



Transmission Gully Information Release

This document has been proactively released

Information Withheld

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act).

Where this is the case, the relevant sections of the Act that would apply have been identified.

Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to sections of the Act under which information has been withheld:

- [23] 9(2)(a) - to protect the privacy of natural persons, including deceased people
- [24] 9(2)(b)(i) - to protect trade secrets
- [25] 9(2)(b)(ii) - to protect the commercial position of the person who supplied the information or who is the subject of the information
- [34] 9(2)(g)(i) - to maintain the effective conduct of public affairs through the free and frank expression of opinions
- [35] 9(2)(g)(ii) - to maintain the effective conduct of public affairs through protecting ministers, members of government organisations, officers and employees from improper pressure or harassment
- [37] 9(2)(i) - to enable the Crown to carry out commercial activities without disadvantage or prejudice
- [38] 9(2)(j) - to enable the Crown to negotiate without disadvantage or prejudice
- [39] 9(2)(k) - to prevent the disclosure of official information for improper gain or improper advantage
- [40] Not in scope

Where information has been withheld, a numbered reference to the applicable section of the Act has been made, as listed above. For example, a [23] appearing where information has been withheld in a release document refers to section 9(2)(a).

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Communications materials – timeline, questions and answers

Transmission Gully: COVID-19 settlement overview

- The media release announcing the Transmission Gully Covid-19 in-principle settlement agreement in August 2020 is here: <https://www.nzta.govt.nz/media-releases/new-opening-date-and-covid-19-disruption-payments-agreed-for-transmission-gully-motorway/>. This summary provides further background to the settlement.
- To protect New Zealanders from COVID-19, the Government Alert Level 4 lockdown required all non-essential workers to stay home. Among other things, this impacted the government's major construction projects as sites were required to shut down.
- The Government-required site closures gave rise to a range of obligations under existing contractual frameworks (which are put in place to deal with this kind of unusual scenario). The Transmission Gully Project Agreement recognised that not every possible risk can be foreseen, managed or insured against. These rare and unusual kinds of circumstances are referred to in the Project Agreement as Uninsurable Events.
- The Project Agreement prescribes a process to manage Uninsurable Events if they arise - essentially both parties are obliged to mitigate the risk if they can. In the case of COVID-19 this meant negotiating how to share the costs arising from the Level 4 lockdown and how risks would be shared in the event of any resurgence. If these negotiations did not result in agreement; then either party could have chosen to terminate the Project Agreement.
- Officials from the Treasury, Te Waihanga and Waka Kotahi advised that agreeing a settlement was the most cost-effective option, would best deliver the benefits Waka Kotahi expects from the project, and support other outcomes important to the Crown (timely project completion, market impact, and risks to the long-term investment pipeline, etc).
- On this basis, the Crown's preferred outcome was to negotiate a fair agreement to resolve issues associated with COVID-19 (i.e. agree how to share costs, manage delay, and other measures to stabilise and complete the project).
- Although the Crown's preference was always a fair settlement, significant and complex negotiations were required to ensure the costs were acceptable and a settlement delivered the best overall outcome for the Crown. The Treasury and Te Waihanga worked closely with Waka Kotahi to help resolve these matters.
- This project bundles construction together with whole-of-life services and financing. This meant that multiple parties needed to agree to (and then formally document) any settlement. These legal documents then needed a range of approvals.

- Waka Kotahi finalised the last of the legal documents to give effect to the settlement on 17 December 2020. The settlement restores time and cost certainty for the project, by providing for compensation payments totalling \$164.2 million, a pavement construction variation of \$45.5 million and a revised opening date in September 2021.
- Now that this has been completed, we have greater confidence about time and costs and the Contractor can get on with finishing construction of the road. Even though the Project has an achievable plan to deliver post-COVID, it is expected that issues will arise and be managed (as they would during any major project).
- Every effort has been made to mitigate future delivery risks, including:
 - the appointment of a site monitor who is embedded in the project to track progress towards completion;
 - an at-risk payment is part of the settlement (which is only paid if the road is delivered on time); and
 - penalties (in the form of liquidated damages of more than \$250,000 per day) will also be incurred by the builder if the road is not open by September 27, 2021.
- During Cabinet’s consideration of these matters, it recognised that some issues in the project had emerged before COVID-19, and so it ordered an independent *Interim Project Review* to help find out why and learn from this. That review has now been completed and the report is now available on Te Waihanga’s website.
- Recognising that Transmission Gully attracts high public interest, the Treasury, Te Waihanga, Waka Kotahi and the Ministry of Transport have together elected to proactively release information to help people understand what has happened.
- This proactive release includes:
 - All reports from Te Waihanga and the Treasury on the COVID-19 Settlement
 - All Board-level papers from Waka Kotahi on the COVID-19 settlement
 - The *Interim Project Review* Report
 - This narrative along with questions and answers to aid interpretation

Questions and Answers

To assist the public in interpreting this information officials have prepared questions and answers that fall into the following four areas:

- Background about Public Private Partnerships (PPPs)
- Background about the Transmission Gully Project
- The COVID-19 settlement
- The *Interim Project Review*

Background: Public Private Partnerships

What is a PPP?

- It is a long term contract for the delivery of a service, where the provision of the service requires the construction of a new asset (or the enhancement of an existing asset), that is financed from external (private) sources on a non-recourse basis, and where full legal ownership of the asset is retained by the Crown.

How is a PPP different from “normal” procurement?

- PPPs bundle together whole-of-life services (that are otherwise procured independently at different stages) under a single long-term contract.
- PPPs transfer risk to the private sector partner where they are best placed to manage that risk.
- PPPs specify service outcomes required from an asset rather than prescriptive input specifications that relate to the asset itself. (It must do x; not it must be x). Conventional forms of procurement focus on asset input specifications, which traditionally dictate how the asset is constructed.
- PPPs have a periodic (typically quarterly) payment profile which commences only once the asset is operational and is calculated based on the actual performance of the asset and required service outcomes. In other words, the Government *only pays for the infrastructure when it is completed and performing to the agreed contractual standard.*

What are the benefits of a PPP?

- The PPP model is intended to create incentives for the delivery of high-quality infrastructure assets, and for on time and on budget delivery. The PPP model incentivises these outcomes by:
 - putting third party capital at risk;
 - integrating design, construction, maintenance and – for certain contracts – operations into one entity; and
 - allocating risks to parties best able to manage those risks.

When would you use a PPP?

- This type of contract is only used where the project business case determines it is expected to achieve better outcomes than if it were procured using conventional methods, for the same, or lower, net present cost.
- PPP procurement is used in New Zealand where it offers value for money over the life of the project relative to conventional procurement methods.

Background: Transmission Gully Project

What is the Transmission Gully project?

- The Transmission Gully Project is a 27 kilometre four-lane motorway, which will run from Mackays Crossing to Linden through Transmission Gully. Four new interchanges, and three new link roads, connect the motorway to Paekākāriki, SH58, Waitangirua and Whitby, and Kenepuru.
- The project will provide a more resilient route between Wellington and the lower and central North Island that will be safer and more reliable for motorists and better able to resist (and recover from) earthquakes and storms.
- The \$1.25 billion Transmission Gully motorway is being delivered as a Public Private Partnership (PPP) by the Wellington Gateway Partnership (WGP) in partnership with the New Zealand government acting through Waka Kotahi, NZ Transport Agency (Waka Kotahi).
- The project is complex with multiple stakeholders (Regional and local councils), with difficult and steep terrain requiring large-scale earthworks during construction of the project. It includes over 10.2 million cubic metres of earth moved (equivalent to around 4080 swimming pools), and cuts of up to 70 metres deep.

Who are the parties to the Transmission Gully PPP?

- Waka Kotahi entered into a PPP Project Agreement with the WGP in July 2014.
- WGP is owned by Pacific Partnership, ACC and Infrared Capital Partners. WGP is a special purpose vehicle (SPV), providing equity and debt funding for the Project.
- WGP is contracted to build the motorway for a fixed price, and to maintain and operate the motorway for a period of 25 years from completion.
- WGP has contracted an unincorporated joint venture of CPB Contractors and HEB Construction (together, the builder) to design and construct the motorway and Ventia to operate and maintain the motorway during the 25-year operating term.

What are the benefits of the Transmission Gully project?

- Waka Kotahi expects that successful completion of the Transmission Gully project will:
 - deliver a more resilient route between Wellington and the lower North Island, better able to resist and recover from earthquakes and storms;
 - provide a safer journey for motorists, significantly reducing the number of fatal and serious injury crashes;
 - provide more reliable journey times for motorists;
 - reduce traffic on the existing State Highway 1 which will provide a safer and more pleasant environment for communities along this coastal route;
 - reduce fuel costs and contribute to economic growth.

What issues have arisen in the course of the Transmission Gully project so far?

- The Project has experienced a number of issues including:
 - Significant re-estimation of earthworks requirements, and associated consenting matters;
 - Wet weather and significant storm events, which made early earthworks seasons less productive than expected;
 - Kaikōura earthquake damage and repairs, which also impacted the availability of resources across various supply chains; and
 - The COVID-19 Level 4 lockdown and other COVID-19 related impacts.
- In February 2020, Waka Kotahi announced that it had reached a settlement dealing with the time and cost impacts of the above non-COVID-19 related issues. That announcement is here: <https://www.nzta.govt.nz/media-releases/transmission-gully-to-open-in-time-for-christmas-2020/>

When will Transmission Gully be completed and how much more will it cost?

- As at the end of January 2021, the Project is approximately 92% complete.
- The settlement agreement requires the Transmission Gully motorway to open to traffic by 27 September 2021.
- Once open, there will be further work required before the project is fully completed, including landscaping and testing and commissioning of new technology systems. This work is scheduled to be completed by 27 March 2022.
- The COVID-19 settlement includes COVID-19 payments totalling \$164.2 million and a pavement construction variation of \$45.5 million – the new solution is faster and will help make up some lost time.

COVID-19 settlement

Why did the short Level 4 lockdown and COVID-19 create so much additional cost and delay to the project?

- While the lockdown had direct impacts (like no work on site for the lockdown period) it also created indirect impacts (like serious disruption of the work-force and the supply chain) that meant it took longer for work to restart after the lockdown period lifted, and required a change in workforce strategy.
- This was partly because the Builder previously relied on moving people in and out of Australia frequently to work on the project – and this approach became impractical in a managed quarantine situation.
- The lockdown started during the critical summer paving season, delaying work that couldn't be quickly restarted – as colder, wetter weather became more prevalent, and key personnel were no longer in the country.
- Together these events have had an increasing and cumulative effect on the build programme of work which generally needs to be done in a specific order (as you can't seal a road you haven't made yet).

Why did the Crown agree to pay for COVID-19 impacts?

- The Crown agreed to additional compensation for COVID-19 impacts because it was the right thing to do given that the lock downs were outside the WGP's control.
- It was fair, reasonable and appropriate to do this, and in line with existing legal obligations in the Project Agreement and consistent with how the Crown has dealt with its impacted suppliers and contractors across its supply chain.
- Any attempt not to share these costs would likely have resulted in litigation, further delay and more cost increases to the Transmission Gully project. It would have prolonged uncertainty which could have negatively impacted the supply chain, particularly in the context of COVID-19.

How did you assess whether the settlement reflected actual COVID-19 costs?

- Independent experts were engaged by Waka Kotahi to review the Contractor's and Builder's claims and to provide confidence that the numbers presented were an accurate reflection of the real costs.
- This review process involved an independent cost assessment of both the time and resource impact.

Aren't PPPs supposed to transfer risk? Why hasn't that happened here?

- Across all procurement models, contractors are reluctant to take on responsibility for risks they cannot reasonably anticipate, mitigate or control.
- While the PPP model involves a high degree of risk transfer to the Contractor when compared to traditional models, some risks are retained by Waka Kotahi or shared with the Contractor, including Force Majeure and Uninsurable Events.
- These type of events cannot reasonably be foreseen, but the agreement does provide a way of dealing with the impacts – requiring both parties to use reasonable endeavours to mitigate the impacts (and share the risk).

Why did the negotiations and settlement agreement take so long to complete?

- Agreement in principle was reached in August 2020 and announced at that time, with full documentation of the settlement into the project agreements completed in December.
- The negotiations were complex, involving many stakeholders with different interests, and so documenting and approving all the details of the settlement naturally took some time.
- The Crown was responsible and cautious in undertaking due diligence at each stage to make sure the settlement was progressing in line with expectations.
- This did take time, but the careful approach has resulted in a Project plan that the Contractor and Builder were confident was achievable, with better mechanisms in place to identify and manage the risks of further delay.

Why and when did the Treasury get involved, and what did it do?

- The Treasury advises the Minister of Finance about risks that may arise under the Deed of Indemnity provided by the Crown to support Waka Kotahi's payment obligations for the Transmission Gully project.
- As a result of the Deed of Indemnity, the Crown has rights to information and power to intervene in the project, if required. Waka Kotahi escalated this matter to the Treasury on 8 May 2020, in line with its obligations to the Crown.
- The Treasury recognised that Waka Kotahi would need support from the Crown to successfully resolve the negotiations. It invoked one of its additional powers – enhanced monitoring – to clarify decision rights and stay close to the matter.
- The Treasury established a small team to support Waka Kotahi, which included advisors from Te Waihangā and external legal advisors (Buddle Findlay). This team helped to advise Joint Ministers and Cabinet on the negotiations, the options available to them, and the potential impacts of their decisions.
- The Treasury also led this proactive release of Transmission Gully information.

Why won't you proactively release more of the scenario analysis and other commercial information?

- The scenario analysis is proprietary and commercially sensitive. Sharing this information could prejudice future Crown negotiations

Interim Project Review

Why was the Review undertaken?

- Following the COVID-19 settlement in August 2020, Cabinet agreed that Te Waihangā would oversee an independent *Interim Project Review* of Transmission Gully.
- The focus of the review was how the project was awarded for the agreed price, whether the price was realistic, and whether the risks then identified were appropriately considered.

What was the purpose of the Review?

- The purpose of the review was to identify important lessons that should be captured and learned from the Transmission Gully experience to improve outcomes for future infrastructure projects.
- This is particularly important in the context of the current investment pipeline which suggests a large number of major complex infrastructure projects will be undertaken in coming years, stretching New Zealand's capacity and capability.

Who was involved in the review?

- The terms of reference for the review identified the need for a suitably qualified international Expert Reviewer with highly specialised skill and experience, who was not conflicted in the New Zealand market context.
- Te Waihanga appointed Steve Richards as the Expert Reviewer. Mr Richards has over 25 years' experience supporting the Australian and several State Governments on major road and rail projects with specific expertise in PPPs.
- The international Expert Reviewer was supported by two NZ-based peer reviewers Sir Michael Cullen and Lindsay Crossen. Te Waihanga officials facilitated the review.

What did the review investigate?

- The terms of reference scope for the Transmission Gully Interim Review was on the project Business Case development and the procurement process, including project governance frameworks and excluded project implementation and value for money matters.
- The Terms of Reference asked the Reviewer to consider the following three focus areas:
 - Business Case
 - Risk Transfer
 - Governance and Timeframes
- The full Terms of Reference can be found on the Te Waihanga website.

What material was relied upon for the review and which agencies and organisations were interviewed for the Review?

- The review relied upon contemporary records held by the Treasury, Ministry of Transport and Waka Kotahi.
- 25 people from a range of organisations at the relevant time were interviewed to complement the above information, including representatives from:
 - Waka Kotahi, New Zealand Transport Agency
 - New Zealand Treasury
 - Advisian
 - PwC
 - Russell McVeagh
 - Bond Construction Management

- Bank of New Zealand
- Accident Compensation Corporation
- Greater Wellington Regional Council (GWRC)
- Wellington Gateway Partnership (PPP) Consortium
- Positive Connection (PPP) Consortium

How long did the Review take and how much did it cost?

- The Review was estimated to take 12 weeks and was completed as planned.
- The Review will cost approximately \$176,500 for an overseas independent Expert Reviewer with two NZ based peer reviewers.

What did the review find?

- The review identified a number of useful lessons that could be learned, both for Te Waihangā and Waka Kotahi to apply in their respective roles in relation to this and any future PPP projects. These included:
 - The need for the consented scheme to reflect the use of PPP procurement,
 - The importance of setting the Affordability Threshold at the appropriate level,
 - The need for all stakeholders to engage in the management of consenting risk, and
 - The need for a project procurement governance structure appropriate for PPP Procurement with transparency as to how key PPP decisions are made and clear delegations in decision making responsibilities.
- The review identified many strengths in the Project, including Waka Kotahi's use of specialist advisors, its growing technical depth in PPPs, and its ability to learn and apply lessons (notably on the Puhoi to Warkworth PPP).
- The full report from the review can be found on the Te Waihangā website.

What is the government response to the review?

- Cabinet has considered the findings and recommendations and has directed Waka Kotahi and Te Waihangā to implement the recommendations in their practices, specifically:
 - It has directed Waka Kotahi to report to the Ministry of Transport on how it is taking the recommendations of the review into account in its Governance practices;
 - It has directed Te Waihangā to improve the PPP guidance (much of which predates Te Waihangā's existence); and

- It has directed Te Waihanga to undertake a further review of the Transmission Gully project after construction has been completed to learn further lessons.

Does this mean we shouldn't do a PPP again in future?

- No. We should continue to consider PPPs as one of the tools in the procurement toolkit and use them where they likely produce the best outcomes and value for money to the Crown. They remain important enablers for our high-end, high value and complex construction.
- The problems that have manifested on the Transmission Gully project are not a product of the PPP model but have resulted from consenting issues, weather and storms, earthquakes and a pandemic, which would have happened irrespective of the procurement model utilised.

Transmission Gully Timeline

Project Phase	Date	Milestone
Pre-PPP Project Development	July 1997	Designation approved subject to certain terms and conditions.
	2006	Funding confirmed for investigation of Transmission Gully during 2006 and 2007.
	December 2006	Contracts awarded for investigations and preliminary design of the project.
	2007	Transmission Gully project team is fully established.
	2009	New Zealand PPP Programme established
	March 2009	Minister of Transport identifies 'Roads of National Significance', signals use of PPP for some projects including potentially for Transmission Gully.
	December 2009	Wellington Northern Corridor Plan released, described as 'green light' for Transmission Gully.
	September 2010	Transmission Gully referred to Board of Inquiry for Regional Freshwater Plan change.
	August 2011	Transmission Gully referred to Board of Inquiry for revised designation and resource consenting.
	May 2012	Board of Inquiry draft approval for resource consents.
June 2012	Board of Inquiry approves designation and resource consents.	
PPP Business Case Development & Approval	August 2012	The Minister of Transport directed that Waka Kotahi consider PPP procurement for Transmission Gully.
	September 2012	Waka Kotahi Board approved the PPP detailed business case, including the initial estimate of the Public Sector Comparator (PSC).
	November 2012	Govt announces approval to use of PPP model for Transmission Gully.
	January 2013	Expressions of Interest issued to market.
Procurement Phase <i>(i.e. Expression of Interest, Request for Proposals, & Preferred Bidder Negotiations)</i>	March 2013	Expressions of Interest closed.
	April 2013	Announcement of (two) short-listed consortia.
	May 2013	Request for Proposals issued.
	August 2013	Waka Kotahi Board considers and approves paper on review of the PSC and Affordability Threshold (AT) changes.
	October 2013	Request for Proposals closed.
	November 2013	Waka Kotahi Board approves Preferred Bidder recommendation.
	December 2013	Preferred Bidder announcement and Waka Kotahi Board approves negotiation strategy with Preferred Bidder.
	January-July 2014	Preferred Bidder negotiations.
	July 2014	Waka Kotahi Board provided approval to enter into the PPP contract and Government approvals obtained and the contract signed. Completion date of 30 April 2020 and approximate costs of \$850m.
Delivery Phase	September 2014	Sod turning ceremony (but construction start proper relied upon required management plans to be approved/ certified by the Councils).
	December 2019	All existing claims settled for \$190.6m and new opening date agreed – November 2020.
	February 2020	Public announcement of revised road opening date following December 2019 settlement.
	March/April 2020	Project shutdown during COVID Alert Level 4.
	8 May 2020	Waka Kotahi escalates to Treasury in line with reporting obligations relating to risks under the Deed of Indemnity.
	May 2020	Ministers advised of the particular impacts of COVID-19 Alert Level 4 on the PPPs in construction, including the Transmission Gully

Project Phase	Date	Milestone
		project.
	29 May 2020	Waka Kotahi announces that it has reached agreement for the contractor and builder to carry out a winter construction programme, while the parties continue to seek to agree a new completion date and explore the financial implications of the COVID-19 delays.
	6 July 2020	Cabinet established tagged operating contingencies to provide for costs relating to a negotiated settlement of the impacts of the COVID-19 Alert Level 4 on the Transmission Gully project, and authorised the Ministers of Finance and Transport to take decisions as required to resolve matters associated with the negotiations.
	7 July 2020	The Treasury advises Waka Kotahi that the enhanced monitoring framework now applies.
	August 2020	The Minister of Finance provides Crown Consent to the settlement, subject to due diligence by officials.
	21 August 2020	COVID-19 settlement announced, a total of approximately \$164.2m and a new opening date of 27 September 2021.
	21 August 2020	Ministers of Transport and Infrastructure announce independent expert review to be overseen by Te Waihangā.
	17 December 2020	COVID-19 settlement and consequential documents full, final and legally binding.
	23 December 2020	The Treasury considers that the enhanced monitoring put in place on 7 July is no longer required and returns the project to standard monitoring.
	12 April 2021	Cabinet considers the <i>Interim Project Review</i> of Transmission Gully and directs Te Waihangā and Waka Kotahi to implement the recommendations from the review.
	TBC	Proactive release of documents relating to the Transmission Gully COVID-19 settlement.

Impacts of COVID 19 on Pūhoi to Warkworth

Confidential & Legally privileged

Meeting Date	15 May 2020
ELT Sponsor	Brett Gliddon, GM Transport Services
Prepared By	Lucy Riddiford and Simon Penlington
Legal Reviewer	Anna Moodie
Version	Draft for CEO
Date	9 May 2020
Pages	5 + 2 Attachments

Purpose

This paper updates the Board on the implications of COVID-19 and the associated Level 4 alert lockdown on the Pūhoi to Warkworth Public Private Partnership (PPP) s 9(2)(i) [REDACTED]

[REDACTED]. The information and advice in this paper is intended to provide the Board with the background to inform the decisions Waka Kotahi will need to make on the PPP projects over the next 1 – 2 months.

Recommendations

It is recommended the Board:

- s 9(2)(i) [REDACTED]
- s 9(2)(i) [REDACTED]
- s 9(2)(i) [REDACTED]
- s 9(2)(i) [REDACTED]

§ 9(2)(i) [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

COVID-19 Alert Level 4 lockdown

COVID-19 will have impacts on the integrity of the PPP model which is focused on delivering projects on a fixed price and fixed time. The impacts of COVID-19 and the Level 4 lockdown will delay the expected completion of the projects, increase their overall construction cost and also come with an increased cost of finance to cover debt payments during the delay period. There will also be flow on impacts to the project beyond the lifting of the Level 4 lock down.

The builder has some reliance on overseas management, labour and equipment and COVID 19, and associated immigration restrictions, will have an ongoing impact on these supply chains.

Governance and negotiating approach

Waka Kotahi has established the Transport Services Covid-19 Steering group to oversee all issues associated with the stand down of capital works projects, including the PPPs. This group is chaired by the former Interim Chief Executive and the other members are the General Manager Transport Services, General Manager Corporate Support, Group General Counsel and Chief Financial Officer. Standing attendees are Senior Manager Project Delivery, Chief Advisor Engineering, General Counsel Litigation and General Counsel Light Rail. The group meets weekly, supporting a negotiating team, led by the Senior Manager Project Delivery and supported by Chief Advisor Engineering and General Counsel Litigation (with support of external legal and financial advisers).

External advisors include Bell Gully (who are also advising the Department of Corrections on PPP issues, and have been involved in the negotiation of all PPPs in New Zealand), Justin Smith QC, and Mafic § 9(2)(i)

[Redacted]

§ 9(2)(i) [Redacted]

[Redacted]

[Redacted]

s 9(2)(i)

s 9(2)(i)

[Redacted text block]

[Redacted text block]

Key Issues

Legal position

s 9(2)(i), s 9(2)(h)

[Redacted text block]

[Redacted text block]

Options development

s 9(2)(i)

[Redacted text block]

s 9(2)(i)

[Redacted text block]

s 9(2)(i)

s 9(2)(i)

s 9(2)(i)

s 9(2)(i)

s 9(2)(i)

[Redacted]

s 9(2)(i)

s 9(2)(i)

Operations and maintenance

Redacted - Out of scope

[Redacted]

[Redacted]

s 9(2)(i), s 9(2)(j)

[Redacted]

- [Redacted]
- [Redacted]

[Redacted]

- [Redacted]
- [Redacted]

Stakeholders

In addition to the Minister and the Ministry of Transport, the following external stakeholders will need to be engaged in connection with the PPP projects, with the level of engagement depending in large part on how material any settlement is and how far it deviates from the standard PPP model.

The Treasury: Waka Kotahi will need to engage with the Treasury s 9(2)(i)

Infrastructure Commission: The Infrastructure Commission has taken over Treasury's prior role as 'guardian of the PPP model'. s 9(2)(i)

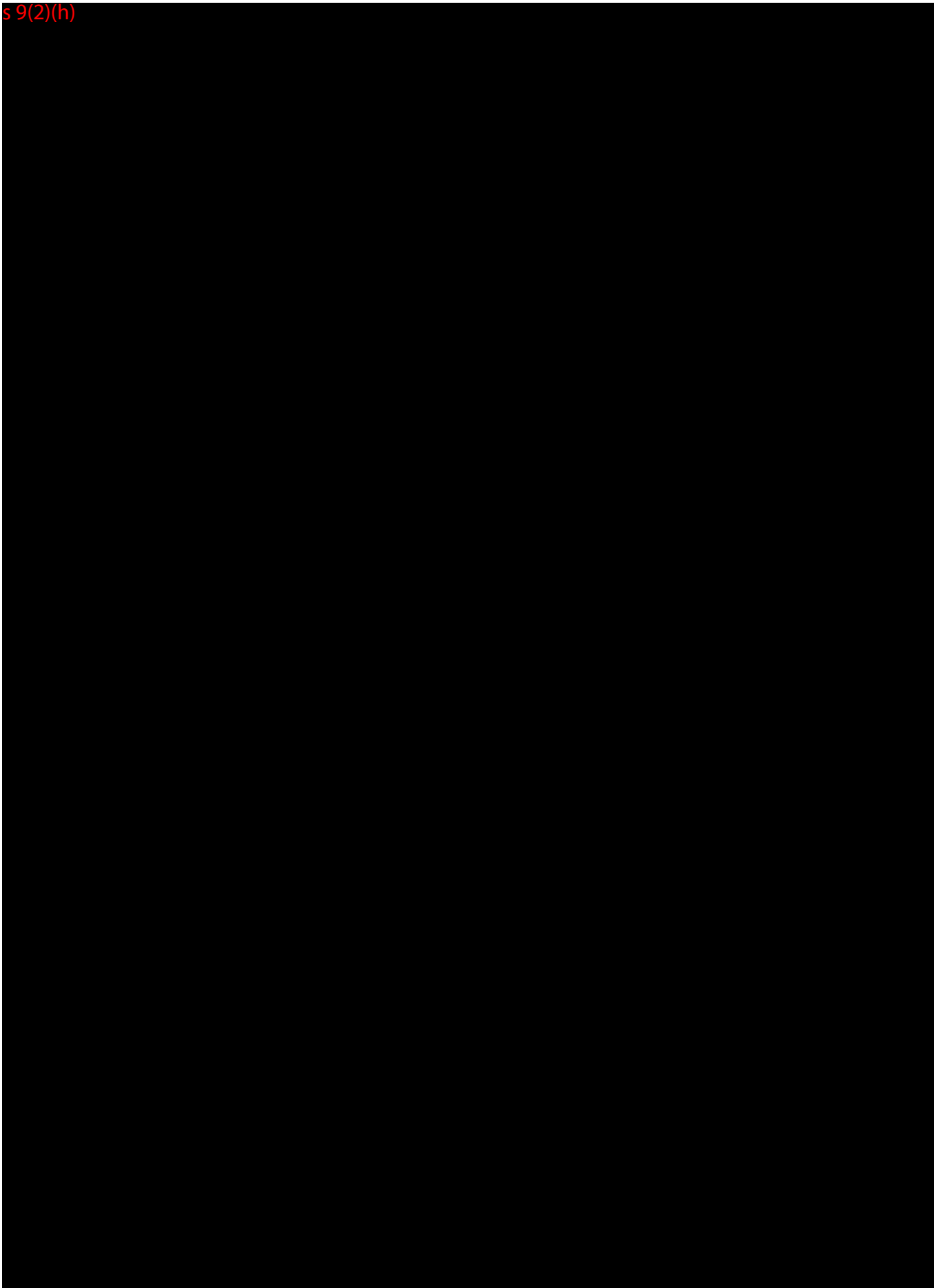
Health & Safety, Customer/Stakeholder & Environmental Impact

The impact of this decision is considered by Waka Kotahi to be neutral in terms of health and safety, the public and other stakeholders, and the environment.

Attachments

- Attachment 1** Summary of the legal framework which applies to COVID 19 and Alert Level 4
- Attachment 2** Preliminary financial analysis undertaken for Pūhoi to Warkworth

s 9(2)(h)



§ 9(2)(h) [Redacted]

[Redacted]

[Redacted]

[Redacted]

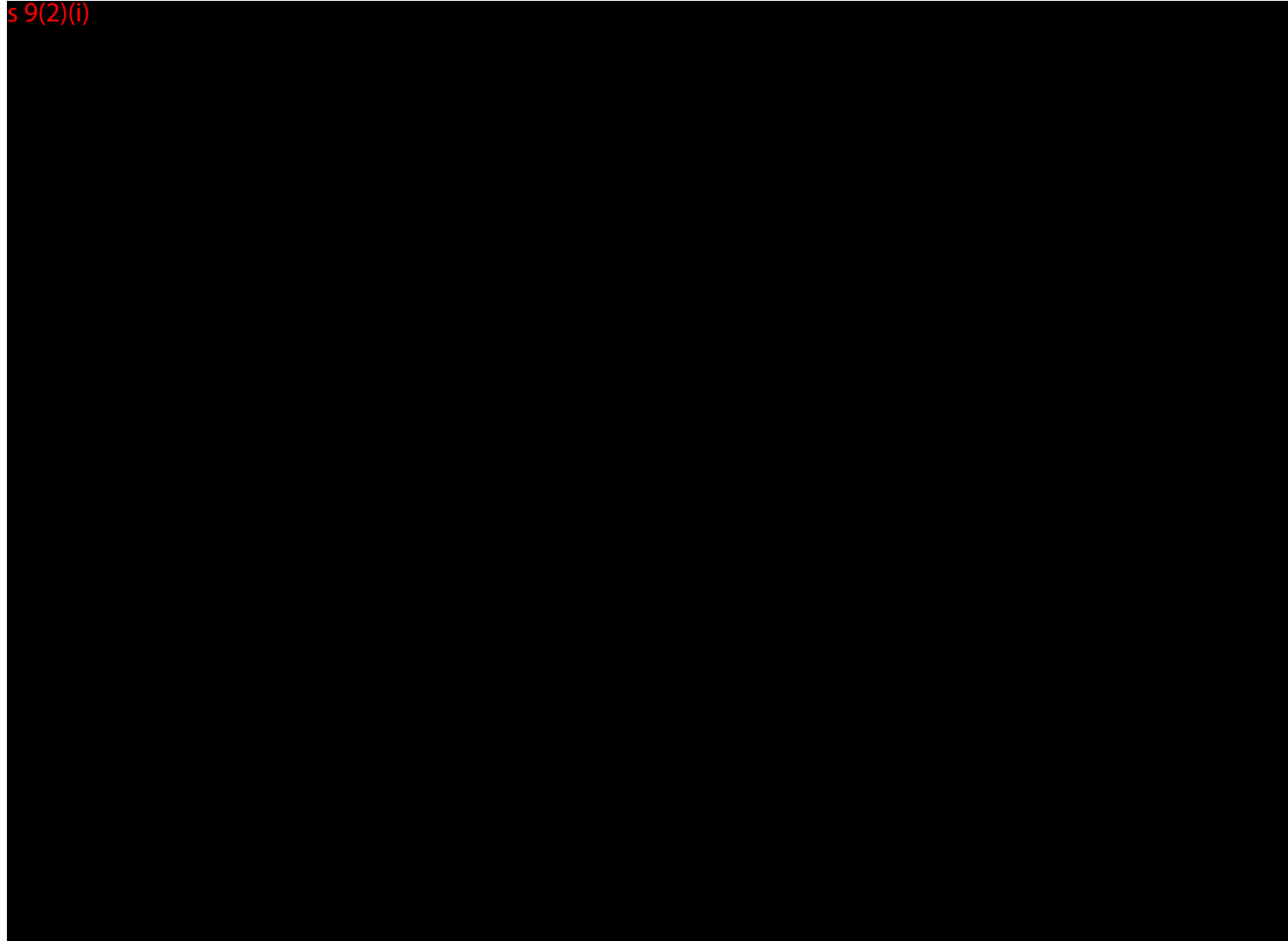
[Redacted]

[Redacted]

[Redacted]

[Redacted]

Attachment 2



s 9(2)(i)



Impacts of COVID 19 on Transmission Gully and interim decisions

In confidence/Commercially sensitive/Legally privileged (all)

Meeting Date	15 May 2020
ELT Sponsor	Brett Gliddon
Prepared By	Simon Penlington
Legal Reviewer	Lucy Riddiford
Version	Draft
Date	8 May 2020
Pages	6 + 1 Attachment

Purpose

This paper updates the Board on the implications of COVID-19 and the associated Level 4 alert lockdown on the Transmission Gully Public Private Partnership (PPP) s 9(2)(i) [redacted]. It also seeks the Board's approval to two interim decisions related to the Transmission Gully settlement, to allow the parties further time to reach agreement on the consequences of COVID 19 and Alert Level 4, without impacting the December 2019 settlement.

Recommendations

It is recommended the Board:

- **Notes** that the contractual impact of COVID-19 and the associated Level 4 alert lockdown on the Transmission Gully Public Private Partnership (PPP) is the same as for the Puhoi to Warkworth PPP, and that the same governance s 9(2)(i) [redacted] approach described in the Board paper "Impacts of COVID 19 on Puhoi to Warkworth" is being taken for the Transmission Gully PPP claim.
- **Approves** [redacted]
s 9(2)(i), s 9(2)(b)(ii), Redacted - Out of scope
[redacted]
- **Approves** s 9(2)(i), s 9(2)(b)(ii), Redacted - Out of scope
[redacted]

¹ CPB Contractors Pty Limited ABN 98 000 893 667 and HEB Construction Limited acting as an unincorporated joint venture and on a joint and several basis

s 9(2)(i), s 9(2)(b)(ii), Redacted - Out of scope
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

- **Authorises** the CEO to execute any documentation and do all other things necessary to give effect to the above resolutions.

Strategic Relevance

The Transmission Gully project is contracted under a PPP model and aligns with the Government Policy Statement 2018 objectives to improve access, resilience and safety.

Background

Impact of COVID-19

In the Board paper titled “Impact of COVID-19 on Puhoi to Warkworth”, Management described the contractual impact of COVID on the Puhoi to Warkworth PPP, the governance approach to assessing a contractual claim, and the legal framework that applies. The contractual impact and legal framework is the same for the Transmission Gully PPP, and Management is following the same governance approach to managing the claim.

s 9(2)(i)
[Redacted]
[Redacted]
[Redacted]
[Redacted]

The settlement

s 9(2)(i), s 9(2)(b)(ii)
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

s 9(2)(i), s 9(2)(b)(ii), Redacted - Out of scope

s 9(2)(i), s 9(2)(b)(ii), Redacted - Out of scope

[Redacted]

Addressing the consequences of an Uninsurable Event

Transmission Gully has been severely impacted by COVID 19 and the associated Alert Level 4 lockdown.

The commencement of COVID-19 Alert Level 4 triggered a Force Majeure Event under the Project Agreements. It is also an “Uninsurable Event” which is a subset of Force Majeure Event which gives both parties an option to terminate the Project Agreement, if a mitigation plan to address the Uninsurable Event is not agreed and the Uninsurable Event or its consequences is continuing. The parties have 40 business days to agree a mitigation plan, failing which the Builder can terminate the sub contract agreement. If this occurs, WGP will pass the termination notice to Waka Kotahi. Waka Kotahi may also exercise a termination right after this 40 business day period expires.

Waka Kotahi has the option to elect to accept the termination or issue a continuation notice. If Waka Kotahi accepts the termination, it must repay the debt owed to the lenders and all equity invested by WGP to date.

s 9(2)(i)
[Redacted]

The parties are currently in discussions about the COVID 19 and Alert Level 4 lockdown impacts and trying to negotiate an agreed mitigation plan. s 9(2)(i)

In the meantime, there are two decisions required to preserve Waka Kotahi’s current position and enable the parties to continue to negotiate a mitigation plan or commercial resolution of COVID 19 impact issues.

Waka Kotahi has received advice from Bell Gully. Their advice is provided as Attachment 1 and they will provide a further opinion to support the agreement that will be required to document these decisions.

Key issues

s 9(2)(i)

[Redacted]

- s 9(2)(i), s 9(2)(b)(ii), Redacted - Out of scope
[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

s 9(2)(i)
[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

s 9(2)(i), s 9(2)(b)(ii), Redacted - Out of scope
[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Operations and maintenance

s 9(2)(i)
[Redacted]

[Redacted]

[Redacted]

Negotiations to date

Discussions with Transmission Gully are less advanced than for Puhoi to Warkworth. There has been significant publicity, suggesting that CPB (which is the senior joint venture partner of the

³ s 9(2)(i)
[Redacted]

builder) may intend to terminate the agreement **s 9(2)(i), s 9(2)(b)(ii)**
[Redacted]

s 9(2)(i), s 9(2)(b)(ii)
[Redacted]

[Redacted]

Costs if Waka Kotahi issues a termination notice

s 9(2)(i)
[Redacted]

[Redacted]

[Redacted]

Health & Safety, Customer/Stakeholder & Environmental Impact

The impact of this decision is considered by the NZ Transport Agency to be neutral in terms of health and safety, the public and other stakeholders, and the environment.

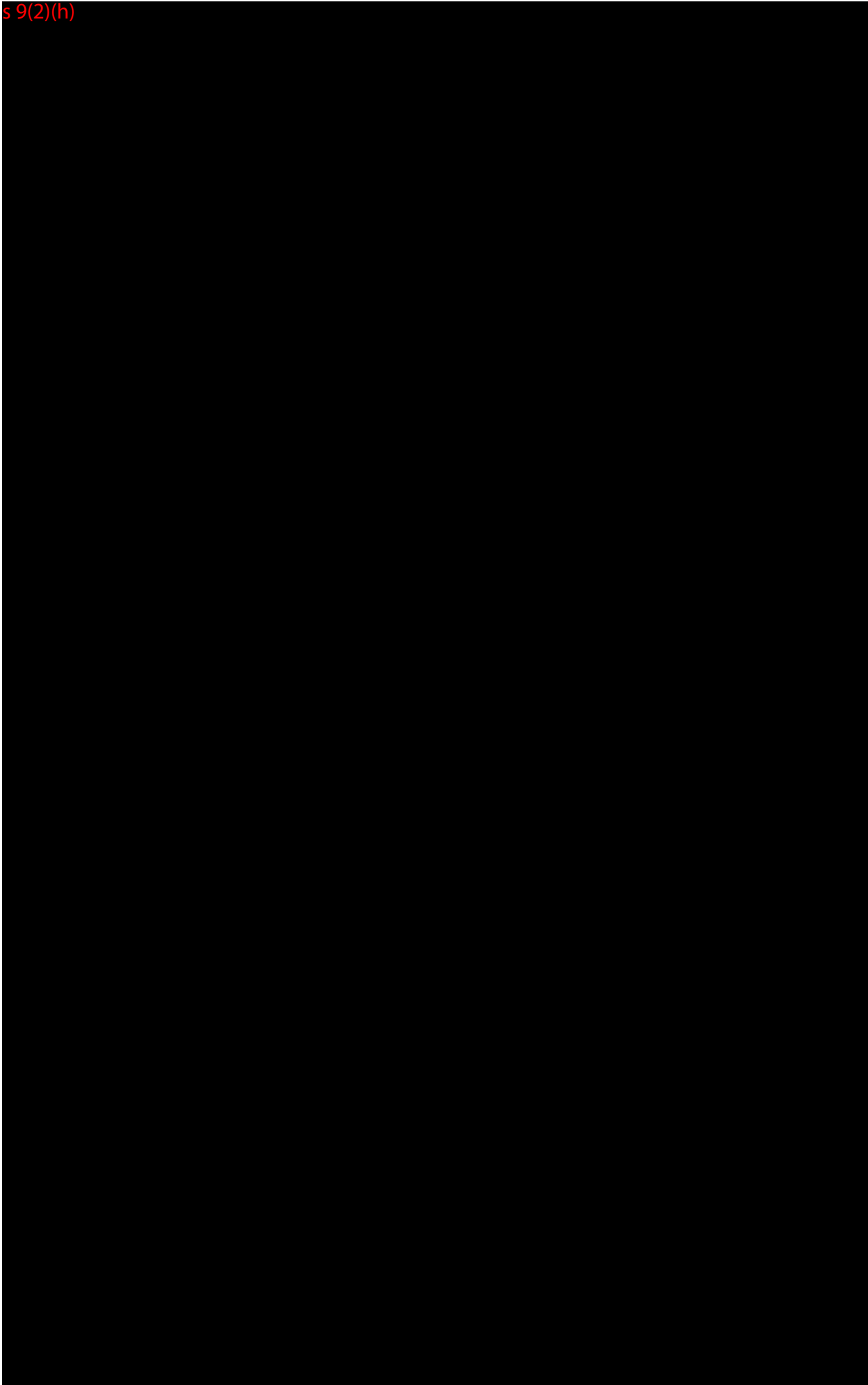
Related Documents

s 9(2)(i), Redacted - Out of scope
[Redacted]

Attachments

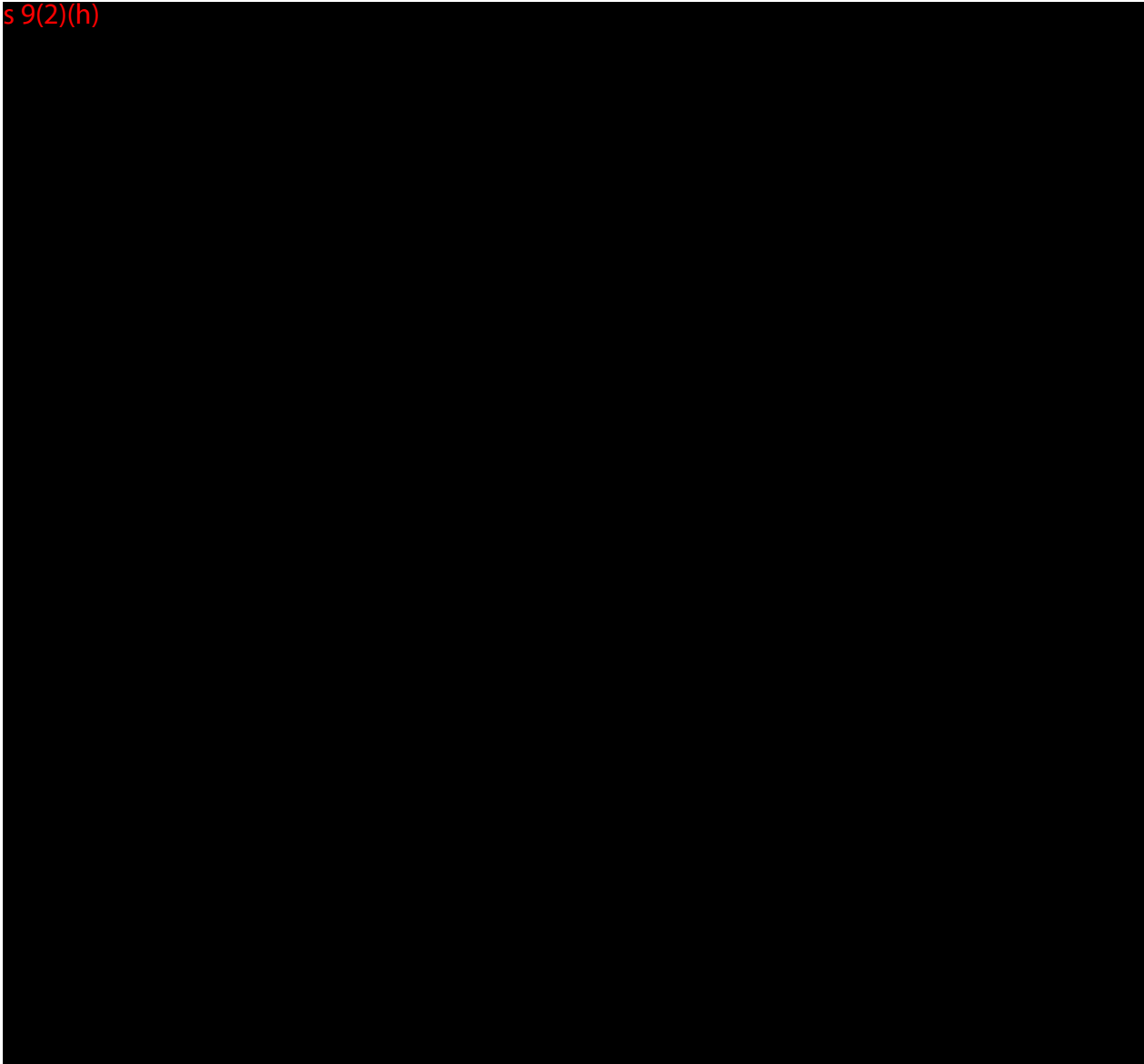
- Attachment 1** Advice from Bell Gully

s 9(2)(h)



s 9(2)(h)

s 9(2)(h)



s 9(2)(h)

Transmission Gully PPP – Impacts of COVID-19 (Interim Arrangements)

In confidence/Commercially sensitive/Legally privileged

Meeting Date	Circular
ELT Sponsor	Brett Gliddon, GM Transport Services
Prepared By	Lucy Riddiford
Legal Reviewer	Simon Penlington
Version	Final
Date	20 May 2020
Pages	8 + 2 Attachments

Purpose

This paper asks the Board to consider and approve three related items in relation to the Transmission Gully PPP project: the entry into a short term (to be negotiated but currently 6 weeks) interim agreement relating to certain winter works, the entry into a standstill agreement, s 9(2)(i)

At its meeting on 20 May 2020, Management provided a verbal update to the Board on the matters contained in this paper. The Board requested that Management provide a paper setting out these issues, with Directors confirming their endorsement by 11am on 21 May 2020.

Recommendations

It is recommended the Board signs or assents to the written resolutions set out in Attachment 1.

Strategic Relevance

There are potentially material cost, timing and reputational consequences associated with how Waka Kotahi addresses the impact of COVID-19 on the project. s 9(2)(i)

s 9(2)(i)

Background

The Transmission Gully PPP was entered into in 2014 after a two year period of negotiation. Treasury was the proponent of the model and the PPP was approved by Cabinet.

Further background as to the potential impact of COVID-19 on the project and the legal position is set out in Board papers *Impacts of COVID 19 on Pūhoi to Warkworth* (15 May: 2.1) and *Impacts of COVID 19 on Transmission Gully and interim decisions* (15 May 2020: 2.2) and is not repeated in full here.

Key background information is also included in Attachment 2 for convenience.

s 9(2)(i)

COVID-19 and its impacts are new, unanticipated events outside the control of Waka Kotahi.

Waka Kotahi has engaged Justin Smith QC, Peter Mathewson (former CEO of Opus) and Mafic, in addition to Bell Gully, who advised on the original transaction and the settlement. In engaging these advisers, Waka Kotahi has been keen to ensure sufficient independence and challenge. The approach outlined in this paper has been developed with external the legal advisers and Mafic. Bell Gully will provide a legal opinion, confirming that the approach is consistent with their legal advice and that of Justin Smith QC.

Uninsurable Event – timing

The commencement date for the Uninsurable Event is accepted by all parties, on a without prejudice basis, to be 26 March 2020. The following key dates flow from this event date:

- Tuesday 19 May 2020 (+35 Business Days) – from this date the Builder could issue a termination notice under the sub-contract;
- Tuesday 26 May 2020 (+ 40 Business Days) – from this date WGP or Waka Kotahi could issue a termination notice under the Project Agreement;
- Wednesday 24 June 2020 – the last date Waka Kotahi could issue a continuation notice under the Project Agreement, if a termination notice was issued on 26 May; and
- Wednesday 8 July – the earliest date on which the Project Agreement would terminate if a termination notice was issued on 26 May and Waka Kotahi did not issue a continuation notice.

Proposed Agreements

The proposed Winter Works Agreement and Standstill Agreement are both linked to the timeframes referred to above. As noted above, they are intended to allow the parties to seek an agreed way forward for the project without a termination or continuation notice being issued while they are continuing to negotiate. We discuss below the key issues associated with these agreements.

Key Issues

Funding and decision-rights

s 9(2)(i)

As Waka Kotahi would not be able to fund these payments, it would require funding assistance from core Crown. Management has had several constructive meetings with Treasury and we are working through the question of ultimate decision rights with them.

The ultimate decision regarding termination is likely to sit with Cabinet, rather than Waka Kotahi.

Decision-rights are less clear in a negotiated outcome scenario. s 9(2)(i)

. Treasury is supportive of the view that decision rights should rest with the relevant departments and agencies s 9(2)(i), Redacted - Out of scope

It has been assumed that the Winter Works Agreement would be funded out of the NLTF, as well as any negotiated commercial settlements to address the impacts of COVID 19. Redacted - Out of scope, s 9(2)(i)

Waka Kotahi will keep Treasury informed of progress in the negotiations.

Management will provide further updates to the Board on decision-making rights following further engagement with Treasury.

Notwithstanding likely core Crown involvement, the Waka Kotahi board can make the decisions outlined in this paper, which are designed to preserve the Waka Kotahi legal position and provide further time for the negotiations to take place, while ensuring that work continues on the ground.

Proposed Winter Works Agreement and Standstill Agreement

Winter Works Agreement

Under the proposed Winter Works Agreement, the Builder would continue on-site and off-site works for a minimum period of 6 weeks and up to 3 months, subject to negotiations. Some of these works were not programmed to be undertaken in winter, and there is additional cost associated with doing so.

Based on a 6-week programme, these proposed works amount to s 9(2)(i) (weather dependant), broadly broken down as follows:

s 9(2)(b)(ii)

s 9(2)(i)

In parallel with the on-site/off site works, Waka Kotahi, the Builder and WGP will use this period to seek to agree on the time and cost impacts of COVID-19 that will be met by Waka Kotahi. The parties will also look to agree on the high-level design for, and additional costs of, a new (deep lift) pavement solution for parts of the Transmission Gully main alignment exceeding a specified gradient. This revised pavement solution is intended to result in quicker delivery and an improved end product, and also creates greater flexibility to use New Zealand based sub-contractors. If the parties do agree, amendments to the Project Agreement will be required to reflect the changes to the pavement solution and the overall changes to programme and costs.

Standstill Agreement

Under the proposed Standstill Agreement, the parties would agree not to issue a termination notice until after the expiry of the s 9(2)(i) of the Winter Works Agreement. s 9(2)(i)

s 9(2)(b)(ii), s 9(2)(i)

- [Redacted]
- [Redacted]

Scenario analysis

s 9(2)(i)

- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

Released under the Official Information Act 1982

s 9(2)(i), s 9(2)(b)(ii)

s 9(2)(i), s 9(2)(b)(ii)

s 9(2)(h)

s 9(2)(i), s 9(2)(b)(ii)

Released under the Official Information Act 1982

s 9(2)(h)

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

s 9(2)(i)

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

- [Redacted list item]
- [Redacted list item]
- [Redacted list item]
- [Redacted list item]

Released under the Official Information Act 1982

Factors to consider

The proposed Winter Works Agreement and Standstill Agreement approach has been developed collaboratively with WGP and the Builder. Entry into these agreements is intended to give the parties time to reach a broader agreement without the risk of this being undermined by receipt of a termination notice. Entry into these arrangements should not be controversial from any stakeholder's perspective, as they largely relate to timing, or actual COVID-19 costs, s 9(2)(i)

s 9(2)(i), s 9(2)(b)(ii)

s 9(2)(i)

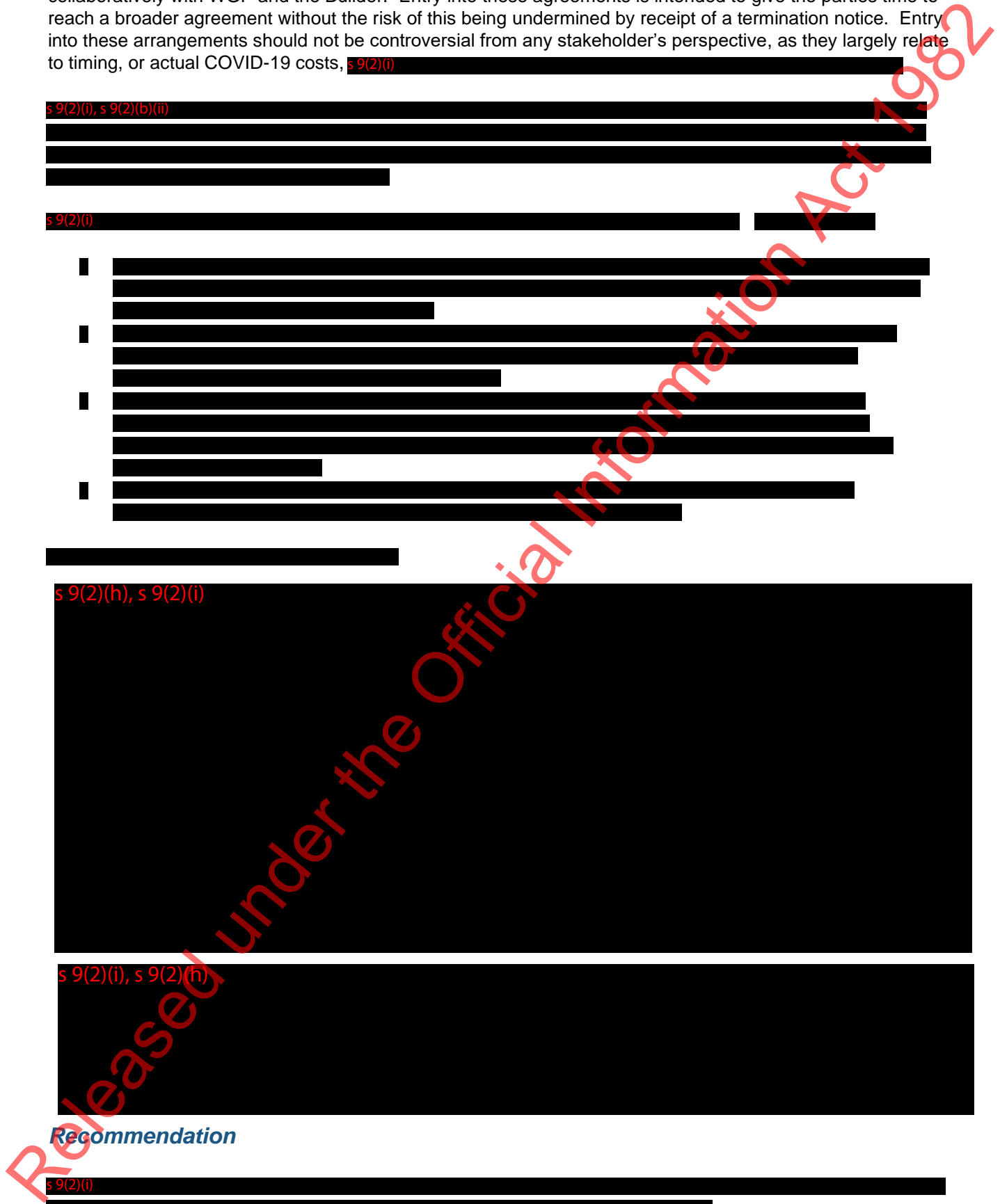
- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

s 9(2)(h), s 9(2)(i)

s 9(2)(i), s 9(2)(n)

Recommendation

s 9(2)(i)



s 9(2)(i)

Health & Safety, Customer/Stakeholder & Environmental Impact

The impact of this decision is considered by Waka Kotahi to be neutral in terms of health and safety, the public and other stakeholders, and the environment.

In terms of stakeholders, early engagement with Treasury and the Minister suggests s 9(2)(i)

. Absent the Winter Works agreement, there would be further delays to a key piece of infrastructure for the Capital, which will improve access, resilience and safety.

s 9(2)(i)

Related Documents

Impacts of COVID 19 on Puhoi to Warkworth (15 May: 2.1)

Impacts of COVID 19 on Transmission Gully and interim decisions (15 May 2020: 2.2)

Attachments

Attachment 1 Circular Resolutions

Attachment 2 Key background information

Attachment 1

Waka Kotahi NZ Transport Agency

Written Resolutions of the Board

(pursuant to clause 13, Schedule 5 of the Crown Entities Act 2004)

Background

The Board wishes to approve three related items in relation to the Transmission Gully PPP project: the entry into a short term interim agreement relating to certain winter works; the entry into a standstill agreement § 9(2)(i)
§ 9(2)(i)
§ 9(2)(i)

Resolutions

The Board:

- **Notes** the contents of this paper accompanying these written resolutions
- **Approves** Waka Kotahi entering into an agreement (the Winter Works Agreement) with the Builder under which:
 - Waka Kotahi will meet certain additional costs of work to be undertaken during winter to allow the project to keep progressing while the parties work through the COVID-19 impacts, for a minimum period of § 9(2)(j), subject to negotiations; and
 - the parties will seek to negotiate and finalise arrangements in relation to certain increased costs and delays associated with the impacts of COVID-19 on the project.
- **Approves** Waka Kotahi entering into a standstill agreement (Standstill Agreement) with the Builder and Wellington Gateway Partnership under which the parties will agree not to issue termination notices in respect of the Project Agreement or construction sub-contract for a period to be negotiated, § 9(2)(j)
- **Endorses** the negotiation approach for the Standstill Agreement and § 9(2)(j)
§ 9(2)(j)
§ 9(2)(j)
§ 9(2)(j)
§ 9(2)(j)
- **Authorises** the CEO to execute any documentation and do all other things necessary to give effect to the above resolutions.

Signed/assented to:

Cassandra Crowley

David Smol

Catherine Taylor

Ken Rintoul

Victoria Carter

Patrick Reynolds

Attachment 2

Key background Information

PPP

The Transmission Gully project is contracted under a PPP model. The parties entered the agreement in 2014. Originally the road was contracted to open on 30 April 2020. Under the settlement (summarised below), the opening date was revised to 1 November 2020. It is now likely, with COVID-19, that the opening will be delayed into 2021, although the precise length of the delay is yet to be determined.

COVID-19 Alert Level 4 lockdown

COVID-19 will have impacts on the PPP model which is focused on delivering projects on a fixed price and fixed time. The impacts of COVID-19 and the Level 4 lockdown will delay the expected completion of the projects, increase their overall construction cost and also come with an increased cost of finance to cover debt payments during the delay period. There will also be flow on impacts to the project beyond the lifting of the Level 4 lock down.

The builder has some reliance on overseas management, labour and equipment and COVID 19, and associated immigration restrictions, will have an ongoing impact on these supply chains.

The settlement

s 9(2)(i)

[Redacted text block]

[Redacted text block]

[Redacted text block]

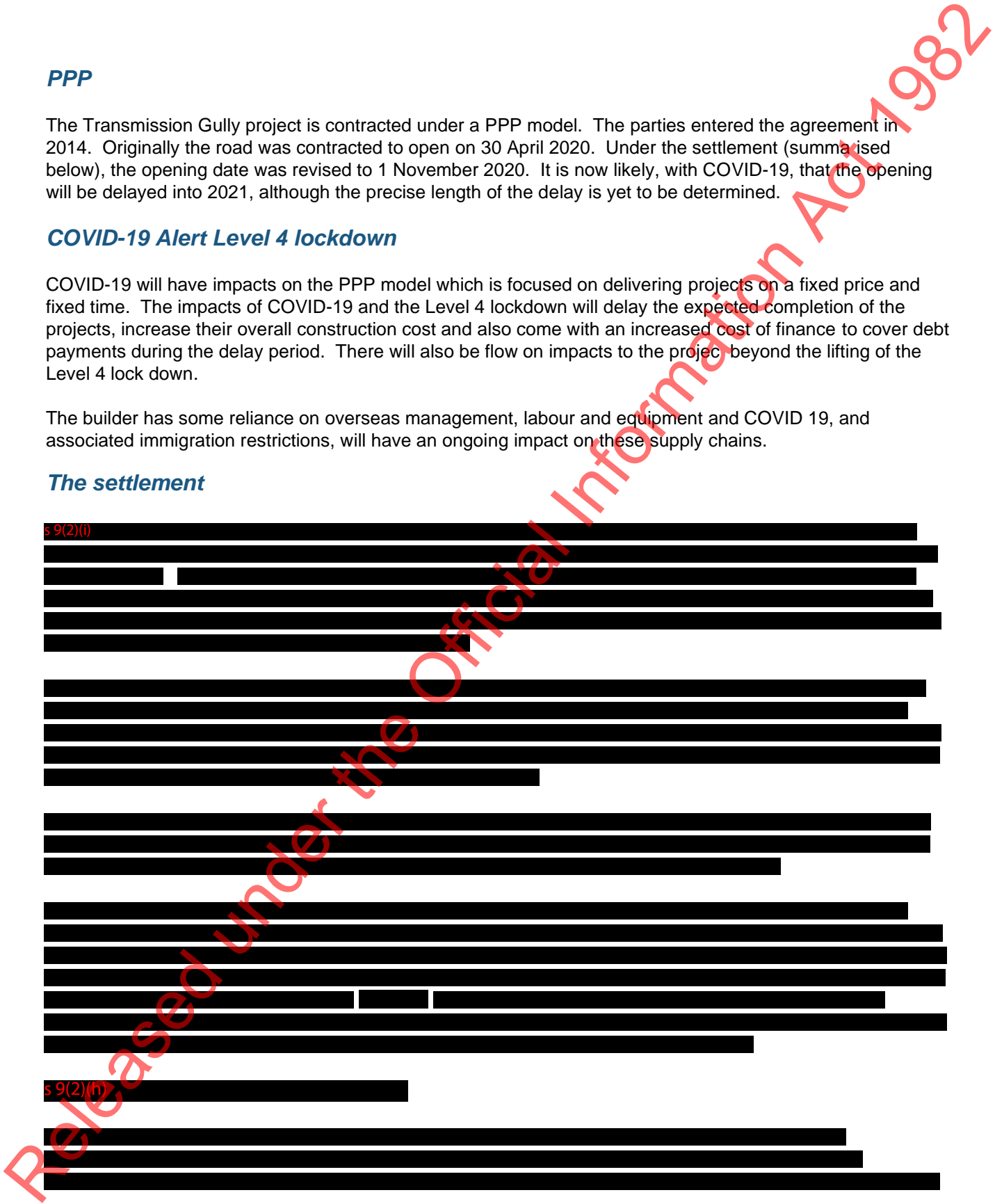
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s 9(2)(b)

[Redacted text block]

s 9(2)(i)

[Redacted text block]



s 9(2)(h)

[Redacted text block]

- [Redacted bullet point]
- [Redacted bullet point]
- [Redacted bullet point]
- [Redacted bullet point]

[Redacted text block]

Released under the Official Information Act 1982

Waka Kotahi NZ Transport Agency Board Minutes	
Date & time	21 May 2020, 4.30pm – 5.00pm
Location	Via Zoom
Board members in attendance	Cassandra Crowley (Chair), David Smol, Catherine Taylor, Ken Rintoul, Patrick Reynolds,
NZTA staff in attendance	Nicole Rosie (Chief Executive) Brett Gliddon (General Manager Transport Services) Lucy Riddiford (General Counsel, Light Rail) Anna Moodie (Group General Counsel & Board Secretary)
External attendees	None
Apologies	Victoria Carter

Introduction and governance matters

Cassandra Crowley assumed the role of Chair, s 9(2)(g)(i) [REDACTED].

Transmission Gully (legally privileged)

The Chair introduced the meeting, noting the Board held a special meeting on 20 May 2020 to discuss the Transmission Gully PPP. At that meeting, Management provided an overview of the current status of the negotiations relating to the contractual claims arising from the impact of COVID-19, and proposed interim arrangements to preserve Waka Kotahi's position while negotiations continue. s 9(2)(g)(i) [REDACTED]

[REDACTED]

The Chair noted Management had sought advice from external parties, including Mafic, Bell Gully and Justin Smith QC. Mafic, Justin Smith QC and the Chief Executive had not been involved in the settlement agreement entered into in December 2019, so were able to provide a fresh perspective on the negotiations. The Board has also requested that Mark Binns provide oversight and advice on Waka Kotahi's longer-term approach to the PPPs.

s 9(2)(i) [REDACTED]

The Board discussed the delays to the project to date. The project was originally scheduled to be completed in April 2020. However, following the Kaikoura earthquake (a force majeure event), the date for completion was extended to June 2020. As part of the settlement agreement in December 2019, it was agreed the completion date would be extended to

December 2020. s 9(2)(i) [Redacted]

s 9(2)(i) [Redacted]

s 9(2)(i) [Redacted]

Substantive negotiations to agree delivery dates and costs as a result of COVID-19 will continue, and any final decision would come back to the Board for approval.

s 9(2)(i) [Redacted]

The Board acknowledged the project had high political interest. Treasury, Crown Infrastructure Partners and the Ministers of Transport and Infrastructure had also been kept across progress. Treasury has been supportive of the approach to date.

Redacted - Out of scope [Redacted]

s 9(2)(g)(i) [Redacted]

[Redacted], agreed to the following resolutions and that that agreement would be recorded in the minutes of the special meeting.

Resolutions	<p>The Board</p> <ul style="list-style-type: none"> • Noted the contents of the paper Transmission Gully PPP – Impacts of COVID-19 (Interim Arrangements), dated 20 May 2020. • Approved Waka Kotahi entering into an agreement (the Winter Works Agreement) with the Builder under which: <ul style="list-style-type: none"> ○ Waka Kotahi will meet certain additional costs of work to be undertaken during winter to allow the project to keep progressing while the parties work through the COVID-19 impacts, for a minimum period of s 9(2)(i) [REDACTED], subject to negotiations; and ○ the parties will seek to negotiate and finalise arrangements in relation to certain increased costs and delays associated with the impacts of COVID-19 on the project. • Approved Waka Kotahi entering into a standstill agreement (Standstill Agreement) with the Builder and Wellington Gateway Partnership under which the parties will agree not to issue termination notices in respect of the Project Agreement or construction sub-contract for a period to be negotiated, s 9(2)(i) [REDACTED] • Endorsed the negotiation approach for the Standstill Agreement and s 9(2)(i) [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] • Authorised the CEO to execute any documentation and do all other things necessary to give effect to the above resolutions.
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General Business

There was no further business.

The meeting concluded at 5.10pm.



19/10/2020 1:44 PM

Minutes approved by the R&A Committee Chair

Cassandra Crowley

Joint Report: Impacts on PPPs arising from the Level 4 lockdown

Date:	22 May 2020	Report No:	T2020/1589
		File Number:	ST-4-8

Action sought

	Action sought	Deadline
Minister of Finance (Hon Grant Robertson)	Note the sector-wide strategy for negotiating and contracting through public private partnerships. Refer this briefing to identified Ministers.	22 May 2020
Minister for Infrastructure (Hon Shane Jones)	Note the sector-wide strategy for negotiating and contracting through public private partnerships.	22 May 2020

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
Liz Innes	Principal Advisor, Investment Management and Asset Performance	[35]	✓
Brendan Herder	Commercial Advisor, Investment Management and Asset Performance	[35]	
Andy Hagan	Acting Deputy Secretary, Financial and Commercial	[39]	

Minister's Office actions (if required)

Return the signed report to Treasury.
Refer to Ministers as identified in the paper.

Enclosure: Yes

Joint Report: Impacts on PPPs arising from Level 4 Lockdown

Purpose

1. The purpose of this Joint Report from The Treasury and the Infrastructure Commission is to outline procurement matters arising from the COVID-19 lockdown that may compromise significant current construction projects.
2. In particular, there are ongoing negotiations in relation to three PPP projects, which could result in significant fiscal and commercial consequences to the Crown. We are working closely with the relevant agencies and do not recommend taking any specific centralised action at this time.

Escalating negotiations in construction phase PPP projects

3. While the Government acted swiftly and fairly to set procurement policy and provide certainty to construction contractors in the wake of COVID-19 there are legal and commercial matters arising from the lockdown that now need close attention.
4. The most urgent of these are escalating negotiations on three Public Private Partnerships (PPPs). The three PPP projects, their procuring entities, contractual counterparties and major construction sub-contractors are set out below:

Project	Agency	Contractual Counterparty (SPV)	Builder(s)
Transmission Gully PPP	Waka Kotahi New Zealand Transport Agency (NZTA)	Wellington Gateway Partnership (WGP)	CPB Contractors & HEB Construction
Pūhoi to Warkworth PPP	NZTA	NX2	Fletcher Construction Company & Acciona Infrastructure
Waikeria Prison PPP	Department of Corrections	Cornerstone Infrastructure Partners	CPB Contractors

5. It is possible that that the Alert Level 4 lockdown constituted an ‘uninsurable event’, as defined in the PPP Project Agreements – which would give rise to termination rights for both parties. [25]
6. Difficult negotiations between NZTA and the contractors have brought about a formal escalation from NZTA in line with their obligations to report to Treasury. These reporting obligations are triggered when NZTA considers there is a reasonable risk they may need to call on an indemnity provided by the Crown in relation to the PPP projects (discussed further below).

7. This primary risk of a call on the indemnity arises from the possible termination of the contract(s), giving rise to significant immediate payment obligations under the PPP Project Agreement. The Treasury is confident these obligations can be met if required.

Potential outcomes

8. There are a range of possible outcomes from these negotiations. At one end of the spectrum the agencies could successfully negotiate a commercial agreement to complete construction. At the other end of the spectrum, the agreements may be terminated – crystallising significant immediate payment obligations under the PPP contracts and with the Crown still left having to determine how to proceed with and fund the completion of the projects. We are currently working through the different implications and choices for the Crown under various scenarios.
9. In the (unlikely) worst-case scenario, all three PPP projects being built at the moment could be terminated at once on or around 26 May, [25]
10. NZTA and the Department of Corrections have the right to terminate their respective agreements as early as 26 May, but have indicated no intention to do so. In the worst-case scenario the builders/SPVs on all three PPPs being built at the moment could issue termination notices by 26 May, [37]

Treasury response to escalations

11. The Treasury has observed the calibre of the agency negotiators, and steps taken to date, following the NZTA escalation. In our view (and that of the Infrastructure Commission) these people are highly capable, and their advisors are some of the best available in New Zealand. If it is possible to negotiate an acceptable agreement to progress the projects, the Treasury is confident they will do this.
12. There is a related agreement, the Reimbursement and Management Agreement (RAMA) between the Crown and NZTA relating to a Crown indemnity of NZTA's obligations to the PPP contractor. The Crown indemnity (and therefore the RAMA) was necessary because NZTA is a Statutory Crown Entity (rather than a Public Service Department like the Department of Corrections or Ministry of Education, who could enter into a PPP without the need for a specific indemnity).
13. The RAMA provides Treasury with escalated monitoring powers designed to give it a view of the situation, and if necessary, joint management to help resolve issues. Based on our assessment of process, information flows and capability to date; we see no benefit in exercising these powers at this time.

¹ Termination could crystallise a Crown obligation to make substantial payments under each PPP contract immediately, with the Crown liable to arrange and meet the costs of completing the projects. We are taking advice on the potential legal and fiscal implications (including likely quantum and timing of the payments required in a termination scenario). [25]

14. The Treasury has activated a response team to carry out due diligence in preparation for whatever scenario plays out, to make sure we are well-placed to advise Ministers on their options - including when and how to best exercise them.
15. The response team is drawn from within Treasury and the Infrastructure Commission and augmented by two external experts (legal and commercial) to:
 - a. Identify and assess the range of scenarios on an all-of-Crown basis.
 - b. Determine the likely impacts expected in each scenario (e.g. agency, investment, fiscal, and market outcomes).
 - c. Identify legal and commercial options and the situations in which they might be applied.
 - d. Assess available alternatives.
16. The Treasury has also increased its monitoring of this situation to make sure that the progress on these negotiations is well-understood.

A sector-wide strategy for negotiating and contracting through public private partnerships

17. Given contractual terms vary across Crown projects, there is no single negotiating strategy that could realistically be employed to resolve and agree COVID-19-related impacts. [37]

We recommend that there is no need for the Crown to formally intervene centrally at this time – things are progressing as well as they can and we have good oversight.

18. As such The Treasury considers that the negotiating guidance issued to agencies by the Infrastructure Commission (attached for your reference) and the Treasury's monitoring in response to escalations constitute an appropriate sector strategy for now.
19. The Treasury expects to report to Ministers with any significant developments in negotiations, and provide advice as needed to support any decisions Ministers may need to make on these matters.
20. If the Crown decided to intervene in these negotiations at a later date, this would best be done by way of the Treasury. The Crown (Treasury) is already a direct party to various project documents whereas the Infrastructure Commission is an Autonomous Crown Entity.

[37]

Recommended Action

We recommend that you:

- a **Note** there are contractual and commercial issues with PPP contracts currently in the construction phase as a direct result of the Alert Level 4 COVID-19 lock down.
- b **Agree**, that the agencies party to the PPP agreements continue to manage the commercial negotiations, with oversight, guidance and information sharing between them, the Treasury, and the Infrastructure Commission.
- c **Note** that the sector-wide strategy for negotiating and contracting through public private partnerships consists of:
 - negotiations by procuring entities in line with guidance issued by the Infrastructure Commission
 - ongoing monitoring of negotiations by the Treasury, and
 - preparation of All-of-Crown scenarios and options to aid future decisions.
- d **Refer** this report to the Ministers of Corrections, Transport, Greater Christchurch Regeneration, Education, Building and Construction, Health, and Infrastructure for their information.

Refer/Not referred.

Andy Hagan
Deputy Secretary, Financial and Commercial (Acting)
Treasury

Peter Murray
General Manager, Major Projects and Advisory
New Zealand Infrastructure Commission Te Waihangā

Hon Grant Robertson
Minister of Finance

Reference: T2020/1744 ST-4-8 (Investment Management and Asset Performance)

Date: 5 June 2020

To: Minister of Finance (Hon Grant Robertson)
Minister for Infrastructure (Hon Shane Jones)

Deadline: None

Aide Memoire – Update on PPP negotiations arising from the Level 4 lockdown

Purpose

This Aide Memoire provides you with an update on the status of the three PPP projects currently under construction, which have been impacted by the COVID-19 Alert Level 4 lockdown and subsequent COVID-19 related restrictions.

Status Update

Summary

- The negotiations led by the New Zealand Transport Agency, Waka Kotahi and Department of Corrections are generally progressing well.
- Standstill Agreements, which temporarily freeze any time-bound legal rights of both parties to allow negotiations to continue, have been put in place for all three projects and construction activity continues on all sites.
- This provides a useful window for us to continue detailed analysis of the range of potential outcomes, and develop advice on how and when decisions may need to be taken. We expect to provide scenario analysis and advice to you by Friday 19 June.

Transmission Gully (TG)

- Waka Kotahi has executed a Standstill Agreement with Wellington Gateway Partnership (WGP) and a Winter Works Agreement with the CPB HEB JV. These agreements will accelerate construction work on site by pre-paying \$14m towards any eventual negotiated settlement, and provide a six-week standstill period where no Termination Notice can be issued, with the legal rights of both parties preserved. The standstill period expires on 10 July.

- The negotiations are ongoing and WGP are yet to provide details of their substantiated costs of COVID-19 related delays. Waka Kotahi has been advised that it will take another four weeks for WGP to provide these details. Until details are provided, we have no visibility of what level of compensation WGP is seeking, and termination under the Project Agreement remains a reasonable risk.
- The Crown has an agreement with Waka Kotahi which provides that for materially large decisions in relation to the two PPPs, Waka Kotahi must seek the consent of the Minister of Finance. The signing of the Standstill Agreement means that WGP cannot issue a Termination Notice before 10 July, which means any decision on how to respond to such a notice would not be required until the 7 August.
- If issued with a Termination Notice, the options are [37]

We are preparing detailed advice on these options and decision-making rights should a Termination Notice be issued to Waka Kotahi after the standstill period expires. This will include considering impacts to the project, the Crown, the construction market and the Government's investment pipeline.

- The Minister of Finance requested additional background information on the project challenges referred to in our Joint Report T2020/1589 'Impacts on PPPs arising from the Level 4 lockdown'. This information is included for your reference in Appendix 1.

Pūhoi to Warkworth (P2W)

[40]

Next Steps and Milestones

Week Commencing	Milestones
8 June	<ul style="list-style-type: none">• <i>Update on progress of negotiations (Aide memoire)</i>
15 June	<ul style="list-style-type: none">• <i>Cross-agency team completes scenario and decision process design</i>
22 June	<ul style="list-style-type: none">• <i>Joint advice to Ministers on scenarios and decision making process (Joint report)</i>• <i>P2W standstill expires 26 June</i>
29 June	<ul style="list-style-type: none">• <i>Update on progress of negotiations (Aide memoire)</i>• <i>Agreed decision-making process ready for activation as needed</i>
6 July	<ul style="list-style-type: none">• <i>TG and WP standstill expires 10 July</i>

Andy Hagan
Deputy Secretary, Financial and Commercial (Acting)
Treasury

Peter Murray
General Manager, Major Projects and Advisory
New Zealand Infrastructure Commission Te Waihangā

Appendix 1: Transmission Gully background, challenges and delays

The Transmission Gully project is a complex and difficult undertaking. Millions of tons of earthworks and significant structures are required to construct the road through difficult terrain. This made it a good candidate for PPP procurement as its size and complexity provided opportunities for innovation, application of international best practice and excellence in risk management.

Determining the fixed price of a PPP contract

When procuring a PPP, the procuring agency sets an 'affordability threshold' (a pricing envelope within which the net present cost of all proposals must fall). The affordability threshold is calculated with reference to a 'public sector comparator', an estimate of what the project would have cost the agency under traditional procurement methods.

For Transmission Gully, Waka Kotahi estimated the public sector comparator based on current best practice delivery, built up from three components: base construction, operational cost, and construction risks able to be transferred to a third party. It also included adjustments to ensure competitive neutrality on tax grounds between the agency and the private sector, consistent with Treasury PPP guidance.

[25]

Challenges and delays

The project was originally due for completion in April 2020. However, the contractor has experienced a number of challenges, including:

- Significant re-estimation of earthworks requirements, and associated consenting matters.
- Wet weather made early earthworks seasons less productive than expected.
- Kaikōura earthquake damage and repair impacted the availability of resources across various supply chains.

It is reasonable to assume that under a different procurement model, the agency would share more of the risk of time and cost overruns with the contractor than they are contractually required to under the PPP project agreement.

2019 Dispute

- In February 2019 the contractor brought a claim for [25] which related to resource consent issues that allegedly delayed the start of the project and had been the subject of discussion since 2016.
- The dispute was settled in December 2019 for \$190.6m, with the planned service commencement date for road opening amended to November 2020.

[25]

Joint Report: Draft Cabinet Paper: Managing the Impact of COVID-19 on Transport PPP projects

Date:	25 June 2020	Report No:	T2020/2056
		File Number:	ST-4-8 (Investment Management and Asset Performance)

Action Sought

	Action Sought	Deadline
Minister of Finance (Hon Grant Robertson)	Agree to the contents of this report. Lodge the attached Cabinet paper for consideration at DEV on 1 July 2020.	Midday 29 June
Minister of Transport (Hon Phil Twyford)	Agree to the contents of this report. Lodge the attached Cabinet paper for consideration at DEV on 1 July 2020.	Midday 29 June
Minister for Infrastructure (Hon Shane Jones)	Note the contents of this report	None

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
Liz Innes (Treasury)	Principal Advisor	[39]	✓
Peter Murray (Infrastructure Commission)	General Manager, Major Projects and Advisory	[35]	
Paul Helm (Treasury)	Head of Government Finance Profession and Chief Government Accountant		

Actions for the Minister's Office Staff (if required)

Return the signed report to Treasury.
Lodge the attached Cabinet paper (following Ministerial consultation) for consideration at DEV on 1 July.
Refer to the Prime Minister and the Associate Ministers of Finance.

Enclosure: YES

Joint Report: Draft Cabinet Paper: Managing the Impact of COVID-19 on Transport PPP projects

Purpose of Report

1. This report provides you with the attached draft Cabinet paper (attached) to:
 - a provide an overview of negotiations on the Transmission Gully PPP project intended to mitigate COVID-19 issues, and identify the scenarios that may eventuate,
 - b agree to establish a tagged contingency to provide funding for a settlement agreement, if one can be reached, and
 - c authorise Joint Ministers to draw this down to fund a settlement on Transmission Gully if one can be agreed, or to take other decisions as needed [37]
2. It also updates you on a decision by the Treasury and Waka Kotahi NZ Transport Agency (Waka Kotahi) to move the Transmission Gully project to enhanced monitoring under the Reimbursement and Management Agreement (the **RAMA**).

Background

3. On 5 June 2020, the Treasury and the New Zealand Infrastructure Commission – Te Waihanaga (Infracom) provided you with an update on the PPP negotiations arising from the Level 4 lockdown [T2020/1744 refers]. The report noted ongoing negotiations in relation to three PPP projects, which could result in significant fiscal and commercial consequences to the Crown.
4. On 19 June 2020, the Treasury and Infracom briefed you on progress with negotiations on the transport PPPs, and you agreed to take a paper to Cabinet seeking approval for contingency funding to cover costs relating to the Transmission Gully Project. [T2020/1938 refers].

[37]

[34]

Moving to enhanced monitoring

9. Given the issues identified above, and following discussion with Waka Kotahi, the Treasury has issued a letter moving the Transmission Gully project to the enhanced monitoring framework under the RAMA. This means:
 - a Waka Kotahi must seek the Crown's prior written consent before taking material actions. We have set out below what we consider these to be for the purposes of Transmission Gully together with an outline of the type of material the Crown will require to support the consent process.
 - b The Crown can require additional enhanced reporting. Given the quality of information flows to date, officials do not consider that any additional prescribed enhanced reporting is required.
 - c The Crown has the option of exercising joint management over any dispute resolution process. Treasury and Infracom officials have confidence that Waka Kotahi has the appropriate team and processes in place to continue negotiations and to manage any dispute resolution process. As such we do not recommend exercising this power at this time.

This effectively expands the types of matters that require Crown consent

10. The Crown requires prior written consultation and the Crown's consent before certain actions can be taken on the Transmission Gully project (as set out in the RAMA). These types of actions include (but are not limited to) a decision to:

[37]

11. The consultation that the Crown may require to support its consent to any of the above scenarios may vary depending on the circumstances at hand. However, this consultation will generally require the following:
 - a Early notice of any provisional views as to the exercise of proposed discretions or the making of any proposed decisions, so that the Crown has adequate time to provide its views.

- b The provision of sufficient information to enable the Crown to provide an informed view. This could include the factors considered, material relied on and reasons for the provisional views taken.
- c Providing the Crown with a fair opportunity to comment, it being acknowledged that the Crown for its part will endeavour to respond promptly to matters on which consultation is being sought.
- d Following consultation on a particular matter, reasonable notice of discretions to be exercised or decisions that are to be made.

Potential costs and seeking agreement to funding

- 12. In almost every scenario, the additional costs associated with Transmission Gully would be significant. In the event of a negotiated settlement, the upfront costs to Waka Kotahi would likely be [37]
- 13. This is because a Termination scenario would trigger the obligation to make termination payments (which are quantifiable but significant – essentially the full amount of the current debt and equity of the Contractor). It will also necessitate re-contracting with another party to complete the project, the costs associated with that, and the Crown would lose the benefits of the PPP arrangement.
- 14. Although costs associated with the transport PPPs are technically borne by the National Land Transport Fund (NLTF), it is highly unlikely that the NLTF will be able to meet these costs (even on an interim basis) due to the significant shortfall we have previously advised Ministers on as a result of reduced revenue and additional COVID-19 related costs. While funding for that shortfall that is being sought through the COVID-19 Response and Recovery Fund cost pressures process, further Crown funding will be required to settle COVID-19 impacts and complete the road on the current agreement or terminate the Transmission Gully PPP.
- 15. We consider that Cabinet approval for a contingency to cover the additional costs relating to Transmission Gully should be sought before 6 July to provide for decisions to be taken quickly if required.
- 16. The current standstill agreement expires on 10 July, which means any decision to agree settlement [37] needs to be taken (allowing enough time to implement the decision) before this date. It remains possible that the standstill is extended, providing more time for negotiation and pushing out timeframes for decisions.
- 17. Regardless, to ensure certainty of funding for any urgent settlement decision, we recommend you seek Cabinet's agreement to establish a tagged operating contingency for costs associated with Transmission Gully. The attached draft Cabinet paper has been prepared on the basis of funding [25] to cover a settlement agreement (if one can be reached), with drawdowns agreed by the Minister of Finance and Minister of Transport subject to Crown consent being given for any proposed settlement.
- 18. We understand that you wish to manage funding associated with this PPP outside of Budget allowances and the COVID-19 Response and Recovery Fund (CRRF). As such, the expenditure associated with the tagged contingency is assumed to have a direct impact on fiscal indicators such as the operating balance and net core Crown debt.
- 19. As this Cabinet paper does not make any provision for funding for Termination, you would need to take a further paper to Cabinet if this scenario arises.

Update on Pūhoi to Warkworth settlement agreement

[40]

Recommended Action

We recommend that you:

- a **note** that the negotiation period (standstill) for Transmission Gully expires on 10 July, that no offer has yet been received and as such, that decision-making may require expeditious approvals so that matters can be resolved as they arise, and the project can be stabilised and set for a strong and confident recovery;
- b **note** that the preliminary scenario analysis for Transmission Gully indicates that the Crown will face difficult and unappealing choices, [37]
- c **note** that the immediate fiscal implications from these negotiations vary significantly depending on the outcome that is achieved; [37]
- d **note** that the NLTF is already facing a significant predicted shortfall in the next year due to reduced revenue and additional COVID-19 related costs, and will not be able to meet either the settlement or potential termination costs associated with Transmission Gully without cuts or delays to projects within the current National Land Transport Programme;
- e **note** that additional Crown funding will therefore be required in cover the predicted shortfall and any costs associated with PPP settlements in order to avoid delaying or cutting projects from the current National Land Transport Programme;
- f **note** that the attached draft Cabinet paper seeks agreement to establish a tagged operating contingency of [25] to provide for any settlement agreement on Transmission Gully that must be decided with urgency before 10 July;
- g [40]

CRRF/Transmission Gully Cabinet paper

- h **agree** to proceed to ministerial and cross-party consultation on the attached draft Cabinet paper;

Agree/disagree

- i **agree** to lodge the attached paper for consideration at the Cabinet Economic Development Committee on 1 July;

Agree/disagree

[25]

k **note** that on this basis Waka Kotahi and the Treasury have elected to move enhanced monitoring as contemplated in the Master Reimbursement and Management Agreement (RAMA) to help ensure consistent and effective decision-making, and;

l **refer** to the Prime Minister and the Associate Ministers of Finance.

Refer/not referred.

Paul Helm
**Head of Government Finance Profession
& Chief Government Accountant**

Peter Murray
**General Manager, Major
Projects and Advisory**

Hon Grant Robertson
Minister of Finance

Hon Phil Twyford
Minister of Transport

Hon Shane Jones
Minister for Infrastructure

Annex A – high level decision map for Transmission Gully COVID-19 negotiations

[37]

Annex B - Key events on the Transmission Gully Project

Feb-March 2012	Board of Inquiry in relation to Transmission Gully as a Road of National Significance.
22 June 2012	Board of Inquiry decision. This provided for a consented scheme design.
November 2012	Cabinet gave the Waka Kotahi approval to finance and build the Transmission Gully highway using a PPP.
21 January 2013	Waka Kotahi called for Expressions of Interest from consortia interested in and capable of delivering the Transmission Gully PPP Project.
April 2013	The Waka Kotahi announced the two consortiums shortlisted to deliver the Transmission Gully PPP Project. These were the Wellington Gateway Partnership and the Positive Connection consortiums.
6 May 2013	A request for proposal was issued to the consortiums and their proposals underwent a rigorous evaluation process to select the preferred bidder for the project.
2 December 2013	The Waka Kotahi announced the Wellington Gateway Partnership as the preferred bidder to finance, design, build, operate and maintain the Transmission Gully motorway.
28 July 2014	The Waka Kotahi signed the Project Agreement with the Wellington Gateway Partnership. D&C Agreement signed on this date also.
22 February 2019	Formal Notice of Dispute: claim by CJV in respect of delay to certification of Enabling Works Management Plan and L5/L6 Tables. Passed through to Waka Kotahi by WGP under the Project Agreement. [25]
19 December 2019	Pre-Settlement Agreement signed between the Waka Kotahi and the CJV which settled all existing claims (including the EWMP claim above as well as some smaller disputes that had arisen). The Settlement Amount of \$190.6m was paid by the Waka Kotahi to the CJV. The agreement provides for a Revised Service Commencement Date (Road Opening) of 30 November 2020.
4 May 2020	WGP gives notice of Delay and Extension Event – COVID-19 Alert Level 3
20 March 2020	Notice given by WGP to Waka Kotahi in relation to likely delay due to COVID-19
6 April 2020	SPV provided Notice of Events as a pass through from the CJV, notifying an Extension Event, An Uninsurable Event and a Qualifying Change in Law has occurred.
30 April 2020	Planned Service Commencement Date (original).
30 November 2020	Revised Planned Service Completion Date under Settlement Agreement

Reference: T2020/2177 ST-4-8 (Investment Management and Asset Performance)

Date: 30 June 2020

To: Minister of Finance
(Hon Grant Robertson)
Minister of Transport
(Hon Phil Twyford)

Deadline: Before DEV at 11am on Wednesday 1 July

Aide Memoire: Managing the impact of COVID-19 on the Transmission Gully Project – talking points for Cabinet Economic Development Committee

You are taking a paper on *Managing the impact of COVID-19 on the Transmission Gully Project* to the Cabinet Economic Development Committee (DEV) tomorrow at 11am.

This aide memoire provides you with talking points and key questions and answers to support you to lead discussions at the meeting.

Talking points

- The Alert Level 4 lockdown required all non-essential construction workers to stay home, impacting government and private sector projects alike.
- This arguably created a Force Majeure/Uninsurable Event under the PPP contracts, which obliges us (and our contractors) to make reasonable efforts to mitigate the impacts of COVID-19 and the Alert Level 4 lockdown.
- We will fairly compensate contractors for these impacts within existing contractual frameworks – including on PPPs which provide ways for parties to manage Force Majeure/Uninsurable Events.
- I would prefer to agree a fair and reasonable settlement with our contractor. This would give us certainty and get the road built without further delay.
- However I do not propose we do this at any cost. [34,25]
- [34,25]
- As such, this paper provides an envelope for a settlement, if one can be reached.

- If it cannot, officials can and will work with New Zealand's supply chains to deliver this project another way if needed - because we still need our road, and partners we trust to help develop infrastructure and shape the future of New Zealand.

What is a PPP?

- It is long term contract for the delivery of a service, where the provision of the service requires the construction of a new asset, or the enhancement of an existing asset, that is financed from external (private) sources on a non-recourse basis, and where full legal ownership of the asset is retained by the Crown

How is a PPP different from normal procurement?

- PPPs bundle together 'whole of life' services (that are otherwise procured independently at different stages) under a single long-term contract
- PPPs transfer risk to the private sector partner where they are best placed to manage that risk, and
- PPPs specify service outcomes required from an asset rather than prescriptive input specifications that relate to the asset itself. (It must do x; not it must be x). Conventional forms of procurement focus on asset input specifications, which traditionally dictate how the asset is constructed.
- PPPs have a periodic (typically quarterly) payment profile which commences only once the asset is operational and is calculated based on the actual performance of the asset and required service outcomes. In other words, the Government only pays for the infrastructure when it is completed and performing to the agreed contractual standard.

What are the benefits of a PPP?

- The PPP model is intended to create incentives for the delivery of high quality infrastructure assets, and for on time and on budget delivery. The PPP model incentivises these outcomes by:
 - putting third party capital at risk
 - integrating design, construction, maintenance and - for certain contracts – operations into one entity, and
 - allocating risks to parties best able to manage those risks.

When would you use a PPP?

- This type of contract is only used where the project business case determines it is expected to achieve better outcomes than if it were procured using conventional methods, for the same, or lower, net present cost. PPP procurement is only used in New Zealand where it offers value for money over the life of the project relative to conventional procurement methods

What is the Transmission Gully project?

- The Transmission Gully Project is a 27 kilometre four-lane motorway, which will run from Mackays Crossing to Linden through Transmission Gully.

- Four interchanges and two new link roads will connect the route to Mackays Crossing, SH58, eastern Porirua and Kenepuru.
- The original Planned Service Commencement Date (completion date) was 30 April 2020. The Project is approximately 85% complete.

Who are the parties to the Transmission Gully PPP?

- Waka Kotahi NZ Transport Agency (Waka Kotahi) entered into a PPP Project Agreement with the Wellington Gateway Partnership (WGP) in July 2014.
- WGP is owned by Pacific Partnership, ACC and Infrared Capital Partners. WGP is a special purpose vehicle (SPV), providing equity and debt funding for the Project.
- WGP is contracted to build the motorway for a fixed price, and to maintain and operate the motorway for a period of 25 years from completion.
- WGP has contracted an unincorporated joint venture of CPB and HEB (together, the builder) to design and construct the motorway and Ventia to operate and maintain the motorway during the operating term.

The media seem to be reporting endless issues on the project, is that true?

- Not everything reported in the media about the project is accurate, though we acknowledge that the negotiations are complicated by the fact it has been a challenging project for the builder, even before the impacts of COVID-19.
- The Builder has experienced a number of issues including:
 - Significant re-estimation of earthworks requirements, and associated consenting matters;
 - Wet weather, which made early earthworks seasons less productive than expected; and
 - Kaikōura earthquake damage and repairs, which also impacted the availability of resources across various supply chains.
- [25]
- This resulted in claims that emanated in the pre-Covid-19 settlement of \$190.6m conditionally agreed in December 2019.

Aren't PPPs supposed to transfer risk? Why is that not happening here?

- Across all procurement models, Contractors are reluctant to take on responsibility for risks they cannot reasonably anticipate, mitigate or control.
- While the PPP model involves a high degree of risk transfer to the PPP Contractor when compared to more traditional models, some risks are retained

by Waka Kotahi or shared with the PPP Contractor, including Force Majeure and Uninsurable Events.

- These type of events cannot reasonably be foreseen, but the agreement does provide a way of dealing with the impacts – requiring both parties to use reasonable endeavours to mitigate the impacts (and share the risk).

What are the state of the negotiations to mitigate the impacts of COVID-19 on Transmission Gully?

- A Winter Works Agreement was signed on 4 June with the Builder, which sets out a 6-week work programme with Waka Kotahi making a payment of \$14m as a prepayment against the COVID-19 related claim.
- A Standstill Agreement with the Builder and the Contractor was entered into in parallel to the Winter Works Programme, which agreed a period of 6 weeks for negotiations during which neither party would seek to terminate the Project Agreement with the legal rights of both parties preserved. The standstill period expires on 10 July. It is likely this will need to be extended.
- The negotiations are ongoing and the CJV has yet to provide details of their substantiated costs of COVID-19 related delays (information was due 26 June but has not been received).
- Until details are provided, we don't know what compensation the Builder is seeking, and termination under the Project Agreement remains a risk.

What options do we have around Transmission Gully?

- We can **attempt to negotiate a settlement** to mitigate the impact of COVID-19. This would resolve the issues associated with COVID-19, provide certainty about the cost and time for completion on the project, and retain the benefits of the PPP model.
- If this is unsuccessful and the standstill is not extended then it is highly likely we will **receive a Termination Notice** from the contractor. We could also elect to **issue a Termination** notice ourselves.
- If we are (or expect to be) issued with a Termination Notice then we can either:
[37]

How much would a termination scenario cost and what does this include?

[37]

How do scenarios compare based on what we know today?

[37]

What is the best option to resolve matters, and why?

- The best option is to negotiate a reasonable and fair settlement. This would resolve the issues associated with COVID-19, provide certainty about the cost and time for completion of the project, and retain the benefits of the PPP model.

[37]

What are you seeking from Cabinet at this point?

- The Cabinet is being asked to authorise Joint Ministers to act so we can make decisions quickly before the standstill expires on July 10. This authorisation is needed to agree a settlement (if one can be negotiated) [37]

- The Cabinet is also asked to agree to a tagged contingency of [37]

[37]

What's going to happen next?

- The Builder will likely make a settlement offer, which is now expected on 3 July. This will set the parameters for any settlement.

[37]

What's happening on the Ara Tuhono Pūhoi to Warkworth (P2W) PPP?

[40]

Liz Innes, Principal Advisor, Investment Management and Asset Performance, [39]

Paul Helm, Head of Government Finance Profession and Chief Government Accountant, [39]

Managing the impact of COVID-19 on the Transmission Gully PPP project

Proposal

1. This paper provides a briefing on the impact of COVID-19 on the Transmission Gully PPP project, identifies a range of possible outcomes that may arise from this, proposes establishing a tagged contingency to cover the fiscal risk, and authorises joint Ministers to take decisions to mitigate these impacts and stabilise the project.

Executive Summary

2. New Zealanders acted together and saved lives by stopping COVID-19 – but this was not costless. The Alert Level 4 lockdown required non-essential construction workers (like most others) to stay home, impacting government and private sector projects alike.
3. As a result, various parts of the Crown are negotiating contract variations for a large number of projects in construction. These negotiations are required to determine which COVID-19 cost increases the Government should meet, and which ones our partners have contractually agreed to and should continue to bear.
4. These negotiations are more difficult for PPPs in construction – including Transmission Gully – than for other contracts because of the increased finance costs associated with delays. In normal times when the Builder is responsible for a delay they will be liable for these finance costs and this works as a performance incentive, but when the delay is a result of an enforced lockdown, it could become unreasonable or even punitive – and the Builder will be reluctant to re-enter into a similar risk position going forward.
5. COVID-19 has had an impact on Transmission Gully including by:
 - 5.1 delaying the expected completion dates;
 - 5.2 increasing overall construction costs;
 - 5.3 increasing the cost of finance (for debt payments during the delay period).
6. The Transmission Gully Project Agreement – like other PPP agreements contemplated this type of situation in the form of an Uninsurable Event. Uninsurable Events are events of Force Majeure, which cannot reasonably be insured against.
7. As with other Force Majeure events, both parties have to make efforts to mitigate the consequences of the event, if they can. The parties are engaged in efforts to mitigate

this Uninsurable Event now – in other words, they are negotiating a variation or settlement to allow for the COVID-19 impacts to be reasonably and fairly allocated.

8. This settlement aims to resolve issues associated with COVID-19 and provide certainty about the cost and time for completion on these projects while retaining the benefits of the PPP model (notably the whole of life risk transfer).

[37]

11. If the parties cannot agree, the Project Agreement provides for termination in recognition that an Uninsurable Event could seriously disrupt the project. These termination rights must be activated within a relatively short fixed period specified in the PPP Project Agreements. Waka Kotahi and the counterparties to the PPP Project Agreement have put in place a “standstill” agreement that effectively freezes rights as they are, to allow a negotiation period to reach settlement. The Transmission Gully standstill agreement expires on 10 July. A high-level decision map is included in Annex A.
12. If by this date agreement cannot be reached, and an extension of the standstill is not negotiated, then on the next business day the Builder is free to attempt termination by issuing a Termination Notice. [37]

[37]

14. All possible decisions – and outcomes – from this point have different costs and risks attached to them. These decisions are not possible without more information – and when information becomes available, they will be needed quickly. [37]

15. [40]

16. We seek Cabinet's agreement to set aside tagged operating contingencies to cover any settlement agreements associated with the transport PPPs, and authorise me, along with the Minister of Transport, to take any other decisions required to resolve these negotiations.
17. Together these actions will put in place what we need for any immediate decision-making so that matters on these negotiations can be resolved as they arise, and the projects can be stabilised for a strong and confident recovery.

Background – Transmission Gully PPP project

18. The Transmission Gully Project is a 27 kilometre four-lane motorway, which will run from Mackays Crossing to Linden through Transmission Gully. Four interchanges and two new link roads will connect the route to Mackays Crossing, SH58, eastern Porirua and Kenepuru.
19. The Project is being delivered as a Public Private Partnership (PPP) entered into by Waka Kotahi by way of a Project Agreement with the Wellington Gateway Partnership (WGP) in July 2014.
20. WGP is a special purpose vehicle, providing equity and debt funding for the Project, who are contracted to build the motorway for a fixed price, and to maintain and operate the motorway for a period of 25 years from completion.
21. WGP comprises Pacific Partnership, ACC and Infrared Capital Partners. The net present value of the final negotiated contract was approximately \$891 million in 2014, with the Planned Service Commencement Date (completion date) being 30 April 2020.
22. WGP has contracted an unincorporated joint venture of CPB and HEB (CJV) to design and construct the motorway and Ventia to operate and maintain the same.

Crown Indemnity and interest rate swap

23. As part of the PPP commitment, the Crown has entered into a Deed of Indemnity that allows WGP to claim credit support from the Crown in the event that Waka Kotahi is not able to meet its payment obligations under the Project Agreement.

24. In order to receive information about, and manage risks in relation to the Deed of Indemnity, the Crown entered into a Reimbursement and Management Agreement (the RAMA) with Waka Kotahi.
25. The RAMA establishes how any payments made by the Crown to WGP under a Deed of Indemnity must be repaid by Waka Kotahi, and provides the Crown powers to effectively monitor and manage its exposure.
26. Also, as part of the PPP commitment, Waka Kotahi is obligated to pay a unitary charge¹ over an extended period that includes the interest cost on the debt the WGP has raised. To hedge itself against fluctuations in this interest rate, Waka Kotahi has entered into an interest rate swap agreement [25]

Challenges and delays

27. The Project was originally due for completion in April 2020. However, the CJV has experienced a number of issues before COVID-19 including:
 - 27.1 Significant re-estimation of earthworks requirements, and associated consenting matters;
 - 27.2 Wet weather, which made early earthworks seasons less productive than expected; and
 - 27.3 Kaikōura earthquake damage and repairs, which also reduced the availability of resources across various supply chains.
28. [25]

2019 Dispute

29. In February 2019 the CJV brought a claim against Waka Kotahi through WGP for \$352m [25] This pertained to resource consent issues that allegedly delayed the start of the project (due to the delayed consent to the Enabling Works Enabling Plan) and had been the subject of discussion since 2016.
30. This claim was disputed by Waka Kotahi before it was eventually settled in December 2019 (together with all other existing claims at that time) for \$190.6m, with the date for road opening pushed back to November 2020.

[25]

¹ The periodic fee that Waka Kotahi will pay to the Contractor over the 25-year operating period of the PPP.

Current Status

32. The Project is approximately 85% complete. A Winter Works Agreement was signed on 4 June with CJV, which sets out a 6-week work programme with Waka Kotahi making a payment of \$14m as a prepayment against the COVID-19 related claim.
33. There are 150-200 people working on-site, and approximately 80 workers apparently unable to re-enter the country. CPB has senior project supervision staff and important sub-contractors who are directly impacted by border restrictions.
34. A Standstill Agreement with the Builder and the SPV was entered into in parallel to the Winter Works Programme, which in effect agreed a period of 6 weeks for negotiations during which neither party would seek to terminate the Project Agreement with the legal rights of both parties preserved. The standstill period expires on 10 July.

Impacts of COVID-19

35. COVID-19 has exacerbated the delay and costs on an already troubled project in a number of ways including:
 - 35.1 delays caused by exclusion from site during level 4 and loss of productivity at levels 3 and 2 and pushing the programme into the winter season;
 - 35.2 increased delay-related costs, and costs of working at COVID-19 lockdown levels 2 and 3 based on additional health and safety measures, etc; and
 - 35.3 productivity issues created by offshore resources not being able to return to NZ due to border restrictions.
36. The combination of COVID-19 and the lockdown could fit within the definition of an Uninsurable Event under the PPP contracts.
37. If the Contractor's and Builder's obligations under the project agreements are materially affected because of the Uninsurable Event, the parties are both obliged to use their reasonable endeavours to avoid or mitigate the effect of the Contractor's/ Builder's inability to perform the affected obligations.
38. If no mitigation/avoidance regime is agreed, then either party may issue a Termination Notice no earlier than 40 business days after the Uninsurable Event.

Termination Notice

39. In the event the Crown receives a Termination Notice, ^[37]
[37]

[37]

Negotiation progress

41. Waka Kotahi and its advisors have been actively engaged in negotiations with WGP and the CJV since the impact of the COVID-19 became apparent. The negotiations are ongoing and the Builder has yet to provide details of their substantiated costs of COVID-19 related delays.
42. The Builder advises Waka Kotahi that this information will not be available until at least 26 June 2020. [37]

[37]

Early indicative scenario analysis

[37]

46. Treasury and the New Zealand Infrastructure Commission – Te Waihanga (Infracom) officials have reviewed early indicative commercial and legal analysis and advice on scenarios prepared for Waka Kotahi. [37]

47. So we can aim for agreement – but not at any cost. Estimates from officials (though again noting no data is yet available from the Contractor) suggest the high end of the range for likely agreement could be as much as [37]

[37]

[37]

Decision-making and next steps

57. The RAMA provides an enhanced monitoring framework which the Treasury and Waka Kotahi have determined now applies for the Transmission Gully Project. This means Waka Kotahi is to request the consent of the Crown for material decisions – including ^[37]
58. The Treasury advises me that the Minister of Finance (as the Crown signatory to the RAMA) must provide this consent on behalf of the Crown. Treasury's legal advisors have advised that we ensure that there are clear decision-making processes in place so that the Crown can react quickly if necessary.
59. This is important to ensure any consents or directions are given to Waka Kotahi within the timeframes allowed for them to take action under the Project Agreement. If the Crown delays in responding then it could increase its liability under the Deed of Indemnity if Waka Kotahi misses a deadline under the Project Agreement.

Update on Pūhoi to Warkworth

[40]

[40]

Financial Implications

64. In the majority of potential scenarios, the additional costs associated with settling or terminating Transmission Gully would be significant. ^[37]
65. Any costs associated with the transport PPPs are usually met from the National Land Transport Fund (NLTF). However, we note that the NLTF is already facing a significant predicted shortfall in the next year due to reduced revenue and additional COVID-19 related costs, requiring Crown funding to avoid cuts or delays to projects within the current National Land Transport Programme. Crown funding for the NLTF shortfall will be considered by Cabinet through the COVID-19 Response and Recovery Fund (CRRF) Round 2 paper on 6 July.
66. In addition to funding for the NLTF shortfall, Crown funding will likely be required to cover additional costs associated with settling or terminating the Transmission Gully PPP. However, given the state of the negotiations, there is still uncertainty about the amount of funding needed and when it will be required.
67. While the Crown would have time to consider funding options in the event of a termination notice being served after the standstill ends on 10 July, if a negotiated settlement is reached then funding would need to be agreed before this.
68. To provide for this outcome, we seek Cabinet's agreement to establish a ^[37] tagged operating contingency to provide for managing any costs relating to a settlement of the Transmission Gully negotiations. We propose that the expenditure associated with this tagged contingency be managed outside of Budget allowances and the CRRF, with a corresponding direct impact on the operating balance and net core Crown debt. This is due to the extraordinary nature of the expenditure.

[37]

[40]

71. We seek Cabinet's agreement to be able to jointly draw down both contingencies subject to Crown consent being given to the proposed settlements.

Legislative Implications

72. There are no legislative implications arising from this paper.

Impact Analysis

Regulatory Impact Statement

73. A regulatory impact analysis is not required for this paper.

Climate Implications of Policy Assessment

74. A Climate Implications of Policy Assessment (CIPA) is not required for this paper.

Population Implications

75. There are no population implications arising from this paper.

Human Rights

76. There are no human rights implications arising from this paper.

Consultation

77. The Treasury and the Infrastructure Commission developed this paper in collaboration with Waka Kotahi NZ Transport Agency. The Ministry of Transport was informed.

No Proactive Release

78. I do not propose to release this paper proactively because these matters are commercially sensitive and subject to ongoing negotiations.

Recommendations

The Minister of Finance and the Minister of Transport recommend the Committee:

- 1 **note** that the negotiations to mitigate the impacts of COVID-19 on the Transmission Gully PPP are ongoing and that the standstill agreement expires on 10 July;
- 2 **note** that key decisions will require expeditious approvals so that matters can be resolved as they arise (and the project is stabilised and set for a strong and confident recovery);
- 3 **agree** that the preferred negotiation outcome for Transmission Gully is a settlement agreement ^[37]
- 4 **authorise** the Minister of Finance and the Minister of Transport to take decisions as required to resolve matters associated with the negotiations on Transmission Gully;

- 5 **note** that the immediate fiscal implications from these negotiations vary significantly depending on the outcome that is achieved, [37]
- 6 **note** that costs associated with the transport PPPs are usually met from the National Land Transport Fund (NLTF);
- 7 **note** that the NLTF is already facing a significant predicted shortfall in the next year due to reduced revenue and additional COVID-19 related costs, requiring Crown funding to avoid cuts or delays to projects within the current National Land Transport Programme;
- 8 **note** that providing Crown funding for the NLTF shortfall will be considered by Cabinet through the COVID-19 Response and Recovery Fund (CRRF) Round 2 paper on 6 July;
- 9 **note** that in addition to funding for the NLTF shortfall, Crown funding will likely be required to cover additional costs associated with settling or terminating the Transmission Gully PPP;
- 10 **note** that while the Crown would have time to consider funding options in the event of a termination notice being served, a negotiated settlement would require funding to be agreed before the present standstill ends on 10 July;

[40]

- 12 **agree** to establish tagged operating contingencies of up to the amounts as follows in Vote Finance, to provide for managing any costs relating to a negotiated settlement of the two transport PPPs:

	\$m – increase/(decrease)				
	2020/21	2021/22	2022/23	2023/24	2024/25 & outyears
Transmission Gully – Tagged Operating Contingency	[37]				
Ara Tuhono Pūhoi to Warkworth – Tagged Operating Contingency	[40]				

- 13 **authorise** the Minister of Finance and the Minister of Transport, acting jointly, to draw down the tagged operating contingency funding in recommendation 11 above (establishing any new appropriations as necessary), subject to Crown consent being given to any proposed settlements;

[37]

15 **agree** that the expenditure associated with the Transmission Gully tagged contingency in recommendation 12 above be managed outside of Budget allowances and the CRRF, with a corresponding direct impact on the operating balance and net core Crown debt;

[40]

Authorised for lodgement

Hon Grant Robertson
Minister of Finance

Hon Phil Twyford
Minister of Transport

Annex A – high level decision map for Transmission Gully COVID-19 negotiations

[37]

Annex B - Key events on the Transmission Gully Project

Feb-March 2012	Board of Inquiry in relation to Transmission Gully as a Road of National Significance.
22 June 2012	Board of Inquiry decision. This provided for a consented scheme design.
November 2012	Cabinet gave the Waka Kotahi approval to finance and build the Transmission Gully highway using a PPP.
21 January 2013	Waka Kotahi called for Expressions of Interest from consortia interested in and capable of delivering the Transmission Gully PPP Project.
April 2013	The Waka Kotahi announced the two consortiums shortlisted to deliver the Transmission Gully PPP Project. These were the Wellington Gateway Partnership and the Positive Connection consortiums.
6 May 2013	A request for proposal was issued to the consortiums and their proposals underwent a rigorous evaluation process to select the preferred bidder for the project.
2 December 2013	The Waka Kotahi announced the Wellington Gateway Partnership as the preferred bidder to finance, design, build, operate and maintain the Transmission Gully motorway.
28 July 2014	The Waka Kotahi signed the Project Agreement with the Wellington Gateway Partnership. D&C Agreement signed on this date also.
22 February 2019	Formal Notice of Dispute: claim by CJV in respect of delay to certification of Enabling Works Management Plan and L5/L6 Tables. Passed through to Waka Kotahi by WGP under the Project Agreement. Claim for \$352m (plus GST) [25]
19 December 2019	Pre-Settlement Agreement signed between the Waka Kotahi and the CJV which settled all existing claims (including the EWMP claim above as well as some smaller disputes that had arisen). The Settlement Amount of \$190.6m was paid by the Waka Kotahi to the CJV. The agreement provides for a Revised Service Commencement Date (Road Opening) of 30 November 2020.
4 May 2020	WGP gives notice of Delay and Extension Event – COVID-19 Alert Level 3
20 March 2020	Notice given by WGP to Waka Kotahi in relation to likely delay due to COVID-19
6 April 2020	SPV provided Notice of Events as a pass through from the CJV, notifying an Extension Event, An Uninsurable Event and a Qualifying Change in Law has occurred.
30 April 2020	Planned Service Commencement Date (original).
30 November 2020	Revised Planned Service Completion Date under Settlement Agreement



Cabinet Economic Development Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Managing the Impact of COVID-19 on the Transmission Gully PPP Project

Portfolios **Finance / Transport**

On 1 July 2020, the Cabinet Economic Development Committee:

- 1 **noted** that the negotiations to mitigate the impacts of COVID-19 on the Transmission Gully Public Private Partnership (PPP) are ongoing, and that the standstill agreement expires on 10 July 2020;
- 2 **noted** that key decisions will require expeditious approvals so that matters can be resolved as they arise, and so that the project is stabilised and set for a strong and confident recovery;
- 3 **agreed** that the preferred negotiation outcome for Transmission Gully is a settlement agreement [25]
- 4 **authorised** the Minister of Finance and the Minister of Transport to take decisions as required to resolve matters associated with the negotiations on Transmission Gully;
- 5 **noted** that the immediate fiscal implications from these negotiations vary significantly depending on the outcome that is achieved, [25]
- 6 **noted** that costs associated with the transport PPPs are usually met from the National Land Transport Fund (NLTF);
- 7 **noted** that the NLTF is already facing a significant predicted shortfall in the next year due to reduced revenue and additional COVID-19 related costs, requiring Crown funding to avoid cuts or delays to projects within the current National Land Transport Programme;
- 8 **noted** that providing Crown funding for the NLTF shortfall will be considered by Cabinet through the COVID-19 Response and Recovery Fund (CRRF) Round 2 paper on 6 July 2020;
- 9 **noted** that in addition to funding for the NLTF shortfall, Crown funding will likely be required to cover additional costs associated with settling or terminating the Transmission Gully PPP;

10 **noted** that while the Crown would have time to consider funding options in the event of a termination notice being served, a negotiated settlement would require funding to be agreed before the present standstill ends on 10 July 2020;

11 **agreed** that an investigation be undertaken into the Transmission Gully project, including its procurement, terms of contract and implementation, to be overseen by the Infrastructure Commission;

Pūhoi to Warkworth PPP

12 [40]

Financial implications

13 **agreed** to establish tagged operating contingencies of up to the amounts as follows in Vote Finance, to provide for managing any costs relating to a negotiated settlement of the two transport PPPs:

	\$m – increase/(decrease)				
	2020/21	2021/22	2022/23	2023/24	2024/25 & outyears
Transmission Gully – Tagged Operating Contingency	[25]				
Ara Tuhono Pūhoi to Warkworth – Tagged Operating Contingency	[40]				

14 **authorised** the Minister of Finance and the Minister of Transport, acting jointly, to draw down the tagged operating contingency funding referred to above (establishing any new appropriations as necessary), subject to Crown consent being given to any proposed settlements;

15 [37]

16 **agreed** that the expenditure associated with the Transmission Gully tagged contingency in paragraph 13 above be managed outside of Budget allowances and the CRRF, with a corresponding direct impact on the operating balance and net core Crown debt;

17 [40]

Janine Harvey
Committee Secretary

Present: (see over)

Present:

Rt Hon Winston Peters (part of item)
Hon Kelvin Davis
Hon Grant Robertson (Chair)
Hon Phil Twyford
Hon Stuart Nash
Hon Iain Lees-Galloway
Hon Jenny Salesa
Hon Damien O'Connor
Hon Kris Faafoi
Hon Shane Jones
Hon Willie Jackson (part of item)
Hon James Shaw
Hon Eugenie Sage

Officials present from:

Office of the Prime Minister
Officials Committee for DEV



Cabinet

Minute of Decision

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Report of the Cabinet Economic Development Committee: Period Ended 3 July 2020

On 6 July 2020, Cabinet made the following decisions on the work of the Cabinet Economic Development Committee for the period ended 3 July 2020:

DEV-20-MIN-0132	Managing the Impact of COVID-19 on the Transmission Gully PPP Project Portfolios: Finance / Transport	CONFIRMED
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[40]

[40]

Michael Webster
Secretary of the Cabinet

Transmission Gully – interim arrangements extension

Commercially sensitive/Legally privileged (all)

Meeting Date	Circular
ELT Sponsor	Brett Gliddon
Prepared By	Lucy Riddiford and Simon Penlington
Legal Reviewer	Anna Moodie
Version	Final
Date	6 July 2020
Pages	3 + 1 Attachment

Purpose

This paper asks the Board to approve variations to the Standstill Agreement and the Winter Works Agreement and to **§ 9(2)(i), Redacted - Out of scope**, to provide for an extended period to negotiate a commercial settlement of the Builders' claim for compensation to mitigate the effects of COVID-19 on the Transmission Gully PPP project.

Recommendations

It is recommended the Board signs or assents to the written resolutions set out in Attachment 1.

Strategic Relevance

The decisions sought are intended to allow the parties further time to reach a negotiated settlement, which remains the preferred option for resolving issues related to the impact of COVID-19 on the Transmission Gully PPP, **§ 9(2)(i)**.

Background

Background as to the potential impact of COVID-19 on the project and the legal position is set out in the following Board papers: *Impacts of COVID 19 on Pūhoi to Warkworth* (15 May: 2.1); *Impacts of COVID 19 on Transmission Gully and interim decisions* (15 May 2020: 2.2); and *Transmission Gully PPP – Impacts of COVID-19 (Interim Arrangements) dated 20 May 2020*.

Key Issues

Current status

On 28 May, the parties entered into a Standstill Agreement and a Winter Works agreement. [REDACTED]

§ 9(2)(i), Redacted - Out of scope [REDACTED]

[REDACTED]. The purpose of these agreements and the extensions was to provide the parties with enough time to explore a negotiated settlement of the impact of COVID-19 on the Transmission Gully project.

§ 9(2)(i) [REDACTED]

Management considers that it is prudent to extend time to allow for the negotiations to continue without time pressure, to allow for any approvals from Treasury that will be necessary and to allow for the settlement to be documented.

Extensions

The objectives of the Winter Works Agreement and the Standstill Agreement were to:

- Provide the Builder with financial assistance to cover some of the actual costs of on-site and off-site works for a minimum period of 6 weeks. Without this assistance the Builder would have ceased this work during the winter period to save money;
- Provide the parties with a six-week period to agree the time and cost impacts of COVID-19. The parties are also seeking to agree on the high-level design for, and additional costs of, a new (deep lift) pavement solution which will improve the quality of the project and allow for more timely completion.

Negotiations are continuing and Management has some confidence that it will be possible to achieve a settlement within a range that is acceptable to Waka Kotahi.

Management seeks approval to extend the standstill agreement until no later than 7 August 2020 and make further payments § 9(2)(i) [REDACTED] for the period of the standstill. This rate is consistent with the previous winter works payment § 9(2)(i) [REDACTED]

§ 9(2)(i), Redacted - Out of scope [REDACTED]

Key risks

§ 9(2)(i) [REDACTED]

§ 9(2)(i) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

Funding and decision-rights

Treasury has advised Waka Kotahi that it wishes to move to an enhanced monitoring framework, giving Treasury greater oversight and decision rights.

At its meeting on 1 July 2020, the Cabinet Economic Development Committee considered Transmission Gully, § 9(2)(i) [Redacted]

[Redacted]
[Redacted]
[Redacted] Cabinet authorised the Minister of Finance and the Minister of Transport to take decisions as required to resolve matters associated with the negotiations on Transmission Gully. A contingency has been tagged for a negotiated settlement.

Any payment for further winter works would be funded from the NLTF and finance has confirmed that there is money available for this.

Management is working closely with Treasury and other Crown stakeholders, including the Infrastructure Commission and the Ministry of Transport, with a series of workshops held on 2 July 2020 to ensure that officials have a good understanding of the issues associated with the Transmission Gully PPP (and the impact of COVID-19) and the various possible scenarios. This should support expeditious decision-making.

Health & Safety, Customer/Stakeholder & Environmental Impact

The impact of this decision is considered by the NZ Transport Agency to be neutral in terms of health and safety, the public and other stakeholders, and the environment.

Related Documents

[Impacts of COVID 19 on Pūhoi to Warkworth](#) (15 May: 2.1)

[Impacts of COVID 19 on Transmission Gully and interim decisions](#) (15 May 2020: 2.2)

[Transmission Gully PPP – Impacts of COVID-19 \(Interim Arrangements\)](#) (20 May 2020).

Attachments

Attachment 1 Resolutions

Attachment 1

Resolutions

Waka Kotahi NZ Transport Agency

Written Resolutions of the Board

(pursuant to clause 13, Schedule 5 of the Crown Entities Act 2004)

Dated: 2020

Background

The Board wishes to approve variations to the Standstill Agreement and the Winter Works Agreement s 9(2)(i), Redacted - Out of scope, to provide for an extended period to negotiate a commercial settlement of the Builders' claim for compensation to mitigate the effects of COVID-19 on the Transmission Gully PPP project.

Resolutions

The Board:

- **Notes** the contents of this Transmission Gully interim arrangements extension paper dated 2 July 2020.
- **Approves** Waka Kotahi extending the current interim arrangements to allow up to a further 4 weeks (i.e. until Friday 7 August 2020) to negotiate a commercial settlement of the Builders' claim for the compensation to mitigate the effects of COVID-19 on the Transmission Gully PPP project including any or all of the following:
 - Varying the Standstill Agreement with the Builder and Wellington Gateway Partnership dated 28 May 2020 to extend the negotiation period;
 - Varying the Winter Works Agreement with the Builder dated 28 May 2020 to extend the period of works and/or payment for that work; and/or
 - s 9(2)(i), Redacted - Out of scope

(collectively, Variation to the Interim Arrangements).

- **Notes** that Treasury has been advised of the proposed Variation to the Interim Arrangements and execution of any of the variation agreements making up the Variation to the Interim Arrangements will be subject to their confirmation of approval, or confirmation that approval is not required.

- **Delegates** authority to the Chair to approve the Variation to the Interim Arrangements, including the payment **s 9(2)(i)** for the period of the standstill, provided that the variation agreements making up the Variation to the Interim Arrangements are consistent with the key terms set out in this paper, subject to approval from Treasury if required;
- **Authorises** the Chief Executive or her delegates to do all other things necessary or desirable to give effect to the above approval and delegation, including executing any agreements necessary to implement the Variation to the Interim Arrangements, paying any further interim payment to the Builder, signing any other agreement or document or giving any notice.

Signed/assented to:



06/07/2020 4:42 PM

Sir Brian Roche



06/07/2020 4:56 PM

Cassandra Crowley



07/07/2020 9:36 AM

Victoria Carter



06/07/2020 6:04 PM

David Smol



06/07/2020 9:11 PM

Catherine Taylor



07/07/2020 11:39 AM

Ken Rintoul



06/07/2020 5:00 PM

Patrick Reynolds

Voting Results for Waka Kotahi Board Resolutions Jul 2020 re Transmission Gully Interim Arrangements Extension

The signature vote has been passed 7 votes are required to pass the vote, of which 0 must be independent

Vote Response	Count (%)
or	7 (100%)
Agai nst	0 (0%)
Absta ned	0 (0%)
Not Cast	0 (0%)

Voter Status

Name	Vote	Voted On
Carter, V ctor a	or	07/07/2020 9:36 AM
Crow ey, Cassandra	or	06/07/2020 4:56 PM
Reyno ds, Patr ck	or	06/07/2020 5:00 PM
R ntou , Ken	or	07/07/2020 11:39 AM
Roche, Br an	or	06/07/2020 4:42 PM
Smo , Dav d	or	06/07/2020 6:04 PM
Tay or, Cather ne	or	06/07/2020 9:11 PM

Reference: T2020/2354

Date: 9 July 2020

To: Minister of Finance (Hon Grant Robertson)
Minister of Transport (Hon Phil Twyford)
Minister for Infrastructure (Hon Shane Jones)

Deadline: None

Aide Memoire: Update on Transmission Gully PPP negotiations

This aide memoire provides you with an update on the Transmission Gully Public Private Partnership (PPP) negotiations. It updates you on the extension to the Standstill Agreement, the settlement amount, and the move to enhanced monitoring under the Reimbursement and Management Agreement (RAMA).

Background

The Transmission Gully Project (the Project) is a 27 kilometre four-lane motorway, which will run from Mackays Crossing to Linden. The Wellington Gateway Partnership (WGP) is delivering the Project under a PPP Project Agreement with Waka Kotahi NZ Transport Agency (Waka Kotahi).

The COVID-19 Alert Level 4 lockdown required all non-essential construction workers to stay home, impacting government and private sector projects alike. The change in law that prevented site access created a Force Majeure event, which is arguably an Uninsurable Event under the Transmission Gully PPP Project Agreement. An Uninsurable Event obliges Waka Kotahi and WGP to make reasonable efforts to agree how to mitigate its impacts. If agreement cannot be reached within a 40 Business Day period, then WGP has the right to terminate the PPP Project Agreement.

Waka Kotahi's preferred outcome is to negotiate a reasonable and fair settlement with WGP. A settlement would provide certainty about the cost and time for completion of the Project and retain the benefits of the operational aspects of the PPP.

Standstill Agreement

On 4 June 2020, a Standstill Agreement was agreed by Waka Kotahi with WGP for a period of 6 weeks to enable negotiations to take place while ensuring neither party would seek to terminate the Project Agreement. That standstill period expires on 10 July 2020.

On Friday 3 July 2020, the WGP provided details of its starting position for a negotiated settlement in relation to the impacts of COVID-19. An extension of the standstill to 7 August 2020 has been agreed to allow Waka Kotahi time to evaluate the WGP's proposal and conduct negotiations.

Settlement Amount

[37]

Waka Kotahi is focused on ensuring that a fair settlement amount is reached and that costs incurred before the COVID-19 pandemic are not included. An extension to the time required to complete the Project is also part of the negotiations.

Enhanced Monitoring Framework

The RAMA sets out how Waka Kotahi will reimburse the Crown in the event that the Crown indemnity, agreed as part of the PPP contract documentation, is called upon. The RAMA contains the ability for the Crown to put in place additional monitoring requirements and Crown approval rights for certain decisions where there are enhanced risks to the Crown of a claim under the indemnity.

In view of the current circumstances, the Treasury has formally notified Waka Kotahi on 7 July 2020 that we have moved to the Enhanced Monitoring Framework, which has informally been in place since 18 June 2020. This means that Crown consent will be required in relation to material decisions including:

[37]

Next steps

The negotiations between Waka Kotahi and WGP are continuing. [37]

At the end of the Standstill Agreement period on 7 August 2020, the parties will either agree to extend that period, to continue negotiations, or the right to issue a Termination Notice will arise on 10 August 2020.

Dan Cameron, Principal Advisor, New Zealand Infrastructure Commission - Te Waihanga, [35]

Craig Murphy, Manager, The Treasury, [39]

Transmission Gully Update

Commercially sensitive/Legally privileged (all)

Meeting Date	29 July 2020
ELT Sponsor	Brett Gliddon, GM Transport Services
Prepared By	Lucy Riddiford
Legal Reviewer	Anna Moodie, Group General Counsel
Version	Final
Date	23 July 2020
Pages	4

Purpose

This paper provides an update on the negotiations with the Contractor and the Builder to reach a commercial settlement of their claims for compensation to mitigate the effects of COVID-19 on the Transmission Gully PPP project. § 9(2)(i), Redacted - Out of scope

Recommendations

It is recommended the Board:

- **Notes** the contents of this paper.

Strategic Relevance

The Transmission Gully project is contracted under a PPP model and aligns with the Government Policy Statement 2018 objectives to improve access, resilience and safety. The project was impacted by the COVID-19 Alert level 4 lockdown. This is being treated as an “uninsurable event” under the contract and the parties are exploring a commercially negotiated settlement. § 9(2)(i)

Background

Background as to the potential impact of COVID-19 on the project and the legal position is set out in the following Board papers: [Impacts of COVID 19 on Pūhoi to Warkworth](#) (15 May: 2.1); [Impacts of COVID 19 on Transmission Gully and interim decisions](#) (15 May 2020: 2.2); [Transmission Gully PPP – Impacts of COVID-19 \(Interim Arrangements\)](#) (20 May 2020); and [Transmission Gully – interim arrangements extension](#) (6 July 2020).

Key Issues

Timeline and decision making

The parties have entered into a standstill agreement, which was extended on 10 July. The “standstill period” (during which neither party can issue a termination notice) ends on 7 August.

§ 9(2)(i)

Below is the timeline and relevant decision makers, noting that Waka Kotahi is now in an enhanced monitoring regime, which requires Treasury approval for key decisions.

§ 9(2)(i)

On 1 July 2020, the Cabinet Economic Development Committee agreed that the preferred negotiation outcome for Transmission Gully § 9(2)(i)

§ 9(2)(i). Cabinet authorised the Minister of Finance and the Minister of Transport to take decisions as required to resolve matters associated with the negotiations on Transmission Gully. A contingency has been tagged for a negotiated settlement.

§ 9(2)(i)

Management has commenced working with Treasury to seek the necessary approvals § 9(2)(i)

§ 9(2)(i)

§ 9(2)(i)

§ 9(2)(i) [Redacted]

- [Redacted]

- [Redacted]

[Redacted]

[Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

Management will provide an update on the status of negotiations at the meeting.

§ 9(2)(i) [Redacted]

[Redacted]

[Redacted]

- [Redacted]

- § 9(2)(i) [Redacted]

■ [Redacted]

■ [Redacted]

[Redacted]

§ 9(2)(i), Redacted - Out of scope [Redacted]

[Redacted]

[Redacted]

Health & Safety, Customer/Stakeholder & Environmental Impact

The impact of this decision is considered by the NZ Transport Agency to be neutral in terms of health and safety, the public and other stakeholders, and the environment.

Related Documents

[Impacts of COVID 19 on Pūhoi to Warkworth](#) (15 May: 2.1).

[Impacts of COVID 19 on Transmission Gully and interim decisions](#) (15 May 2020: 2.2).

[Transmission Gully PPP – Impacts of COVID-19 \(Interim Arrangements\)](#) (20 May 2020).

[Transmission Gully – interim arrangements extension](#) (6 July 2020).

Attachments

Attachment 1 Advice from Bell Gully dated 20 July 2020: § 9(2)(i) [Redacted]

s 9(2)(h), Redacted - Out of scope



s 9(2)(h), Redacted - Out of scope



Transmission Gully Update – supplementary paper

Commercially sensitive/Legally privileged (all)

Meeting Date	29 July 2020
ELT Sponsor	Brett Gliddon, GM Transport Services
Prepared By	Lucy Riddiford, General Counsel Strategic Projects
Legal Reviewer	Anna Moodie, Group General Counsel
Version	Final
Date	29 July 2020
Pages	3

Purpose

This paper provides an update to the Board on the negotiations to reach a commercial settlement of the Builder and the Contractor's claims for compensation to mitigate the effects of COVID-19 on the Transmission Gully PPP project, seeks endorsement for the proposal to be put to the Builder and seeks delegations **s 9(2)(i), Redacted - Out of scope**

Recommendations

It is recommended the Board:

- **Notes** the contents of this paper;
- **Endorses** the proposal to be put to the Builder to reach a commercial settlement of the Builder's claim for compensation to mitigate the effects of COVID-19 on the Transmission Gully PPP project as described in this paper;
- **Notes** that in order to reach full agreement it will be necessary to reach agreement with the Contractor and the Operator (Ventia) and there is also a component to be agreed between the Contractor and the Builder;
- **Notes** that further approval will be sought from the Board for the final terms of the settlement with all parties;
- **Notes** that Treasury will need to approve the final terms of the settlement;

s 9(2)(i), Redacted - Out of scope

s 9(2)(i), Redacted - Out of scope

Update on the negotiations

Builder

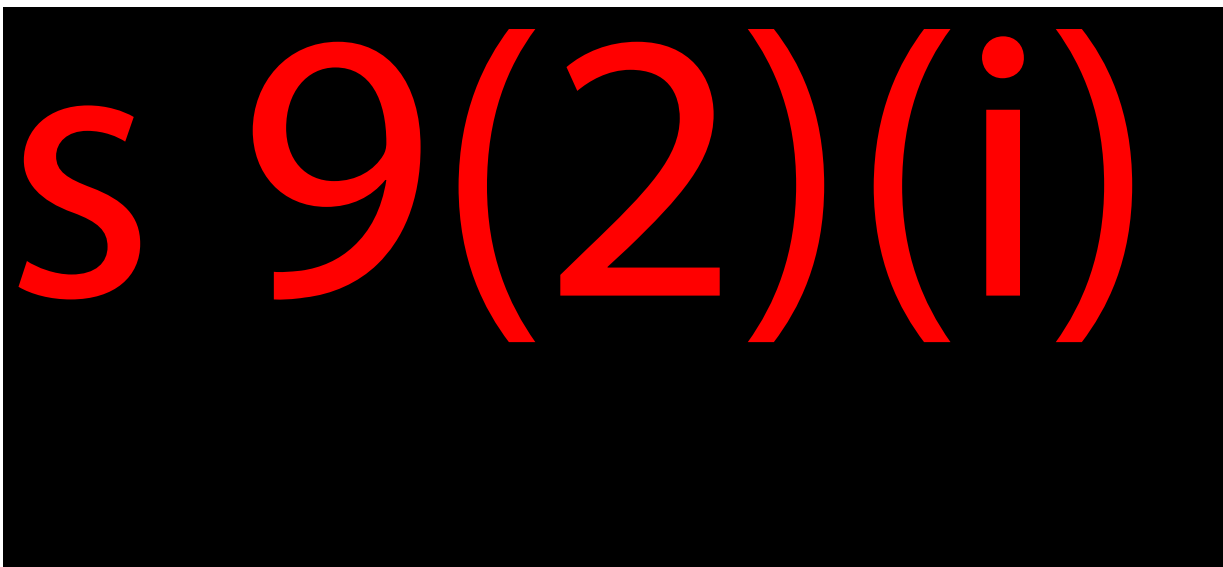
s 9(2)(i), Redacted - Out of scope

This proposal has been discussed with Mark Binns, who is engaged by Waka Kotahi to support the Board and Management. Mr Binns supports the approach.

Management seeks endorsement for the proposal to be put to the Builder.

Other

In order to reach full agreement, the following elements also need to be agreed:



Management will revert to the Board for final approvals of the settlement.

s 9(2)(i)

[Redacted text block]

[Redacted text block]

[Redacted text block]

s 9(2)(i), s 9(2)(b)(ii), Redacted - Out of scope

[Redacted text block]

s 9(2)(i), Redacted - Out of scope

The text is followed by several lines of redacted content, represented by solid black bars of varying lengths.

Treasury

Management is progressing Treasury approvals in parallel with the negotiations. Cabinet has delegated the decision to reach a negotiated settlement to the Ministers of Finance and Transport. The proposed settlement is within the delegation.

Joint Report: Update on Transmission Gully negotiations to mitigate the impact of COVID-19

Date:	3 August 2020	Report No:	T2020/2537
		File Number:	ST-4-8

Action sought

	Action sought	Deadline
Minister of Finance (Hon Grant Robertson)	Provide Crown consent for Waka Kotahi to agree a settlement for Transmission Gully subject to due diligence. Agree to draw down under the existing tagged contingency to effect the Transmission Gully settlement. [40,25]	Thursday 6 August 2020
Minister of Transport (Hon Phil Twyford)	Agree to draw down under the tagged contingency to effect the Transmission Gully settlement.	Thursday 6 August 2020
Minister for Infrastructure (Hon Shane Jones)	Note the contents of this report	None

Contact for telephone discussion (if required)

Name	Position	Telephone		1st Contact
Liz Innes	Principal Advisor, Investment Management and Asset Performance	[39]	[35]	✓
Peter Murray (Infrastructure Commission)	General Manager, Major Projects and Advisory	[35]		
Craig Murphy	Manager, Investment Management and Asset Performance	[39]		

Minister's Office actions (if required)

Return the signed report to Treasury.

Enclosure: Yes (attached)

Joint Report: Update on Transmission Gully negotiations to mitigate the impact of COVID-19

Executive Summary

New Zealanders acted together and saved lives by stopping COVID – but this was not costless. The Alert Level 4 lockdown required non-essential construction workers (like most others) to stay home, impacting government and private sector projects alike.

As a result, various parts of the Crown are negotiating contract variations for a large number of projects in construction. These negotiations will determine which COVID-19 cost increases the Government should meet, and which ones our partners have contractually agreed to and should continue to bear.

These negotiations are generally more difficult for the three PPPs in construction than for other contract forms due to their contractual complexity and enhanced cost of delay resulting from financing.

The PPP Project Agreements contemplated this type of low probability, high impact situation beyond the control of the parties as an Uninsurable Event and both parties are obliged to make efforts to mitigate it, if they can.

The parties are engaged in efforts to mitigate this Uninsurable Event now by negotiating a settlement agreement to allow for the COVID-19 impacts to be mitigated on reasonable and fair terms. If they cannot reach an agreement then it may be possible for either party to terminate the Project Agreement and walk away.

A settlement agreement would resolve issues associated with COVID-19 and provide certainty as to the cost and time for completion of the project, while retaining the overall structure of the PPP agreements – including the risk transfer.

On 9 July the Treasury and Infracom briefed you that they had notified the New Zealand Transport Agency Waka Kotahi (Waka Kotahi) that the enhanced monitoring framework now applied, as contemplated in the Reimbursement and Management Agreement (RAMA). This means that Crown consent is required for all material decisions; [37]

Negotiations on the Transmission Gully PPP Project have progressed to the point that the New Zealand Transport Agency (Waka Kotahi) is close to agreement on a full and final settlement to mitigate the impacts of COVID-19 on the project.

The proposed settlement agreement will have a maximum of [37] in increased costs and a 10-month delay from the pre-COVID delivery plan with the road being completed by 27 September 2021. This is within the acceptable parameters set by Waka Kotahi's commercial advisors and is [37] better than the best alternative [37]

Crown consent is required for Waka Kotahi to proceed with the settlement agreement. This consent is needed promptly an "in principle" agreement can be signed by 11 August 2020. After that date, if there is no settlement agreement or standstill extension, the Builder or the Contractor may attempt Termination. [37]

The Treasury and the New Zealand Infrastructure Commission, Te Waihanga (Infracom) agree that the proposed settlement is the best possible outcome for the Project, Waka Kotahi and the Crown. It is a reasonable payment based on actual impacts, will hold the parties to their obligations to deliver the Project, and realise the benefits we expected.

This paper invites you to provide Crown consent to the settlement arrangements, and approve the drawdown of funds so Waka Kotahi can give effect to the settlement agreement (which Waka Kotahi and the Builder are aiming to finalise before 21 August 2020 with the Contractor and the Operator to accede to later after obtaining relevant approvals). This will stabilise the project and allow parties to get on with building the road.

[40,25]

Recommended Action

We recommend that you:

Crown consent

- a **note** that negotiations are underway on Public-Private Partnership (PPP) projects to reach settlement to resolve issues associated with COVID-19 and provide certainty about the cost and time for completion on these projects.
- b **note** that negotiations on the Transmission Gully Project have progressed well. Waka Kotahi has reached agreement with the Builder and is close to reaching a settlement agreement with other parties.
- c **note** that this settlement with the builder includes a maximum of [37] in increased costs and a 10-month delay from the pre-COVID delivery plan [37]
- d **note** that Waka Kotahi requires Crown consent in order to proceed to a global agreement and that the Minister of Finance must provide this.
- e **consent** to Waka Kotahi proceeding to agree settlement for the Transmission Gully project to a maximum fiscal impact of [37] subject to due diligence by officials.

Consent / do not consent.

Financial implications

- f **note** that on 1 July 2020, the Cabinet Economic Development Committee [DEV-20-MIN-0132 confirmed by CAB-20-MIN-0329]:

[37]

- ii. **authorised** the Minister of Finance and Minister of Transport, acting jointly, to draw down the tagged operating contingency funding referred to above (establishing any new appropriations as necessary), subject to Crown consent being given to any proposed settlements;
- iii. **agreed** that the expenditure associated with the Transmission Gully tagged contingency be managed outside of Budget allowances and the CRRF, with a corresponding direct impact on the operating balance and net core Crown debt;
- iv. [40]

g **note** that Crown consent to the settlement for Puhoi to Warkworth was given by the Minister of Finance on 22 June 2020, while Crown consent to the Transmission Gully settlement is sought in recommendation e above;

h **agree** to appropriate [37] in funding from the Transmission Gully – Tagged Operating Contingency to cover the costs of the negotiated settlement;

Agree / disagree

i [40]

Agree / disagree

j **approve** the following changes to appropriations to give effect to the policy decisions in recommendations h and i above, with a corresponding impact on the operating balance and net core Crown debt:

Vote Transport Minister of Transport	\$m - increase/(decrease)				
	2020/21	2021/22	2022/23	2023/24	2024/25 & Outyears
Multi-Category Expenses and Capital Expenditure:					
COVID-19 - NLTF Funding for Cost Pressures and Revenue Shocks (MCA)					
<i>Non-Departmental Output Expenses:</i>					
COVID-19 – NLTF Operating Cost Pressure and Revenue Shortfall Funding	[37]		-	-	-
<i>Non-Departmental Capital Expenditure:</i>					
Equity Injection to Waka Kotahi NZ Transport Agency			-	-	-
Total Multi-Category Expenses and Capital Expenditure: COVID-19 - NLTF Funding for Cost Pressures and Revenue Shocks (MCA)			-	-	-
Total Operating			-	-	-
Total Capital			-	-	-

Approved / not approved

k **agree** that the proposed changes to appropriations for 2020/21 in recommendation j above included in the 2020/21 Supplementary Estimates, and that, in the interim, the increases be met from Imprest Supply;

Agree / disagree

l **agree** [40]

and that the remaining [37] be charged against the Transmission Gully – Tagged Operating Contingency described in recommendation h above.

Agree / disagree

m **note** that the amount of funding to be paid to Waka Kotahi for costs associated with the Transmission Gully settlement will be based on the final settlement amount.

[40,25]

Referrals

p **refer** a copy of this report to the Prime Minister, and Ministers of Corrections, Greater Christchurch Regeneration, Education, Building and Construction, and Health for their information.

Refer / not referred.

Craig Murphy
**Manager, Investment Management
and Asset Performance**

Peter Murray
**General Manager, Major
Projects and Advisory**

Hon Grant Robertson
Minister of Finance

Hon Phil Twyford
Minister of Transport

Hon Shane Jones
Minister for Infrastructure

Joint Report: Update on Transmission Gully negotiations to mitigate the impact of COVID-19

Purpose of Report

1. The purpose of this report is to update you on the outcome of the Transmission Gully negotiations, invite you to provide Crown consent to allow Waka Kotahi to agree a settlement [40,25] and recommend you approve the drawdown of funds to give effect to the settlement.

Context

2. On 5 June 2020, the Treasury and the New Zealand Infrastructure Commission – Te Waihanga (Infracom) provided you with an update on the PPP negotiations arising from the Level 4 lockdown [T2020/1744 refers]. The report noted ongoing negotiations in relation to three PPP projects in construction, which could result in significant fiscal and commercial consequences to the Crown.
3. On 19 June 2020, the Treasury and Infracom briefed you on progress with negotiations on the transport PPPs, and you agreed to take a paper to Cabinet seeking approval for contingency funding to cover costs relating to the Transmission Gully Project. [T2020/1938 refers].
4. On 1 July 2020, the Cabinet Economic Development Committee (DEV) discussed the impacts of COVID-19 on the Transmission Gully PPP project and noted that a range of possible outcomes could arise from the situation. DEV agreed to establish tagged contingencies to cover the fiscal risk, and authorised the Minister of Finance and the Minister of Transport to take decisions to mitigate these impacts and stabilise the project. [CAB-20-MIN-0329 refers].
5. On 9 July 2020, the Treasury and Infracom briefed you that they had notified the New Zealand Transport Agency Waka Kotahi (Waka Kotahi) that the enhanced monitoring framework now applied, as contemplated in the Reimbursement and Management Agreement (RAMA). This means that Crown consent is required for all material decisions; including accepting a termination notice, entering into a dispute or agreeing to a settlement.
6. Since then negotiations have been progressing well to the extent that we expect them to be substantially completed next week (before the current standstill expires on 7 August 2020). It is possible that full documentation and execution of the agreement will not be completed within these timeframes, and as such we expect that the standstill will be extended for 1-2 weeks to allow for this to occur.
7. Further background information on the Transmission Gully project is available for your reference in Annex A.

Proposed Transmission Gully settlement

8. The settlement agreement is made up of a number of components, including compensation to mitigate the impacts of COVID-19, time relief and a pavement variation. These components are described in more detail below.

Settlement component	Amount (\$m)
Compensation for the Builder	[25]
Compensation for the SPV	
Compensation for the Operator	
Deep lift pavement solution	45.5
[25]	[23]
Total settlement	224

Compensation for COVID-19 impacts

9. There are three parties that are to be compensated for COVID-19 impacts in relation to Transmission Gully. These parties are the Contractor (WGP), the Builder (CPB/HEB), and the Operator (Ventia).
10. In consideration for a full and final settlement Waka Kotahi will make a compensation payment for the costs associated with COVID-19, including [37] to the Builder. The first payment would be \$40 million (less the \$19 million already paid for Winter Works). The balance of the payments to be paid monthly from settlement to Road Opening, except for \$7.5 million, which is to be paid at the end of the construction period, subject to achieving the Road Opening date of 27 September 2021.

[25]

13. Ventia is entitled to delay costs associated with its current liquidated damages entitlement, and the pavement variation (discussed below). The costs sought by Ventia are up to a maximum of [25]
14. This means that the total compensation required for COVID-19 impacts for Transmission Gully under the settlement agreement will be a maximum of \$178m (with the remaining \$45.5 contributing to the Pavement variation below).

Delay to road completion date

The parties have agreed to a delay period of 10 months with a revised completion date of 27 September 2021. [34]

The Builder has agreed that it will commence paying liquidated damages after 27 September 2021, subject to any future contractual extension of time relief.

Exclusion of impact of certain future COVID-19 related events

16. This is yet to be discussed in negotiations, although the Waka Kotahi starting point is the same as it was for the Pūhoi to Warkworth PPP Project settlement. The purpose of these negotiations is to limit costs that can be claimed for future defined events and to provide certainty. This would prevent another Uninsurable Event arising from a COVID Lockdown level 3 or 4 (or their equivalent) in the future.
17. This effectively means Waka Kotahi takes the financial risk for cost and time impacts on the project if the Government increases the lockdown level to require physical distancing and/or contact tracing.

Pavement variation

18. Around 10 kilometres of Deep Lift Asphalt (instead of unbound granular pavement known as chip seal) is to be placed along the alignment in areas approaching and over the Wainui saddle and other areas of steeper gradient. Earthworks in these areas were the last to be completed and so were significantly impacted by COVID-19 as the lockdown and re-establishment periods meant these works must now occur in winter – with associated productivity challenges.
19. The Deep Lift pavement is less weather sensitive than the contracted unbound granular pavement so works can be carried out over a greater number of marginal days. The programme time savings from this change are significant – and have been assessed by both the Builder and Waka Kotahi as saving 4 months. The cost for this change is \$45.5 million, although this does not include any amount payable to Ventia to address the changed maintenance and lifecycle profile and this would be addressed separately.

Incentivising performance

20. There is a greater need than usual to ensure commercial measures are in place to help incentivise performance – i.e. on time completion of the road. To this end, \$7.5 million of the COVID-19 compensation to the Builder is at risk subject to on-time completion of the road, which would provide increased incentives for performance
21. The Builder will also provide letters of credit to the value of \$35 million (subject to negotiations), in favour of Waka Kotahi, which are available to be called on until Final Completion is achieved (e.g. approximately 27 March 2022, being 6 months after the scheduled Road Opening Completion).
22. The Builder has agreed that a Waka Kotahi monitor will be embedded in the project, which will improve compliance with some control processes (e.g. documentation) and should mean improved visibility over any issues going forward.

¹ The periodic fee that Waka Kotahi will pay to the Contractor over the 25 year operating period of the PPP.
Joint Report T2020/2537:Update on Transmission Gully negotiations to mitigate the impact of COVID-19

Options analysis

23. Treasury and Infrastructure Commission officials have reviewed various commercial and legal analysis and advice on scenarios prepared for Waka Kotahi, and have scrutinised these with support from the agency team and its experts.
24. We consider that agreeing this settlement is significantly better than every other possible outcome for the project, Waka Kotahi and the Crown. A high-level summary of the scenario analysis is attached in Annex B.

Rationale for agreeing the proposed settlement

25. The settlement option is the lowest cost scenario and the one that best achieves Waka Kotahi's desired outcomes.

[37]

[34]

[37]

[37]

Decision rights and funding

Crown Consent

31. Under the RAMA Waka Kotahi is to request Crown consent for certain decisions, and the proposed settlement agreement for Transmission Gully is one that requires Crown consent to proceed. The Minister of Finance can provide this consent on behalf of the Crown.
32. Our shared view is that settlement is the best scenario available on this project. The Treasury and the Infrastructure Commission recommend you provide Crown consent to allow Waka Kotahi to proceed with the Transmission Gully settlement agreement to mitigate the effects of COVID-19, subject to due diligence by officials on the final settlement agreement.

33. Your consent is needed promptly so that the settlement agreement can be made in principle (to a commercial terms sheet level) before the expiry of the current standstill on 7 August. On this basis the standstill will probably be extended for 1-2 weeks to allow completion of a binding settlement agreement with the Builder, due diligence and approvals. Further time will be required for WGP to obtain lender approval and a tax ruling. We anticipate these steps to be completed by 1 November 2020, although the precise date is yet to be agreed.

[37]

Funding is needed to cover the cost of the settlement

35. Costs associated with the transport PPPs are usually met from the National Land Transport Fund (NLTF). However, as we have previously advised you, the NLTF has been under pressure due to reduced revenue and additional COVID-19 related costs, requiring Crown funding to avoid cuts or delays to projects within the current National Land Transport Programme (NLTP). We noted that additional funding would likely be required to meet any potential settlement costs in order to avoid further impacts on the NLTP.
36. As part of the paper on Transmission Gully that you took to the Cabinet Economic Development Committee on 1 July 2020, the Committee [DEV-20-MIN-0132 confirmed by CAB-20-MIN-0329]:
- a agreed to establish tagged operating contingencies of up to the amounts as follows in Vote Finance, to provide for managing any costs relating to the negotiated settlement of the two transport PPPs:

	\$m – increase/(decrease)				
	2020/21	2021/22	2022/23	2023/24	2024/25 & outyears
Transmission Gully – Tagged Operating Contingency	[37]				
Ara Tuhono Pūhoi to Warkworth – Tagged Operating Contingency	[40]				

- b authorised the Minister of Finance and Minister of Transport, acting jointly, to draw down the tagged operating contingency funding referred to above (establishing any new appropriations as necessary), subject to Crown consent being given to any proposed settlements;
- c agreed that the expenditure associated with the Transmission Gully tagged contingency be managed outside of Budget allowances and the CRRF, with a corresponding direct impact on the operating balance and net core Crown debt;
- d agreed that the expenditure associated with the Ara Tuhono Pūhoi to Warkworth tagged operating contingency above be charged against the COVID-19 Response and Recovery Fund, established as part of Budget 2020;
37. We consider that it is appropriate to provide grant funding to cover the costs of the settlements given that they have arisen as the result of a necessary but costly public policy decision taken by the Government. This is consistent with the approach taken to funding contractual variation costs associated with other projects including Waikeria Prison and the Otakaro construction projects.

38. [37]

39. We are conscious that the Crown has already provided a significant amount of funding to support Waka Kotahi to manage the impacts of COVID-19, including \$600 million through the COVID-19 Response and Recovery Fund (CRRF) Pathway Package. We have analysed the different categories of costs included in the two settlements and consider that they all directly relate to the impacts of COVID-19 and the government's public health response (as opposed to being costs associated with any other issues associated with the projects).

Residual commercial risks

[34,37]

[40,25]

Investigation into Transmission Gully

Cabinet request for an investigation into the Transmission Gully Project

52. As part of its consideration of the paper on the impacts of COVID-19 on Transmission Gully, DEV also agreed that an investigation be undertaken into the Transmission Gully project, including its procurement, terms of contract and implementation, to be overseen by the Infrastructure Commission [DEV-20-MIN-0132 confirmed by CAB-20-MIN-0329 refers].

53. The proposed scope and approach to carrying out the investigation is described below for discussion with Ministers at a meeting scheduled on 4 August 2020. The review is expected to take around six months.

Proposed scope of the investigation

54. The investigation will look at how well the Transmission Gully project has delivered on its objectives to derive lessons that can be applied to future procurement of major infrastructure projects. Given the difficulties the project has faced, the review would need to consider the following topics:
- a Business Case – whether the budget presented was based on sufficient and reasonable supporting analysis and assessments of costs, including appreciation of the inherent and contingent risks and their associated financial implications;
 - b Procurement timeframes – whether appropriate timeframes were allowed for approval, commencement, and completion of the tender process to allow the contracting parties to fully understand and appraise the risk of the project and for Waka Kotahi to understand the nature of the proposals;
 - c Procurement and risk transfer – whether the outcomes following the various issues suffered by the project may have been different under the alternative procurement approaches considered in the Detailed Business Case;
 - d Project governance – whether the governance structure had the knowledge and experience of delivering PPP construction projects (including the nature of risks transferred to the private sector), to effectively oversee the project and address issues in a timely fashion;
 - e Contract management – how effective the contract management process has been in both protecting the commercial position of Waka Kotahi while also supporting the decision making and required processes to keep the project on track; and
 - f Contractor performance – how the contractor has performed in respect of key tasks such as schedule and cost management, quality assurance, health and safety, onsite productivity, supply chain management and the mitigation of risks and whether more could have been done by any party to mitigate the time and cost impacts the project has experienced.

There is a need for an independent reviewer

55. Infracom proposes that an international approach is taken to procuring a suitably qualified advisor to lead the Transmission Gully review. Infracom has identified the following requirements for an independent reviewer – and as such recommends sourcing an international advisor, probably from Australia, as:
- a The potential for conflicts of interest in the New Zealand market is high;
 - b Given the scale of the Transmission Gully Project, most suitably qualified and experienced advisors in New Zealand are likely to have had some involvement in the Transmission Gully Project to date;
 - c Given the relatively small size of the New Zealand advisory market, suitably qualified and experienced individuals may be reluctant to express a truly free and frank view; and
 - d The international market has a deeper pool of suitably qualified and experienced consultants with knowledge of a wide range of similarly large scale projects.

Initiating the investigation

56. Infracom will engage with Treasury and Ministry of Transport officials to ensure the terms of reference appropriately reflect relevant stakeholder perspectives while remaining in line with Infracom's mandate.
57. Infracom does not propose to commence the review nor actively seek a consultant in the market to conduct the review until there is a clear outcome from the current negotiations in relation to COVID-19 to avoid prejudicing the negotiations. Infracom will, however, continue to support the Treasury in progressing negotiations to ensure the process is robust and delivers value to the Crown.
58. [37]

Consultation

59. The Treasury and Infracom are together responsible for this information and advice, which has been produced by working closely with the Ministry of Transport, Waka Kotahi and their advisors.
60. This report was shared with Waka Kotahi and the Ministry of Transport for their information and feedback.

Communications

61. Waka Kotahi will manage communications about the settlement agreement.

Annex A Background – Transmission Gully PPP project

62. The Transmission Gully Project is a 27 kilometre four-lane motorway, which will run from Mackays Crossing to Linden through Transmission Gully. Four interchanges and two new link roads will connect the route to Mackays Crossing, SH58, eastern Porirua and Kenepuru.
63. The Project is being delivered as a Public Private Partnership (PPP) entered into by Waka Kotahi by way of a Project Agreement with the Wellington Gateway Partnership (WGP) in July 2014.
64. WGP is a special purpose vehicle, providing equity and debt funding for the Project, who are contracted to build the motorway for a fixed price, and to maintain and operate the motorway for a period of 25 years from completion.
65. WGP comprises Pacific Partnership, ACC and Infrared Capital Partners. The net present value of the final negotiated contract was approximately \$891 million in 2014, with the Planned Service Commencement Date (completion date) being 30 April 2020.
66. WGP has contracted an unincorporated joint venture of CPB and HEB (CJV) to design and construct the motorway and Ventia to operate and maintain the same.

Challenges and delays

67. The Project was originally due for completion in April 2020. However, the CJV has experienced a number of issues before COVID-19 including:
 - a Significant re-estimation of earthworks requirements, and associated consenting matters;
 - b Wet weather, which made early earthworks seasons less productive than expected; and
 - c Kaikōura earthquake damage and repairs, which also reduced the availability of resources across various supply chains.
68. As a result of these and other challenges (including the CJV's performance) the Project has experienced significant delays and cost over-runs and the CJV has been under significant financial duress.

2019 Dispute

69. In February 2019 the CJV brought a claim against Waka Kotahi through WGP for \$352m [25] This pertained to resource consent issues that allegedly delayed the start of the project (due to the delayed consent to the Enabling Works Enabling Plan) and had been the subject of discussion since 2016.
70. This claim was disputed by Waka Kotahi before it was eventually settled in December 2019 (together with all other existing claims at that time) for \$190.6m, with the date for road opening pushed back to November 2020.
71. [25]

Current Status

72. The Project is approximately 85% complete. A Winter Works Agreement was signed on 4 June with CJV, which sets out a 6-week work programme with Waka Kotahi making a payment of \$14m as a prepayment against the COVID-19 related claim.
73. There are 150-200 people working on-site, and approximately 80 workers apparently unable to re-enter the country. CPB has senior project supervision staff and important sub-contractors who are directly impacted by border restrictions.
74. A Standstill Agreement with the Builder and the SPV was entered into in parallel to the Winter Works Programme, which in effect agreed a period of 6 weeks for negotiations during which neither party would seek to terminate the Project Agreement with the legal rights of both parties preserved. The standstill period was later extended, and now expires on 7 August.

Impacts of COVID-19

75. COVID-19 has exacerbated the delay and costs on an already troubled project in a number of ways including:
 - a delays caused by exclusion from site during level 4 and loss of productivity at levels 3 and 2 and pushing the programme into the winter season;
 - b increased delay-related costs, and costs of working at COVID-19 lockdown levels 2 and 3 based on additional health and safety measures, etc; and
 - c productivity issues created by offshore resources not being able to return to NZ due to border restrictions.
76. The combination of COVID-19 and the lockdown could fit within the definition of an Uninsurable Event under the PPP contracts.
77. If the Contractor's and Builder's obligations under the project agreements are materially affected because of the Uninsurable Event, the parties are both obliged to use their reasonable endeavours to avoid or mitigate the effect of the Contractor's/ Builder's inability to perform the affected obligations.
78. If no mitigation/avoidance regime is agreed, then either party may issue a Termination Notice no earlier than 40 business days after the Uninsurable Event.



BOARD PAPER

Transmission Gully COVID-19 Settlement

Commercially sensitive and legally privileged (all)

Resolution Date	August 2020
ELT Sponsor	Brett Gliddon, GM Transport Services
Prepared By	Lucy Riddiford, General Counsel Strategic Projects
Legal Reviewer	Simon Penlington, General Counsel Litigation
Version	Final
Date	3 August 2020
Pages	9 + 4 Attachments

Purpose

To seek approval for Waka Kotahi to enter into a settlement for the Transmission Gully PPP to mitigate the effects of COVID-19 (COVID-19 Settlement) s 9(2)(i) [redacted].

Recommendations

It is recommended the Board **signs or assents** to the written resolutions set out in Attachment 1.

Strategic Relevance

Transmission Gully is a project contracted under a PPP model. The project aligns with the Government Policy Statement 2019 objectives to improve access, resilience and safety.

COVID-19 has delayed the expected completion of the project, increased its overall construction cost and has also increased the cost of finance to cover debt payments during the delay period. The proposed settlement will resolve issues associated with COVID-19 and provide ongoing certainty as to price and the time for completion, retaining the overall structure of the PPP agreements, including the risk transfer.

s 9(2)(i), Redacted - Out of scope [redacted]

Background

Background as to the potential impact of COVID-19 on the project and the legal position is set out in the following Board papers: *Impacts of COVID 19 on Pūhoi to Warkworth* (15 May: 2.1); *Impacts of COVID 19 on Transmission Gully and interim decisions* (15 May 2020: 2.2); *Transmission Gully PPP – Impacts of COVID-19 (Interim Arrangements)* (20 May 2020); *Transmission Gully – interim arrangements extension* (6 July

2020); and *Transmission Gully Update* (29 July 2020). The Board was also provided with a hard copy supplementary update paper at its meeting on 29 July 2020, which set out the then current status of the negotiations, sought endorsement for the proposal to be put to the Builder s 9(2)(i), Redacted - Out of scope

The recommendations in this paper have been informed by advice from Bell Gully, Mafic Partners and Mark Binns who has endorsed the COVID-19 Settlement, following an update discussion on 4 August 2020.

s 9(2)(i)

- [Redacted]
- [Redacted]
- [Redacted]

Management has reached agreement in principle with the Builder, on the terms set out in this paper and recommends that the Board approve the terms of that settlement, with a delegation to the Chair to approve the final settlement and a delegation to the Chief Executive to take all steps necessary to give effect to that approval.

Delegations are also sought to approve settlements with WGP and Ventia on the terms set out in this paper.

Waka Kotahi is subject to the enhanced monitoring framework under the Master Reimbursement and Management Agreement (RAMA). This effectively gives the Crown decision rights s 9(2)(i)

s 9(2)(i) s 9(2)(i). Cabinet has authorised joint Ministers of Finance and Transport to approve a settlement. The proposed settlement is within the parameters of that approval. The Board Chair and Management attended a meeting with the Ministers of Finance, Transport and Infrastructure on 4 August 2020. They have received a joint report from Treasury and the Infrastructure Commission, recommending the approval of a settlement on the terms outlined in this paper. Approval is expected by 6 August. A copy of the Joint Report is in the Resource Centre.

Key Issues

Proposed COVID-19 Settlement

Total settlement parameters

The COVID-19 settlement is made up of a number of components, including compensation to mitigate the impacts of COVID-19, time relief and a pavement variation. These components are described in more detail below.

s 9(2)(i)

Builder

The key terms of the settlement with the Builder were endorsed by the Board at its meeting on 29 July and are set out in Attachment 2. All the key terms endorsed by the Board have been accepted by the Builder.

Management seeks approval to pay the Builder:

- s 9(2)(i) for COVID-19 related costs; and
- \$45.5m for the pavement variation.

The pavement variation mitigates the effect of COVID-19 by enabling programme savings of 4 months (and the associated costs).

Other

Several COVID-19 issues remain to be worked through with WGP and Ventia that will result in further payments by Waka Kotahi. s 9(2)(i)

[Redacted]

s 9(2)(i), s 9(2)(b)(ii)

[Redacted]

[Redacted]

[Redacted]

Ventia is entitled to delay costs associated with its current liquidated damages entitlement, and the pavement variation (discussed below). The costs sought by Ventia are up to s 9(2)(i)

[Redacted]

This means that the total compensation for COVID-19 impacts for Transmission Gully under the settlement will be a maximum of s 9(2)(b)(ii) with an additional \$45.5m for the pavement variation.

The steps to settlement are set out at the end of this paper. Management seeks a delegation to the Chair to approve an extension to the standstill agreement, if necessary to document the COVID-19 settlement.

Reasons to support the proposed COVID-19 Settlement

The proposed settlement is consistent with guidance from the Infrastructure Commission

The Infrastructure Commission, along with Treasury has been providing oversight to the negotiations on the Waka Kotahi PPPs, as well as the Department of Corrections' Waikeria PPP. They have produced a practice note that was provided to the Ministers of Finance and Infrastructure in a joint report from Treasury and the

Infrastructure Commission dated 22 May 2020. The proposed approach is consistent with the practice note, which:

- Encouraged the PPP procuring entities to engage in a dialogue with the Contractors and work cooperatively to seek solutions that maximise the chance of achieving good project outcomes with recognition that COVID-19 may present risks that could not have been foreseen, mitigated or priced at the time the Project Agreements were executed.
- In considering the response, consider not only the risk profile of the project, but also the wider principles of the Construction Sector Accord, including building trusting relationships, being bold, valuing people and acting with collective responsibility, noting that in some instances terminating the Project Agreement may be the right outcome.
- Ensure the Contractor has taken all practicable steps to mitigate the loss or damage caused by the lockdown, recognising that the procuring entity may also play a role in mitigating the loss.
- Where possible, support and bolster sub-contractors and supply chains, noting that care should be taken not to undermine the clear allocation of responsibility within the PPP structure.

Options analysis

Mafic has been assisting Waka Kotahi in assessing the options available to it in relation to dealing with the impact of COVID-19 on the PPP. Relevant slides from the analysis undertaken by Mafic are attached as Attachment 3. **s 9(2)(i)**

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

s 9(2)(i)

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Rationale for the proposed settlement offer

There are a number of factors that contribute to recommending the settlement:

¹ Waka Kotahi Chief Adviser Engineering, Peter Mathewson (former CEO of WSP) and David Jewell (principal of Bond CM)

s 9(2)(i)



s 9(2)(i)




Impact on the NLTF

There is adequate cash flow available to meet the up-front costs of the proposed settlement from the NLTF. There is ongoing discussion with Treasury on the most appropriate mechanism to fund the full cost of the settlement, which could include funding by way of a grant.

Timing and steps to settlement completion

On or before 7 August 2020

- Update the joint Ministers under “no surprises”
 - Inform Treasury and confirm approach and timing of Treasury approval (or confirmation no approval is necessary)
 - Waka Kotahi Board approval as per this paper
 - s 9(2)(i), s 9(2)(b)(ii)
- 

As soon as possible thereafter, but likely by end August



- Integrated Settlement agreement - This agreement will be legally binding and will be based on the December 2019 settlement agreement, updated to reflect the COVID settlement. The parties will be Waka Kotahi and the Builder. Any lump sums paid out under this settlement agreement § 9(2)(i), Redacted - Out of scope, with reduced bonding then applying through to the final completion.

By 1 November (the timing will be subject to WGP and their approval requirements)

- WGP will become party to the integrated settlement agreement, finalising changes to the financial model, project documents, tax ruling, finance documents and other ancillary contracts. This is likely to take 2.5 – 3 months.
- Document any change notice with the Builder, WGP and Ventia to record terms on which the deep lift pavement change will be designed, built and maintained and (if not agreed prior) the impacts on lifecycle costs.

§ 9(2)(i), Redacted - Out of scope

[Large redacted area consisting of multiple blacked-out paragraphs]

Health & Safety, Customer/Stakeholder & Environmental Impact

The impact of this decision is considered by Waka Kotahi to be neutral in terms of health and safety, the public and other stakeholders, and the environment.

§ 9(2)(i)

Waka Kotahi is preparing a communications plan and will work closely with the Ministers' offices and Treasury on the communications plan.

Related Documents

[Impacts of COVID 19 on Pūhoi to Warkworth](#) (15 May: 2.1).

[Impacts of COVID 19 on Transmission Gully and interim decisions](#) (15 May 2020: 2.2).

[Transmission Gully PPP – Impacts of COVID-19 \(Interim Arrangements\)](#) (20 May 2020).

[Transmission Gully – interim arrangements extension](#) (6 July 2020).

[Transmission Gully Update](#) (22 July 2020) and [Supplementary paper](#) (provided in hard copy to the Board at its meeting on 29 July 2020).

Attachments

- | | |
|---------------------|---|
| Attachment 1 | Resolutions |
| Attachment 2 | Key terms of the settlement with the Builder |
| Attachment 3 | Mafic analysis dated 3 August 2020 |
| Attachment 4 | Bell Gully advice: <i>Transmission Gully PPP – Material Damage Insurance</i> (31 July 2020) |

Resource Centre

- | | |
|-------------------|---|
| Document 1 | Joint Report: Update on Transmission Gully negotiations to mitigate the impact of COVID-19 dated 3 August 2020 (NZ Infrastructure Commission and Treasury). |
|-------------------|---|

Attachment 1

Resolutions

Waka Kotahi NZ Transport Agency

Written Resolutions of the Board (pursuant to clause 13, Schedule 5 of the Crown Entities Act 2004)

Background

The Board wishes to approve entry into a settlement by Waka Kotahi for the Transmission Gully PPP to mitigate the effects of COVID-19.

Resolutions

The Board:

- **Notes** the contents of this paper;
- **Approves** the terms of the settlement for the Transmission Gully PPP to mitigate the effects of COVID-19 on the terms set out in this paper (COVID-19 Settlement);
- **Notes** that Treasury has been advised of the COVID-19 Settlement and execution will be subject to their confirmation of approval, or confirmation that approval is not required;
- **Notes** that there is adequate cash flow available to meet the up-front costs of the settlement from the NLTF;
- **Notes** that Joint Ministers have approved the COVID-19 Settlement, including funding the COVID-19 Settlement subject to due diligence by Treasury;
- **Delegates** authority to the Chair to approve the COVID-19 Settlement provided such agreement is consistent with the key terms set out in this paper, subject to approval from Treasury if required;
- **Delegates** authority to the Chair to approve an extension to the standstill agreement, if necessary to document the COVID-19 Settlement;
- **Delegates** authority to the Chair to approve any changes to the settlement agreement approved by the Board in December 2019 (December 2019 Settlement) that are necessary and consequential to the COVID-19 Settlement; and
- **Authorises** the Chief Executive or her delegates to do all other things necessary or desirable to give effect to the above approval and delegation, including executing any agreements necessary to implement the COVID 19 Settlement, the December 2019 Settlement, paying the settlement sum to the Builder, WGP and Ventia, signing any other agreement, including updating the project documents or document or giving any notice.

Signed/assented to:



04/08/2020 7:48 PM



05/08/2020 3:53 PM

Sir Brian Roche

Cassandra Crowley



05/08/2020 8:10 AM



05/08/2020 10:03 AM

Victoria Carter

David Smol



04/08/2020 10:15 PM



05/08/2020 2:43 PM

Catherine Taylor

Ken Rintoul



04/08/2020 8:11 PM



05/08/2020 10:21 AM

Patrick Reynolds

John Bridgman

Attachment 2

Key terms of the settlement with the Builder

- *Unitary charge:* Commence the payment of the senior debt component of the unitary charge from 1 November 2020;
- *Target road completion date:* 27 September 2021, subject to future contractual entitlements for extensions of time. The Builder has agreed that it will commence paying liquidated damages after 27 September 2021, if the road is not completed. s 9(2)(i), s 9(2)(b)(ii)
[REDACTED]
- *Cash elements:* In consideration for a full and final settlement Waka Kotahi will make a compensation payment for the costs associated with COVID-19. The payment to the Builder to be s 9(2)(i) (excluding payments to WGP and to Ventia, which is the Operator). The first payment to be \$40m, less the \$19m already paid for Winter Works. The balance of the payments to be paid monthly from settlement to Road Opening, save for \$7.5m paid at the end, subject to achieving the Road Opening date of 27 September 2021.
- *Exclusion of impact of certain future COVID-19 related events:* the parties have agreed to limit costs that can be claimed for future defined events to provide certainty. This would prevent another Uninsurable Event arising from a COVID Lockdown level 3 or 4 (or their equivalent) in the future. Waka Kotahi effectively takes the financial risk for cost and time impacts on the project if the Government increases the lockdown level to require physical distancing and/or contact tracing or Alert Level 3 or 4 or their equivalent (lockdown so that the Builder is legally unable to access the site or is materially impeded in its provision of the works through partial lockdown measures).
- *Pavement variation:* +/-10km of Deep lift placed along the alignment in areas approaching and over the Wainui saddle and other areas of steeper gradient. The cost for this change is \$45.5m (excluding payments to Ventia).
- *Other elements:* The Builder to provide letters of credit to the value of \$35m, available to be called on until Final Completion is achieved (e.g. approximately 27 March 2022, being 6 months after the scheduled Road Opening Completion).

Voting Results for Transmission Gully COVID-19 Settlement

The signature vote has been passed 8 votes are required to pass the vote, of which 0 must be independent

Vote Response	Count (%)
or	8 (100%)
Against	0 (0%)
Abstained	0 (0%)
Not Cast	0 (0%)

Voter Status

Name	Vote	Voted On
Br dgman, John	or	05/08/2020 10:21 AM
Carter, V ctor a	or	05/08/2020 8:10 AM
Crow ey, Cassandra	or	05/08/2020 3:53 PM
Reyno ds, Patr ck	or	04/08/2020 8:11 PM
R ntou , Ken	or	05/08/2020 2:43 PM
Roche, Br an	or	04/08/2020 7:48 PM
Smo , Dav d	or	05/08/2020 10:03 AM
Tay or, Cather ne	or	04/08/2020 10:15 PM

s 9(2)(i)

s 9(2)(i)

s 9(2)(i)

s 9(2)(i)

s 9(2)(i)

s 9(2)(i)

s 9(2)(i)

s 9(2)(i)

s 9(2)(i), s 9(2)(h), Redacted - Out of scope



s 9(2)(i), s 9(2)(h), Redacted - Out of scope



s 9(2)(i), s 9(2)(h), Redacted - Out of scope



s 9(2)(i), s 9(2)(h), Redacted - Out of scope





Reference: T2020/2751

ST-4-8

Date: 5 August 2020

To: Minister of Finance
(Hon Grant Robertson)
Minister of Transport
(Hon Phil Twyford)

Deadline: 6 August 2020 (for decisions recommended in T2020/2537)

Commercial analysis to support consideration of the proposed Transmission Gully PPP Settlement

Purpose

The purpose of this aide memoire is to provide you with the information and analysis you requested yesterday to support your consideration of the proposed Transmission Gully PPP (the PPP) settlement.

Approach to commercial analysis

Mafic Partners (commercial advisors) has been assisting Waka Kotahi in assessing the options available to it in relation to dealing with the impact of COVID-19 on the PPP. Relevant slides from the analysis undertaken by Mafic are attached at enclosure A and a description of each slide is provide at annex A.

The Mafic framework (which was also used to analyse the Puhoi to Warkworth PPP settlement) uses both quantitative and qualitative analysis to assess different scenarios. [37]

Preferred scenario

The framework demonstrated that the preferred option [37]

Best alternative scenario

The Mafic analysis found that the best alternative was [37]

[37]

Cost analysis

Waka Kotahi external and internal construction experts¹ met with the Builder on a number of occasions to discuss details of the claim including:

- direct and indirect costs associated with Lockdown
- immediate and consequential programme related impacts (i.e. delays), and
- risks related to the ongoing impacts of COVID-19 through to project completion, other than a return to Level 3 or higher, which the Builder was being asked to price.

This iteration provided increasing certainty about the immediate and ongoing impacts, range of likely costs associated with the settlement, and gives high confidence that the settlement is in line with the actual costs and impacts of COVID-19.

[37]

¹ Waka Kotahi Chief Adviser Engineering, Peter Mathewson (former CEO of WSP) and David Jewell (principal of Bond CM)

Rationale for the proposed settlement offer

Treasury and Infracom officials recommend agreeing the proposed settlement because:

- This option is the lowest cost option and best achieves the qualitative outcomes that Waka Kotahi values.

[37]

Liz Innes, Principal Advisor, Investment Management and Asset Performance, The Treasury [35]

Guy Finny, Advisor, Infrastructure Commission, [35]

Craig Murphy, Manager, Investment Management and Asset Performance, The Treasury [39]

[37]

[37]

Reference: T2020/2848

ST-4-8

Date: 14 August 2020

To: Minister of Corrections (Hon Kelvin Davis)
Minister of Finance (Hon Grant Robertson)
Minister of Transport (Hon Phil Twyford)
Minister for Infrastructure (Hon Shane Jones)

Aide Memoire – Advice on impacts on PPP settlement negotiations arising from the upgraded COVID-19 Level Alerts

Purpose

This Aide Memoire advises you about the impact of the upgrades in COVID-19 alert levels on the recently concluded settlements for the three PPP projects currently under construction.

Status of settlement agreements

As we previously advised, negotiations led by the New Zealand Transport Agency (Waka Kotahi) and the Department of Corrections (the Department) have successfully concluded settlement agreements on the following PPP projects:

- Transmission Gully (T2020/2056, T2020/2537 and T2020/2751 refer);
- Pūhoi to Warkworth (T2020/1938 refers); and
- The Waikeria Correctional Facility (T2020/2753 refers).

These settlements are at different stages in the approvals process. Pūhoi to Warkworth is complete, Waikeria is expected to complete this week, and Transmission Gully has some preconditions and approvals to work through – this is expected to complete by the end of August (though this may now be delayed).

Each of the settlement agreements contemplated an escalated COVID-19 risk and the re-imposition of alert levels that might impact the works - i.e. they set out how this risk would be shared between the Crown and the contractors in the event of future outbreaks.

As a result the Crown is no longer exposed to termination for uninsurable risk in relation to COVID-19 – but the Department and Waka Kotahi are obliged to consider reasonable claims for COVID-19 related costs within the limits of what was agreed. The nature of these agreements and likely impacts at the current alert levels are described for each project below.

Transmission Gully

It has been agreed in the non-binding Commercial Terms sheet¹ (signed 7 August 2020) that:

- Waka Kotahi will be responsible for the risks associated with any return to or period spent at Alert Levels 3 or 4 as a result of a COVID-19 event
- the Contractor/Builder will be responsible for the risks associated with any return to or period spent at Alert Levels 1 or 2 as a result of a COVID -19 event, and
- Waka Kotahi will be responsible for risks associated with enhanced COVID-19 related border restrictions.

Given the recently imposed Level 2 restrictions apply to the project now and assuming there are no enhanced border restrictions, there should be no additional exposure to the Crown at this time.

Pūhoi to Warkworth

[40]

Waikeria Correctional Facility

[40]

¹ This was signed alongside a binding standstill provision that allows time for approvals to make the whole term sheet binding which will occur as part of an Integrated Settlement Agreement, expected to complete in late August

[40]

Next Steps

We will continue to monitor the completion of current settlements and the actual impacts of the heightened COVID-19 Alert Levels and advise you on this as needed. If there is a move to Alert Level 4 then the costs and risks on these projects could become substantially higher.

Also under any move to Level 4 that affects the Transmission Gully project before the settlement is complete, it is almost inevitable that the Builder will seek to increase the settlement amount and/or amend the time relief in its favour.

Given this, as you weigh up and set Alert Level restrictions in response to the latest outbreak, we recommend you take potential project and construction sector impacts carefully into account.

In our view it is worth considering as part of any Alert Level change, whether construction should be deemed essential work, or making exceptions for key projects like these ones, where the public value of proceeding (and managing COVID-19 transmission risks onsite) may outweigh the public value of stopping (and managing commercial and delivery risks).

Liz Innes, Principal Advisor, Investment Management, Treasury [35]
Dan Cameron, Principal Advisor, Infrastructure Commission [35]
Peter Murray, General Manager, Infrastructure Commission [35]
Craig Murphy, Manager, Investment Management, Treasury [39]

Joint Report: Resolving ^[37] matters on Transmission Gully -
update to settlement agreement

Date:	2 September 2020	Report No:	T2020/3026
		File Number:	ST-4-8

Action sought

	Action sought	Deadline
Minister of Finance (Hon Grant Robertson)	Provide Crown consent to the integrated settlement agreement for Transmission Gully, [37] Agree to the consequential changes to appropriations in this report.	Thursday 3 September 2020
Minister of Transport (Hon Phil Twyford)	Agree to the consequential changes to appropriations in this report.	None
Minister for Infrastructure (Hon Shane Jones)	Note the contents of this report.	None

Contact for telephone discussion (if required)

Name	Position	Telephone		1st Contact
Liz Innes	Principal Advisor, Investment Management and Asset Performance (Treasury)	[39]	[35]	✓
Craig Murphy	Manager, Investment Management and Asset Performance (Treasury)			
Peter Murray	General Manager, Major Projects Advisory (Infrastructure Commission)	n/a		

Minister's Office actions (if required)

Return the signed report to Treasury.

Note any feedback on the quality of the report

Enclosure: No

Joint Report: Resolving [37] matters on Transmission Gully
- update to settlement agreement

Executive Summary

New Zealanders acted together and saved lives by stopping COVID – but this was not costless. The Alert Level 4 lockdown required non-essential construction workers (like most others) to stay home, impacting government and private sector projects alike - including the Transmission Gully PPP project (Transmission Gully).

The COVID-19 lockdown impacted Transmission Gully significantly, and the parties worked together to mitigate these impacts. On 3 August 2020, we advised you that Transmission Gully negotiations were substantially complete. You provided Crown consent to allow Waka Kotahi to agree a settlement [25] and Joint Ministers approved the drawdown of funds to give effect to the settlement.

At the time, officials advised you that the settlement was expected to cost [37] subject to further negotiations [T2020/2357 refers]. Negotiations between all parties are now complete [37]

[25]

On this basis, officials recommend you provide Crown consent to the Integrated Settlement Agreement for Transmission Gully, [25]

Recommended Action

We recommend that you:

Final outcome of negotiations for the Transmission Gully COVID-19 settlement

- a **note** that negotiations on the integrated settlement for Transmission Gully have now been completed and that Waka Kotahi expects agree the final form of the agreement this week, with execution in mid-September, once all the parties have gone through their respective approval processes;
- b **note** that the cost of the final settlement is \$209.7m and that the amount of funding to be paid to Waka Kotahi for the costs associated with the Transmission Gully settlement [37]

Consequential changes to appropriations

- c **note** that on 1 July 2020, the Cabinet Economic Development Committee [DEV-20-MIN-0132 confirmed by CAB-20-MIN-0329]:
 - i. **agreed** to establish tagged operating contingencies of up to the amounts as follows in Vote Finance, to provide for managing any costs relating to the negotiated settlement of the two transport PPPs:

	\$m – increase/(decrease)				
	2020/21	2021/22	2022/23	2023/24	2024/25 & outyears
Transmission Gully – Tagged Operating Contingency	[25]				
Ara Tuhono Pūhoi to Warkworth – Tagged Operating Contingency	[40]				

- ii. **authorised** the Minister of Finance and Minister of Transport, acting jointly, to draw down the tagged operating contingency funding referred to above (establishing any new appropriations as necessary), subject to Crown consent being given to any proposed settlements;
- iii. **agreed** that the expenditure associated with the Transmission Gully tagged contingency be managed outside of Budget allowances and the CRRF, with a corresponding direct impact on the operating balance and net core Crown debt;
- d **note** that on 3 August 2020, the Minister of Finance, Minister of Transport, and Minister for Infrastructure jointly agreed to draw down into an appropriation [37] in funding from the Transmission Gully – Tagged Operating Contingency described above to cover the costs of the negotiated settlement;
- e **note** that the cost of the final settlement is \$209.7 million and that the amount of funding to be paid to Waka Kotahi New Zealand Transport Agency for the costs associated with the Transmission Gully settlement [37] by Joint Ministers from the Transmission Gully – Tagged Operating Contingency [T2020/2537 refers];

- f **agree** to [37] the appropriation associated with the Transmission Gully settlement as detailed in recommendation f below, [37]

Agree/disagree

- g [37]

Agree/disagree

- h **approve** the following changes to appropriations to give effect to the policy decisions in recommendations d above, with a corresponding impact on the operating balance and net core Crown debt:

Vote Transport Minister of Transport	\$m - increase/(decrease)				
	2020/21	2021/22	2022/23	2023/24	2024/25 & Outyears
Multi-Category Expenses and Capital Expenditure: COVID-19 - NLTF Funding for Cost Pressures and Revenue Shocks (MCA) <i>Non-Departmental Output Expenses:</i> COVID-19 – NLTF Operating Cost Pressure and Revenue Shortfall Funding	[25]	-	-	-	-
Total Multi-Category Expenses and Capital Expenditure: COVID-19 - NLTF Funding for Cost Pressures and Revenue Shocks (MCA)		-	-	-	-
Total Operating		[37]	-	-	-

- i **agree** that the proposed changes to appropriations for 2020/21 above included in the 2020/21 Supplementary Estimates;

Agree/disagree

- j **note** that, to give effect to the policy decision in recommendation e above, [25]

Vote Finance	\$m - increase/(decrease)				
	2020/21	2021/22	2022/23	2023/24	2024/25 & Outyears
[25]					

k **agree** that [25]

Agree/disagree

[25]

Craig Murphy
**Manager, Investment Management
and Asset Performance**

Peter Murray
**General Manager, Major
Projects and Advisory**

Hon Grant Robertson
Minister of Finance

Hon Phil Twyford
Minister of Transport

Hon Shane Jones
Minister for Infrastructure

Joint Report: Resolving ^[37] matters on Transmission Gully - update to settlement agreement

Purpose of Report

1. The purpose of this report is to advise you of the outcome of negotiations on the Transmission Gully PPP Project (Transmission Gully), and invite you to provide Crown consent to allow the New Zealand Transport Agency – Waka Kotahi (Waka Kotahi) to proceed to agree the settlement ^[25]

Context

2. On 5 June 2020, the Treasury and the New Zealand Infrastructure Commission – Te Waihanga (Infracom) provided you with an update on the PPP negotiations arising from the Level 4 lockdown [T2020/1744 refers]. The report noted ongoing negotiations in relation to three PPP projects in construction, which could result in significant fiscal and commercial consequences to the Crown.
3. On 19 June 2020, the Treasury and Infracom briefed you on progress with negotiations on the transport PPPs, and you agreed to take a paper to Cabinet seeking approval for contingency funding to cover costs relating to the Transmission Gully PPP Project (Transmission Gully). [T2020/1938 refers].
4. On 1 July 2020, the Cabinet Economic Development Committee (DEV) discussed the impacts of COVID-19 on the Transmission Gully project and noted that a range of possible outcomes could arise from the situation. DEV agreed to establish tagged contingencies to cover the fiscal risk and authorised the Minister of Finance and the Minister of Transport to take decisions to mitigate these impacts and stabilise the project. [CAB-20-MIN-0329 refers].
5. On 9 July 2020, the Treasury and Infracom briefed you that they had notified the New Zealand Transport Agency - Waka Kotahi (Waka Kotahi) that the enhanced monitoring framework now applied, as contemplated in the Reimbursement and Management Agreement (RAMA). This means that Crown consent is required for all material decisions; including accepting a termination notice, entering into a dispute or agreeing to a settlement. [T2020/2354 refers].
6. On 3 August 2020, the Treasury and Infracom briefed you on the outcome of the Transmission Gully negotiations, invited you to provide Crown consent to allow Waka Kotahi to agree a settlement ^[25] and recommended you approve the drawdown of funds to give effect to the settlement. At the time, officials advised you that the settlement was expected to cost ^[37] subject to further negotiations [T2020/2357 refers].
7. Negotiations between all parties are now complete and Waka Kotahi negotiators have ^[37]
Waka Kotahi briefed media on the settlement agreement, including the cost figures, on 21 August 2020.

[25]

Giving effect to the Transmission Gully COVID-19 settlement

The settlement will become legally binding through an Integrated Settlement Agreement

9. Following the agreement of terms with CPB Contractors Property Limited and HEB Construction Limited (the Builder) Waka Kotahi has been negotiating to finalise costs and create a legally binding agreement between the three key parties: Waka Kotahi, Wellington Gateway Partnership No. 2 LP (Contractor) and the Builder.
10. This agreement is known as the Integrated Settlement Agreement (ISA) because along with recording the agreed settlement in relation to the Builder's and the Contractor's claims arising from the impacts of COVID-19, it also includes the outstanding provisions of the settlement from December 2019 conditional that have not yet become unconditional.
11. The obligations to make payments in settlement of the COVID-19 claims will come into force when the ISA is signed. Other obligations under the ISA (including the remaining obligations in respect of the 2019 Settlement Agreement) remain conditional until the Effective Date as defined.
12. The Effective Date will occur once all the parties have obtained all necessary consents and approvals and have agreed the detailed terms of amendments to the underlying project documents to reflect the terms of the ISA settlements and the basis on which the project will be completed. This is expected to occur on or around 1 November.

[37]

13. [37]

These changes are summarised in the table below:

Settlement component	Estimated costs (\$m)	Actual costs (\$m)
Compensation for the Builder [25]	[25]	\$145.5m
\$7.5m of this payment is at risk based on the timing of road opening.		
Compensation for the Contractor		\$12.5m
Compensation for the Operator		\$6.2m ^[24]
Deeplift pavement solution	\$45.5m	\$45.5m
Total settlement	[37]	\$209.7m

14. The final settlement is therefore [37] than the amount previously drawn down [37] by Joint Ministers from the Transmission Gully – Tagged Operating Contingency [T2020/2537 refers].
15. This paper proposes consequential changes to appropriations to move the [25]

[24]

[37]

[25,40]

[25,40]

Next Steps – completing this process and getting on with building the road

Due diligence is occurring in real time and our advisors are satisfied

37. Treasury's external legal advisor (Buddle Findlay) has completed an iterative review of the Integrated Settlement Agreement as it has been drafted by Waka Kotahi's external legal advisor (Bell Gully). Buddle Findlay has advised Treasury that the agreement is consistent with the proposed settlement as described in our advice on 3 August – it does what we said it would do. [T2020/2357 refers].

38. Buddle Findlay advises that it does not have any material concerns that the Integrated Settlement Agreement increases the liability of Waka Kotahi or the Crown beyond what was previously agreed and detailed to you (i.e. in their view it has been well-drafted to give effect to the settlement without increasing risk). [25]

Issuing the Crown consent to Waka Kotahi

39. The consent you provide is subject to due diligence by officials. This cannot be completed until a final Integrated Settlement Agreement is received from Waka Kotahi. The final draft agreement is expected shortly (this week) and officials from Treasury and Infracom, along with our advisor Buddle Findlay, are standing by to complete this.
40. Following this due diligence, and subject to your agreement to the recommendations in this paper, the Treasury will issue the Crown consent to Waka Kotahi so it can proceed to agree the Integrated Settlement Agreement [25]
Treasury officials will notify you when this process is complete.

Consultation

41. Treasury and Infracom officials have collaborated closely with Waka Kotahi (and its external legal advisor Bell Gully). The Ministry of Transport were also invited to review the financial recommendations.
42. Treasury and Infracom officials have also consulted with Buddle Findlay (Treasury's external legal advisor) on the matters outlined in this paper.

Treasury Report: Completing approval requirements for the Pūhoi and Transmission Gully Settlement Agreements

Date:	24 September 2020	Report No:	T2020/3198
		File Number:	ST-4-8

Action sought

	Action sought	Deadline
Hon Grant Robertson Minister of Finance	Sign and return the letters to the Treasury by 30 September for distribution as and when required.	Wednesday 30 September 2020
Hon Phil Twyford Minister of Transport	Note the contents of this report.	Wednesday 30 September 2020

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
Liz Innes	Principal Advisor, Investment Management and Asset Performance (IMAP)	[39]	[35] ✓
Craig Murphy	Manager, Investment Management and Asset Performance (IMAP)		

Minister's Office actions (if required)

Return the signed report to Treasury. Sign the attached letters and return them to the Treasury.

Note any feedback on the quality of the report

Enclosure: No

Treasury Report: Completing approval requirements for the Pūhoi and Transmission Gully Settlement Agreements

Executive Summary

Due diligence has been completed on the Transmission Gully Integrated Settlement Agreement and officials have advised Waka Kotahi they may proceed to enter into the settlement.

As part of the process to finalise the settlement, a range of approvals are required, including from the banks involved in financing the PPP. The banks are meticulous, and require us to demonstrate the ongoing application of all relevant legal documents – notably they want confirmation that the Deed of Indemnity continues to apply.

This (in their view) reduces the risk that the Crown will consider that it is not liable under the Deed (i.e. by arguing that changes made by way of this settlement and consequential amendments to the Project Agreement somehow invalidate the Deed).

In reality, this is a very remote risk for the banks. The Crown expects to honour its existing legal obligations and the Deed of Indemnity is clear that amendments to the Project Agreement do not invalidate it.

Despite this, legal advisors to Waka Kotahi and Treasury (Bell Gully and Buddle Findlay respectively) agree that making a declaration about the ongoing application of the Deed under the signature of the Minister of Finance will be the quickest and easiest way to move forward. This approach avoids the expense of seeking a legal opinion or entering into a dispute with the Banks and does no harm – it does not create any new obligations or risk.

As such, this paper recommends you sign a letter (attached) to affirm that the Deed of Indemnity remains in full force and effect in respect of the Project Agreement as amended pursuant to the requirements of the Transmission Gully Integrated Settlement Agreement.

[40]

Recommended Action

We recommend that you:

- a **note** that due diligence on the Integrated Settlement Agreement for the Transmission Gully Project has been completed and the Crown consent formally provided to Waka Kotahi
- b **note** that the next steps towards a full, final and legally binding settlement for the Transmission Gully project includes seeking approval from the banks, and a condition of this approval is that the Crown must confirm for the avoidance of doubt that the Deed of Indemnity continues to apply
- c **note** that our legal advice is that the most efficient way to meet this condition is to issue a letter declaring the Crown's legal position under the signature of you, the Minister of Finance
- d [40]
- e **agree** to sign and return the letters to the Treasury by 30 September for distribution as and when required, and

Agree/disagree.
- f **note** that the Treasury proposes to lead a proactive release of information in relation to Transmission Gully after the settlement is full and final (in November) including information from Waka Kotahi and Infracom, and that we will brief Joint Ministers on this fully at the time.

Craig Murphy
Manager, Investment Management and Asset Performance

Hon Grant Robertson
Minister of Finance

Treasury Report: Completing approval requirements for the Pūhoi and Transmission Gully Settlement Agreements

Purpose of Report

1. The purpose of this report is to advise you of progress on finalising the Transmission Gully Settlement Agreement, invite you to sign letters to meet approval requirements from bank lawyers, and advise you that we are planning a proactive release of information about Transmission Gully.

Background

2. On 5 June 2020, the Treasury and the New Zealand Infrastructure Commission – Te Waihanga (Infracom) provided you with an update on the PPP negotiations arising from the Level 4 lockdown [T2020/1744 refers]. The report noted ongoing negotiations in relation to three PPP projects in construction, which could result in significant fiscal and commercial consequences to the Crown.
3. On 19 June 2020, officials briefed you on progress with negotiations on the transport PPPs, and you agreed to take a paper to Cabinet seeking approval for contingency funding to cover costs relating to the Transmission Gully PPP Project (Transmission Gully). [T2020/1938 refers].
4. On 1 July 2020, the Cabinet Economic Development Committee (DEV) discussed the impacts of COVID-19 on the Transmission Gully project and noted that a range of possible outcomes could arise from the situation. DEV agreed to establish tagged contingencies to cover the fiscal risk and authorised the Minister of Finance and the Minister of Transport to take decisions to mitigate these impacts and stabilise the project. [CAB-20-MIN-0329 refers].
5. On 9 July 2020, officials briefed you that they had notified the New Zealand Transport Agency - Waka Kotahi (Waka Kotahi) that the enhanced monitoring framework now applied, as contemplated in the Reimbursement and Management Agreement (RAMA). This means that Crown consent is required for all material decisions; including accepting a termination notice, entering into a dispute or agreeing to a settlement. [T2020/2354 refers].
6. On 3 August 2020, officials briefed you on the outcome of the Transmission Gully negotiations, invited you to provide Crown consent to allow Waka Kotahi to agree a settlement and an [38], and recommended you approve the drawdown of funds to give effect to the settlement. At the time, officials advised you that the settlement was expected to cost [37] subject to further negotiations [T2020/2357 refers].
7. Following the agreement of terms with CPB Contractors Property Limited and HEB Construction Limited (the Builder) Waka Kotahi negotiated to finalise costs and create a legally binding agreement between the three key parties: Waka Kotahi, Wellington Gateway Partnership No. 2 LP (Contractor) and the Builder.
8. This binding agreement is known as the Integrated Settlement Agreement (ISA) because along with recording the agreed settlement in relation to the Builder's and the Contractor's claims arising from the impacts of COVID-19, it also includes the outstanding provisions of the settlement from December 2019 conditional that have not yet become unconditional.

9. On 3 September 2020 you noted settlement costs [37] and you provided Crown consent (subject to due diligence by officials) to allow Waka Kotahi to proceed to agree ISA [25] [T2020/3026 refers].

Crown consent for the Integrated Settlement Agreement

10. Officials have had the opportunity to scrutinise the ISA at various points through its development, and were provided with the final ISA to complete due diligence on Friday 18 September 2020.
11. Officials from Treasury and Infracom along with Treasury's legal advisors (Buddle Findlay) completed due diligence for the Crown. We are satisfied that the terms of the final form of the ISA are consistent with the terms of the settlement as we described it to you on 3 September 2020 when you provided conditional Consent.
12. On that basis, on 18 September the Treasury advised Waka Kotahi that the due diligence condition has been satisfied, and as such Waka Kotahi has Crown consent to enter into the ISA. Following this we understand that Waka Kotahi signed the ISA on Monday 21 September 2020.
13. The obligations to make payments in settlement of the COVID-19 claims have now come into force, while other obligations (including the remaining obligations in respect of the 2019 Settlement Agreement) remain conditional until the Effective Date.
14. The Effective Date will occur once all the parties have obtained all necessary consents and approvals and have agreed the detailed terms of amendments to the underlying project documents to reflect the terms of the Integrated Services Agreement. We expect this to be completed on or around 1 November 2020.

Obtaining necessary approvals: the Crown needs to confirm its obligations

15. As you are already aware, both the Transmission Gully and Pūhoi to Warkworth PPPs are supported by a Crown Deed of Indemnity (in substantially the same form). The RAMA is linked to both Deeds.
16. The Deeds reference the Project Agreement for each PPP, and these Project Agreements will be altered to give effect to the COVID-19 settlements that have been negotiated.
17. The Deeds have a saving provision that states that the Crown's obligations will not be prejudiced by (among other things) any amendment or replacement of the Project Agreement. However Bell Gully (Waka Kotahi's legal advisor) tells us that it is usual practice for banks to require a guarantor's confirmation when any document to which the guarantee relates is materially amended (regardless of any savings provisions).

18. While the PPP documents are indemnities rather than guarantees, the bank appears to be applying the same approach as it would in scrutinising a guarantee. The rationale for this is:
 - a the law tends to support guarantors over the beneficiaries of guarantees – so getting a guarantor confirmation is the best way to ensure the guarantor cannot seek to raise the amendment as a defence to any liability, and
 - b the banks' consider that Crown credit support is fundamental to these transactions - and they have no appetite for any risk, no matter how remote, that this could be prejudiced.

Transmission Gully

19. For the Transmission Gully PPP project, the lawyers acting for the banks have asked for the following:
 - a a written confirmation from the Crown that the Deed of Indemnity continues to apply notwithstanding the changes to the Project Agreement associated with the settlement; and
 - b a legal opinion/certificate that the confirmation was duly authorised/executed.
20. These would need to be provided as conditions precedent under the bank documents (not our documents) and would be needed for approximately 1 November (on the current timetable).
21. Treasury has taken advice in this matter from its legal advisor Buddle Findlay, and in our view the position we are being asked to take is the one that would apply regardless – the Crown will continue to honour its existing legal obligation including those under the Deeds as evidenced by the savings provisions in the Deed itself.
22. Officials considered pushing back on the banks request; however our advisors from Bell Gully, Waka Kotahi and Buddle Findlay have convinced us that it will be quicker and easier to simply restate our legal position. Doing this does no harm – it does not create any new obligation or risk, and it avoids the costs of seeking an opinion, or entering into a dispute with the banks.
23. To this end, we have drafted a letter (attached) that essentially confirms that – for the avoidance of doubt – the Crown's existing obligations continue to apply. Treasury Legal and Buddle Findlay our external legal advisers consider your signature on this declaration will be sufficient to satisfy the reasonable requirements of the banks.¹

Pūhoi to Warkworth

24. [40]

25. [40]

¹ The alternative would have been to invite a written delegation from you to specifically authorise Treasury officials to sign the letter on your behalf, and get a legal opinion opining on the validity of this delegation – but this seems less efficient than simply inviting you to sign the letter.

Proposed proactive release of information in relation to Transmission Gully

The public interest in the Transmission Gully project is high

26. The Transmission Gully project has attracted a high level of public interest over time and this has extended to the COVID-19 settlement agreement. Treasury has received two OIA requests in relation to the Transmission Gully settlement so far, and we expect further enquiries to come. Both Waka Kotahi and the Ministry of Transport have also reported receiving OIAs relating to this matter.
27. In light of this interest, and to make the best use of effort in meeting the likely demand for information, Treasury proposes to coordinate a proactive release of relevant documents across the relevant entities. Waka Kotahi and the Infrastructure Commission support this proposal. Each entity will mark up redactions, and Waka Kotahi has offered to provide a full review of all redactions on behalf of the Crown.
28. We expect to apply a scope that is sufficient to satisfy the public interest (and as such it will be guided by the OIAs already received). Treasury expects to put these documents and redactions through to Joint Ministers for information ahead of the release.
29. We propose to time the release some time after the Effective Date (sometime in November 2020) – i.e. once all approvals are completed and the settlement is full, final and legally binding. This is because we will be able to release more information at that time - once the matter is no longer under active consideration.

Hon Grant Robertson

MP for Wellington Central

Minister of Finance

Minister for Sport and Recreation

Minister Responsible for the Earthquake Commission

Associate Minister for Arts, Culture and Heritage



[40]



Lucy Riddiford
Waka Kotahi New Zealand Transport Agency
Chews Lane
WELLINGTON

Dear Lucy

TRANSMISSION GULLY PPP PROJECT – CROWN DEED OF INDEMNITY

1. We refer to the following documents:
 - a. the Project Agreement between the New Zealand Transport Agency and Wellington Gateway Partnership No.2 LP dated 28 July 2014 (**Project Agreement**);
 - b. the Deed of Indemnity between Her Majesty the Queen in right of New Zealand acting by and through the Minister of Finance (the **Crown**) and New Zealand Transport Agency dated 28 July 2014 (**Deed of Indemnity**); and
 - c. the Integrated Settlement Agreement between the New Zealand Transport Agency, Wellington Gateway Partnership No.2 LP and (on a joint and several basis) CPB Contractors Pty Limited and HEB Construction Limited dated on or about 18 September 2020 (the **Integrated Settlement Agreement**).
2. Capitalised terms used in this letter, unless otherwise defined, have the meanings given to them in the Project Agreement.
3. The Crown acknowledges that the Integrated Settlement Agreement contemplates certain changes to the Project Agreement, and that other changes to the Project Agreement may be necessary to satisfy the conditions precedent to the Integrated Settlement Agreement or to give effect to the transactions contemplated by it.
4. The Crown confirms that the Deed of Indemnity will remain in full force and effect in respect of the Project Agreement as amended or as amended and restated as contemplated by, or otherwise as required to satisfy the conditions precedent under, the Integrated Settlement Agreement, or as required to give effect to the transactions contemplated by it.

5. From the date on which the amended or amended and restated Project Agreement is executed on behalf of the Transport Agency and the Contractor, the amended or amended and restated Project Agreement will continue to comprise the "Project Agreement" for the purposes of the Deed of Indemnity.
6. Nothing in this letter affects the Transport Agency's obligations under the Reimbursement Agreement (as defined in the Deed of Indemnity) including, without limitation, the requirement for the Transport Agency to obtain the consent of the Crown to any Material TA Action (as defined in the Reimbursement Agreement).
7. The Crown confirms that:
 - a. a copy of this letter may be provided to the Contractor and the Security Trustee; and
 - b. this letter is intended to confer a benefit on the Contractor and, to the extent only that the Security Trustee is entitled to rights pursuant to clause 6.1(b) of the Deed of Indemnity the Security Trustee, and may be relied upon and enforced by those persons under the Contract and Commercial Law Act 2017.

Yours sincerely

Hon Grant Robertson
Minister of Finance

Joint Report: Finalising the COVID-19 settlement for Transmission Gully

Date:	4 December 2020	Report No:	T2020/3605
		File Number:	ST-4-8-3-1-3

Action sought

	Action sought	Deadline
Minister of Finance (Hon Grant Robertson)	Provide Crown consent to allow Waka Kotahi to [37] proceed to complete the Transmission Gully COVID-19 settlement. Agree to draw down the tagged contingency to cover COVID-19 costs.	Monday 7 December 2020 No deadline.
Minister of Transport (Hon Michael Wood)	Agree to draw down the tagged contingency to cover COVID-19 costs.	No deadline.

Contact for telephone discussion (if required)

Name	Position	Telephone		1st Contact
Liz Innes	Principal Advisor, Investment Management and Asset Performance, The Treasury	[39]	[35]	✓
Peter Murray	General Manager, Major Projects and Advisory, Infrastructure Commission			
Craig Murphy	Manager, Investment Management and Asset Performance, The Treasury	[39]		

Minister's Office actions (if required)

Return the signed report to Treasury.

Enclosure: No

Joint Report: Finalising the COVID-19 settlement for
Transmission Gully

On 3 August 2020, officials briefed you on the outcome of the Transmission Gully negotiations, invited you to provide Crown consent to allow Waka Kotahi to agree a settlement with the Wellington Gateway Partnership's (WGP) [T2020/2357 refers].

Since then the parties have been working through the consequential amendments needed in a range of legal documents and this process is nearly complete.

[25]

The paper also invites Joint Ministers to appropriate funding to Waka Kotahi from the existing tagged contingency for COVID-19 costs in relation to the Transmission Gully and Ara Tuhono Pūhoi to Warkworth COVID-19 settlements.

Recommended Action

We recommend that you:

[38]

a [25]

b

c

d

Consent / do not consent (Minister of Finance only)

Additional COVID-19 related costs

- e **note** that in the course of completing the settlements on the two transport PPPs Waka Kotahi has incurred a range of COVID-19 driven costs related to the settlement process, including for finance, advisors, insurance, independent review, and establishing a monitor for Transmission Gully;
- f **note** that on 1 July 2020, the Cabinet Economic Development Committee [DEV-20-MIN-0132 confirmed by CAB-20-MIN-0329]:
- i. **agreed** to establish tagged operating contingencies of up to the amounts as follows in Vote Finance, to provide for managing any costs relating to the negotiated settlement of the two transport PPPs:

	\$m – increase/(decrease)				
	2020/21	2021/22	2022/23	2023/24	2024/25 & outyears
Transmission Gully – Tagged Operating Contingency	[37]				
Ara Tuhono Pūhoi to Warkworth – Tagged Operating Contingency	[40]				

- ii. **draw down** the tagged operating contingency funding referred to above (establishing any new appropriations as necessary), subject to Crown consent being given to any proposed settlements;
- iii. **agreed** that the expenditure associated with the Transmission Gully tagged contingency be managed outside of Budget allowances and the CRRF, with a corresponding direct impact on the operating balance and net core Crown debt;

- g **note** that on 3 August 2020, the Minister of Finance, Minister of Transport, and Minister for Infrastructure jointly agreed to draw down into an appropriation [37] in funding from the Transmission Gully – Tagged Operating Contingency, and [40]

[T2020/2537 refers];

- h **note** that on 3 September 2020, the Minister of Finance, Minister of Transport, and Minister for Infrastructure jointly agreed to [37]

[T2020/3026 refers];

- i **agree** to provide \$9.7 million to Waka Kotahi to cover additional COVID-19 related costs associated with settlement of both PPPs;

Agree / disagree.

- j **approve** the following changes to appropriations to give effect to the policy decisions in recommendation i above, with a corresponding impact on the operating balance and net core Crown debt:

Vote Transport Minister of Transport	\$m – increase/(decrease)				
	2020/21	2021/22	2022/23	2023/24	2024/25 & outyears
Multi-Category Expenses and Capital Expenditure: COVID-19 - NLTF Funding for Cost Pressures and Revenue Shocks (MCA) <i>Non-Departmental Output Expenses:</i> COVID-19 – NLTF Operating Cost Pressure and Revenue Shortfall Funding	9.700	-	-	-	-
Total Multi-Category Expenses and Capital Expenditure: COVID-19 - NLTF Funding for Cost Pressures and Revenue Shocks (MCA)	9.700	-	-	-	-
Total Operating	9.700	-	-	-	-

Approve / do not approve.

- k **agree** that the proposed changes to appropriations for 2020/21 above included in the 2020/21 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;

Agree / disagree.

- l [38]

[37]

Agree / disagree.

Craig Murphy
Manager, Investment Management and Asset Performance, The Treasury

Peter Murray
General Manager, Major Projects and Advisory, Infrastructure Commission

Hon Grant Robertson
Minister of Finance

Hon Michael Wood
Minister of Transport

Joint Report: Finalising the COVID-19 settlement for Transmission Gully

Purpose of Report

1. The purpose of this report is to recommend that you provide Crown consent to authorise a change in terms for the Transmission Gully COVID-19 settlement agreement.

Background

2. New Zealanders acted together and saved lives by stopping COVID – but this was not costless. The Alert Level 4 lockdown required non-essential construction workers (like most others) to stay home, impacting government and private sector projects alike.
3. As a result, various parts of the Crown needed to negotiate with suppliers where projects were in construction. These negotiations were required to determine which COVID-19 cost increases the Government should meet, and which ones our partners have contractually agreed to and should continue to bear.
4. These negotiations were more difficult for the three PPPs in construction than for other contracts because COVID-19:
 - i delayed the expected completion dates
 - ii increased overall construction costs, and
 - iii increased the cost of finance (for debt payments during the delay period).
5. The PPP Project Agreements contemplated this type of situation as an Uninsurable Event (because they saw this type of risk coming, if not the exact nature of it) and both parties were obliged to make efforts to mitigate the impacts of it, if they can.
6. To do this the parties negotiated a variation, or change of terms, to allow for the COVID-19 impacts reasonably and fairly. Without this agreement it would have been possible for either party to terminate the Transmission Gully Project Agreement and walk away.
7. The negotiated settlement will resolve issues associated with COVID-19 and provide certainty about the cost and time for completion on the Transmission Gully project – in other words to get the project back on track to deliver the road.
8. The Minister of Finance agreed to the proposed settlement on 3 August and since then, Waka Kotahi and its adviser Bell Gully have been working to give effect to this by documenting agreed changes and progressing through authorisations.
9. This process is nearly complete. Officials and Treasury's adviser Buddle Findlay are scrutinising final documents to complete due diligence for the Crown. The parties aim to complete authorisations and execute the documents on 10 December 2020 to make the settlement full, final and legally binding.
10. There is one outstanding matter - [25]

This is a material action that requires Crown consent to proceed.

[25]

[25]

11. [25]

12. [25]

13. [25]

[25]

14. [25]

15. [25]

16. [25]

17. [25]

18. [25]

[25]

19. [25]

20. [25]

21. [25]

22. [25]

23. [25]

[25]

24. [25]

25. [25]

26. [25]

27. [25]

Waka Kotahi has incurred additional costs as a result of COVID-19

28. Waka Kotahi has incurred additional costs that are directly related to the COVID-19 settlements. It will further incur additional costs as a result of delays on both projects (for example additional Waka Kotahi overhead, additional advisory costs and payments [37])

29. Waka Kotahi has sought funding for the costs that are directly associated with the settlement, not general delay costs. The types of cost and the estimated amount of each is set out in the table below. The total funding sought at this time is \$9.7 million.

Item	Incurred	Future
Mafic (financial advice)	[25]	
Bell Gully (legal advice)		
Insurance costs (Transmission Gully)		
Monitor (Transmission Gully)	[37]	
Independent Reviewer costs	[25]	
Pūhoi to Warkworth additional charge		
Pūhoi extension of standstill		
Total	[25]	

Adviser costs (Transmission Gully and Pūhoi to Warkworth)

30. Waka Kotahi engaged Bell Gully to provide legal advice and Mafic to provide financial analysis and advice in relation to the effects and mitigation of COVID-19 on Transmission Gully and Pūhoi to Warkworth.

Insurance costs (Transmission Gully)

[25]

Monitor costs (Transmission Gully)

32. As part of the COVID-19 settlement Waka Kotahi has appointed a monitoring team to maintain oversight of the performance of the Contractor and the Builder. This oversight is to monitor compliance by the Contractor and the Builder with their obligations to deliver. It is designed to provide early warning in relation to significant delays, or failure to comply with the Project Agreement. The cost for the Monitoring Team is forecast to be [25]

Independent Reviewer costs (Transmission Gully)

33. As a result of the COVID-19 incurred delay, Waka Kotahi is incurring additional costs for the Independent Reviewer. These costs will be capped at a maximum of [25] Waka Kotahi will seek reimbursement for these costs as they are incurred.

Unitary charge [25]

34. [25]

[40,25]

35. [40,25]

[25]

36. [25]

Funding these COVID-19 related costs

37. The Treasury has previously indicated it will support Waka Kotahi requests for funding to cover costs that are driven by the COVID-19 pandemic. Officials have carefully scrutinised these costs and consider that these claims meet the criteria.
38. On 1 July 2020, the Cabinet Economic Development Committee [DEV-20-MIN-0132 confirmed by CAB-20-MIN-0329] agreed to establish tagged operating contingencies to provide for managing any costs relating to the negotiated settlement of the two transport PPPs.

[37]



Reference: T2021/60

ST-4-8-4-11

Date: 19 January 2021

To: Minister of Finance (Hon Grant Robertson)
Minister of Transport (Hon Michael Wood)

Aide Memoire – Final Execution of COVID-19 Settlement Agreements for Transmission Gully and Pūhoi to Warkworth

The purpose of this Aide Memoire is to advise you that the COVID-19 settlement agreements for the Transmission Gully and Pūhoi to Warkworth projects are now full, final and unconditional.

As a result of this Treasury has written to Waka Kotahi to advise that it will now return to standard monitoring arrangements for Transmission Gully (down from the enhanced framework which has been in place since July).

The Treasury commends the efforts of Waka Kotahi and its advisors in finalising these agreements, which conclude months of difficult negotiations and secure the Crown's preferred negotiation outcomes; restoring time and cost certainty to these projects.

Pūhoi to Warkworth settlement outcome

[40]

Transmission Gully settlement outcome

Waka Kotahi has finalised an Integrated Settlement Agreement (including an Amended and Restated Project Agreement and related documents to give effect to the integrated settlement) which became full, final and unconditional on 17 December 2020.

The integrated settlement restores time and cost certainty for the project, by providing for compensation payments totalling [37] a pavement construction variation of [37] and a revised opening date of September 2021.

De-escalation of enhanced Crown monitoring

A Reimbursement and Management Agreement (RAMA) between Waka Kotahi and the Crown governs the management of Crown indemnities provided to Waka Kotahi in relation to the Waka Kotahi PPP Projects.

On 7 July 2020 the Crown gave notice to Waka Kotahi that the enhanced monitoring framework of the RAMA applied in relation to the Transmission Gully Project, as COVID-19 increased the likelihood of a demand under the Deed of Indemnity relating to Transmission Gully.

The finalisation of the Transmission Gully Settlement and additional Crown funding to cover COVID-19 related costs have substantially mitigated the risk of a call on the Indemnity. As such, on 23 December the Crown gave notice to Waka Kotahi that the enhanced monitoring framework no longer applies, and the standard monitoring framework has been reinstated.

This means that Waka Kotahi is no longer obliged to consult with the Crown and obtain Crown consent for actions that do not exceed a materiality threshold set out in the RAMA. Waka Kotahi must still request the Crown's prior written consent to material actions above the materiality threshold set out in the RAMA and comply with various information undertakings under the standard framework.

Information to be proactively released

Given the high level of public interest in the projects, and the significance of the settlements, we consider that the proactive release of all substantive advice relating to the Transmission Gully COVID-19 settlement is in the public interest. Joint Ministers have previously been advised of our intent to release this information [T2020/3198 refers]. We will brief you on this release in detail before we do it.

The suite of documents proposed for proactive release are currently with Waka Kotahi, Infracom and the Ministry of Transport for consultation and we expect the release to be published sometime in February. We note the Ministry of Transport has already provided feedback for our consideration.

We expect this proactive release to include the Cabinet paper you and the Minister of Transport provided to Cabinet on these matters (with appropriate redactions) now that negotiations have concluded, and commercial sensitivity is significantly reduced. We will seek agreement from you and the Minister of Transport to do this when we brief you on the release.

Liz Innes, Principal Advisor, Investment Management and Asset Performance, The Treasury, [39]

Craig Murphy, Manager, Investment Management and Asset Performance, The Treasury, [39]

Joint Report: Learning lessons from Transmission Gully – interim review and proactive release

Date:	25 February 2021	Report No:	T2021/262
		File Number:	SH-11-5-12-6-10

Action sought

	Action sought	Deadline
Minister of Finance (Hon Grant Robertson)	<p>Note that when Cabinet considered COVID-19 matters in relation to Transmission Gully it also agreed that Te Waihanga would facilitate an independent review of the Transmission Gully Project.</p> <p>Agree to lodge a joint paper to enable Cabinet consideration of the <i>Transmission Gully Interim Project Review</i> and the government response to this.</p> <p>Refer the attached draft Cabinet paper for Ministerial consultation, send feedback to Treasury, and lodge the final paper by 11 March for consideration by DEV on 17 March.</p> <p>Note the proposed proactive release on the Transmission Gully COVID-19 settlement, and that your previous Cabinet paper could be released as part of this information.</p> <p>Approve the proactive release of the attached Cabinet material on the Treasury and/or Waka Kotahi websites.</p>	<p>1 March</p> <p>11 March</p>
Minister of Transport (Hon Michael Wood)	<p>Note that when Cabinet considered COVID-19 matters in relation to Transmission Gully it also agreed that Te Waihanga would facilitate an independent review of the Transmission Gully Project.</p> <p>Agree to lodge a joint paper to enable Cabinet consideration of the <i>Transmission Gully Interim Project Review</i> and the government response to this.</p> <p>Note the proposed proactive release on the Transmission Gully COVID-19 settlement, and that the Ministers previous Cabinet paper could be released as part of this information.</p> <p>Approve the proactive release of the attached Cabinet material on the Treasury and/or Waka Kotahi websites.</p>	<p>1 March</p> <p>11 March</p>

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
Rachel Bishop	Senior Analyst, National Infrastructure Unit	[39]	[35] ✓
Liz Innes	Principal Advisor, Investment Management		
Peter Murray	General Manager, Te Waihanga		N/A (mob)
David Taylor	Manager, National Infrastructure Unit		

Minister's Office actions (if required)

If the Minister agrees to take a Cabinet paper to DEV, initiate Ministerial consultation and provide feedback to Treasury so the paper can be finalised and lodged by 11 March, and considered at Dev on 17 March.

Return the signed report to Treasury.

Note any feedback on the quality of the report

Enclosure: Yes (attached)

Joint Report: Learning lessons from Transmission Gully – interim review and proactive release

Executive Summary

As authorised by Cabinet, Joint Ministers and with your consent, Waka Kotahi has finalised an Integrated Settlement Agreement to mitigate the impacts of COVID-19 which became full, final and unconditional on 17 December 2020.

The integrated settlement restores time and cost certainty for the project, by providing for compensation payments totalling \$164.2 million, a pavement construction variation of \$45.5 million and a revised opening date of September 2021.

When Cabinet considered matters to do with the Transmission Gully COVID-19 settlement in July, it recognised some issues originated before COVID-19 and it agreed an investigation into the project should occur. This independent review, facilitated by Te Waihanga, has now finished and the report is attached for your consideration in Annex B of the draft Cabinet paper.

The Review findings have been considered by Te Waihanga and Waka Kotahi who are already taking actions to strengthen guidance and practice as a result. Some of these areas – notably governance – will require sustained time and focus to make lasting improvements.

Given the Review was directed by the Cabinet, it is probably appropriate for you to provide the report back to Cabinet for its consideration. You can also help ensure the lessons are really embedded by inviting Cabinet to direct Te Waihanga and Waka Kotahi to act in response to the report. A draft Joint Cabinet paper from the Ministers of Finance and Transport is attached in Annex B to give effect to this.

Te Waihanga expects to make the Review publicly available. Separately, the Treasury, Te Waihanga, the Ministry of Transport and Waka Kotahi have agreed to proactively release information relating to the COVID-19 settlement agreement. The Treasury has managed this process on behalf of the Crown.

Most of the information to be released is attached, with appropriate redactions applied, for your information in Annex C. This paper and the proposed Cabinet paper on this matter would also be included in the final proactive release.

We have been considering the best way to manage this proactive release, and the publication of the Review, given commentary on the Transmission Gully project has been significant and public interest remains high.

Officials from Treasury, Te Waihanga, the Ministry of Transport and Waka Kotahi have agreed to coordinate release of the COVID-19 settlement information and the Review and provide a common set of questions and answers and timeline of events to help aid interpretation and understanding.

This communications material is being developed now, and will be provided to you with the final information for proactive release once your last Cabinet paper on this matter is finalised, if it proceeds.

Recommended Action

We recommend that you:

- a** **Note** that when Cabinet considered COVID-19 matters in relation to Transmission Gully it agreed that Te Waihanga would facilitate an independent review of the Transmission Gully Project which has now been completed.

Noted

Minister of Finance

Noted

Minister of Transport

- b** **Agree** to take a joint paper to DEV to enable Cabinet consideration of the *Transmission Gully Interim Project Review* and the government's response.

Agreed

Minister of Finance

Agreed

Minister of Transport

- c** **Refer** the attached draft Cabinet paper for Ministerial consultation to receive feedback in time to lodge the final paper by 11 March for consideration by DEV on 17 March.

Agreed

Minister of Finance

- d** **Note** that Treasury, Te Waihanga and Waka Kotahi plan to proactively release documents relating to the Transmission Gully COVID-19 settlement, with appropriate redactions, on the Waka Kotahi website (included in Annex C), and that officials recommend that your previous Cabinet paper be released as part of this information.

Noted

Minister of Finance

Noted

Minister of Transport

- e** **Agree** to the proactive release of the *Managing the impact of COVID-19 on the Transmission Gully PPP project* Cabinet Paper and relevant DEV and CAB minutes on the Treasury and/or Waka Kotahi website (as included with appropriate redaction in Annex C).

Agree/disagree

Minister of Finance

Agree/disagree

Minister of Transport

David Taylor
Manager, National Infrastructure Unit

Peter Murray
**General Manager – Major Projects and
Advisory, Te Waihanga**

Hon Grant Robertson
Minister of Finance

Hon Michael Wood
Minister of Transport

Joint Report: Learning lessons from Transmission Gully – report back on interim review and proactive release

Purpose

1. The purpose of this report is to:
 - a report back on the investigation Cabinet directed into the Transmission Gully Project, and present you with the report from this: *Transmission Gully Interim Project Review* (the Review);
 - b provide you with a draft Cabinet paper so you can refer the Review to Cabinet for consideration;
 - c inform you that we plan to proactively release information from Treasury, Te Waihanga and Waka Kotahi relating the Transmission Gully COVID-19 settlement by the end of March;
 - d seek your approval to proactively release your Cabinet paper from July last year, *Managing the impact of COVID-19 on the Transmission Gully PPP project* and relevant minutes with the other proactive release information; and
 - e invite you to review the coordinated communications approach from joint agencies and provide us with additional direction, if required.

Background Transmission Gully COVID-19 settlement

2. The Transmission Gully project has attracted a high level of public interest over time. Most recently, this interest has extended to the impacts of COVID-19 on project costs and timeframes.
3. New Zealand's COVID-19 Alert Level 4 lockdown required non-essential workers to stay home, which impacted the Transmission Gully project by delaying expected completion dates, increasing overall construction costs and increasing the cost of finance for the Builder.
4. Low probability, high risk events beyond the control of any party (such as a pandemic) are contemplated as Uninsurable Events under the PPP contact. Both parties are required to make efforts to mitigate the impact of such events, if they can. Waka Kotahi has been engaged in significant negotiations with the Builder to determine a fair and reasonable basis on which COVID-19 impacts on the project should be mitigated.
5. Waka Kotahi has now executed a full, final and binding Integrated Settlement Agreement that restores time and cost certainty for the project. The integrated settlement provides for compensation payments totalling \$164.2 million, a pavement construction variation of \$45.5 million and a revised opening date of September 2021.
6. Given the high level of public interest in the project, and the significance of the settlement, we consider that the proactive release of all substantive advice relating to the Transmission Gully COVID-19 settlement is in the public interest. Joint Ministers have previously been advised of our intent to release this information [T2020/3198 refers].

Transmission Gully Interim Project Review

7. As part of its consideration of the paper on the impacts of COVID-19 on Transmission Gully in July 2020, DEV also agreed that an investigation be undertaken into the Transmission Gully Project, to be overseen by Te Waihanga, the New Zealand Infrastructure Commission [DEV-20-MIN-0132 refers].
8. The Transmission Gully Interim Project Review (the Review) focused on how the Transmission Gully project agreement was awarded for the price agreed, whether this was a realistic price, and whether the risks identified at the time were appropriately managed.
9. The completed Review, attached in Annex B of the draft Cabinet paper, identified four key findings it considered to have caused the pre-COVID-19 delays and cost increases:
 - a **Inadequacies in the Governance Structure** in that there was a lack of transparency as to how key PPP decisions were being made and clear delegations in decision making responsibilities.
 - b The **sub-optimal management of consenting risk** by both Waka Kotahi and the successful tenderer.
 - c A **non-PPP scheme design used in the PPP procurement** of the Project resulted in inevitable additional costs and changes as the project was re-defined during the procurement process.
 - d **The Affordability Threshold (the price guidance to bidders) was set below the Public Sector Comparator¹**, resulting in bids that were set too low and creating risks which manifested during the construction phase. Whilst this was recognised during procurement and adjustments were made, such adjustments during procurement are not in line with best practice, and stronger governance was needed around the issue once it was identified.

Recommendations and Response

10. The Review identified 12 specific actions to improve aspects of New Zealand's PPP policy management and future PPP projects. Te Waihanga supports all 12 recommendations.
11. The Review commended Waka Kotahi for the work it had already done to ensure lessons learned from the Transmission Gully were captured and applied to improve future PPP road projects, for example with the Pūhoi to Warkworth project.
12. Waka Kotahi has also been quick to implement actions that begin to address some of the specific recommendations of the Review, including:
 - a Appointment of specialist adviser to its Board to support the resolution of the impacts of COVID-19 on the PPP;
 - b Appointment of a Monitor, to monitor delivery during the balance of the construction phase, and report to the Investment & Delivery Committee of the Board;
 - c Preparation of an operating term legal framework and practical contract management manual ahead of the operating phase.

¹ The PSC is an estimate of the risk adjusted whole of life cost of a project if it were to be delivered by the procuring entity using conventional procurement methods. It is primarily used as a benchmark against which to assess the net present cost of procuring the project as a PPP.

13. Te Waihanga is preparing itself to begin work to update the PPP Guidelines. The following recommendations can be addressed as part of that work to update guidance for PPPs and their application in New Zealand.

Review's recommendation	
BC1	That Waka Kotahi include an outline of a Service Need Specification in future road PPP business cases.
BC3	That Te Waihanga considers publishing additional information for internal and external stakeholders related to the use of the PPP model.
RT1	That Te Waihanga considers reviewing the definition of the Public Sector Comparator (PSC) to provide clearer guidance that it represents the most efficient likely method of providing the defined output currently available to the public sector.
RT2	That Te Waihanga considers developing a whole of government PPP guidance on improved governance and delegations for the setting and approving the Affordability Threshold (AT)
GT1	For future PPP projects, the Waka Kotahi Board should receive advice on a proposed PPP project governance approach and endorse a recommended governance structure.
GT2	To ensure separation of decision making and clarity of roles and responsibilities, an approved PPP decision making matrix and responsibility assignment (RACI) document should be ratified by the Waka Kotahi Board for future PPP projects, with management and currency maintained by a lower-level governance group.
GT4	The Waka Kotahi Board considers forming a board sub-committee with the charter to focus specifically on PPP project matters, so that important project decisions can be discussed independently of standing agenda items and other important matters.
GT5	Te Waihanga considers developing model guidelines on PPP project management structures to assist line agencies when developing PPP governance structures.
GT6	Te Waihanga considers a whole-of-government PPP policy requiring all departments, agencies and authorities delivering projects using the PPP delivery model to ensure their proposed PPP governance structures are based on benchmark/model PPP governance structures, with departures clearly explained with supporting reasons/justification.

14. The recommendations in the table below will probably only become important when the Government is considering a new PPP project, as such we recommend they are revisited then, and the lessons are applied as part of that process.
15. The Treasury supports these recommendations, with the following caveats:
- a BC2 – Agencies will work together about the best way to apply this recommendation. There is some discussion about how best to do this and we are confident this will result in a constructive approach.
 - b RT3 – We consider that while a strategy for consenting is important, the wider consenting environment in New Zealand is complex, and it is important to recognise that consenting challenges are not Waka Kotahi's alone to solve.

Review's recommendation	
BC2	That Waka Kotahi consider developing benchmarks (both from local and international PPP experience) on ranges of estimated Operations and Maintenance (O&M) costs and project risks for comparable motorway projects.
GT3	<p>The Waka Kotahi Board should consider appointing their own specialist and experienced PPP adviser (reporting directly to the Board) that can provide independent and open advice on PPP project matters when presented to the Board.</p> <p>Note: in the interim, Waka Kotahi has appointed a specialist adviser to the Board to advise on the resolution of the impacts of COVID-19 on its PPP programme.</p>
RT3	That Waka Kotahi considers developing for future PPP projects a structured consenting strategy document as a key project control document/artefact, including for use in procurement/tender documents

Draft Cabinet paper – Lessons learned from the Interim Review

16. A draft joint Cabinet paper 'Lessons Learned from the Transmission Gully Review' is attached to this report (in Annex B) for you to review and share with your ministerial colleagues for consultation. The paper:
- a Summarises the background, findings, and the recommendations of the Review;
 - b Presents the final *Transmission Gully Interim Project Review* to Cabinet;
 - c Provides a proposed government response to the Review;
 - d Notes the release of the Review and the planned proactive release of information on the Transmission Gully COVID-19 settlement will occur around the same time, and how this will be coordinated; and
 - e Proposes that Cabinet:
 - i Directs Te Waihanga to address most of the recommendations in the tables above through its planned refresh of the PPP Guidelines;
 - ii Directs Te Waihanga to oversee a further review at the completion of the construction phase, to assess project implementation and value for money matters.
17. If you agree to take this draft Joint Cabinet paper, we recommend you provide it to your colleagues for consultation. If this is completed for lodgement on 11 March the paper can be considered by DEV on 17 March.

Proactive release of Transmission Gully COVID-19 information

18. The Treasury, Te Waihanga and Waka Kotahi propose to proactively release all substantive reports and advice provided to Ministers and the Waka Kotahi Board on the Transmission Gully COVID-19 settlement.

19. This was originally expected to occur in November (along with the original date we expected the settlement to become full and final). Given this milestone was ultimately achieved in mid-December, the process of redactions and consultation has been similarly delayed, however officials have collaborated closely to deliver the proactive release as soon as possible.
20. We now propose to proactively release the documents listed in Annex A, subject to certain information being withheld under the following sections of the Official Information Act 1982 as applicable.
21. The current binder of documents for release is attached, with appropriate redactions applied, in Annex C. This Joint report, and the proposed Cabinet paper (if it progresses) will be added to this binder with appropriate redactions. The final binder will then be provided to you for your information before the public release.

Proposed release of your previous (July 2020) Cabinet paper

22. The *Managing the impact of COVID-19 on the Transmission Gully PPP project* Cabinet Paper (and relevant minutes from DEV and CAB) is within the scope of the proactive release and there is significant public interest in this information. Cabinet Office Circular 18(4) sets out the requirements and procedures for the proactive release of Cabinet material.
23. You chose not to release this Cabinet Paper (and relevant minutes from DEV and CAB) previously because of ongoing commercial sensitivity during negotiations [paragraph 78 of your Cabinet paper refers].
24. However, the Transmission Gully settlement agreement is full and final and officials consider that you can now elect to proactively release your Cabinet paper and minutes without prejudicing future commercial activity. We recommend you do this as it is consistent with government policy and in the public interest to do so.

Communications

25. Media coverage and commentary on the Transmission Gully project has been significant and public interest remains high. As such, we expect that both the Review and the Proactive release will be reviewed in detail by media and the public.
26. In light of this interest, Treasury, Te Waihanga, the Ministry of Transport and Waka Kotahi will coordinate release of the COVID-19 settlement information and the Review; and provide a set of questions and answers and a timeline of events to aid interpretation and understanding.
27. The purpose of this coordination is to promote good government, openness and transparency and foster public trust and confidence in the Crown. It will help ensure accuracy (with review by all entities) and will reduce the handling costs associated with multiple Official Information requests through multiple agencies.
28. Officials plan that the proactive release of information will be made on the Waka Kotahi Transmission Gully project website, as this is where the public are most likely to seek it. Te Waihanga will release the Review on its website. Supporting communications material will be provided in both places.
29. We expect the timing of these releases will be as soon as possible following Cabinet's consideration of these matters; i.e. by the end of March or as otherwise agreed with your office.

Consultation

30. The Treasury, Ministry of Transport, Waka Kotahi and Te Waihanga have each:
 - a provided all documents within the scope of the proactive release
 - b reviewed the documents (including proposed redactions) and
 - c agreed to the proactive information release.
31. The Treasury has also provided a legal review of all redactions.
32. The Treasury, Te Waihanga Waka Kotahi and the Ministry of Transport have all contributed to the Review, the development of the draft Cabinet paper, and have been consulted on the information presented in this report.

Annex A: Documents for proactive release in Tranche 1

Doc. Date	Created By	Title
15 May 2020	Waka Kotahi	Board Paper: Impacts of COVID-19 on Pūhoi to Warkworth and Board Paper: Impacts of COVID-19 on Transmission Gully and interim decisions
21 May 2020	Waka Kotahi	Waka Kotahi Board Minutes 21 May Special Board (TG Content)
22 May 2020	The Treasury and Te Waihanga	Impacts on PPPs arising from the Level 4 lockdown
5 Jun 2020	The Treasury and Te Waihanga	Update on PPP negotiations arising from the Level 4 lockdown
25 Jun 2020	The Treasury and Te Waihanga	Draft Cabinet Paper: Managing the Impact of COVID-19 on Transport PPP projects
30 Jun 2020	The Treasury	Managing the impact of COVID-19 on the Transmission Gully Project – talking points for Cabinet Economic Development Committee
1 Jul 2020	Cabinet Office	Managing the Impact of COVID-19 on the Transmission Gully PPP Project
6 Jul 2020	Office of the Minister of Finance and Office of the Minister of Transport	Managing the impact of COVID-19 on the Transmission Gully PPP project (subject to your agreement)
6 Jul 2020	Cabinet Office	Report of the Cabinet Economic Development Committee: Period Ended 3 July 2020
6 Jul 2020	Waka Kotahi	Board Paper: Transmission Gully – interim arrangements extension
9 Jul 2020	The Treasury and Te Waihanga	Update on Transmission Gully PPP negotiations
20 Jul 2020	Waka Kotahi	Board Paper: Transmission Gully PPP – Impacts of COVID-19 (Interim Arrangements)
29 Jul 2020	Waka Kotahi	Board Paper: Transmission Gully Update
29 Jul 2020	Waka Kotahi	Board Paper: Transmission Gully Update – supplementary paper
3 Aug 2020	The Treasury and Te Waihanga	Update on Transmission Gully negotiations to mitigate the impact of COVID-19
3 Aug 2020	Waka Kotahi	Board Paper: Transmission Gully COVID-19 settlement
5 Aug 2020	The Treasury	Commercial analysis to support consideration of the proposed Transmission Gully PPP settlement
14 Aug 2020	The Treasury and Te Waihanga	Advice on impacts on PPP settlement negotiations arising from the upgraded COVID-19 Level Alerts
2 Sep 2020	The Treasury and Te Waihanga	Resolving [9(2)(i)] matters on Transmission Gully – update to settlement agreement
24 Sep 2020	The Treasury	Completing approval requirements for the Pūhoi and Transmission Gully Settlement Agreements
4 Dec 2020	The Treasury and Te Waihanga	Finalising the COVID-19 settlement for Transmission Gully
19 Jan 2021	The Treasury	Final Execution of COVID-19 Settlement Agreements for Transmission Gully and Pūhoi to Warkworth
~26 Feb 2021	The Treasury and Te Waihanga	TBC: Joint paper Lessons Learned from the Transmission Gully Review
~11 March 2021	Office of the Minister of Finance and Office of the Minister of Transport	TBC: Cabinet paper Lessons Learned from the Transmission Gully Review

Annex B: Draft Cabinet Paper

Annex C: Transmission Gully Proactive Release Binder

Office of the Minister of Finance and for Infrastructure
Office of the Minister of Transport

Chair, Cabinet Economic Development Committee

Lessons Learned from the Transmission Gully Interim Project Review Proposal

- 1 This paper reports back to Cabinet on the findings and recommendations of the Transmission Gully Interim Project Review (the Review), which Cabinet directed the New Zealand Infrastructure Commission (Te Waihanga) to oversee in July 2020 [DEV-20-MIN-0132 confirmed by CAB-20-MIN-0329 refers].

Executive Summary

- 2 New Zealanders acted together and saved lives by stopping COVID-19 – but this was not costless. The Alert Level 4 lockdown required non-essential construction workers (like most others) to stay home, impacting government and private sector projects alike.
- 3 As a result, the Crown negotiated many variations to its projects in construction to determine which COVID-19 costs should be covered by the Government and which our contractual partners had already agreed to, and so should continue to bear.
- 4 One of these negotiations was for the Transmission Gully PPP Project (the Project). The negotiation was to mitigate the impacts of COVID-19, including further delay to the expected completion dates, increased construction costs, and increased costs of finance for the Builder.
- 5 On 1 July 2020, the Cabinet Economic Development Committee (DEV) discussed the impacts of COVID-19 on the Transmission Gully project and noted that a range of possible outcomes could arise from the situation. DEV agreed to establish tagged contingencies to cover the fiscal risk and authorised the Minister of Finance and the Minister of Transport to take decisions to mitigate these impacts and stabilise the project [DEV-20-MIN-0132 refers].
- 6 Recognising that the Project faced challenges even before the COVID-19 pandemic, DEV also agreed that an investigation be undertaken into the Project, to be overseen by Te Waihanga [DEV-20-MIN-0132 refers].
- 7 Since July, Waka Kotahi has finalised an Integrated Settlement Agreement which restores time and cost certainty for the Project. It provides for compensation payments totalling \$164.2 million, a pavement construction variation of \$45.5 million and a revised opening date of September 2021. This settlement became full, final and unconditional on 17 December 2020.

- 8 Meanwhile, the *Transmission Gully Interim Project Review* (the Review) was established by Te Waihanga to give effect to Cabinet's direction. The review followed a structured process from mid-October to December 2020 with documents sourced from Waka Kotahi, the Treasury and the Ministry of Transport supplemented with interviews with individuals involved in the Project at the time.
- 9 The Review has revealed some lessons that could usefully be applied to government projects generally (notably in relation to governance and consenting risk) and some that are more unique to the PPP contracting model; including around setting the affordability threshold (costs were underestimated) and outcome specification.
- 10 Some of these lessons have been applied in practice already – Waka Kotahi and PPP practitioners have proactively adopted them; and some (mostly gaps in the PPP guidance framework) are yet to be addressed. This paper proposes we direct Te Waihanga to develop its guidance to effectively implement most of the recommendations from the Review.
- 11 Given the Transmission Gully Project is the subject of ongoing public interest, a proactive release of information regarding the Transmission Gully COVID-19 settlement has been prepared by The Treasury, Te Waihanga and Waka Kotahi. The Minister of Transport and I have been separately briefed on this and I have directed officials to prepare to manage the proactive release in conjunction with the release of the Review.
- 12 The purpose of this paper is to:
 - 12.1 report back to Cabinet on the findings and recommendations of the Review,
 - 12.2 invite Cabinet to direct Te Waihanga to implement the recommendations arising from the review, and
 - 12.3 provide you with the approach to managing the proactive release of information about the Transmission Gully COVID-19 settlement and Review.

Related documents

- 13 The following information is included in the Annexes to this paper:
 - Annex A: The Terms of Reference for the Transmission Gully Interim Project Review;
 - Annex B: The Final Transmission Gully Interim Project Review Report;
 - Annex C: Te Waihanga's response to the recommendations of the Review;
 - Annex D: Communications materials – timeline, questions and answers.

Background

The Transmission Gully PPP Project (the Project)

- 14 The Project is a 27 kilometre four-lane motorway through Transmission Gully. It connects with the existing SH1 at Mackays Crossing in the north, and Linden in the south. Four new interchanges, and two new link roads, connect the motorway to Paekākāriki, SH58, Waitangirua/Whitby and Kenepuru.
- 15 The Project is being delivered as a Public Private Partnership (PPP), entered into by Waka Kotahi by way of a Project Agreement with the Wellington Gateway Partnership (WGP) in July 2014.
- 16 The project was originally due for completion in April 2020. In early 2020 a new opening date of December 2020 was announced, agreed as part of a settlement to address the following challenges faced by the contractor:
 - 16.1 Significant re-estimation of earthworks requirements, and associated consenting matters;
 - 16.2 The impact of several storm events resulted in significant additional costs to construction; and
 - 16.3 Kaikōura earthquake damage and repair impacted the availability of resources across various supply chains.
- 17 As a result of these and other challenges, the Project experienced significant delays and cost over-runs, and the contractor had been under significant financial pressure prior to the challenges imposed by COVID-19.

Impact of the COVID-19 Alert Level 4 Lockdown

- 18 New Zealand's COVID-19 Alert Level 4 lockdown required non-essential construction workers to stay home, impacting government and private sector infrastructure projects alike. The lockdown impacted the Transmission Gully Project by further delaying expected completion dates, increasing overall construction costs and increasing the cost of finance for the Builder.
- 19 The PPP Project Agreements contemplated this type of low probability, high impact situation beyond the control of the parties as an Uninsurable Event with both parties obliged to make efforts to mitigate the event, if they can.

Transmission Gully COVID-19 Settlement

- 20 Following lengthy negotiations with the Builder, Waka Kotahi finalised an Integrated Settlement Agreement (including an Amended and Restated Project Agreement and related documents to give effect to the integrated settlement) which became full, final and unconditional on 17 December 2020.

- 21 The integrated settlement restores time and cost certainty for the project, by providing for compensation payments totalling \$164.2 million, a pavement construction variation of \$45.5 million and a revised opening date of September 2021.

The Transmission Gully Interim Project Review (the Review)

Scope of the Review

- 22 As part of its consideration of the paper on the impacts of COVID-19 on Transmission Gully, this Committee agreed that an investigation be undertaken into the Project, to be overseen by Te Waihanga [DEV-20-MIN-0132 refers].
- 23 The Terms of Reference (Annex A) required that the Review focus on how the Project was awarded for the price agreed, and whether this was a realistic price considering the project risks.
- 24 The Review has now been completed and the report is included in Annex B. The Review considered three major elements:
- 24.1 **The Business Case** – the Public Sector Comparator development and the commercial case for the preferred procurement model;
 - 24.2 **Risk Transfer** – whether the key risks were appropriately allocated, including the consenting strategy, and how the Affordability Threshold was set and approved; and
 - 24.3 **The project Governance Structure** – whether it was appropriate and sufficient time was allowed for decisions and processes to be effected.

Findings from the Review

- 25 There were four primary findings identified in the Review. Two of these findings are consistent with challenges common to many significant infrastructure projects:
- 25.1 **Inadequacies in the Governance Structure** in that there was a lack of transparency as to how key PPP decisions were being made and no clear delegations in decision making responsibilities. In this case the use of a non-PPP project management structure was one of the key causes for the weakness in the Governance Structure.
 - 25.2 **The sub-optimal management of consenting risk** by all parties.
- 26 The following two findings are specific to the PPP procurement model:
- 26.1 **A non-PPP scheme design used in the PPP procurement** of the Project resulted in inevitable additional costs and changes as the project was better defined during the procurement process.

- 26.2 **The Affordability Threshold (the maximum expected cost of the project) was set too low**, resulting in bids that were set too low and creating risks which manifested during the construction phase. Whilst this was recognised during procurement and adjustments were made, such adjustments during procurement are not in line with best practice, and stronger governance was needed around the issue once it was identified.

Government Response to the Review

- 27 The Review identified 12 specific actions to improve aspects of New Zealand's PPP policy management and future PPP projects (which are included in Annex C).

Actions already taken

- 28 The review notes that Waka Kotahi has already applied many lessons from the Transmission Gully procurement process to improve the subsequent Pūhoi to Warkworth PPP procurement process.
- 29 Waka Kotahi has also been quick to implement actions that begin to address some of the specific recommendations of the Review, including:
- 29.1 Appointment of specialist adviser to its Board to support the resolution of the impacts of COVID-19 on the PPP;
 - 29.2 Appointment of a Monitor, to monitor delivery during the balance of the construction phase, and report to the Investment & Delivery Committee of the Board;
 - 29.3 Preparation of an operating term legal framework and practical contract management manual ahead of the operating phase.
- 30 As part of the ongoing process of review and opportunities to improve, the Project will also be subject to a Treasury Gateway 4 review ahead of the commencement of the operating phase.

Items for immediate action

- 31 Most of the recommendations outlined in the Review can be addressed by updating guidance for PPPs and their application in New Zealand. As such, we propose this committee directs officials to implement the recommendations of the review by revising and updating New Zealand's PPP Guidance.

Items for future action

- 32 There are a small number of recommendations from the Review that would be applied when and if a new PPP project is considered¹. These recommendations could be revisited then, and lessons applied as part of that process.
- 33 The Review was not intended to investigate project delivery or value for money. Officials recommend that we undertake a further review at the right point to understand and apply lessons from these areas as well.
- 34 On this basis, we propose to direct Te Waihanga to undertake a further review at the completion of the construction phase, to assess project implementation and value for money matters.
- 35 We also recommend Waka Kotahi report back to the Ministry of Transport on how it is strengthening governance practice in response to the Review's recommendations, on this and other large projects, within the next 12 months.
- 36 I note that the Ministry of Transport and Treasury together apply Investor Confidence Rating (ICR) assessments to Waka Kotahi. The October 2020 mid-cycle Outlook discussion highlighted that Waka Kotahi is taking action to improve its investment decision making and delivery.
- 37 The Treasury completed a review of the ICR in 2020 and is working to strengthen and re-establish the ICR to continue to measure investment management capability and performance. The Ministry and Waka Kotahi will be able to use this tool to consider the impact of their actions over time.

Financial Implications

- 38 This paper has no financial implications.

Legislative Implications

- 39 There are no legislative implications arising from this paper.

Impact Analysis

Regulatory Impact Statement

- 40 A Regulatory Impact Statement is not required for this paper.

Climate Implications of Policy Assessment

- 41 A Climate Implications of Policy Assessment (CIPA) is not required for this paper.

¹ The Cabinet Office Circular (19) 6 requires agencies to engage with Te Waihanga if contemplating major infrastructure investment, or considering the use of PPPs. The Government Procurement Rules requires agencies to engage with and follow Te Waihanga's guidance when procuring major infrastructure, including when procuring a PPP.

Population Implications

42 There are no population implications arising from this paper.

Human Rights

43 There are no human rights implications arising from this paper.

Consultation

44 The Treasury has prepared this Cabinet paper in collaboration with Te Waihanga, Waka Kotahi, and the Ministry of Transport.

Communications

45 The Transmission Gully project has attracted a high level of public interest over time and this has extended to the COVID-19 settlement agreement, and probably the Review.

46 In light of this interest, Treasury, Te Waihanga, the Ministry of Transport and Waka Kotahi propose to coordinate the release of these documents and supporting communications information. This includes a narrative, questions and answers and a timeline to aid interpretation attached for your reference in Annex D.

47 The purpose of this coordination is to promote good government, openness and transparency and foster public trust and confidence in the Crown. It will also reduce the handling costs associated with multiple Official Information requests through multiple agencies.

48 I have agreed that the proactive release of information will be made on the Waka Kotahi Transmission Gully project website, as this is where the public are most likely to seek it. Te Waihanga will release the Review on its website. Supporting communications material will be released in both places.

49 The timing of these releases will be as soon as possible following consideration of this paper, and as agreed with the office of the Minister of Finance.

Proactive Release

50 I intend to release this Cabinet paper proactively as part of the planned release on Transmission Gully, at a time agreed with the office of the Minister of Finance.

Recommendations

The Minister of Finance and the Minister of Transport recommend that the Committee:

Transmission Gully Interim Project Review

1 **note** that the COVID-19 Level 4 Lockdown impacted the Transmission Gully PPP Project (the Project) by delaying expected completion dates, increasing overall construction costs, and increasing the cost of finance over and above existing cost and schedule overruns;

- 2 **note** that to mitigate the impacts of COVID-19, an Integrated Settlement Agreement was agreed and became full, final and unconditional on 17 December 2020;
- 3 **note** that as directed by the Cabinet Economic Development Committee, Te Waihanga has overseen the Transmission Gully Interim Project Review (the Review), attached in Annex B to this paper [DEV-20-MIN-0132 refers];
- 4 **note** that the Review focused on how the Project was awarded for the price agreed and whether this was a realistic price considering the project risks, and identifies the following key lessons:
 - 4.1 the governance structure (and therefore the decision-making for key PPP decisions) was not appropriate for the Project;
 - 4.2 consenting risk was not well managed by all parties;
 - 4.3 a scheme design that was not developed for a PPP project was used to procure the PPP project, resulting in additional costs as the design was adapted during the procurement process;
 - 4.4 the Affordability Threshold (the maximum expected cost of the project) was set too low, resulting in the costs for the project being set too low from the beginning.
- 5 **note** that the Review identified recommendations that could improve future PPP projects and aspects of New Zealand's PPP policy management, and that:
 - 5.1 Waka Kotahi and Te Waihanga have already taken steps to address some of the recommendations of the Review;
 - 5.2 Most remaining recommendations can be implemented by updating the New Zealand PPP guidance;
 - 5.3 A small number of the recommendations can only be addressed if or when a new PPP project is being considered.
- 6 **note** that the Minister for Infrastructure directs Te Waihanga to:
 - 6.1 work with the Treasury to update the New Zealand PPP guidance to give effect to the recommendations in the Review;
 - 6.2 advise on applying the remaining recommendations from the Review at such time as any new PPP project is considered;
 - 6.3 oversee a further review of the Project once construction has been completed to assess project implementation and value for money.
- 7 **authorise** the Minister of Finance and for Infrastructure, and the Minister of Transport to jointly approve further details of the further review referred to in recommendation 6.3 above;

- 8 **direct** Waka Kotahi to report back to the Ministry of Transport on how it is strengthening governance practice in response to the Review's recommendations, on this and other large projects, within the next 12 months;
- 9 **note** that given the high level of public interest in the Project, and the significance of the settlement, the proactive release of all substantive advice relating to the Transmission Gully COVID-19 settlement is appropriate, and that this will occur alongside the release of the Review at a time agreed with the office of the Minister of Finance.

Authorised for lodgement

Hon Grant Robertson

Minister of Finance
Minister for Infrastructure

Hon Michael Wood

Minister of Transport

Annex A: Transmission Gully Interim Project Review Final Terms of Reference

This document is not provided as it is already available on the Te Waihanga website
<https://infracom.govt.nz>

Annex B: Finance Transmission Gully Interim Project Review Report – 3 Feb 2021

This document is not provided as it is already available on the Te Waihanga website
<https://infracom.govt.nz>

Annex C: Te Waihanga Response to Review Recommendations

Review's recommendation		Te Waihanga Response
Business Case (BC) Recommendations		
BC1	That Waka Kotahi include an outline of a Service Need Specification in future road PPP business cases.	Agree Te Waihanga supports the recommendation and notes that this is a requirement of the current PPP guidelines. Whilst no specific action is required by Te Waihanga, current wording in the Guidelines will be reviewed for clarity
BC2	That Waka Kotahi consider developing benchmarks (both from local and international PPP experience) on ranges of estimated Operations and Maintenance (O&M) costs and project risks for comparable motorway projects.	Noted Te Waihanga supports the recommendation, which is an action for Waka Kotahi to progress. However, given that no road PPP are currently proposed this is not an immediate priority albeit the understanding of and benchmarking of O&M cost data does have significant value for all major road procurement models and Waka Kotahi institutionally. In addition, there is value in benchmarking risk contingencies both locally and internationally on ranges of estimated project risks for comparable road projects.
BC3	That Te Waihanga considers publishing additional information for internal and external stakeholders related to the use of the PPP model.	Agree Te Waihanga agrees with the recommendation and is in the process of commissioning consultants to support its refresh of its PPP Guidelines. It being noted that the Review highlighted concerns around public perception that a business case supporting PPP delivery of a project ensures cost certainty.
Risk Transfer (RT) Recommendations		
RT1	That Te Waihanga considers reviewing the definition of the Public Sector Comparator (PSC) to provide clearer guidance that it represents the most efficient likely method of providing the defined output currently available to the public sector.	Agree Te Waihanga supports the recommendation and is in the process of commissioning consultants to support its refresh of its PPP Guidelines. The review of the PSC definition will form part of that workstream.
RT2	That Te Waihanga considers developing a whole of government PPP guidance on improved governance and delegations for the setting and approving the Affordability Threshold (AT)	Agree Te Waihanga supports the recommendation and is in the process of commissioning consultants to support its refresh of its PPP Guidelines. The review will extend to model governance structures for PPP projects and delegations generally, including in relation to AT setting.
RT3	That Waka Kotahi considers developing for future PPP projects a structured consenting strategy document as a key project control document/artefact, including for use in procurement/tender documents	Noted Since TGP, Waka Kotahi's approach to consenting has evolved, however, the need for a clearly understood and thought out consenting strategy remains. Whilst this is not an immediate work stream in the event of future horizontal PPP projects this will be necessary requirement

Governance and Timeframes (GT) Recommendations		
GT1	For future PPP projects, the Waka Kotahi Board should receive advice on a proposed PPP project governance approach and endorse a recommended governance structure.	Noted Te Waihanga supports the recommendation and as a workstream as part of the refresh of its PPP Guidelines, intends to develop a preferred governance model for PPPs and standard form delegations. Whilst no transport PPPs are currently being contemplated by Waka Kotahi, the guidelines would be applicable to Waka Kotahi.
GT2	To ensure separation of decision making and clarity of roles and responsibilities, an approved PPP decision making matrix and responsibility assignment (RACI) document should be ratified by the Waka Kotahi Board for future PPP projects, with management and currency maintained by a lower-level governance group.	Noted As noted above, Te Waihanga supports the recommendation and as part of the refresh of its PPP Guidelines intends to develop a standard form preferred governance model for PPPs, which will include decision making matrix and RACI documents. Whilst no transport PPPs are currently being contemplated by Waka Kotahi, the guidelines would be applicable to Waka Kotahi and will have general application to large, complex infrastructure procurement generally.
GT3	The Waka Kotahi Board should consider appointing their own specialist and experienced PPP adviser (reporting directly to the Board) that can provide independent and open advice on PPP project matters when presented to the Board.	Noted Te Waihanga supports the recommendation and notes Waka Kotahi's advice that it has appointed a specialist adviser to the Board to advise on the resolution of the impacts of COVID-19 on its PPP programme. In addition, Waka Kotahi has appointed a Monitor, supported by an extensive and experienced monitoring team, to monitor delivery during the balance of the construction phase of TGP. However, Te Waihanga considers that in relation to PPP procurement, specialist advice with appropriate technical knowledge of PPPs is necessary to comply with the recommendation.
GT4	The Waka Kotahi Board considers forming a board sub-committee with the charter to focus specifically on PPP project matters, so that important project decisions can be discussed independently of standing agenda items and other important matters.	Noted Te Waihanga supports the recommendation and will include for consideration in its updated review of its Guidance in relation to governance.
GT5	Te Waihanga considers developing model guidelines on PPP project management structures to assist line agencies when developing PPP governance structures.	Agree As noted above. Te Waihanga as part of its recently commissioned review intends to develop model guidance on PPP project management structures.
GT6	Te Waihanga considers a whole-of-government PPP policy requiring all departments, agencies and authorities delivering projects using the PPP delivery model to ensure their proposed PPP governance structures are based on benchmark/model PPP governance structures, with departures clearly explained with supporting reasons/justification.	Agree Te Waihanga agrees that the model governance structure guidelines when developed should be as be adopted by PPP procuring agencies with departures articulated, justified, and approved by their relevant Boards or equivalent.

Annex D: Communications materials – timeline, questions and answers

Transmission Gully: COVID-19 settlement overview

The communications material presented to Cabinet is unchanged, and is presented at the front of the binder for the convenience of readers.



Cabinet Economic Development Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Lessons Learned from the Transmission Gully Review

Portfolios **Finance / Infrastructure / Transport**

On 7 April 2021, the Cabinet Economic Development Committee (DEV):

Transmission Gully Interim Project Review

- 1 **noted** that the COVID-19 Level 4 lockdown impacted the Transmission Gully Public Private Partnership (PPP) Project (the Project) by delaying expected completion dates, increasing overall construction costs, and increasing the cost of finance over and above existing cost and schedule overruns;
- 2 **noted** that to mitigate the impacts of COVID-19, an Integrated Settlement Agreement was agreed and became full, final and unconditional on 17 December 2020;
- 3 **noted** that on 1 July 2020, DEV:
 - 3.1 agreed that the preferred outcome for the Project is a settlement agreement;
 - 3.2 authorised the Minister of Finance and the Minister of Transport to take decisions as required to resolve matters associated with the negotiations on Transmission Gully;
 - 3.3 agreed that an investigation be undertaken into the Project, including its procurement, terms of contract and implementation, to be overseen by the New Zealand Infrastructure Commission (Te Waihanga);

[DEV-20-MIN-0132]
- 4 **noted** the contents of the Review report, attached as Annex B to the paper under DEV-21-SUB-0055;
- 5 **noted** that the Review focused on how the Project was awarded for the price agreed and whether this was a realistic price considering the Project risks, and identifies the following key lessons:
 - 5.1 the governance structure (and therefore the decision-making for key PPP decisions) was not appropriate for the Project;
 - 5.2 consenting risk was not well managed by all parties;

- 5.3 a scheme design that was not developed for a PPP project was used to procure the PPP project, resulting in additional costs as the design was adapted during the procurement process;
- 5.4 the Affordability Threshold (the maximum expected cost of the Project) was set too low, resulting in the costs for the Project being set too low from the beginning;
- 6 **noted** that the Review identified a number of matters that could improve future PPP projects and aspects of New Zealand's PPP policy management, and that:
- 6.1 Waka Kotahi New Zealand Transport Agency (Waka Kotahi) and Te Waihanga have already taken steps to address some of the recommendations of the Review;
- 6.2 most of the remaining recommendations can be implemented by updating the New Zealand PPP guidance;
- 6.3 a small number of the recommendations can only be addressed if or when a new PPP project is being considered;
- 7 **noted** that the Minister for Infrastructure intends to direct Te Waihanga to:
- 7.1 work with Treasury to update the New Zealand PPP guidance to give effect to the recommendations in the Review;
- 7.2 advise on applying the remaining recommendations from the Review at such time as any new PPP project is considered;
- 7.3 oversee a further review of the Project once construction has been completed to assess project implementation and value for money;
- 8 **authorised** the Minister of Finance, the Minister for Infrastructure, and the Minister of Transport to jointly approve further details of the further review referred to in paragraph 7.3 above;
- 9 **noted** that the Minister for Infrastructure will direct Waka Kotahi to report back to the Ministry of Transport on how it is strengthening governance practice in response to the Review's recommendations, on this and other large projects, within the next 12 months;
- 10 **noted** that given the high level of public interest in the Project, and the significance of the settlement, the proactive release of all substantive advice relating to the Transmission Gully COVID-19 settlement is appropriate, and that this will occur alongside the release of the Review at a time agreed with the office of the Minister of Finance.

Gerrard Carter
Committee Secretary

Present: (see over)

Present:

Hon Grant Robertson (Chair)
Hon Dr Megan Woods (Deputy Chair)
Hon Carmel Sepuloni (part of item)
Hon David Parker
Hon Nanaia Mahuta
Hon Poto Williams
Hon Damien O'Connor
Hon Stuart Nash
Hon Kris Faafoi
Hon Willie Jackson (part of item)
Hon Michael Wood
Hon Dr David Clark
Hon Phil Twyford
Rino Tirikatene, MP
Deborah Russell, MP

Officials present from:

Office of the Prime Minister
Office of the Chair
Officials Committee for DEV