening the Motorway (including the progress of the Project Company's Activities and the satisfaction of the Opening Conditions Precedent); and
 - (iii) convene a meeting of the Operational Readiness Group to inspect the Project Company's Activities within 10 Business Days after receiving an Operational Readiness Notice or a Further OR Notice.
- (c) RMS will within 10 Business Days after the inspection referred to in clause 16.15A(b)(iii) is carried out, give the Project Company a written notice informing the Project Company either:
 - (i) that the Operational Readiness Group determines that the Opening Conditions Precedent have been satisfied;
 - (ii) containing a list of items which the Operational Readiness Group believes must be completed in order to satisfy the Opening Conditions Precedent; or
 - (iii) 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 16.15A(c)(ii).
- (d) If RMS issues a notice:
 - (i) pursuant to clause 16.15A(c)(i), clause 16.16 will apply; or
 - (ii) pursuant to clauses 16.15A(c)(ii) or 16.15A(c)(iii), the Project Company must proceed with the Project Company's 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 16.15A(b)(iii) and 16.15A(c) will re-apply.
- (e) 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; and
- (v) Project Company must give the Operational Readiness Group such access to the Construction Site, the Motorway, the Project Company's 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.

16.16 Opening of the Project Works

- (a) Except as expressly contemplated in the SWTC or clause 16.15A, the Project Works may not be opened for public use prior to the Motorway Opening Date. For the avoidance of doubt, nothing in this clause 16.16(a) prevents or restricts the Motorway from being open for the use of the public from the date of this deed.
- (b) The Project Company must open all traffic lanes of the Project Works 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 the Toll Collection System and levy tolls in relation to the Motorway in accordance with clause 21.
- (c) The Project Company must:
 - (i) give notice to RMS of its good faith estimate of the date on which it anticipates that a traffic lane of the Project Works could be opened for public use at least 60 Business Days before the anticipated date of opening and update that estimate as soon as practicable if it materially changes;
 - (ii) give notice to RMS of the date on which it intends to open the Project Works for public use at least 20 Business Days before to the intended date of opening;
 - (iii) otherwise liaise with RMS to ensure the opening of the Project Works is managed effectively;
 - (iv) effect all insurances required in relation to the Project Works under clause 26 prior to opening any part of the Project Works for public use; and
 - (v) do all things required to be done under this deed (including the SWTC) prior to the Project Works being opened to public use.
- (d) The parties acknowledge that, notwithstanding any provision of this deed, the opening of the Project Works 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.

16.17 **Not used**

17. **DEFECTS CORRECTION PERIODS**

17.1 **Correction of Defects**

- (a) The Project Company must correct all Defects in the Project Works during the relevant Defects Correction Period.
- (b) Without limiting clause 17.1(a), if during a Defects Correction Period, RMS discovers or believes there is a Defect in the Project Works, RMS may, without prejudice to any other rights which RMS may have under this deed or otherwise at law, give the Project Company a written direction specifying the Defect and requiring the Project Company to correct 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 17.1(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 17.1(b) prior to the expiration of the relevant Defects Correction Period and the Project Company does not give a written notice under clause 17.1(c) or, if it does, the Independent Certifier determines that a Defect exists, the Project Company must correct 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 Project 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.

17.2 **Project Works**

The Project Works (other than the Third Party Works) have:

- (a) a Defects Correction Period which begins on the Date of Completion and expires 24 months after the Date of Completion; and
- (b) a further Defects Correction Period of 12 months in respect of any work the subject of a direction under clause 17.1(b) during the Defects Correction Period, which begins on the date of the correction of the Defect (or the part of it).

17.3 Local Area Works

Each discrete part of the Local Area Works has:

- (a) a Defects Correction Period which begins when the relevant discrete part is complete, which will be when:
 - (i) either:
 - (A) the relevant Authority which has jurisdiction in respect of the discrete part of the Local Area Works gives written notice to the Project Company that the Authority is satisfied that the discrete part is complete; or
 - (B) if the Project Company is unable to obtain the notice referred to in clause 17.3(a)(i)(A) despite:
 - (aa) promptly seeking that notice upon completion of the discrete part of the Local Area Works;
 - (bb) giving the Relevant Authority not less than 20 Business Days to provide the notice requested; and
 - (cc) otherwise using their best endeavours to obtain that notice,
the Project Company gives RMS written notice that they have been unable to obtain that notice and that in their view, the relevant Local Area Works are complete; and
 - (ii) RMS and the Independent Certifier have been provided with a copy of the relevant notice,
and which expires 12 months after the relevant discrete part is complete; and
- (b) a further Defects Correction Period of 12 months in respect of any work the subject of a direction under clause 17.1(b) (relating to the discrete part of the Local Area Works) during the Defects Correction Period, which begins on the date of the correction of the Defect (or the part of it).

17.4 Utility Service Works

Each discrete part of the Utility Service Works has:

- (a) a Defects Correction Period which begins when the relevant discrete part is complete, which will be when:
 - (i) either:
 - (A) the relevant Authority which has jurisdiction in respect of the Utility Service gives written notice to the Project Company that the Authority is satisfied that the discrete part is complete; or
 - (B) if the Project Company is unable to obtain the notice referred to in clause 17.4(a)(i)(A) despite:
 - (aa) promptly seeking that notice upon completion of the discrete part of the Utility Service Works;

- (bb) giving the relevant Authority not less than 20 Business Days to provide the notice requested; and
 - (cc) otherwise using their best endeavours to obtain that notice,

the Project Company gives RMS written notice that it has been unable to obtain that notice and that in its view, the relevant Utility Service Works are complete; and
 - (ii) RMS and the Independent Certifier have been provided with a copy of the relevant notice,
- and which expires 12 months after the relevant discrete part is complete; and
- (b) a further Defects Correction Period of 12 months in respect of any work the subject of a direction under clause 17.1(b) (relating to the discrete part of the Utility Service Works) during the Defects Correction Period, which begins when:
 - (i) either:
 - (A) the relevant Authority with jurisdiction in respect of the Utility Service gives written notice to the Project Company that the Defect has been corrected; or
 - (B) if the Project Company is unable to obtain the notice referred to in clause 17.4(b)(i)(A) despite:
 - (aa) promptly seeking that notice upon completion of the discrete Defect;
 - (bb) giving the relevant Authority not less than 20 Business Days to provide the notice requested; and
 - (cc) otherwise using their best endeavours to obtain that notice,

the Project Company gives RMS written notice that it has been unable to obtain that notice and that in its view, the relevant Defect is Complete; and
 - (ii) RMS and the Independent Certifier have been provided with a copy of the relevant notice on the date of correction of the Defect (or the part of it).

17.5 **Property Works**

Each discrete part of the Property Works has:

- (a) a Defects Correction Period of 12 months, which begins upon the later of:
 - (i) the completion of that discrete part of the Property Works; and
 - (ii) the submission by the Project Company to RMS and the Independent Certifier of a certificate or signed statement (as the case may be) under clause 11.4; and
- (b) a further Defects Correction Period of 12 months in respect of any work the subject of a direction under clause 17.1(b) (relating to the discrete part of the Property Works) during the Defects Correction Period, which begins on the date of correction of the Defect (or the part of it).

17.6 **Failure by the Project Company to comply with direction**

If the Project Company fails to comply with a notice given under clause 17.1(b), RMS may (without limiting any other rights it may have including under clause 8.6) apply for a court order for specific performance.

17.7 **Rights not affected**

Neither RMS's rights, nor the Project Company's liability, whether under this 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:

- (a) the rights conferred upon RMS or the Independent Certifier by this clause 17 or any other provision of this deed;
- (b) the exercise of, or the failure by RMS or the Independent Certifier to exercise, any such rights; or
- (c) any direction of RMS under this clause 17.

18. **MOTORWAY STRATUM LEASE**

18.1 **Motorway Stratum Lease**

- (a) The parties acknowledge and agree that the Motorway Stratum 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 19A.
- (c) RMS must grant the Project Company the Motorway Stratum Lease and a licence over the Licensed Maintenance Areas in accordance with Schedule 19A.
- (d) Between the Date of Completion and the date on which the Motorway Stratum Lease is registered at Land and Property Information (NSW), the respective rights and obligations of RMS and the Project Company will be as set out in the draft Motorway Stratum Lease comprising Exhibit D and the parties will be bound by the provisions of the draft Motorway Stratum Lease comprising Exhibit D from and including the Date of Completion, even though the parties may not have executed the Motorway Stratum Lease or it may not have been completed in accordance with Schedule 19A.

18.2 **Easements**

RMS:

- (a) may create the Easements referred to in Appendix A to Schedule 19 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.

18.3 **Not used**

19. **OPERATION, MAINTENANCE AND REPAIR**

19.1 **General obligation**

- (a) Without limiting the Project Company's obligations under this clause 19:
- (i) on and from the date of this deed until the Expiry Date, the Project Company must operate the Motorway; and
 - (ii) on and from the Date of Completion until the Expiry Date, the Project Company must maintain and repair the Motorway and maintain and repair the Third Party Works,

so that:

- (iii) subject to clause 19.2, 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;
 - (iv) the performance of each part of the Motorway and the Third Party Works meets the performance standards specified in the SWTC;
 - (v) the Motorway and the Third Party Works will be capable of achieving Final Handover at the end of the Term;
 - (vi) the Project Works and the Third Party Works otherwise remain at all relevant times fit for their intended purposes and that Defects are corrected as soon as possible;
 - (vii) those parts of the Motorway which do not comprise the Project Works and Third Party Works will, subject to clause 4.2, otherwise remain at all relevant times fit for their intended purpose to the extent that such parts were fit for their intended purposes as at the date of this deed; and
 - (viii) 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 the SWTC (including in Appendix 9 of the Additional Project Deed Requirements) represent the minimum requirements which the Project Company must satisfy for the purpose of fulfilling the obligations specified in clause 19.1(a).
- (c) The Project Company bears the risk that:
- (i) compliance by it with the minimum requirements referred to in clause 19.1(b); and
 - (ii) without limiting clause 19.1(c)(i), the development of, and compliance with, maintenance standards of the kind referred to in the SWTC,

will not enable the obligations specified in clause 19.1(a) to be fulfilled.

- (d) Without limiting clause 19.1(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 19.1(b) to enable the obligations specified in clause 19.1(a) to be fulfilled.

19.1A **Maintenance during construction**

- (a) The Project Company must carry out all maintenance work specified in section 5.15 of the SPR (including all related documentation, asset condition assessment and reporting) on the Existing Motorway and all relevant completed parts of the Project Works, commencing from the date three months after the date of the D&C Deed until the Date of Completion. This clause 19.1A only applies until the Date of Completion.
- (b) Various types of maintenance activities, measures, intervention levels and response times are described in the SWTC. In addition to this information which describes the most common and minimum work to be carried out, the Project Company must undertake other maintenance activities:
 - (i) reasonably expected to provide for safe and uninterrupted passage of road users;
 - (ii) required due to the Project Works and as a consequence of the Project Company's Activities; and
 - (iii) required as a result of damage by traffic incidents, to the extent that the cost of the relevant maintenance activities does not exceed \$15,000 per incident. Where the cost of the maintenance activities required as a result of damage by traffic exceeds \$15,000 per incident, the Project Company is not required to undertake such maintenance activities unless directed to do so by RMS as a Change.
- (c) The Project Company must carry out any maintenance work that is required on roads and paths outside the Construction Site which results from the Project Works, the Temporary Works or the Project Company's Activities.
- (d) The Project Company must provide its maintenance management procedures to RMS's Representative within 60 days of the date that it is given access to the roads within the Construction Site pursuant to the Site Access Schedule.

19.1B Arrangement of a maintenance contractor

- (a) RMS and the Project Company acknowledge and agree that:
 - (i) as at the date of this deed, the Project Company has not procured a maintenance contractor for the performance of the maintenance and repair obligations under this deed after the Date of Completion; and
 - (ii) as part of ensuring a consistent approach to maintenance in the M4 corridor prior to the completion of the M4 East Project Works, RMS has agreed to provide the Project Company with details of RMS's current maintenance contractor(s) performing maintenance services in relation to the M4 motorway to the Project Company in accordance with this clause 19.1B.
- (b) RMS and the Project Company acknowledge and agree that Project Company is not obligated to enter into a maintenance contract with the maintenance contractor referred to in clause 19.1B(a).

19.1C Operations during construction

Without limiting its other obligations under this deed, the Project Company must operate the Motorway to ensure that, in carrying out and completing the Project Works and the Temporary Works, and except as expressly contemplated in this deed, all traffic lanes of the Existing Motorway (including all on-ramps, off-ramps, exits and entries) are at all times open to the public for the safe, continuous and efficient passage of vehicles.

19.2 **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 section 5.18 of the SPR, 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 19.15 or 22.3; 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.

19.3 **Performance of O&M Work**

- (a) Without limiting clause 19.1, 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, the Third Party Works 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, and the Third Party Works;
- (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.

19.4 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 9.5(e) for the Project Plans incorporated into the O&M Manuals under clause 9.5(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.

19.5 **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 19.1,

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 12 months.

- (b) If at the end of such 12 month period the non-conformances specified in a notice issued by RMS in accordance with clause 19.5(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 \$20 million (Indexed) in the form reasonably acceptable to RMS, as security for the Project Company's performance of its obligations under clause 19.1.

19.5A **Motorway Operator Services**

- (a) RMS and the Project Company acknowledge and agree that:
 - (i) as part of ensuring a consistent approach to the operation of the M4 corridor prior to the completion of the M4 East Project Works, the Transport Management Centre (being a division of Transport for New South Wales) (**TMC**) and RMS will perform the Project Company's operations obligations under this deed on an interim basis;
 - (ii) without limiting the terms of any arrangements between the Project Company, the TMC and RMS, in performing the Project Company's operations obligations under this deed, the TMC and RMS will apply a "best for network" approach in accordance with its standard operational procedures; and
 - (iii) it is anticipated that, subject to clause 19.6, the Project Company will procure a separate person(s) to perform the Motorway Operations Services in place of the TMC and RMS.
- (b) Unless and until the Project Company procures a separate person to perform the Project Company's operations obligations under this deed as contemplated by

clause 19.5A(a)(ii), the Project Company will be deemed to have fulfilled its obligations under this deed that are Motorway Operator Services.

19.6 **WestConnex Operational Integration**

- (a) The Project Company acknowledges and agrees that:
 - (i) the Project Works are intended to form part of the broader WestConnex Program of Works; and
 - (ii) RMS may, at any time during the Term, elect to require the Project Company, by notice in writing, to integrate the operation of the Motorway with the broader WestConnex Program of Works (or part thereof).
- (b) If RMS provides a notice to the Project Company as contemplated by clause 19.6(a)(ii), the Project Company must provide all cooperation, documents, information and other assistance as required by RMS in order to implement the integration of operations across the WestConnex Program of Works (or part thereof).
- (c) RMS and the Project Company acknowledge and agree that to achieve operational integration across the WestConnex Program of Works (or part thereof), the parties must enter into negotiations and thereafter negotiate in good faith in an endeavour to agree on a method of achieving the relevant operational integration.
- (d) RMS and the Project Company acknowledge that in any negotiations under clause 19.6(c), 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.

19.7 **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 Stratum, the Motorway and any Third Party Works to inspect and observe the operation, maintenance and repair of the Motorway and the maintenance and repair of the Third Party Works or to exercise any right or perform any obligation which RMS has under any Project Document.

19.8 **Changes to Motorway**

Subject to clause 14, 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.

19.9 Advertising signage

Subject to clause 15.5(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 the Third Party Works (or permit any third party to do so).

However, this clause 19.9 will not prevent the Project Company from installing and maintaining operational directional signage which is specified in the SWTC (but on the basis that the Project Company obtains all other necessary Approvals in respect of such signage).

19.10 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 owned by the Project Company or the subject of a lease or hire purchase agreement:

- (a) 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 lease or hire purchase agreement; and
- (b) which includes a right for the Project Company to assign its rights and obligations under the lease or hire purchase agreement to RMS (or its nominee) prior to the end of the term of such lease or hire purchase agreement on an early termination of this deed.

19.11 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 commercial terms negotiated on an arm's length basis having regard to the obligations of the Project Company under this deed; 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 19.12, the Project Company must not:

- (i) terminate the appointment of any Key Relevant Entity unless another person, in respect of which clause 19.11(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 an O&M Deed or to any other 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 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.

19.12 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, 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 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 19.12(a).

19.13 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 or any Third Party Works 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 or any Third Party Works of which it is aware.
- (b) If the Project Company provides or is required to provide a report to RMS in accordance with clause 19.13(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.

19.14 Final Handover

- (a) The parties must, if required by RMS, carry out joint inspections of the Motorway and Third Party Works at a mutually convenient time:
 - (i) 1 year prior to the Expiry Date; and
 - (ii) 6 months prior to the Expiry Date.
- (b) Following each inspection under clause 19.14(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 19.14(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 19.14(b) in accordance with the programme agreed or determined pursuant to clause 19.14(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**) 40% of all revenue collected by the Toll Collection System during the last 1 year or 6 months of the Term (as the case may be) until such time as the balance of the Escrow Account equals or exceeds 40% of the total estimated cost of the works (as agreed or determined pursuant to clause 19.14(b)); or

- (B) provide to RMS an unconditional undertaking for an amount equal to 40% of the estimated cost of the works (as agreed or determined pursuant to clause 19.14(b)),

as security for the performance of such works and the Project Company's or Trustee's other obligations under this clause 19.14.

- (d) Subject to its rights to have recourse to the monies held in the Escrow Account, RMS must pay the balance held in the Escrow Account to the Project Company within 20 Business Days after the Date of Final Handover.
- (e) As conditions precedent to Final Handover:
 - (i) there must be:
 - (A) no immediate repair work required to any part of the Motorway or the Third Party Works; and
 - (B) otherwise no Defects in the Motorway or the Third Party Works;
 - (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 and 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 and the Third Party Works after the expiry of the Term for a period of 12 months.
- (f) During the final 3 months 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 and the Third Party Works to a level of competency that will allow those personnel to manage, operate, maintain and repair the Motorway and the Third Party Works so that the obligations specified in clause 19.1 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 19.14(f) be completed to the reasonable satisfaction of RMS.
- (h) For a period of 12 months 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 and the maintenance and repair of the Third Party Works 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 6.2 and 6.3 of the Additional Project Deed Requirements, with respect to each:
 - (i) Asset Item of the Motorway and the Third Party Works referred to in the SWTC and, subject to clause 19.14(i)(ii), each Asset Type forming part of that Asset Item; and

- (ii) Asset Type or Asset Sub-Type of the Motorway and the Third Party Works specified in Appendix section 4.7 of the SPR,
- 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 Item, Asset Type or Asset Sub-Type or any part thereof is less than the "specified residual design life", as defined in sections 6.2 and 6.3 of the Additional Project Deed Requirements for the relevant Asset Item, 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 Item, 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 19.14(j); or
 - (ii) in any event, 60 Business Days after receipt of RMS's notice under clause 19.14(j),
- carry out all necessary work to ensure that the "residual design life" of the relevant Asset Item, Asset Type or Asset Sub-Type or part thereof is equal to the "specified residual design life" for the relevant Asset Item, 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 or the Third Party Works; and
 - (vi) in a manner which causes as little inconvenience as possible to:
 - (A) users of the Motorway or the Third Party Works;
 - (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 19.14(k) within the time specified, subject to clause 19.14(n), the Project Company must pay RMS (without limiting the provisions of clause 17) the cost determined by RMS under clause 19.14(j)(ii) as a debt due and payable by the Project Company to RMS.
- (m) Compliance by the Project Company with clauses 19.14(k) and 19.14(l) is a condition precedent to Final Handover.

- (n) Nothing in clause 19.14(l) will limit RMS's rights against the Project Company, whether under this deed or otherwise according to law in respect of any Defect.

19.15 Services conduits

- (a) The Project Company acknowledges that the Project Works must include conduits for the accommodation of RMS's cables in accordance with Appendix D08 of the SPR.
- (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, the Motorway Stratum and any Third Party Works 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.

19.16 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.

20. REPORTING AND NOTICES

20.1 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 20.1(a) are available to RMS at all reasonable times for examination, audit, inspection, transcription and copying.
- (d) Without limiting its obligations under clause 34, if this deed is terminated, the Project Company must give RMS all books of account and records referred to in clause 20.1(a) which are necessary for the continued operation, maintenance and repair of the Motorway and the maintenance and repair of the Third Party Works.
- (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 20.1(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 24 hourly basis, the daily numbers of vehicles using the Motorway by vehicle class (passenger or commercial) for each Tollable Section at the point of toll collection;
 - (ii) 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 21 of this deed; and
 - (iii) 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 21 of this deed.

20.2 Copies of notices

Each party must provide to the other party 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 party is 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.

20.3 **Advice regarding rights**

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

21. **PAYMENTS AND REVENUE**

21.1 **Tolls**

- (a) Subject to clause 21.1(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).

21.2 **Entitlement to toll revenue**

The Project Company will be entitled to all revenue collected by the Toll Collection System during the Term.

21.3 **Other revenue**

- (a) The Project Company must not (without the prior written approval of RMS) engage in, or permit the Motorway or the Motorway Stratum 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 Stratum 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 21.3(b) must be consistent with clause 2.2 of the Motorway Stratum Lease.
- (d) In giving or withholding approval to a proposal submitted to RMS pursuant to clause 21.3(b), RMS must act reasonably.

21.4 **Interoperability**

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

22. TRANSPORT NETWORK MANAGEMENT

22.1 No restrictions on RMS

The Project Company acknowledges that 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.

22.2 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 26B will not be closed (or materially reduced) during the Term.

22.3 Permitted RMS Activities

- (a) The Project Company acknowledges and agrees that, notwithstanding the terms of the Motorway Stratum Lease but subject to this clause 22.3, 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 vehicle, public transport, pedestrian or bicycle access to the Motorway;

- (ii) construct, operate and maintain any road or other means of vehicle, public transport, pedestrian or bicycle access above or below the Motorway;
 - (iii) construct, operate and maintain Utility Services (in whole or in part) in the Motorway Stratum;
 - (iv) construct, operate and maintain any other infrastructure or improvement (in whole or in part) in the Motorway Stratum; and
 - (v) connect any such Utility Services or other infrastructure or improvements to the Motorway or to any other structures located within the Motorway Stratum.
- (b) RMS must not undertake a Permitted RMS Activity:
- (i) prior to the Date of Completion where the Permitted RMS Activity involves construction or connection of the type referred to in clause 22.3(a), 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 and RMS has provided notice to the Project Company under clause 22.3(c)(i), then:
- (i) the Project Company must:
 - (A) give RMS and its nominees sufficient access to the Construction Site, the Motorway Stratum, 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 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:
 - (aa) installing such equipment as is necessary to prevent untolled use of the Motorway; and
 - (bb) 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 construction, operation and use of the Motorway;
 - (C) ensure that its Related Parties comply with the requirements of this clause 22.3(d)(ii); and
 - (D) pay to the Project Company the aggregate amount calculated in accordance with Schedule 42A; 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 22.3(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 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 22.3 (other than works contemplated by clause 22.3(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.

23. INTERFACES

23.1 Not used

23.2 Not used

23.3 Master Access Deed

- (a) In this clause 23.3, **Access Authority Instrument** means an AAI within the meaning of the Master Access Deed, in respect of the Rail Corridor Works, and the terms **Application Fee, Assessment Deposit, RailCorp's Costs, RailCorp's Facilities, RailCorp's Operations, Railway, Railway Corridor, Safety Interface Agreement** and **Track Possession** have the meanings given to them in the Master Access Deed.
- (b) The Master Access Deed has been entered into between RMS and RailCorp for the purpose of obtaining approval for the carrying out of the Rail Corridor Works. The Project Company acknowledges that it has carefully reviewed the Master Access Deed and that it is aware that:
 - (i) the Project Company has obligations to RMS which reflect those of RMS to RailCorp under the Master Access Deed;

- (ii) the balance of this clause 23.3 refers to the terms of the Master Access Deed as if they were directly between the Project Company and RailCorp even though those obligations are to be performed by the Project Company to RMS to satisfy RMS's obligations to RailCorp;
 - (iii) RMS will be responsible to RailCorp under the terms of the Master Access Deed and any Safety Interface Agreement (if any and insofar as it relates to the Project Company's Activities) in respect of all parts of the Project Company's Activities that relate to the Rail Corridor Works;
 - (iv) the Project Company will be responsible to RMS in respect of those parts of the Project Company's Activities that relate to the Rail Corridor Works which have been allocated to RMS; and
 - (v) RMS is relying upon the Project Company to properly perform the Project Company's Activities so that RMS can fully meet its obligations to RailCorp under the Master Access Deed and the relevant Safety Interface Agreement or otherwise at Law.
- (c) Without limiting any other part of this deed:
- (i) the Project Company must comply with, carry out and fulfil each condition, requirement and obligation of RMS relating to the Master Access Deed and the relevant Safety Interface Agreement as part of the Project Company's Activities, including those conditions, requirements and obligations which RMS is expressly or impliedly required to comply with, carry out and fulfil but only to the extent that those conditions, requirements and obligations relate to the scope and extent of the Project Works, Temporary Works or Project Company's Activities, so as to ensure that RMS is able to fully meet its obligations to the Master Access Deed and the relevant Safety Interface Agreement or otherwise at Law, except:
 - (A) for any obligation which, by its nature, can only be performed solely by RMS;
 - (B) as specified in Schedule 62;
 - (C) to the extent that RMS notifies the Project Company that it has already performed, or will be responsible for performing, an obligation, in which case the Project Company must cooperate in obtaining, producing and providing all necessary information and assistance to enable RMS to perform the relevant obligation, including participating in meetings with RMS and RailCorp if requested to do so by RMS;
 - (ii) in complying with clause 23.3(c)(i), the Project Company must take all action necessary to ensure RMS complies with its obligation to RailCorp relating to the Master Access Deed and the relevant Safety Interface Agreement within the time required, including, in the case of any notice given to RMS by RailCorp relating to a notice under clause 28.2(a) of the Master Access Deed to remedy a default under clause 28.1(a) or clause 28.1(b) of the Master Access Deed, to ensure RailCorp is not entitled to terminate:
 - (A) the Access Authority Instrument pursuant to clause 28.2(b)(iii) of the Master Access Deed; or
 - (B) the Master Access Deed pursuant to clause 28.2(b)(iv) of the Master Access Deed;

- (iii) the Project Company must, in carrying out the Project Company's Activities:
 - (A) comply with any directions of RMS's Representative in relation to compliance with the conditions and requirements of the Master Access Deed and the relevant Safety Interface Agreement;
 - (B) ensure that no act or omission of the Project Company constitutes, causes or contributes to any breach by RMS of its obligations to RailCorp relating to the Master Access Deed or the relevant Safety Interface Agreement;
 - (C) the Project Company must, if nominated by RMS, following a nomination by RailCorp under clause 11.3(b) of the Master Access Deed and in the Access Authority Instrument, procure that the Contractor accept appointment by RailCorp as Principal Contractor and, without limiting any obligations under this deed, perform as, and comply with the obligations of, the Principal Contractor under the Master Access Deed;
 - (D) provide to RMS's Representative at the same time as RailCorp, any notice or submission that the Project Company issues to RailCorp;
 - (E) provide to RMS's Representative promptly, and in any case within one Business Day of receiving it, a copy of any notice or other document received from RailCorp;
 - (F) ensure that RMS's Representative is notified sufficiently in advance of and invited to attend all proposed meetings between the Project Company and RailCorp; and
 - (G) otherwise act consistently with the terms of the Master Access Deed;
- (iv) whenever in connection with the terms of the Master Access Deed or the relevant Safety Interface Agreement RMS makes an acknowledgment or gives a release or warranty to RailCorp, then, subject to the other terms of this deed, the Project Company is deemed to make the same acknowledgement or give the same release or warranty to RMS on the same terms and conditions as the acknowledgement, release or warranty made or given by RMS in the same way as if the relevant terms of the acknowledgement, release or warranty were set out in full in this deed with the appropriate changes to the parties;
- (v) the Project Company acknowledges that the Master Access Deed contains a number of provisions pursuant to which RMS acknowledges that RailCorp has made no representation or other inducement, except for representations or inducements expressly set out in the Master Access Deed, and that RMS in entering into the Master Access Deed has not relied on any representation or other inducement by or on behalf of RailCorp, except for representations or inducements expressly set out in the Master Access Deed. The Project Company agrees that RMS similarly makes and has made no representation or other inducement, except for representations or inducements expressly set out in this deed or the Master Access Deed, on which the Project Company relies in entering into this deed, except for representations or inducements expressly set out in this deed or the Master Access Deed;

- (vi) the Project Company bears the risk of all Contamination in accordance with clause 22 of the Master Access Deed on the same basis as if the relevant provisions of clause 22 of the Master Access Deed had been set out in full in this deed, mutatis mutandis;
 - (vii) subject to clause 23.3(g) and clause 23.3(h), the Project Company acknowledges and agrees that RMS will not be liable upon any Claim by the Project Company arising out of or in connection with any act or omission by RMS or RailCorp arising out of or in any way in connection with the Master Access Deed, the relevant Safety Interface Agreement or the Rail Corridor Works, including the cancellation of, or changing of any date for, a Track Possession; and
 - (viii) nothing in this deed authorises the Project Company, and the Project Company must not under any circumstances purport, to exercise any right of RMS under, or to be RMS's agent for the purposes of, the Master Access Deed.
- (d) Without limiting any clause of this deed, the Project Company indemnifies RMS against any claim against RMS by RailCorp or any liability RMS may incur to RailCorp arising out of or in connection with:
- (i) an interruption to the Railway, RailCorp's Operations or any of RailCorp's Facilities to the extent that it is caused or contributed to by the Project Company;
 - (ii) an act, omission or neglect of the Project Company or any of the Project Company's employees, contractors or agents in undertaking the Project Company's Activities, including the Rail Corridor Works;
 - (iii) a breach by the Project Company of this deed, whether deliberate, unintentional, negligent or otherwise; or
 - (iv) occupation of the Railway Corridor by the Project Company or any of the Project Company's employees, contractors or agents including, but not limited to any claim or liability arising out of or in connection with:
 - (A) loss of or damage to property of RMS or RailCorp;
 - (B) damage, expense, loss or liability in respect of loss or damage to any other property belonging to any third party; and
 - (C) damage, expense, loss or liability in respect of personal injury to or death of any person.
- (e) The Project Company's liability to indemnify RMS under clause 23.3(d) will be reduced proportionally to the extent that such liability was attributable to the wrongful, negligent or unlawful acts or omissions or wilful misconduct of or a breach of this deed by any of RMS, or RMS's employees or agents.
- (f) Subject to clause 23.3(c)(i)(B), the Project Company is responsible for paying, is liable for and must pay all amounts that RMS is or would otherwise be liable to pay to RailCorp under or in connection with the Master Access Deed, including RailCorp's Costs, any Application Fee, Assessment Deposit, further Assessment Deposit, amounts under clause 25.2 and clause 28.5 of the Master Access Deed and any amounts payable under each and every indemnity provision of the Master Access Deed as if the Project Company were named in the Master Access Deed instead of RMS.

Upon receipt of a statement or invoice from RMS or RailCorp in respect of any amount that the Project Company is responsible for paying under this clause 23.3(f), RMS will promptly pass a copy to the Project Company who must pay RMS the required amount within 8 days of receipt of the statement or invoice.

If the Project Company fails to make the payment within the time required, the amount of the payment will be a debt due from the Project Company to RMS.

RMS will promptly refund to the Project Company any surplus Assessment Deposit that RailCorp refunds to RMS in relation to clause 6.3 of the Master Access Deed.

- (g) The Project Company is responsible for directly arranging with RailCorp any Track Possession which it may require for the carrying out of the Project Company's Activities.

For this purpose, the Project Company must comply with the procedure in the Master Access Deed for arranging a Track Possession or any other access which the Project Company may require to the Railway Corridor or RailCorp's Facilities for the purpose of carrying out the Project Company's Activities.

The Project Company acknowledges and agrees that RMS will not be liable upon any Claim by the Project Company arising out of or in connection with:

- (i) the time it may take for RailCorp to grant a Track Possession;
 - (ii) the failure by RailCorp to grant a Track Possession for the date, time or duration requested or required by the Project Company;
 - (iii) the dates upon which Track Possessions are granted by RailCorp or the time or duration of any Track Possession granted by RailCorp;
 - (iv) the need for the Project Company to coordinate its activities, and cooperate, with third parties that may be sharing a Track Possession that is available to the Project Company;
 - (v) any conditions imposed by RailCorp in respect of the execution of the Project Company's Activities to be undertaken during a Track Possession or at any other time; or
 - (vi) anything else arising out of or in connection with the need for Track Possessions by the Project Company.
- (h) If after the date of this deed, RailCorp changes the RailCorp's Technical Conditions from those in effect as at the date of this deed pursuant to clause 5.1(c) of the Master Access Deed, clause 5.4 of the Master Access Deed, clause 12.2 of the Master Access Deed, or clause 25 of the Master Access Deed, to the extent that the change to RailCorp's Technical Conditions necessitates a change to the Rail Corridor Works, then RMS must pay the Project Company the reasonable net direct incremental costs incurred by the Project Company arising directly out of the change referred to under this clause 23.3(h).
- (i) Despite clause 16 and the meanings of Excusable Cause of Delay and Act of Prevention:
- (i) none of the circumstances referred to under clause 23.3(h) will be taken to constitute an Excusable Cause of Delay or an Act of Prevention; and

- (ii) the Project Company will not be entitled to a Qualifying Delay, or to Project Company's Delay Costs,

in relation to a change to RailCorp's Technical Conditions, the Rail Corridor Works or any Change or Direction in relation to a change contemplated under clause 23.3(h). Subject to any entitlement in accordance with clause 23.3(h), the Project Company acknowledges and agrees that RMS will not be liable upon any Claim by the Project Company arising out of or in connection with a change to RailCorp's Technical Conditions or the Rail Corridor Works.

- (j) The Project Company is responsible for the preparation, review and amendment of RailCorp Maintenance Plans under the Master Access Deed, including responsibility for meeting requirements under the Master Access Deed as to timing of preparation and submission of RailCorp Maintenance Plans. The RailCorp Maintenance Plans must address RailCorp's requirements in relation to the Rail Corridor Works. The Project Company must provide information and assistance to RMS in relation to the development of those RailCorp Maintenance Plans as they relate to RailCorp's requirements under the Master Access Deed. The Project Company must ensure that the RailCorp Maintenance Plans are included as separate and discrete subplans in the Maintenance Plan under this deed.

23A MATERIAL ADVERSE EFFECT

23A.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.

23A.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) any of the connections to the Motorway specified in Schedule 26B are closed or materially reduced during the Term for reasons other than as contemplated by clause 22.2;
 - (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 23A.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.

23A.3 Occurrence of Possible MAE Event

- (a) If a notice is given under clause 23A.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 23A.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 23A.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 23A.3(b), the Project Company will be deemed to have accepted that a Possible MAE Event has not occurred.

23A.4 Notice of Material Adverse Effect

- (a) If it has been agreed or determined in accordance with clause 23A.3 that a Possible MAE Event the subject of a notice given under clause 23A.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 23A.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 23A.2(a) has had or has started to have a Material Adverse Effect.

23A.5 Occurrence of MAE Event

- (a) If a notice is given under clause 23A.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 23A.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 23A.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 23A.5(b), the Project Company will be deemed to have accepted that the Possible MAE Event the subject of its notice under clause 23A.4(a) has not had or started to have a Material Adverse Effect.

23A.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 23A.5 that the Possible MAE Event the subject of a notice issued under clause 23A.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 the Project Company to give to the Equity Investors the lower of:
 - (i) the Equity Return they would have received if the event, omission or circumstance had not occurred; and
 - (ii) the Projected Equity Return.
- (b) 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.

23A.7 Payment as a last resort

- (a) RMS will not be required to consider or provide any method of redress under clause 23A.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.
- (b) 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 23A.6(a).

23A.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 23A.6(a) within 90 Business Days after the parties commenced negotiations under clause 23A.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 23A.6(b)(i) to 23A.6(b)(iv) (inclusive) without the parties' consent and is otherwise consistent with this clause 23A.

23A.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 23A.6(a);
- (b) the Possible MAE Event is caused or contributed to by a breach of a Project Document by the Project Company or its Related Parties or is otherwise within the control of the Project Company or its 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.

23A.10 Implementation of redress

- (a) The Project Company must ensure that any redress afforded under this clause 23A 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.

24. RATES, TAXES AND GST

24.1 Rates and Taxes

Subject to clause 25, and clause 38.2, 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 Stratum as from the date of this deed; and
- (b) subject to clause 24.2, 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 execution of this deed, the licence or lease of the Motorway Stratum and other Project Documents or otherwise.

24.2 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 24.2(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 24.2(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 24.2(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 24.2(d) shall not apply to any supply dealt with under clause 24.2(e).
- (e) The parties acknowledge that this clause 24.2(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 24.2(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 24.2(e)(ii)(A).
- (iii) Where clause 24.2(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 24.2(e)(ii), the parties are unable to agree on a means of calculating the additional amounts payable, clause 24.2(b) shall apply without any limitation imposed by this clause 24.2(e), however:
 - (A) the Supplier must only issue a tax invoice or an adjustment note to reflect the application of clause 24.2(e)(iii) after the parties have either reached an agreement under this clause 24.2(e)(iii) or have determined that they are unable to reach such an agreement; and
 - (B) the additional amount payable pursuant to clause 24.2(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 24.2(e)(iii)(A).
- (iv) Where any party to this deed receives a demand, assessment or private ruling regarding the matters addressed in clause 24.2(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 24.2(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.

24.3 **Not used**

25. **CHANGES IN LAW**

25.1 **No claim unless Qualifying Change in Law**

- (a) Subject to clauses 14, 16.11 and 23A and this clause 25, 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 20 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 16.11, 23A and this clause 25, comply with the Qualifying Change in Law at its own cost.

25.2 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 Project Works or Temporary Works (which may include a direct effect on the method or means by which the Project Company carries out the Project Works or Temporary Works) 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 direct costs of carrying out the Project Works or the Temporary Works,

and the Project Company wishes to make a Claim for Change Costs under this clause 25 on account of the Qualifying Change in Law then 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
 - (iv) setting out the Project Company's estimate of the increase in the Project Company's direct costs of carrying out the Project Works and the Temporary Works that result directly from complying with the Qualifying Change in Law (and a reasonable amount on account of overhead and profit of the Contractor not exceeding the D&C Margin), including sufficient information to support the estimate.
- (b) If the Project Company issues a notice complying with the requirements of clause 25.2(a) and otherwise complies with the requirements of this clause 25, clause 14.1 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 limited:
 - (i) to the increase in the Project Company's direct costs of carrying out the Project Works or Temporary Works that result directly from complying with the Qualifying Change in Law (and a reasonable amount on account of overhead and profit of the Contractor not exceeding the D&C Margin); and
 - (ii) in accordance with clause 25.2(c).
 - (c) RMS will only be liable to pay a portion of the Change Costs determined in accordance with clause 25.2(b) as follows:
 - (i) where the Change Costs, together with the Change Costs for other Qualifying Changes in Law under this clause 25.2, are less than or equal to [REDACTED] in aggregate, RMS will be liable for [REDACTED] of the Change Costs;
 - (ii) where the Change Costs, together with the Change Costs for other Qualifying Changes in Law under this clause 25.2, are greater than [REDACTED] in aggregate but less than or equal to [REDACTED] in

aggregate, RMS will be liable for _____ of the portion of the Change Costs from _____ to _____ and _____ of the portion of the Change Costs from _____ to _____; and

- (iii) where the Change Costs, together with the Change Costs for other Qualifying Changes in Law under this clause 25.2, are greater than _____ in aggregate, RMS will be liable for _____ of the portion of the Change Costs from _____ to _____, _____ of the portion of the Change Costs from _____ to _____ and _____ of the portion of the Change Costs which is above _____.

25.3 **Qualifying Change in Law after Completion**

Clause 23A.2 will apply if a Qualifying Change in Law occurs after the Date of Completion.

26. **LOSS OR DAMAGE AND INSURANCE**

26.1 **Risk of loss or damage**

- (a) The Project Company must, in carrying out the Project Company's 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 and the Temporary Works.
- (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 clause 26.9(b), the Project Company must in accordance with clause 26.9, promptly make good any Loss or damage to the Project Works, the Temporary Works or the Motorway (as applicable) which occurs during the period that the Project Company bears the risk of Loss or damage.

26.2 **Certain third party claims**

The Project Company will have no liability to RMS or its Related Parties, nor will RMS or its Related Parties be entitled to make any Claim against the Project Company under clause 27.1, 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:

- (a) the decision by RMS to proceed with the Project; or
- (b) the existence or location of the Motorway.

26.3 **Insured Liability**

- (a) Nothing in this deed operates to exclude or limit the Project Company's liability to RMS or its Related Parties for any Loss to the extent to which such Loss is an Insured Liability.
- (b) For the purposes of this deed, "Insured Liability" means:
- (i) where the Project Company or any of its 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:

- (A) the amount or amounts actually recovered by the Project Company or its Related Parties or RMS or its Related Parties (as applicable) from; and
- (B) the amount or amounts for which the Project Company or its Related Parties or RMS or its Related Parties is otherwise actually indemnified by,

the insurer or insurers of such Project Insurance; and

(ii) where, but for:

- (A) the failure of the Project Company to comply with its obligations under this clause 26 to obtain a Project Insurance;
- (B) the insolvency of the insurer or insurers of such Project Insurance; or
- (C) any act or omission by the Project Company or its Related Party (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 or its Related Party 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 or its Related Party 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.

26.4 **Damage to third party property**

- (a) Without limiting clause 27.1, where any damage to or loss or destruction of real or personal property of a third party (other than the Project Works or the Temporary Works) occurs which arises out of a breach by the Project Company of this deed or an act or omission of the Project Company, the Project Company must do one of the following (at the option of the relevant third party):
 - (i) promptly repair, replace or reinstate the damage, loss or destruction; or
 - (ii) reasonably compensate the third party.
- (b) Without limiting clause 8.6(a)(i)(B), if the Project Company fails to carry out the repair, replacement or reinstatement work or pay reasonable compensation within a reasonable time, RMS may carry out the repair, replacement or reinstatement work or pay reasonable compensation, and any Loss suffered or incurred by RMS will be a debt due and payable from the Project Company to RMS.

26.5 **Project Insurances**

- (a) The Project Company must effect and maintain the Project Insurances (or cause the Project Insurances to be effected and maintained) in accordance with Schedule 43.
- (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 any 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 be reasonably 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 Project Insurance;
 - (ix) do all things reasonably required by the other party 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;
 - (x) comply at all times with the terms of each Project Insurance; and
 - (xi) ensure that, to the extent permitted by Law, all policies of insurance against liabilities, which it is required by this deed to effect or maintain, do not reduce or exclude the insurance cover in respect of liabilities assumed under clauses 27.1(a) and 27.1(b).
- (c) The Project Company is responsible for, must pay (where relevant) and accepts all risks in connection with any deductibles or excess in respect of any claim on a Project Insurance policy.

26.6 **Premiums**

- (a) The Project Company must punctually pay all premiums in respect of all insurance policies effected by it in accordance with this clause 26 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 26 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.

26.7 **Dealing with claims**

In addition to the obligations to notify the insurer under any Project Insurance, the Project Company must:

- (a) keep RMS fully informed of subsequent developments concerning the claim under any Project Insurance (**Notifiable Claim**);
- (b) not compromise, settle or enforce a Notifiable Claim without the prior written consent of RMS (which must not be unreasonably withheld or delayed); and
- (c) diligently pursue any Notifiable Claim.

26.8 Insurance proceeds

- (a) The parties agree that the proceeds of each claim (if any) 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), until such time as the proceeds are applied in accordance with clause 26.8(b).
- (b) The parties agree that the Project Company and RMS will, to the extent permitted under the relevant insurance proceeds, procure the release, on a progressive basis, of the insurance proceeds contemplated in clause 26.8(a) for reinstatement work carried out by the Project Company 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 must be applied for the repair, reinstatement or replacement of the Project Works, the Temporary Works and/or the Motorway (as applicable).

26.9 Reinstatement

Subject to clauses 26.13 and 26.9B, if any physical loss or damage occurs:

- (a) to any part of the Project Works, the Temporary Works or the Motorway, the Project Company must (without limiting its other obligations under this deed):
 - (i) subject to allowing reasonable time for inspection by insurers and to the terms 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:
 - (aa) it complies with the SWTC; and
 - (bb) 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; or
- (b) as a result of an Uninsurable Force Majeure Event and clause 23A 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 23A or, if the parties are unable to come to an agreement, a determination has been made under this deed which is final and binding on the parties.

26.9A **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 43 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 26.9A(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 26.9A(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 26;
 - (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 paragraphs 3(a)(ii) or 3(a)(iii) of Schedule 43 will not constitute evidence that, or estop RMS from denying that, any event falls within the definition of "Uninsurable Force Majeure Event".

26.9B Existing asset risk pre-Completion

The parties acknowledge and agree that:

- (a) the Project Company will hold limited property damage insurance in relation to property damage to the Existing Motorway prior to the Date of Completion; and
- (b) to the extent the Project Company is not required to hold the relevant insurance prior to the Date of Completion, RMS:
 - (i) retains the risks associated with property damage to the Existing Motorway other than property damage caused by, arising out of or in any way in connection with the Project Company's Activities prior to the Date of Completion; and
 - (ii) must promptly rectify and reinstate such property damage to the Existing Motorway to the extent it would have done so in the ordinary course of maintaining and repairing the Existing Motorway prior to the date of this deed.

26.10 Direction by RMS to reinstate to different specifications

- (a) RMS may require the Project Company to reinstate or repair the Project Works or the Motorway on the basis of different specifications by directing a Change pursuant to clause 14.
- (b) The reinstatement or repair work will only constitute a Change to the extent that it differs from what would have otherwise been required under this deed.
- (c) The available insurance proceeds will be taken into account in calculating the Net Financial Impact of the Change.

26.11 Procedure for Third Party Claims

- (a) Where clause 27.1 applies as a result of a Claim made against RMS by a third party (**Third Party Claim**), then RMS must:
- (i) notify the Project Company about the Third Party Claim promptly;
 - (ii) keep the Project Company informed of the progress of the Third Party Claim;
 - (iii) 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) 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).
- (b) If a Third Party Claim is settled or paid without the Project Company's prior written consent (other than a Third Party Claim referred to in clause 26.11(a)(iv)(A) or clause 26.11(a)(iv)(B)) the Project Company shall not 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.
- (c) Notwithstanding anything to the contrary in this deed but except in respect of the indemnity in clause 34.4(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.

26.12 Uninsurable Force Majeure Event

Where an Uninsurable Force Majeure Event subsists for a continuous period of more than 12 months and RMS fails to exercise its rights under clause 31.9, the Uninsurable Force Majeure Event will be a Change and RMS will be deemed to have issued a Change Proposal in regard thereto.

26.13 Uninsurable Risks

- (a) If the Project Company believes that any risk that it is required to insure under this deed is or becomes Uninsurable, then:
- (i) it must notify the other party within 5 Business Days after it believes that the risk has become Uninsurable; and
 - (ii) clauses 26.13(b) to 26.13(f) 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 or a Related Party or Related Body Corporate of the Project Company).
- (c) If a risk is Uninsurable, the Project Company must approach the insurance market on a regular basis (satisfactory to RMS and the Project Company, both acting reasonably) to establish whether that risk remains Uninsurable and must advise RMS accordingly.
- (d) If any Loss or damage occurs to any part of the Project Works or the Temporary Works as a result of an Uninsurable Force Majeure Event, the Project Company is not obliged to comply with its obligations under clause 26.9 unless directed to do so by RMS as a Change.
- (e) 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.
- (f) If RMS gives the Project Company a notice pursuant to clause 26.13(e) 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.

27. INDEMNITY AND LIABILITY EXCLUSIONS

27.1 Indemnity from the Project Company

- (a) 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; or
 - (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,

caused by, arising out of, or in any way in connection with:

 - (iii) the Project Company's Activities, including the Temporary Works and the Project Works or the Project;
 - (iv) RMS's ownership of the Construction Site, the Local Area Works Site, the Temporary Areas, the Maintenance Site, the Motorway Stratum or the Licensed Maintenance Areas; or
 - (v) the use or occupation of the Construction Site, the Local Area Works Site, the Temporary Areas, the Maintenance Site, the Motorway Stratum or the Licensed Maintenance Areas, by the Project Company or the Contractor.
- (b) The Project Company must indemnify the Indemnified Parties from and against any Pure Economic Loss suffered or incurred by any Indemnified Party, caused by, arising out of, or in any way in connection with:
 - (i) the Project Company's Activities, including the Temporary Works and the Project Works or the Project;

- (ii) RMS's ownership of the Construction Site, the Local Area Works Site, the Temporary Areas, the Maintenance Site, the Motorway Stratum or the Licensed Maintenance Areas; or
 - (iii) the use or occupation of the Construction Site, the Local Area Works Site, the Temporary Areas, the Maintenance Site, the Motorway Stratum or the Licensed Maintenance Areas, by the Project Company or the Contractor.
- (c) 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, the Project Company's breach of a term of any Project Document.
- (d) Clauses 27.1(a), 27.1(b) and 27.1(c) do not lessen or otherwise affect the Project Company's other obligations under this deed.
- (e) 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 Motorway Stratum and the Maintenance Site.

27.2 Exclusions from indemnity

- (a) Where under the terms of this deed:
- (i) the Project Company indemnifies RMS from and against any Liability, Claim or Loss, the Project Company's liability to indemnify RMS will be reduced to the extent that any breach of this deed or the other Project Documents or other act or omission (including any negligence) of RMS, including an act or omission (including any negligence) of its Related Parties, contributed to the Liability, Claim or Loss;
 - (ii) RMS indemnifies the Project Company from and against any Liability, Claim or Loss, RMS's liability to indemnify the Project Company will be reduced to the extent that any breach of this deed or the other 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's Related Parties contributed to the Liability, Claim or Loss; and
 - (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.
- (b) Clauses 27.2(a)(i) and 27.2(a)(iii) will not apply to reduce 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.
- (c) Clause 27.2(a)(ii) will not apply to reduce RMS's liability to indemnify the Project Company to the extent that the act or omission of the Project Company is an act or omission in the exercise of its rights or powers under this deed.

27.3 Consequential Loss

- (a) Subject to clause 27.3(d), RMS has no liability to the Project Company, nor will the Project Company be entitled to make any Claim in respect of any Consequential Loss incurred or sustained by the Project Company:
 - (i) as a result of any act or omission of RMS (whether negligent or otherwise);
 - (ii) under any indemnity; or
 - (iii) as a result of a breach by RMS of a Project Document.
- (b) Subject to clause 27.3(c), the Project Company has no liability to RMS, nor will RMS be entitled to make any Claim in respect of any Consequential Loss incurred or sustained by RMS:
 - (i) as a result of any act or omission of the Project Company (whether negligent or otherwise);
 - (ii) under any indemnity; or
 - (iii) as a result of a breach by the Project Company of any Project Document.
- (c) Clause 27.3(b) does not operate to exclude or limit any liability incurred or Claim made by RMS or its Related Parties to the extent that any Loss suffered by RMS as a result of such liability or Claim:
 - (i) is an Insured Liability;
 - (ii) not used;
 - (iii) is a Loss caused by a Defect;
 - (iv) is a Loss in respect of death or personal injury;
 - (v) is a Loss in respect of any criminal acts, fraud or Wilful Misconduct on the part of the Project Company or its Related Parties;
 - (vi) is a Loss which is the subject of the indemnities in clauses 9.8(d), 11.8(d), 11.11(f), 29.2(a), 29.3(e) and 34.4;
 - (vii) subject to clause 26.3, in respect of any Liability of the Project Company or its Related Parties to a third party (including to another Indemnified Party);
 - (viii) for Loss or a Liability to the extent that the Project Company or any of its Related Parties 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
 - (ix) is a Liability which, by law, the parties cannot limit or contract out of.

- (d) Clause 27.3(a) does not operate to exclude or limit any liability incurred or Claim made by the Project Company or its Related Parties to the extent that any Loss suffered by the Project Company as a result of such liability or Claim:
- (i) is an Insured Liability;
 - (ii) is a Loss arising from death or personal injury;
 - (iii) is a Loss arising from any criminal acts, fraud or Wilful Misconduct on the part of RMS or its Related Parties;
 - (iv) is a Liability which, by law, the parties cannot limit or contract out of; or
 - (v) is in respect of any sum payable in respect of any Change, Qualifying Change in Law, Change in Codes and Standards or Compensation Event.

27.4 No circularity

The provisions of clauses 27.2 and 27.3 do not operate to release the Project Company from any liability to RMS to the extent that an insurer of any policy of insurance required under this deed seeks to rely on 27.2 or 27.3 to deny liability which it otherwise has to indemnify an insured under the relevant policy.

28. NOT USED

29. INTELLECTUAL PROPERTY

29.1 Licence of Intellectual Property Rights

Subject to clause 29.1A and clause 29.1B, the Project Company (irrevocably for all time and despite any termination of this deed for any reason) grants to RMS an irrevocable, non-exclusive, royalty free, perpetual and fully assignable licence to use, possess, modify, vary or amend (and to sublicense others to use, possess, modify, vary or amend) all Intellectual Property Rights in or relating to:

- (a) the Design Documentation;
- (b) the materials, documents, images, photographs, software, processes and methods relevant to the Project Works, the Temporary Works and the Project Company's Activities (including processes and methods of working); and
- (c) each of the Deliverables,

(together the **Contract Documentation and Deliverables**) for:

- (d) 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 Company's Activities or the Project Works and the Temporary Works;
- (e) any purpose associated with further development of the Construction Site; and
- (f) any other purpose associated with the Project Works or the Temporary Works,

which licence is effective immediately and will survive termination of this deed.

29.1A Proprietary Software

- (a) Subject to clause 29.1A(b) and clause 29.1B, the Project Company grants to RMS a perpetual, irrevocable, royalty-free licence to use (including to sublicense) any computer software (including both source code and object code versions) which is required by RMS to obtain the full benefit of the Project Company's Activities but in which the Intellectual Property Rights are not owned by the Project Company (**Proprietary Software**).
- (b) The licence in clause 29.1A(a) will not extend to a part of the Proprietary Software that is not owned by the Project Company (**Third Party Rights**) if:
 - (i) the Third Party Rights are generally commercially available on reasonably commercial terms; or
 - (ii) the Project Company has:
 - (A) been unable (despite using its best endeavours) to procure from the relevant third party the right to grant the licence in clause 29.1A(a) in respect of those Third Party Rights; and
 - (B) the Project Company has notified RMS:
 - (aa) that it has been unable to procure the necessary licence rights for those Third Party Rights; and
 - (bb) as to the terms, if any, (including any cost) on which RMS will be able to procure the required rights to use, reproduce and modify those Third Party Rights.

29.1B Intellectual Property under the Tolling Equipment Works Contract

The licences in clause 29.1 and clause 29.1A will not extend to a part of the Contract Documentation and Deliverables and Proprietary Software provided under the Tolling Equipment Works Contract if the Project Company has:

- (a) been unable (despite using its best endeavours) to procure the relevant licence rights from the Tolling Equipment Works Contractor under the Tolling Equipment Works Contract; and
- (b) the Project Company has notified RMS:
 - (i) that it has been unable to procure the necessary licence rights; and
 - (ii) as to the terms, if any, (including any cost) on which RMS will be able to procure the relevant licence rights.

29.2 Warranty

- (a) The Project Company:
 - (i) warrants that RMS's use of the Contract Documentation and Deliverables, or any other work provided by the Project Company under this 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 29.1; 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 Company's Activities or the Contract Documentation and Deliverables.
- (b) For the purposes of clause 29.2(a), RMS's use of the Contract Documentation and Deliverables 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 Deliverables or any part of the Project Works or the Temporary Works to which the Contract Documentation and Deliverables or any other work provided by the Project Company under this 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.

29.3 **Project Company to procure for RMS**

- (a) The Project Company agrees to, and agrees to procure the cooperation of any other third parties 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 this clause 29; 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 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 29.3 if the Project Company 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 that:
 - (i) the use of the Intellectual Property Rights licensed under this clause 29 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 is able to grant the licence granted in clause 29.1.
- (d) Without limiting clause 29.3(c), if any action or Claim for infringement or alleged infringement of any Intellectual Property Rights 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 Deliverables,

the Project Company's Activities 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 29.1, in accordance with this deed; or
 - (ii) modify or replace the Contract Documentation and Deliverables, the Project Company's Activities or relevant part of them, in respect of which Intellectual Property Rights are licensed pursuant to clause 29.1, so that no further infringement will occur and so that the modified or replaced Contract Documentation and Deliverables, the Project Company's Activities or relevant part of them in respect of which Intellectual Property Rights are licensed pursuant to clause 29.1 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 of any warranty set out in this clause 29; or
 - (ii) any actual or alleged infringement of an Intellectual Property Right in connection with the Contract Documentation and Deliverables, the Project Company's Activities or any part of them.

29.4 Moral rights

The Project Company, in respect of the Intellectual Property Rights set out in this clause 29:

- (a) to the extent permitted by Law, will not, and will take reasonable steps to ensure that its 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 29.4(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.

29.5 Intellectual Property Rights in Planning Application Documents

- (a) Ownership of, and all Intellectual Property Rights in, the Planning Application Documents vests in RMS when each Planning Application Document comes into existence.
- (b) Upon request by RMS's Representative, the Project Company must do all things necessary to perfect the vesting of such ownership and Intellectual Property Rights in RMS.
- (c) RMS grants to the Project Company an irrevocable, non-exclusive and royalty free licence to use the Planning Application Documents (and to sublicense others to use the Planning Application Documents) for the purpose of performing the Project Company's Activities and any of its other obligations under this deed.

30. CONFIDENTIALITY, PUBLICITY AND PRIVACY

30.1 General restriction

Subject to clause 30.2, no party will, at any time, 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 Contractor, the Operator, WDA, the Independent Certifier 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.

30.2 Exceptions

The restrictions imposed by clause 30.1 will 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 Project Company or RMS, is required to be disclosed to:
 - (i) any actual or prospective investor in or lender to (or assignee or novatee of a lender to) the Project Company Group;
 - (ii) any insurer in respect of the Project;
 - (iii) any of the Project Company's, RMS's or WDA's officers, employees, professional advisers, auditors or consultants; or
 - (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;
- (g) by RMS that is not Commercially Sensitive Information; or
- (h) without limiting this clause 30.2 or clause 30.4, any disclosure by RMS's Representative of any Project Document relating to this deed and which the Project Company (acting reasonably) has agreed with RMS's Representative contains no Commercially Sensitive Information.

30.2A **Obligation preserved**

Where disclosure is permitted under clause 30.2, other than clauses 30.2(a), 30.2(b), 30.2(c), 30.2(d) and 30.2(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.

30.3 **Publicity**

- (a) The Project Company must not issue any information, publication, document or article for publication concerning the Project or the Project Company's Activities in 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 or any of its Subcontractors receives a direct request from the media for comment in respect of any aspect of the Project or the Project Company's 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 Construction Site, the Motorway or the Motorway Stratum (or permit any third party to do so) without the prior written approval of RMS (acting reasonably).

30.4 Disclosure by RMS

- (a) Notwithstanding the other provisions of this clause 30.4 but subject to clause 30.4(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 will be tabled in Parliament of the State of New South Wales by or on behalf of RMS or WDA 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 or WDA's contracts register in accordance with the GIPA Act; and
 - (iv) RMS and RMS's Representative or WDA may make the Project Documents or any of them available to any person as required by any applicable Law, to the Minister (or Office of the Minister) with responsibility for RMS, or for any other legitimate government purpose or process.
- (b) The parties acknowledge that:
- (i) RMS has consulted with the Project Company in relation to the disclosure of those parts of the Project Documents that are not Commercially Sensitive Information;
 - (ii) RMS will notify the Project Company of any proposed disclosure of any information that RMS considers (acting reasonably) may be Commercially Sensitive Information by RMS or WDA 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 30.4(b)(ii), RMS will take reasonable steps to consult with the Project Company before RMS or WDA discloses the information referred to in clause 30.4(b)(ii), including under the GIPA Act; and
 - (iv) if, following:
 - (A) notification by RMS in accordance with clause 30.4(b)(ii); or
 - (B) consultation between RMS and the Project Company in accordance with clause 30.4(b)(iii),
- the Project Company objects to disclosure of some or all of the information referred to in clause 30.4(b)(ii) on the basis that it is Commercially Sensitive Information, the Project Company must provide details of any such objection within 5 Business Days of the date the Project Company received notification from RMS or the date on which the consultation process concluded (as relevant).
- (c) RMS or WDA may take into account any objection received from the Project Company pursuant to clause 30.4(b)(iv) in determining whether the information identified by the Project Company as Commercially Sensitive Information should be disclosed.
- (d) Nothing in this clause 30.4 will limit or otherwise affect the discharge of RMS's obligations under the GIPA Act.

30.5 Privacy

- (a) Without limiting clause 7.1, the parties must comply with the Privacy Laws in carrying out and implementing the Project.
- (b) Where a party will be collecting or disclosing Personal Information from an individual in connection with the Project, it must:
 - (i) either:
 - (A) ensure that the disclosure is permitted under the Privacy Laws; or
 - (B) procure the consent of the individual to whom that Personal Information relates sufficient to enable such disclosure to occur and to enable the recipient to collect, use, and disclose that Personal Information for the purposes of the Project;
 - (ii) take reasonable steps to ensure that the Personal Information disclosed is accurate, complete and up-to-date; and
 - (iii) take reasonable steps to inform that individual of any matters required by the Privacy Laws.

31. DEFAULT AND TERMINATION

31.1 Events of Default

Each of the following events is an Event of Default:

- (a) the Project Company fails to commence or to expeditiously and diligently progress the Project Company's Activities as required by clause 16.1 or the Project Company displays an intention to permanently abandon the Project;
- (b) not used;
- (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 19.2 (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;
- (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;
- (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 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, 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,

by a party which is:

- (iii) reputable, solvent and has the resources and experience to perform its obligations under the D&C Deed or an O&M Deed (or in the case of the Contractor Guarantor or the Operator Guarantor, the Contractor's obligations under the D&C Deed or the Operator's obligations under an O&M Deed, as the case may be); and
 - (iv) otherwise acceptable to RMS; 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.

31.2 **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 31.2(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 31.2(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 there is a failure to Remedy the Event of Default in accordance with the terms of a Remedy Notice or if urgent action is necessary:
 - (i) RMS may take any action it considers appropriate to:
 - (A) Remedy the Event of Default; or
 - (B) take that urgent action,
 - and may enter and remain on the Construction Site, any Extra Land, the Maintenance Site and any other land upon which the Project Company's Activities are being carried out to do so; and
 - (ii) the Project Company must indemnify RMS from and against any Claim or Loss RMS reasonably suffers or incurs in respect of that action.
- (e) If, at any time (even if the Project Company has previously given RMS a notice under clause 31.2(e)(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 this clause 31.2(e), RMS must, as soon as practicable after receiving a notice under clause 31.2(e)(i), review the Remedy Period.
- (f) If the Project Company has given a notice to RMS under clause 31.2(e)(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 19.2),
 - 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.
- (g) If the Project Company considers in good faith that a Remedy Period extended by RMS pursuant to clause 31.2(f) is not reasonable, it may refer the matter for resolution in accordance with the Dispute Resolution Procedure.

31.3 **NOT USED**

31.4 **NOT USED**

31.5 **NOT USED**

31.6 **Termination by RMS**

- (a) If an Event of Default is not Remedied within the Remedy Period (as extended if at all in accordance with clause 31.2(f) or clause 31.2(g)) or if at any time during the relevant Remedy Period (as extended if at all in accordance with clause 31.2(f) or clause 31.2(g)):

- (i) 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
- (ii) 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 19.2),

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 31.6(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.
- (c) Upon termination of this deed (other than termination under clauses 31.7, 31.8 or 31.9), RMS will not be liable to pay any compensation or other moneys to the Project Company 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 to the relevant Subcontractor following termination of that Subcontract).
- (d) Upon termination of this deed by RMS under this clause 31.6:
 - (i) RMS may require a novation of any one or more of:
 - (A) if this deed is terminated prior to the Date of Completion, the D&C Deed and the Tolling Equipment Works Contract; or
 - (B) if this deed is terminated after the Date of Completion:
 - (aa) an O&M Deed; and
 - (bb) 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 Deliverables;
 - (D) procure the assignment of the Project Company's rights under the insurance policies maintained by the Project Company under clause 26;
 - (E) hand over any other documentation relating to the Project within the custody or control of the Project Company or its 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 or maintain and repair the Third Party Works; and

- (iii) the Project Company must peaceably surrender and yield up to RMS, the Construction Site, any Extra Land and any other land upon which the Project Company's Activities are being carried out (including any right, title or interest in them).
- (e) The Project Company acknowledges that nothing in this clause 31 obliges RMS to require or consent to the novation of any Subcontract to RMS.
- (f) The Project Company, for the purposes of executing any document or doing any other thing reasonably required for the purposes of or to give effect to clause 31.6(d), irrevocably appoints RMS as its attorney as from the date of termination with full power and authority to execute any such document and do any such other thing on behalf of the Project Company, if the Project Company fails to execute such document or do such other thing within 5 Business Days of being requested in writing to do so by RMS.
- (g) The parties acknowledge and agree that RMS may terminate this deed under this clause 31 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.

31.6A Right to damages

- (a) Subject to clause 31.6(c), any termination of this deed under this clause 31 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) Any termination of this deed by RMS under this clause 31 (other than clauses 31.7 or 31.9) 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.

31.7 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 31.11 will apply.
- (b) RMS acknowledges and agrees that the Project Company will not be in breach of this deed to the extent the Project Company is prevented from undertaking the Project in accordance with this deed as a consequence of a Final Determination.

31.7A Termination for Native Title Claim

If the Project Company is prevented from carrying out the Project Company's Activities for a continuous period of more than 6 months as a result of a direction, order or requirement referred to in clause 11.10(a), RMS may in its absolute discretion terminate this deed at any time after that 6 month period by giving a notice to that effect to the Project Company, in which case clause 31.11 will apply.

31.8 Termination by the Project Company

Subject to clause 31.10, 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 Stratum 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 11.1 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) a court makes a Final Determination which is not the result of:
 - (i) the Project Company's failure to comply with its obligations under a Project Document;
 - (ii) a breach by the Project Company of its warranties under a Project Document;
 - (iii) a wrongful act or omission of the Project Company or its Related Parties; or
 - (iv) a failure by the Project Company or any of its Related Parties to comply with any Law,and RMS fails to procure that the effect of such Final Determination is overcome within 18 months of the Project Company giving written notification to RMS of such Final Determination; or
- (e) the Project Company is prevented from carrying out the Project Company's Activities for a continuous period of more than 6 months as a result of a direction, order or requirement referred to in clause 11.10(a).

If an event referred to in clause 31.8(c)(i) occurs, then in respect of the 12 month period referred to in clause 31.8(c)(ii), RMS must pay to the Project Company in respect of that period monthly in arrears an amount (including costs, Losses or expenses) sufficient to place members of the Project Company Group as a whole in the net (including after Tax) position they would have been in had the event referred to in clause 31.8(c) not occurred.

31.9 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 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 31.11 will apply.

31.10 **Suspension of termination notice**

- (a) If the Project Company issues a notice of termination under clause 31.8, 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 31.8; 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 31.10(b)(i) or 31.10(b)(ii), this deed automatically terminates under clause 31.8 on the date RMS's suspension of the Project Company's right to terminate expires; or
 - (ii) under clause 31.10(b)(iii), this deed continues in force.
- (d) The Project Company must continue to perform its obligations under this 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 the Project Company's right to terminate under clause 31.10(a), to the extent the Project Company is unable to continue to perform its obligations under this deed, RMS must pay the Project Company in respect of the period of suspension monthly in arrears any additional amounts (including costs, Losses or expenses) that the Project Company reasonably and properly incurs as a result of such suspension.

31.11 **Termination payments**

- (aa) Without prejudice to clause 31.6A, if this deed is terminated under clause 31.7 in respect of a Final Determination which is not a result of:
 - (i) the Project Company's failure to comply with its obligations under a Project Document;
 - (ii) a breach by the Project Company of its warranties under a Project Document;
 - (iii) a wrongful act or omission of the Project Company or its Related Parties; or
 - (iv) a failure by the Project Company or any of its Related Parties to comply with any Law,RMS must within 30 Business Days after the date of termination:
 - (v) pay the Early Termination Amount to the Project Company; and

- (vi) release any undertaking provided to RMS under this deed.
- (a) Without prejudice to clause 31.6A, if this deed is terminated under clause 31.7A or clause 31.8, 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 provided to RMS under this deed.
- (b) Without prejudice to clause 31.6A, if this deed is terminated under clause 31.9, 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 provided to RMS under this deed.

31.12 Termination of Motorway Stratum Lease

- (a) Notwithstanding the provisions of the Motorway Stratum Lease as to the term of the Motorway Stratum Lease, the Project Company acknowledges and agrees that the tenancy created by the Motorway Stratum 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 Stratum 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 Stratum 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 Stratum 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 Stratum Lease.

32. 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.

33. FORCE MAJEURE

33.1 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 has taken and/or proposes to take to remedy the situation;
 - (iv) an estimate of the time during which the Project Company will be unable to carry out its obligations due to the Force Majeure;
 - (v) an estimate of the costs that the Project Company will incur to remedy the situation; and
 - (vi) details of all insurance moneys upon which the Project Company will be able to rely in making good damage caused by the Force Majeure.
- (b) After giving notice under clause 33.1(a) the Project Company must continue to provide to RMS all relevant information pertaining to the Force Majeure.

33.2 Meeting

The parties must meet within 5 Business Days after service of a notice of a Force Majeure event to determine the estimated length of time for which the Force Majeure will continue.

33.3 Suspension of obligations

- (a) Subject to clause 33.3(f), if a Force Majeure occurs the Project Company's obligations under this deed (other than under this clause 33) 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 33.1(a) is issued, no party will be in default of its obligations under this 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 33.1(a).
- (c) The Project Company must notify RMS immediately after it ceases to be prevented or delayed from performing its obligations as a result of a Force Majeure event.
- (d) RMS will not be obliged to provide any financial relief to the Project Company during the period of suspension.
- (e) Upon the Project Company becoming able to recommence performing its obligations which were suspended under clause 33.3(a), the Project Company must recommence the performance of those obligations.
- (f) Clause 33.3(a) will only apply to suspend the Project Company's obligation under clause 19.2 to keep all traffic lanes of the Motorway open where the occurrence of the Force Majeure event prevents the safe passage of vehicles.

33.4 Duty to remedy Force Majeure

The Project Company must remedy and Mitigate the effects of a Force Majeure promptly in accordance with clause 26.9.

34. EXPIRATION

34.1 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 Stratum (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 or maintain and repair the Third Party Works;
- (c) pay to RMS any insurance proceeds from any insurances for reinstatement or replacement of the Project Works, the Third Party 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.

34.2 **Final Handover**

- (a) When the Project Company considers 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 34.2(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.

34.3 **Effect of notice of Final Handover**

A notice issued under clause 34.2(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 or Third Party Works comply with this deed; or
- (c) prejudice any rights or powers of RMS.

34.4 **Not used**

35. **REPRESENTATIONS, WARRANTIES AND COVENANTS**

35.1 **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) 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.

35.2 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.

36. **AMENDMENTS TO OTHER PROJECT DOCUMENTS**

36.1 **Variations to this deed**

Subject to clause 14.2, this deed may only be varied by a deed executed by or on behalf of both RMS and the Project Company.

36.2 **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 (**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 therefor;
 - (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 30 Business Days after receiving the Project Company's written request under clause 36.2(b), that:
 - (i) it consents to the Amendment; or

- (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 36.2(c) will reapply as if the additional information were the written request under clause 36.2(b).

36A DEBT FINANCING AND REFINANCING

36A.1 Pre Completion financing

Subject to the Shareholder Loan Agreement, the Project Company must not:

- (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.

37. ASSIGNMENT

37.1 Entitlement to assign

- (a) 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.
- (b) In granting its consent under clause 37.1(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 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) RMS is assigning, transferring, sub-participating or otherwise 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 Stratum Lease.

37.2 Change of Control prior to Completion

- (a) The Project Company undertakes to RMS that the direct legal and beneficial owners of the Project Company will remain unchanged until Completion.
- (b) Subject to clause 37.2(c), the Project Company must not permit:

- (i) any Change of Control of the Project Company; or
- (ii) a person:
 - (A) who is not an Ultimate Shareholder, or
 - (B) who is an Ultimate Shareholder but which is a managed (and not ultimately owned) entity which does not at the date of this deed or following any event which is approved by RMS under this clause 37, have an economic interest in the shares of the Project Company,

to acquire any shares, units or an economic interest in shares or units in any Holding Company (other than an Ultimate Shareholder) of the Project Company,

prior to Completion without the prior written consent of RMS (which may not be unreasonably withheld).

- (c) RMS will be deemed to be acting reasonably under clause 37.2(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.

37.3 Change of Control after Completion

For the purposes of clause 37.1, any Change of Control of the Project Company 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 37.

38. EXPENSES AND STAMP DUTIES

38.1 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.

38.2 Stamp duties

As between the parties, the Project Company must pay all stamp, registration and similar taxes including fines and penalties payable to or required to be paid by any appropriate

Authority or determined to be payable in connection with the execution, delivery, performance or enforcement of this deed or any payment receipt or other transaction contemplated by them.

39. NOTIFICATION OF CLAIMS

39.1 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 39.1(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, including any work connected with the Direction of RMS's Representative in respect of which notice has been given under clause 39.1(a).

(c) If the Project Company issues a notice under clause 39.1(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 39.1(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 39.1(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 39.1(c)(iii).
- (d) If within 20 Business Days after first receipt of the notice under clause 39.1(a)(i), RMS's Representative has not taken any action under clause 39.1(c), RMS's Representative will be deemed to have given a notice under clause 39.1(c)(ii).

39.2 **Notice of other Claims**

- (a) If the Project Company 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 by RMS) under, arising out of, or in any way in connection with, this deed or the Project Company's Activities, including anything in respect of which:
 - (i) the Project Company is otherwise given an express entitlement under this deed; or
 - (ii) this deed expressly provides that an amount is to be paid to the Project Company,

the Project Company must give RMS's Representative the notice required by clause 39.3(a) and a Claim in accordance with clause 39.3(b).
- (b) Clause 39.2(a) does not apply to any Claim made by the Project Company pursuant to clause 23A.

39.3 **Prescribed notices**

- (a) Any written notice referred to in clause 39.2 must:
 - (i) be provided not later than 25 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 39.2 must:

- (i) be provided not later than 20 Business Days after giving the written notice under clause 39.3(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.

39.4 **Continuing events**

If the Direction, event, circumstance, act, omission, fact, matter or thing upon which the Claim referred to in clause 39.1 or clause 39.2 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 39.3(b) every 35 Business Days after the written Claim under clause 39.3(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.

39.5 **Bar**

If the Project Company fails to comply with clauses 11.11(a)(i), 13.4, 16.11, 25.2, 33.1, 39.1, 39.2, 39.3 or 39.4:

- (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.

39.6 **Other provisions unaffected**

Nothing in clauses 39.1 to 39.5 will limit the operation or effect of any other provision of this deed which requires the Project Company to give notice to RMS's Representative in order to preserve an entitlement to make a Claim against RMS.

40. **NSW CODE OF PRACTICE**

40.1 **NSW Code and NSW Guidelines**

In addition to terms defined in this deed, terms used in this clause 40 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.

40.2 **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;
 - (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
 - (iii) comply with the Construction Plan.
- (b) The Project Company must at all times comply with, and meet, any obligations imposed by, the NSW Code and NSW Guidelines.
- (c) The Project Company must notify 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 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 40, 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 appoint or engage another party in relation to the Project Company's Activities where that appointment or engagement would breach a sanction imposed on the other party in relation to the NSW Code or NSW Guidelines.

40.3 **Access and information**

- (a) The Project Company must maintain 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, authorised personnel (including personnel of the CCU) to:
 - (i) enter and have access to sites and premises controlled by the Project Company, including the Construction 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, 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.

40.4 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, 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.

40.5 Compliance

- (a) The Project Company bears the cost of ensuring its compliance with the NSW Code and NSW Guidelines, including in respect of any positive steps it is obliged to take to meet its obligations under the NSW Guidelines. The Project Company is 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 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 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 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.

41. **BUILDING CODE**

- (a) The Project Company must comply with the Building Code. Copies of the Building Code are available at www.comlaw.gov.au.
- (b) Compliance with the Building Code shall not relieve the Project Company from responsibility to perform this deed, or the Project Company from liability for any defect in the works arising from compliance with the Building Code.
- (c) Where a change in this 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 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;
 - (ii) the Subcontractors of the Project Company;
 - (iii) the consultants of the Project Company; and
 - (iv) the Related Entities of the Project Company (refer to 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 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 or a related entity of it 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 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 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 and its 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 and its 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 of its Subcontracts impose obligations on Subcontractors equivalent to the obligations under this clause 41.
- (k) The Project Company:
 - (i) acknowledges and agrees that it is accredited under the OHS Accreditation Scheme; and
 - (ii) must comply 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.

42. NOTICES

42.1 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 42.1(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 42.1(c)(iii) under clauses 5, 7.4, 7.5, 11.9, 11.10, 13.4, 14, 16.6, 23A, 25.2, 26, 31, 32, 33,

or 36, in addition to the Notice sent pursuant to clause 42.1(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 42.1(c)(i) or 42.1(c)(ii).

42.2 **Effectiveness of notices**

- (a) A Notice referred to in clause 42.1(d) will not be effective unless it is delivered in accordance with clause 42.1(c)(i) or clause 42.1(c)(ii).
- (b) A Notice issued pursuant to clause 42.1(c)(iii) and a Notice issued pursuant to clause 42.1(c)(i) or clause 42.1(c)(ii) must be identical, and in the event that they are not identical, neither Notice will constitute a valid Notice.

42.3 **When a notice is given**

A Notice that complies with this clause 42 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 42.3(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 42.1(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 42.3(c); and
 - (ii) the date determined in accordance with clause 42.3(a) or 42.3(b) (as the case may be).

42.4 **Address for notices**

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

RMS

Address: 101 Miller Street
North Sydney NSW 2060

Email address: _____

Attention: General Manager Motorway Projects

Fax number: 02 8588 4171

The Project Company

Address: Level 18, 101 Miller Street
North Sydney NSW

Email address: _____

Attention: Project Director

Fax number: To be provide by the Project Company after the date of this deed.

42.5 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 42.5(b), any attachments to such letter which are referred to in the letter, will form part of the communication under this clause 42. 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 42.1(c)(iii) will only form part of a communication under this clause 42 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; and
 - (B) 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.

43. **GENERAL**

43.1 **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 43.1(b)(i).

43.2 **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.

43.3 **Taxes**

Without limiting clause 38.2, 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.

43.4 **Indemnity**

- (a) Each indemnity in this deed is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this deed.
- (b) It is not necessary for a party to incur expense or make any payment before enforcing a right of indemnity conferred by this deed.
- (c) A party must pay on demand any amount it must pay under an indemnity in this deed.

43.5 **Vienna Convention**

The United Nations Convention on Contracts for the International Sale of Goods does not apply to this deed.

43.6 **Non reliance**

Without limiting clauses 11.7 and 11.8, 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, WDA or anyone on behalf of RMS or WDA 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 43.6(a) and 43.6(b).

43.7 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.

43.8 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.

43.9 Unlimited discretion

- (a) Except as expressly otherwise provided in this deed (including in clause 43.9(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 43.9(a):
 - (i) except as expressly provided in this deed (including in clause 43.9(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 43.9 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.

43.10 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.

43.11 No agency, partnership, joint venture or other fiduciary relationship

Nothing in this deed or any other Project Document to which RMS or the Project Company are expressed to be parties 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) creating a partnership, joint venture or fiduciary relationship between RMS and the Project Company.

43.12 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.

43.12A **Set Off**

RMS may set-off or deduct from any monies due to the Project Company:

(a) any debt or other moneys due from the Project Company to RMS; and

(b) any bona fide claim to any money which RMS may have against the Project Company, whether for damages or otherwise,

whether under the Project Documents or otherwise at law relating to the Project.

43.13 **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.

43.14 **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.

43.15 **Survival of certain provisions**

Without limiting clause 43.4:

(a) Clauses 1, 5, 8.6, 9.3(a)(iv), 9.8(d), 11.8, 11.11(f), 13.2(c), 17, 19.14, 20, 24, 25.2(a)(iii), 26.2, 26.3, 26.4, 30, 31, 32, 34, 39, 42 and 43 and any other provisions of this deed which are expressed to survive termination (together the **Surviving Clauses**) will survive rescission, novation, 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.

43.16 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 any transaction contemplated by this 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 all things reasonably necessary to assist RMS to take the steps described in clause 43.16(a);
- (c) it 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 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 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 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 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 43.16, "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.

43.17 Ring Fencing

- (a) Subject to clause 43.17(d), the Project Company must not (and must procure that the Holding Company does 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 an Ultimate Shareholder (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 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 or the Holding Company 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 or the Holding Company acted with the interests of any Associate Entity in mind;
 - (v) whether the Project Company or the Holding Company 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 or the Holding Company 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 43.17(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 20.1(h)(i) and its half-yearly financial report provided under clause 20.1(h)(ii), a report describing all transactions or arrangements entered into by the Project Company or the Holding Company 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 43.17(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 43.17(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 43.17(a)) in place in accordance with the Project Documents to respond to or remedy such an emergency situation, then the Project Company and/or the Holding Company 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;
- (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;
 - (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;
 - (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;
- (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 and the Holding Company in connection with all procurement processes relating to the relevant transaction or arrangement; and
 - (B) the steps taken by the Project Company and the Holding Company to ensure that there are appropriate processes in place to respond to or remedy any continuation or recurrence of the emergency situation;
- (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 43.17(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.

43.18 **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.

43.19 **Project Company not to apply proportionate liability scheme**

To the extent permitted by Law:

- (a) the Project Company must 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 (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 (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 because of the operation of Part 4 of the *Civil Liability Act 2002* (NSW).

43.20 **Subcontracts**

The Project Company must:

- (a) in each Subcontract into which it enters for the carrying out of the Project Company's 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 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 Company's 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 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 Company's Activities that is not covered by clause 43.20(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.

43.21 **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.

43.22 **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 BBSY +2% per annum; and
- (c) capitalised monthly.

43.23 **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 expressly provides to the contrary, relieve the Project Company from its obligations under this deed.

Executed as a deed.

THE SEAL of ROADS AND MARITIME SERVICES ABN 76 236 371 088 was hereunto affixed by its authorised signatory:

Name

Signature

EXECUTED by WCX M4 PTY LIMITED ABN 92 602 963 806 in accordance with section 127(1) of the *Corporations Act 2001* (Cth) by:

Signature of director

Signature of director/secretary

Name

Name