

Schedule 3: Project and Ancillary Documents

Part 1 – Overview of Project Documents and Ancillary Documents

1. Project Documents

The Project Documents are as follows:

- (a) this Agreement between the Transport Agency and the Contractor;
- (b) the Major Sub-contractor Direct Deeds, being:
 - (i) the direct deed between the Transport Agency, the Contractor and an unincorporated joint venture between Leighton Contractors Pty Limited and HEB Construction Limited in relation to the Works Provisioning; and
 - (ii) the direct deed between the Transport Agency, the Contractor and Leighton Contractors Pty Limited in relation to the Operational Services;
- (c) the Financier Direct Deed between the Transport Agency, the Contractor and the Security Trustee;
- (d) the GST Process Letter between the Transport Agency and the Contractor;
- (e) the Independent Reviewer Agreement between the Transport Agency, the Contractor, an unincorporated joint venture between Leighton Contractors Pty Limited and HEB Construction Limited and Leighton Contractors Pty Limited and Aurecon New Zealand Limited;
- (f) from its date of execution, the Service Level Agreement between the Transport Agency and the Contractor; and
- (g) the TG Project Lease (with effect from the Service Commencement Date).

2. Ancillary Documents

The Ancillary Documents are as follows:

- (a) the Construction Sub-contract between the Contractor and an unincorporated joint venture between Leighton Contractors Pty Limited and HEB Construction Limited;
- (b) the O&M Sub-contract between the Contractor and Leighton Contractors Pty Limited;
- (c) the Interface Agreement between the Contractor, an unincorporated joint venture between Leighton Contractors Pty Limited and HEB Construction Limited and Leighton Contractors Pty Limited;
- (d) the parent company guarantee between [REDACTED] and the Contractor in respect of the obligations of the Major Sub-contractor responsible for Works Provisioning;
- (e) the parent company guarantee between [REDACTED] and the Contractor in respect of the obligations of the Major Sub-contractor responsible for Operational Services;

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Part 2 – Forms of certain Project Documents

Annexure 1: Financier Direct Deed

Annexure 2: Major Sub-contractor's Direct Deed

Annexure 3: Independent Reviewer Agreement

Annexure 4: TG Project Lease

Annexure 5: Third Party Interface Protocols

Annexure 1: Financier Direct Deed

Financier Direct Deed

relating to

the Transmission Gully PPP Project

The New Zealand Transport Agency, a crown entity established on 1 August 2008 by section 93 of the Land Transport Management Act 2003 (the **Transport Agency**)

and

[]

Security Trustee

and

[]

Contractor

Date

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This **Financier Direct Deed** is made on

2014

between (1) **The New Zealand Transport Agency**, a crown entity established on 1 August 2008 by section 93 of the Land Transport Management Act 2003 (the **Transport Agency**)

and (2) [] (**Security Trustee**)

and (3) [] (**Contractor**)

Introduction

- A. The background to the Project is set out in the Project Agreement.
- B. The Contractor has granted Security Interests to the Security Trustee in relation to the Project.
- C. The parties agree that the Security Trustee will have the option of exercising certain rights in relation to the Contractor, on the terms set out in this Deed.

It is agreed

1. Interpretation

1.1 Project Agreement

Definitions in the Project Agreement apply in this Deed unless the relevant term is defined in this Deed.

1.2 Definitions

In this Deed, unless the context otherwise requires, the following terms have the following meanings:

Affiliate means any person that is a “related company” of the Security Trustee or any Senior Lender (as the case may be), as that term is defined in section 2(3) of the Companies Act 1993;

Appointed Representative means a Representative that has been notified to the Transport Agency pursuant to a Step-in Notice;

D&C Direct Deed means the Major Sub-contractor’s Direct Deed relating to the Project entered into between the Contractor, [] and the Transport Agency and dated on or about the date of this Deed;

Deed means this financier direct deed;

Event of Default has the meaning given to that term in the Senior Financing Agreements;

Security Trust Deed has the meaning given to that term in the Senior Financing Agreements;

Step-in Date means the date on which the Security Trustee serves a valid Step-in Notice on the Transport Agency pursuant to clause 6.1 (Step-in Notice);

Step-in Notice means a notice served on the Transport Agency by the Security Trustee, advising the Transport Agency:

- (a) of the appointment and identity of the Appointed Representative; and
- (b) that the Appointed Representative is to exercise the rights specified in clause 6.4 (Assumption of Rights);

Step-in Period means the period from the Step-in Date up to and including the earlier of:

- (a) the Step-out Date;
- (b) the date of any novation under clause 9 (Novation);
- (c) the date of any termination of the Project Agreement in accordance with clause 4.1 (Grounds for termination); and
- (d) the date of expiry of the Project Agreement;

Step-out Date means the date specified in a Step-out Notice, being:

- (a) no less than ■ days after the date that notice is served on the Transport Agency if:
 - (i) on that date no Contractor Default is subsisting; or
 - (ii) that notice is issued in circumstances where the Transport Agency has been requested to, but has not, given its consent to a novation under clause 9 (Novation); or
- (b) in all other cases, the date falling ■ days after the date the Step-out Notice is served on the Transport Agency;

Step-out Notice means a notice served on the Transport Agency by the Appointed Representative pursuant to clause 7 (Step-out);

Suitable Substitute Contractor and **Suitable Substitute Sub-contractor** means a person approved by the Transport Agency (such approval not to be unreasonably withheld or delayed) as:

- (a) not being an Unsuitable Third Party;
- (b) having the legal capacity, power and authority to become a party to and perform the obligations of the Contractor under the Project Agreement, or of the Sub-contractor under the applicable Major Sub-contract (as the case may be); and
- (c) employing persons or engaging sub-contractors having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub-contracts) which are sufficient to enable it to perform the obligations of the Contractor under the Project Agreement or of the Sub-contractor under the applicable Major Sub-contract (as the case may be); and

Termination Notice has the meaning given to that term in the Project Agreement.

1.3 Interpretation

In this Deed, unless the context otherwise requires:

- (a) a reference to a clause is a reference to a clause of this Deed;
- (b) a gender includes each other gender;
- (c) the singular includes the plural and vice versa;
- (d) a reference to a person includes:
 - (i) a partnership and also a body of persons, whether corporate or unincorporated; and
 - (ii) reference to its respective successors in title and permitted assigns;
- (e) a reference to documentation includes:
 - (i) a reference to that document as varied, supplemented, novated or substituted from time to time; and
 - (ii) a reference to that documentation in any form, whether paper based or in electronic form encoded on or as part of any form of media;
- (f) any agreement that a party not do a thing also constitutes an agreement that, to the extent it is within the control of that party, it will not suffer or permit or cause that thing to be done;
- (g) any reference to a consent or approval requires the prior written consent or approval of the party required to give that consent;
- (h) whenever the words “includes” or “including” are used in this Deed, they are deemed to be followed by the words “without limitation”;
- (i) a reference to any legislation includes a modification of that legislation or legislation enacted in substitution for that legislation and a regulation, order-in-council and other instrument from time to time issued or made under that legislation;
- (j) the “Introduction” forms part of this Deed;
- (k) headings and the table of contents are included for the purpose of ease of reference only and are not to have any effect on construction and interpretation;
- (l) a reference to days, other than Business Days, is a reference to any calendar day of the year;
- (m) a reference to currency is a reference to New Zealand currency;
- (n) if an obligation falls to be performed or a right is to be exercised on or by a day that is not a Business Day then, unless otherwise specified, that obligation is due to be performed or that right may be exercised on the Business Day next following that day;

- (o) none of the terms nor any of the parts of this Deed are to be construed against a party, by reason of the fact that that term or that part was first proposed or was drafted by that party; and
- (p) a party who has an obligation is to perform that obligation at its own cost, unless a term of this Deed expressly provides otherwise.

1.4 **Priority of documents**

To the extent of any inconsistency between this Deed and any other Project Document, this Deed will prevail.

1.5 **Restriction on exercise of rights under D&C Direct Deed and O&M Direct Deed**

The Transport Agency acknowledges and agrees that it will not exercise its rights under:

- (a) clause [] (Transport Agency's Cure Rights) or clause [] (Transport Agency's Step-in rights) of the D&C Direct Deed (without prejudice to, and other than in circumstances described in, clause 67 of the Project Agreement) or clause [] (Transport Agency's novation rights) of the D&C Direct Deed; or
- (b) clause [] (Transport Agency's Cure Rights) or clause [] (Transport Agency's Step-in rights) of the O&M Direct Deed (without prejudice to, and other than in circumstances described in, clause 67 of the Project Agreement) or clause [] (Transport Agency's novation rights) of the O&M Direct Deed,

during any Required Period, any Step-in Period and/or at any time during any notice period referred to in clause 6.2 (Details of Step-in Notice).

1.6 **Restriction on exercise of rights under Parent Company Guarantees**

The Transport Agency acknowledges and agrees that it will not exercise its rights under:

- (a) the Parent Company Guarantee given by [REDACTED] of the D&C Sub-contractor, until the FDD Termination Date; or
- (b) the Parent Company Guarantee given by [REDACTED] of the O&M Sub-contractor, during any Required Period, any Step-in Period and/or at any time during any notice period referred to in clause 6.2 (Details of Step-in Notice).

1.7 **Commencement**

The rights and obligations of the parties under this Deed commence on Financial Close.

2. **Consent to security**

2.1 **Security Interest**

The Transport Agency acknowledges notice of, and consents to, the Security Interests granted by the Contractor in favour of the Security Trustee under the Security Documents.

2.2 Other security interest

The Transport Agency confirms that, as at the date of this Deed, it has not received notice of any other Security Interest granted over the Contractor's rights under the Project Agreement.

2.3 Turnover obligations

If the Transport Agency receives any payment in cash or in kind or recovers any amount (including by way of set off) in excess of its entitlement under any Project Document following enforcement by the Security Trustee of any Security Document, the Transport Agency shall, on demand, pay the amount of the receipt to the Security Trustee for distribution in accordance with the Security Documents.

2.4 No obligations

Except as specifically provided for in this Deed, the Transport Agency has no obligations (whether express, implied, collateral or otherwise) to the Security Trustee or a Senior Lender in connection with the Project Agreement.

3. Exercise of the Transport Agency's termination rights

3.1 Termination of Project Agreement

- (a) The Transport Agency may give a notice terminating the Project Agreement at any time, on the grounds of a Contractor Default, if:
 - (i) it complies with clause 3.2, clause 3.3 and clause 3.4; and
 - (ii) it is entitled to do so under clause 4.1 (Grounds for termination).
- (b) The Transport Agency may give a notice terminating the Project Agreement (on grounds other than Contractor Default) in accordance with the Project Agreement. This Deed will not apply to termination of the Project Agreement where this clause 3.1(b) applies.

3.2 Termination Notice

The Transport Agency may only terminate the Project Agreement on the grounds of a Contractor Default if the Transport Agency has provided to the Security Trustee:

- (a) in the case of a Remediable Contractor Default:
 - (i) a copy of the Warning Notice that was served on the Contractor in accordance with clause 76.4 (Warning Notice) of the Project Agreement; and
 - (ii) a copy of the Termination Notice that was served on the Contractor in accordance with clause 76.5(b) (Termination Notice) of the Project Agreement; or
- (b) in the case of an Immediate Termination Event, a copy of the Termination Notice that was served on the Contractor under clause 76.5(a) (Termination Notice) of the Project Agreement,

together with, in either case, written details of any other existing liabilities or unperformed obligations under any Project Document of which the Transport Agency is aware at the time of the Termination Notice.

3.3 Timing of Termination Notices

The Transport Agency may only exercise its termination rights under clause 3.2 if it has provided a copy of the Termination Notice to the Security Trustee no less than ■■■ Business Days prior to the Termination Date specified in that Termination Notice.

3.4 Restrictions on termination

The Transport Agency shall not terminate the Project Agreement during any Step-in Period on grounds that the Security Trustee has taken any action referred to in clause 6 (Step-in) or enforced any Security Document(s).

4. Grounds for termination

4.1 Grounds for termination

The Transport Agency may terminate the Project Agreement at any time if it is entitled to do so under the terms of the Project Agreement and this Deed:

- (a) if no Step-in Notice is given by the Security Trustee during the Required Period;
- (b) after service of a Step-out Notice, so long as the grounds constituting a Contractor Default:
 - (i) continue to subsist; and
 - (ii) are not subject to measures satisfactory to the Transport Agency (acting reasonably) to prevent the recurrence of the Contractor Default;
- (c) if amounts, of which the Transport Agency was not aware (having made reasonable enquiry) at the time of the Termination Notice, subsequently become payable and are not discharged on or before the later of:
 - (i) the end of the Required Period;
 - (ii) the date ■■■ Business Days after such amounts have been notified to the Security Trustee; and
 - (iii) the end of any longer period set out in a payment plan which the Security Trustee may request the Transport Agency to consent to having regard to the quantum of the amount payable (such consent not to be unreasonably withheld);
- (d) on grounds arising or occurring during a Step-in Period in accordance with the terms of the Project Agreement provided that where a Remediable Contractor Default arises or occurs during a Step-in Period, the Appointed Representative (jointly and severally with the Contractor) shall be entitled to the right to seek to remedy or prevent recurrence of that Remediable Contractor Default in accordance with clause 76.4 (Warning Notice) of the Project Agreement (as may be extended in accordance with clause 4.2), and for the duration of any Step-in Period the following modifications to the Project Agreement shall be deemed to apply;
 - (i) the Transport Agency shall not be entitled to terminate the Project Agreement on the grounds of any Immediate Termination Event set out in clauses 76.2(a)(i), 76.2(a)(ii), 76.2(a)(viii) or 76.2(a)(vi) of the Project Agreement;

- (ii) the Transport Agency shall not be entitled to terminate the Project Agreement on the grounds of any Remediable Contractor Default set out in clause 76.2(b)(vii) of the Project Agreement;
- (iii) for the purposes of determining whether a Remediable Contractor Default arises or occurs under clause 76.2(b)(iii) of the Project Agreement after the Step-in Date, General Breaches that arose or occurred prior to the Step-in Date shall not be taken into account during the Step-in Period but, subject to clause 9.3 (Effect of transfer), shall be taken into account at the Step-out Date;
- (iv) for the purposes of determining whether a Remediable Contractor Default arises or occurs under clause 76.2(b)(iv) of the Project Agreement after the Step-in Date, Service Failure Points that arose or were incurred prior to the Step-in Date shall not be taken into account during the Step-in Period but, subject to clause 9.3, shall be taken into account at the Step-out Date;
- (v) for the purposes of determining whether a Remediable Contractor Default arises or occurs under clause 76.2(b)(v), clause 76.2(b)(xiv) or clause 76.2(b)(xv) of the Project Agreement during the Step-in Period or whether an Immediate Termination Event arises or occurs under clause 76.2(a)(ix) of the Project Agreement, no representation or warranty made (or deemed to have been made or repeated) prior to the Step-in Date shall be taken into account during the Step-in Period;
- (vi) the Transport Agency shall not be entitled to terminate the Project Agreement on the grounds of an Immediate Termination Event set out in clause 76.2(a)(iv) of the Project Agreement (but only insofar as the Controller Breach is in respect of a sale, transfer or disposal of any beneficial or equitable interest in any or all of the shares in HoldCo General Partner or the Partnership Interests in HoldCo LP) or a Remediable Contractor Default set out in clause 76.2(b)(xii)(A) or clause 76.2(b)(xiii) of the Project Agreement unless the Security Trustee or an Appointed Representative procures or effects a transfer in breach of clause 9 (Novation); and
- (vii) for the purposes of all applicable Immediate Termination Events and Remediable Contractor Defaults (and for the purposes of clause 76.6(b) of the Project Agreement as it relates to the Immediate Termination Events and Remediable Contractor Defaults), the references to 'not acting independently of the Contractor or HoldCo LP' shall be read as 'not acting independently of the Appointed Representative',

provided that sub-paragraph (i) above shall cease to apply from (but excluding) the [REDACTED] of the LSCD Cure Period and sub-paragraphs (ii) to (vi) above shall cease to apply from (but excluding) the Step-out Date;

- (e) on grounds arising or occurring prior to the Step-in Date in respect of that Step-in Period (whether or not continuing at the Step-in Date), if:
 - (i) the grounds arose during the Works Provisioning phase (including, for the avoidance of doubt, any failure to achieve Service Commencement on or prior to the Last Service Commencement Date), and Service Commencement is not achieved by the end of the LSCD Cure Period; or
 - (ii) the grounds arose during the Operating Term, and neither the Appointed Representative nor the Contractor is using all reasonable endeavours (including implementation of any rectification or prevention programme) to remedy any Contractor Default, or put in place measures satisfactory to the Transport Agency (acting reasonably) to prevent the recurrence of the Contractor Default, or where that Contractor Default cannot be remedied, to address the

circumstances which led to, or the event giving rise to or resulting from the Contractor Default that:

- (A) arose prior to the Step-in Date;
 - (B) is continuing; and
 - (C) would have entitled the Transport Agency to terminate the Project Agreement; or
- (f) if the ground for termination arising prior to the Step-in Date was a failure to achieve Service Commencement on or prior to the Last Date for Service Commencement, at any time during the period commencing on the date which is ■ months after the Step-in Date until the end of the LSCD Cure Period if the Security Trustee or the Appointed Representative has not diligently pursued the achievement of Service Commencement on or prior to the end of the LSCD Cure Period.

4.2 Extension to cure periods

Where:

- (a) a Remediable Contractor Default (as modified under paragraph 4.1(d)) arises or occurs during a Step-in Period;
- (b) the Appointed Representative has sought to remedy or prevent recurrence of that Remediable Contractor Default in accordance with clause 76.4 (Warning Notice) of the Project Agreement; and
- (c) the Appointed Representative demonstrates to the Transport Agency (acting reasonably) that:
 - (i) it has been diligently pursuing rectification or prevention (as applicable) consistent with Good Industry Practice, but has not been able to achieve such rectification or prevention within the timeframe permitted under the Project Agreement; and
 - (ii) it is capable of remedying or implementing the Prevention Plan in respect of the Remediable Contractor default (as the case may be) within a specified extended timeframe being no longer than the greater of ■ Business Days and any other period agreed by the Transport Agency (acting reasonably) (the **Extended Cure Period**),

then the period available under clause 76.4 (Warning Notice) of the Project Agreement for the rectification or prevention of recurrence of the Remediable Contractor Default will be extended by the Extended Cure Period.

- (d) A maximum of one Extended Cure Period will apply to each Remediable Contractor Default.

5. Last Service Commencement Date Cure Period

5.1 Extension of LSCD Cure Period

- (a) Where a Step-in Period commences prior to the Service Commencement Date:
 - (i) the definition of Relevant Service Commencement Date in the Project Agreement shall be read, for the duration of that Step-in Period, as follows:

Relevant Service Commencement Date means:

- (a) as at any date on or prior to the Planned Service Commencement Date, the Planned Service Commencement Date; or
- (b) as at any date after the Planned Service Commencement Date, the [REDACTED] of the then current LSCD Cure Period (as defined in the Financier Direct Deed);
- (ii) any relief to be provided in relation to a Compensation Extension Event will be limited to the relief that would be provided if that Compensation Extension Event was an Extension Event only;
- (iii) clause 38.5(b)(i) (Where relief is not available) of the Project Agreement shall not apply for the duration of that Step-in Period;
- (iv) the LSCD Cure Period shall be extended by [REDACTED] for each day of relief determined to be available (by the Independent Reviewer or the Transport Agency, as applicable) as a result of any Extension Event that:
 - (A) occurs prior to the Step-in Date, but continues to have consequences for which relief is available under the Project Agreement following the Step-in Date; or
 - (B) occurs during the Step-in Period;
- (v) if during the LSCD Cure Period an Event occurs in respect of which relief has yet to be finally determined in accordance with the Project Agreement prior to the end of the then current LSCD Cure Period:
 - (A) the LSCD Cure Period shall be extended until such time as such relief is finally determined; and
 - (B) if relief is determined to be available for such Event, paragraph (iv) shall apply in respect of such relief (with the number of days of relief to be reduced by the number of days of extension under (A) above).
- (b) The Transport Agency acknowledges and agrees that, if during a Step-in Period, the Transport Agency exercises its step-in rights under Part 17 (Transport Agency Step-in) of the Project Agreement:
 - (i) the LSCD Cure Period will be extended by the number of days of the Transport Agency's Step-in Period (as defined in the Project Agreement); and
 - (ii) any requirement to diligently pursue Service Commencement, or to take the actions referred to in clause 3.4 (Restrictions on termination), shall be suspended for the period during which the Transport Agency exercises its rights under Part 17 of the Project Agreement.
- (c) Without limiting the other provisions of this clause, the Security Trustee or the Appointed Representative may request the Transport Agency to consent to an extension to the LSCD Cure Period for a reasonable period, and such consent may not be unreasonably withheld or delayed if the Security Trustee or Appointed Representative demonstrates to the reasonable satisfaction of the Transport Agency that the Security Trustee or Appointed Representative:
 - (i) has complied with the requirement to diligently pursue in accordance with clause 4.1(f) (Grounds for termination);

- (ii) has provided the Transport Agency with a plan (including reasonable particulars) setting out the steps that the Security Trustee or Appointed Representative will take during the extended LSCD Cure Period to remedy the relevant Contractor Default; and
- (iii) Service Commencement is expected to occur during that reasonable period of extension.

5.2 Diligent Pursuit

For the purposes of this Deed, in assessing what can be achieved by diligent pursuit and in assessing whether there has been a failure to diligently pursue or assessing compliance with clause 3.4 (Restrictions on termination), regard must be had to the effect of any Event as well as to any time reasonably necessary to enforce any Major sub-contract, or to engage a substitute Major Sub-contractor in accordance with the terms of this Deed.

6. Step-in

6.1 Step-in Notice

Subject to clause 6.2 and clause 6.3 and without prejudice to the Security Trustee's rights under the Senior Financing Agreements, the Security Trustee may give the Transport Agency a Step-in Notice at any time:

- (a) during which an Event of Default is subsisting (whether or not a Termination Notice has been served); or
- (b) during a Required Period.

6.2 Details of Step-in Notice

The Security Trustee shall give the Transport Agency not less than ■ Business Days' prior written notice (or, where a voluntary administrator has been appointed to the Contractor, not less than ■ Business Day's prior written notice) of:

- (a) its intention to issue a Step-in Notice;
- (b) the identity of the proposed Appointed Representative; and
- (c) reasonable detail of any Event of Default leading to the intention to issue a Step-in Notice,

provided that where the proposed Appointed Representative is a Representative within paragraph (d) of the definition of Representative, the Security Trustee must give the Transport Agency not less than ■ Business Days' prior written notice in accordance with this clause.

6.3 Appointed Representatives

- (a) If the Security Trustee has issued a Step-in Notice in accordance with clauses 6.1 and 6.2, the appointment of a Representative within paragraphs (a) to (c) of the definition of Representative will be effective for all purposes under this Deed, and the Transport Agency will not be entitled to challenge or dispute the effectiveness of any such appointment.

- (b) Subject to paragraph (c) the Security Trustee shall not appoint a Representative within paragraph (d) of the definition of Representative unless it has obtained the prior written approval of the Transport Agency, which approval may only be withheld if the Transport Agency considers that the proposed Representative is an Unsuitable Third Party.
- (c) If, where paragraph (b) above applies:
 - (i) the Transport Agency notifies the Security Trustee within ■ Business Days after its receipt of a notice under clause 6.2 that the proposed Appointed Representative is an Unsuitable Third Party, the notice under clause 6.2 proposing that Appointed Representative will be deemed to be withdrawn; and
 - (ii) If the Transport Agency does not notify the Security Trustee within ■ Business Days after its receipt of a notice under clause 6.2 that the proposed Appointed Representative is an Unsuitable Third Party, the proposed Appointed Representative will be deemed not to be an Unsuitable Third Party for the purpose of clause 6.3(a).

6.4 Assumption of rights

On and from the issue of the Step-in Notice:

- (a) the Appointed Representative shall assume, jointly and severally with the Contractor, the rights (but not the obligations) of the Contractor under all Project Documents until the end of the Step-in Period; and
- (b) the Contractor shall remain solely responsible for the performance of its obligations under the Project Documents until the end of the Step-in Period.
- (c) For the avoidance of doubt, the Step-in Notice must relate to all rights of the Contractor under all Project Documents and cannot apply only to some of those rights.
- (d) The Transport Agency acknowledges that, without limiting the liability of the Contractor, no Representative is or will be, solely by reason of:
 - (i) the creation of the Security Interests under the Senior Financing Agreements;
 - (ii) the entry into this Deed or any other Senior Financing Agreement; or
 - (iii) the taking of enforcement action or the exercise of any powers under the Security Documents or this Deed,

liable for any obligation or liability of the Contractor under the Project Documents (or for any greater such obligation or liability) than it would have been liable for but for the relevant thing described in (i) to (iii) above (inclusive), but nothing in this sub-paragraph (d) affects the liability of the Security Trustee under this Deed.

6.5 Dealings with Appointed Representative

During the Step-in Period, the Transport Agency shall deal with the Appointed Representative and not the Contractor (provided nothing in this clause shall preclude the Transport Agency from continuing to communicate with Contractor Personnel to the extent it considers necessary in connection with the Services).

6.6 Operation of Project Agreement during Step-in Period

During the Step-in Period the Transport Agency will be entitled to exercise its rights under the Project Agreement in accordance with its terms (except to the extent modified by this Deed) and, without limitation, will continue to be entitled to make Deductions or Charges in accordance with Schedule 13 (Performance Regime) of the Project Agreement.

7. Step-out

7.1 Step-out Notice

The Appointed Representative may at any time during the Step-in Period, serve a Step-out Notice on the Transport Agency, specifying the Step-out Date.

7.2 Step-out Date

On the Step-out Date:

- (a) the rights of the Appointed Representative against the Transport Agency will be cancelled;
- (b) the Transport Agency will no longer deal with the Appointed Representative, and will instead deal with the Contractor in connection with the Project Documents; and
- (c) without prejudice to the Transport Agency's rights against the Contractor, the Appointed Representative will be released from any obligations and liabilities to the Transport Agency in connection with that Step-in Period from that date on.

7.3 Continuing obligations

The Contractor shall continue to be bound by the terms of the Project Documents, notwithstanding the issue of a Step-in Notice, the occurrence of a Step-in Period, the passing of a Step-out Date, any action by the Security Trustee or the Appointed Representative or any Senior Lender and/or any provision of this Deed.

8. Replacement of Major Sub-contractors

8.1 Application

This clause 8 will apply if, during a Step-in Period, the Security Trustee or an Appointed Representative intends to replace a Major Sub-contractor, and any replacement of a Major Sub-contractor under this clause shall be deemed to be approved by the Transport Agency for the purposes of clause 16 (Sub-contractors) of the Project Agreement. Any replacement of a Major Sub-contractor in accordance with this clause 8 shall not constitute an Immediate Termination Event under clause 76.2(a)(iii) of the Project Agreement, or a Remediable Contractor Default under clause 76.2(b)(xii)(B) of the Project Agreement.

8.2 Replacement of Major Sub-contractor

If, during a Step-in Period, the Security Trustee or an Appointed Representative intends to replace a Major Sub-contractor:

- (a) clause 16 (Sub-contractors) of the Project Agreement will apply; and

- (b) for the purposes of clause 16(1)(i) of the Project Agreement, the only grounds on which the Transport Agency may withhold its consent to the appointment of the proposed replacement Major Sub-contractor is if that person is not a Suitable Substitute Sub-contractor.

9. Novation

9.1 Transfer to Suitable Substitute Contractor

Subject to clause 9.2, at any time:

- (a) during which an Event of Default is subsisting; or
- (b) during a Step-in Period,

the Security Trustee may, on ■■■ Business Days' prior written notice to the Transport Agency and the Appointed Representative, procure the transfer of the Contractor's rights and obligations under the applicable Project Documents to a Suitable Substitute Contractor. For the avoidance of doubt, the transfer must relate to all rights and obligations of the Contractor under those documents and cannot apply only to some of those rights and obligations.

9.2 Suitable Substitute Contractor

- (a) At the time the Security Trustee notifies the Transport Agency of a proposed transfer pursuant to clause 9.1, the Security Trustee must provide the Transport Agency with details of the identity of the proposed transferee, a copy of the proposed contract pursuant to which such transfer will occur and any further information about the proposed transferee that the Transport Agency may reasonably require to determine whether the proposed transferee is a Suitable Substitute Contractor.
- (b) The Transport Agency shall notify the Security Trustee whether any person to whom the Security Trustee proposes to transfer the Contractor's rights and liabilities under the Project Documents is a Suitable Substitute Contractor, on or before the date falling ■■■ Business Days after the date of receipt of all information reasonably required by the Transport Agency to decide whether the proposed transferee is a Suitable Substitute Contractor.
- (c) The Transport Agency shall not withhold its consent to a proposed transferee under paragraph (b) unless:
 - (i) the proposed transferee is not, in the Transport Agency's reasonable opinion, a Suitable Substitute Contractor; and/or
 - (ii) there are unremedied Contractor Defaults and no Rectification Programme or Prevention Plan required under the Project Agreement or this Deed has been proposed to the Transport Agency's reasonable satisfaction in respect of the Contractor Defaults.
- (d) Any consent by the Transport Agency does not constitute a waiver of any unremedied Contractor Default.

9.3 Effect of transfer

- (a) On any transfer to a Suitable Substitute Contractor becoming effective:
 - (i) the Contractor and the Appointed Representative shall be released from any obligations arising on and from that date under or in connection with this Deed

and the Project Documents, and the Suitable Substitute Contractor shall become liable for obligations arising on and after that date;

- (ii) any accrued Service Failure Points under the Project Agreement shall be cancelled;
 - (iii) any then-subsisting ground for termination of the Project Agreement by the Transport Agency shall be deemed to have no effect and any subsisting Warning Notice or Termination Notice shall be automatically revoked; and
 - (iv) the Transport Agency shall enter into a financier direct deed with the Suitable Substitute Contractor and the lenders (or agent or trustee acting on their behalf) to that Suitable Substitute Contractor, on substantially the same terms as this Deed.
- (b) The Transport Agency acknowledges and agrees that a novation in accordance with this clause 9 shall not constitute a breach of clause 90.3 (Assignment by Contractor) of the Project Agreement or an Immediate Termination Event under clause 76.2(a)(iv) of the Project Agreement.

9.4 Transfer of ownership of Contractor

- (a) If:
- (i) clause 9.1 applies; and
 - (ii) the Security Trustee wishes to procure the transfer of ownership or Control of the Contractor rather than procuring the transfer of the Contractor's rights and liabilities under the Project Agreement and the TG Project Lease,
- then:
- (iii) subject to paragraphs (iv) and (v) below, this clause 9 shall apply (*mutatis mutandis*);
 - (iv) without prejudice to the Transport Agency's rights under clause 9.2, it will be reasonable for the Transport Agency to withhold its consent to any Change of Ownership on the same grounds on which it could withhold its consent under, or in circumstances that would otherwise breach, the Project Agreement; and
 - (v) if consent is given to the Change of Ownership, the Contractor shall be deemed to be a Suitable Substitute Contractor for the purposes of this Deed.
- (b) The Transport Agency acknowledges and agrees that a transfer in accordance with this clause 9.4 shall not constitute a Shareholder Breach or a breach of clause 76.2(b)(xiii) of the Project Agreement.

10. Amendment of Project Documents

10.1 No Alteration without consent

The Transport Agency undertakes for the benefit of the Senior Lenders that:

- (a) until the Senior Debt is repaid in full; or
- (b) until termination of the Project Agreement,

(whichever is the first to occur) it will not make any modification, variation or amendment (each an **Alteration**) to the terms of any Project Document without the consent of the Security Trustee as set out in clause 10.2. For the purposes of this clause 10 **Project Documents** includes the Project Agreement and all schedules to the Project Agreement, but excludes any Operative Documents.

10.2 Consent regime

- (a) The Security Trustee undertakes for the benefit of the Transport Agency that it will not unreasonably withhold or delay its consent to any proposed Alteration to any Project Document.
- (b) The Transport Agency:
 - (i) shall be entitled to rely for all purposes on any copy of the Security Trustee's written consent to any Alteration, where provided by the Contractor to the Transport Agency; and
 - (ii) shall have no obligation to verify the substance or form of any such consent with the Security Trustee or to otherwise make any request directly to the Security Trustee for its consent to an Alteration.
- (c) Where the Security Trustee does not respond to a written request for its consent to an Alteration within ■ Business Days after receipt of the same, it will be deemed to have given its consent and paragraph (d) will apply.
- (d) For the purposes of paragraph (c), the Transport Agency shall be entitled to rely for all purposes on:
 - (i) a copy of the written request for an Alteration as provided by the Contractor to the Security Trustee; and
 - (ii) written confirmation from the Contractor, provided at any time after the end of the ■ Business Day period referred to in paragraph (c), that the Security Trustee did not respond to the request for Alteration within this period,

and will be entitled to proceed with any Alteration on the basis of the Security Trustee's deemed consent.

■ [Redacted]

■ [Redacted]

[Redacted]

■ [Redacted]

[Redacted]

■ [Redacted]

■ [REDACTED]

■ [REDACTED]
[REDACTED]
[REDACTED]

■ [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

12. Tender process

The Transport Agency shall, in undertaking the Tender Process and establishing the Highest Compliant Tender Price under Part 3 of Schedule 18 (Calculation of Compensation on Termination) of the Project Agreement, owe a duty of reasonable care to the Security Trustee to obtain the best price reasonably obtainable at the time the Tender Process is undertaken.

13. Miscellaneous

13.1 Perfecting transfer or release

The Transport Agency shall, at the Contractor's expense, take whatever action the Security Trustee, the Appointed Representative or a Suitable Substitute Contractor taking a transfer in accordance with clause 9.1 (Transfer to a Suitable Substitute Contractor) may reasonably require to perfect any transfer or release under clauses 8 (Replacement of Major Sub-contractors) or 9 (Novation), including the execution of any transfer or assignment, and the giving of any notice, order or direction and the making of any registration which, in each case, the Security Trustee, Appointed Representative or Suitable Substitute Contractor reasonably requires.

13.2 No action to wind up Contractor

The Transport Agency shall not take any action during the term of this Deed to wind up, appoint a receiver, a receiver and manager, an administrative receiver, a liquidator or an administrator or sanction a compromise (or similar arrangement) in relation to the Contractor.

13.3 Term

This Deed shall remain in effect until the earlier of:

- (a) the date on which all amounts that may be or become owing by the Contractor to the Senior Lenders under the Senior Financing Agreements have been irrevocably paid in full and the Security Interests created under the Security Documents have been released by the Security Trustee, except where such repayment or release occurs in connection with a Refinancing permitted under the terms of the Project Agreement in circumstances where the benefit of this Deed continues to be held by the Security Trustee (or a replacement Security Trustee) under the security trust constituted under the existing Security Trust Deed for the benefit of the new Senior Lenders and other finance parties providing the new Senior Debt;
- (b) the date of termination or expiry of the Project Agreement; or

- (c) the date of transfer of the Contractor's rights and liabilities under the Project Documents to a Suitable Substitute Contractor pursuant to clause 9.1 (Transfer to Suitable Substitute Contractor), so long as the requirements of clause 9.3(a) (Effect of Transfer) have then been observed and performed.

13.4 **Security Trustee to notify the Transport Agency**

The Security Trustee shall promptly notify the Transport Agency of:

- (a) any decisions to accelerate the maturity of any amounts owing by the Contractor to a Senior Lender under the Senior Financing Agreements and/or any decisions to demand repayment; and
- (b) the date referred to in clause 13.3(a) on or before the date falling [REDACTED] Business Days after its occurrence.

13.5 **Contractor acknowledgment**

The Contractor joins in this Deed to acknowledge and consent to the arrangements set out and agrees not knowingly to do or omit to do anything that may prevent any party from enforcing its rights under this Deed and shall do all such acts, matters and things as may be required of it to give effect to the provisions of this Deed, including clause 9 (Novation).

14. **Notices**

14.1 **Method of giving notices**

A notice, consent, approval or other communication (each a **Notice**) under this Deed must:

- (a) be in writing addressed to the address of the recipient from time to time designated for the purpose by the addressee to the other parties. The initial address of each party is set out under its name on the execution pages of this Deed; and
- (b) be signed by an authorised representative of the sender.

14.2 **Notice effective**

- (a) No notice or other communication is to be effective until it is received.
- (b) A communication will be deemed to be received:
 - (i) in the case of a letter, on the [REDACTED] Business Day after posting (with all postage paid);
 - (ii) in the case of a facsimile, [REDACTED] on which it is dispatched or, if dispatched after [REDACTED] (in the place of receipt) on [REDACTED] after the date of dispatch;
 - (iii) in the case of an email, [REDACTED] on which it arrives in the recipient's information system (provided that if it is received in that system after [REDACTED] on a Business Day, then it will be deemed to be received on the [REDACTED]), provided that if there is any dispute as to whether an email has been received, the email shall only be deemed to have been received at that time where the party giving notice produces a printed copy of the email which evidences that the email was sent to the email address of the party given notice; and

(iv) in the case of personal delivery, [REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

16. Dispute Resolution

16.1 Interaction between termination and Dispute Resolution

- (a) The parties acknowledge that the Transport Agency is entitled to give a Termination Notice under the Project Agreement regardless of whether a Dispute has been referred to dispute resolution in accordance with Part 21 (Dispute Resolution) of the Project Agreement.
- (b) Where, following the issue of a Termination Notice:
 - (i) the Transport Agency seeks to exercise its rights to terminate the Project Agreement; and
 - (ii) the Security Trustee refers any such action to dispute resolution in accordance with clause 16.2,

the parties agree that the Project Agreement shall not be terminated unless and until the dispute resolution procedures have been finally resolved and the outcome of the dispute resolution procedure is that the Transport Agency is permitted to terminate the Project Agreement in accordance with its terms and this Deed.

16.2 Dispute resolution under this Deed

- (a) If there is a dispute arising in relation to any aspect of this Deed or the subject matter of this Deed, then any party may refer the dispute to be determined in accordance with Part 21 (Dispute Resolution) of the Project Agreement applied *mutatis mutandis*.
- (b) Despite the existence of a Dispute or the referral of the Dispute for resolution under this clause 16.2:
 - (i) the Contractor must continue Works Provisioning, performing the Operational Services and performing its other obligations under the Project Agreement; and
 - (ii) the Transport Agency will continue to perform its obligations under this Deed and the Project Agreement and may exercise its rights under this Deed and the Project Agreement without regard to the existence of the Dispute, while that Dispute has not been resolved pursuant to this clause 16.2.

17. General

17.1 Counterparts

This Deed may be signed in any number of counterparts all of which, when taken together, constitute one and the same instrument. A party may enter into this Deed by executing any counterpart.

17.2 Severability

If any provision of this Deed is or becomes unenforceable, illegal or invalid for any reason, the relevant provision shall be deemed to be modified to the extent necessary to remedy such unenforceability, illegality or invalidity. If such modification is not possible, then such

provision shall be severed from this Deed without affecting the enforceability, legality or validity of any other provision of this Deed.

17.3 **Waiver**

Any delay, failure or forbearance by a party to exercise (in whole or in part) any right, power or remedy under, or in connection with, this Deed shall not operate as a waiver of such right, power or remedy. A waiver of any breach of any provisions of this Deed shall not be effective unless that waiver is in writing and is signed by the party against whom that waiver is claimed. A waiver of any breach shall not be, or be deemed to be, a waiver of any other or subsequent breach.

17.4 **Legal fees**

If any legal action or other proceeding is brought for the enforcement of an obligation under this Deed, the prevailing party shall be entitled to legal fees and other costs incurred in that action or proceeding on a solicitor / client basis (subject to review under the Lawyers and Conveyancers Act 2006) in addition to any other relief to which it may be entitled.

17.5 **Public disclosure**

All public disclosure by the Contractor or the Security Trustee relating to this Deed, including promotional or marketing material (but not including any announcement intended solely for internal distribution or any disclosure required by legal, accounting or regulatory requirements), shall be co-ordinated with and must first be approved in writing by the Transport Agency prior to its release.

17.6 **Entire agreement**

This Deed and the other Project Documents (to which two or more parties are a party) constitute the entire agreement between the parties and together supersede and extinguish all prior agreements and understandings between the parties about their respective subject matters.

17.7 **Amendments in writing**

No amendment to this Deed will be effective unless it is in writing and signed by duly authorised signatories of all the parties.

17.8 **Assignment and related matters**

- (a) No party to this Deed may assign or transfer any part of its rights or obligations under this Deed, unless permitted to do so pursuant to clause 17.8(b), clause 17.8(c) or clause 17.8(d).
- (b) The Security Trustee may assign or transfer its rights and obligations under this Deed to a successor Security Trustee in accordance with the Senior Financing Agreements without the consent of the Transport Agency.
- (c) Any Senior Lender may assign or transfer its rights under the Senior Financing Agreements in accordance with the terms of the Senior Financing Agreements.
- (d) The Transport Agency must assign, novate or otherwise transfer its rights and/or obligations under this Deed to any person that the Transport Agency assigns, novates or otherwise transfers its rights and/or obligations under the Project Agreement in accordance with clause 90.2 (Assignment by the Transport Agency) of the Project Agreement and must procure that the transferee enters into a deed in favour of the

Security Trustee, in a form acceptable to the Security Trustee (acting reasonably) binding itself to the terms of this Deed.

■ [REDACTED]

- (f) If the Security Trustee resigns or is replaced pursuant to the terms of the Senior Financing Agreements, then such resignation or replacement shall not be effective until a new agent has acceded to and has agreed to become bound to the terms of this Deed.
- (g) Notwithstanding the terms of this clause 17.8, the Contractor shall be permitted to assign its rights under this Deed by way of security as part of the Security Interests referred to in clause 2.1 (Consent to Security).

17.9 **Governing Law and jurisdiction**

This Deed is governed by, and is to be construed in accordance with, the Laws of New Zealand. Each party irrevocably submits to the non-exclusive jurisdiction of the New Zealand courts for the purpose of hearing and determining all disputes under or in connection with this Deed.

17.10 **Contractual Remedies Act 1979**

The remedies of damages and cancellation as against the Security Trustee or any other Senior Lender under or in connection with the assignment by way of security of the Contractor's rights under the Project Agreement and each other Project Document made pursuant to the Financing Agreements are hereby expressly excluded for the purpose of section 11 of the Contractual Remedies Act 1979 and the parties agree that this clause shall be deemed to take effect as an amendment to the Project Agreement and each other Project Document (as applicable).

Execution

Executed and delivered as a Deed.

SIGNED by the **New Zealand Transport Agency**, a crown entity established on **1 August 2008** by **section 93 of the Land Transport Management Act 2003** by its attorney in the presence of :

Signature

Witness Signature

Print Attorney Name

Print Name

Witness Occupation

Place of residence

CERTIFICATE OF NON-REVOCATION OF POWER OF ATTORNEY

I, Geoff Dangerfield, of New Zealand, Chief Executive, certify:

1. that by deed dated 25 August 2008, the New Zealand Transport Agency, of Wellington New Zealand, a Crown entity, appointed me as its attorney.
2. that I have not received notice of any event revoking the power of attorney.

Signed at Wellington on _____ July 2014

Geoff Dangerfield

[SIGNED by the Security Trustee

Execution blocks to be added]

[SIGNED by Wellington Gateway Partnership No. 2 LP

Execution blocks to be added]

[REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

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- [REDACTED]
- [REDACTED]
- [REDACTED]

Annexure 2: Major Sub-contractor's Direct Deed

Major Sub-contractor's Direct Deed

relating to

Transmission Gully PPP

**The New Zealand Transport Agency, a crown entity established on
1 August 2008 by section 93 of the Land Transport Management
Act 2003**

the Transport Agency

and

[insert name of major sub-contractor] Limited

Major Sub-contractor

and

Wellington Gateway Partnership No. 2 LP

Contractor

Date

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This **Major Sub-contractor's Direct Deed** is made on 2014

between (1) **The New Zealand Transport Agency, a crown entity established on 1 August 2008 by section 93 of the Land Transport Management Act 2003 (Transport Agency)**

and (2) **[insert name of major sub-contractor] Limited (Major Sub-contractor)**

and (3) **Wellington Gateway Partnership No. 2 LP (Contractor)**

Introduction

- A. The background to the Project is set out in the Project Agreement.
- B. The Contractor has subcontracted its obligations under the Project Agreement to [*insert description of subcontracted obligations*] to the Major Sub-contractor, pursuant to the Major Sub-contract.
- C. The parties agree that the Transport Agency will have the option of exercising certain rights in relation to the Major Sub-contract, on the terms set out in this Deed.

It is agreed

Part 1 – Definitions and Interpretation

1. Definitions

1.1 Project Agreement

Definitions in the Project Agreement apply in this Deed unless the relevant term is defined in this Deed.

1.2 Definitions

In this Deed, unless the context otherwise requires, the following terms have the following meanings:

Additional Obligor means an entity that is wholly owned by the Transport Agency or a Successor Governmental Entity;

Additional Obligor Step-in Notice has the meaning given to it in clause 8.1(a)(iv);

Additional Obligor Step-out Date has the meaning given to it in clause 9(d);

Affiliate means in respect of the Major Sub-contractor or the Contractor (as applicable):

- (a) any holding company or subsidiary of the Major Sub-contractor or the Contractor (as applicable) or another subsidiary of that holding company; or

- (b) any company, body corporate or partnership (including a limited partnership) where 50% or more of the votes exercisable, directly or indirectly, at a meeting or partners meeting, or more than 50% of the profits of which, are controlled by such person;

Assumption Date has the meaning given to it in clause 9(a);

Builder Consent Deed means the deed entitled 'Builder Consent Deed – Transmission Gully PPP Project' dated on or about the date of this Deed between the Contractor, the Major Sub-contractor and the Security Trustee; [*Definition is only applicable for the Direct Deed with the Construction Sub-contractor*]

Consent Date has the meaning given to it in clause 11.4(a);

Contractor Default has the meaning given to it (or to the term "Event of Default" as that term relates to the default of the Contractor) in the Major Sub-contract;

Contractor's Rights has the meaning given to it in clause 9(b)(i)(A);

Default Event means:

- (a) any breach by the Contractor of its obligations under the Major Sub-contract; or
- (b) any other event or circumstance,

that alone or with the giving of notices or passage of time or both, entitles the Major Sub-contractor to terminate, rescind, accept the repudiation of, or suspend [(other than a Payment Suspension Event which shall not be a Default Event under this Deed)] any or all of the Major Sub-contractor's obligations under the Major Sub-contract but only where any such breach, event or circumstances has not been remedied within any relevant cure period set out in the Major Sub-contract or at Law; [*insert is only applicable for the Direct Deed with the Construction Sub-contractor*]

Default Event Notice has the meaning given to it in clause 6.2(a);

Intervention Failure has the meaning given to it in clause 12.1 (Rights preserved);

Major Sub-contract means that agreement dated on or around the date of this Deed between the Contractor and the Major Sub-contractor, with respect to the Project;

Major Sub-contract Documentation means the Major Sub-contract and each other bank guarantee, performance bond, stand-by letter of credit or other guarantee or security held by the Contractor to secure the obligations of the Major Sub-contractor under the Major Sub-contract;

Major Sub-contractor Notice has the meaning given to it in clause 6.2(c);

MSDD Dispute has the meaning given to in clause 18 (Dispute resolution);

Notice of MSDD Dispute has the meaning given to it in clause 18 (Dispute resolution);

Novation Agreement has the meaning given to it in clause 11.4(b)(ii);

Novation Effective Date means the date of commencement of the performance of the obligations under the Novation Agreement, as set out in the Novation Agreement;

O&M Consent Deed means the deed entitled 'O&M Consent Deed – Transmission Gully PPP Project' dated on or about the date of this Deed between the Contractor, the Major Sub-

contractor and the Security Trustee; [*Definition is only applicable for the Direct Deed with the O&M Sub-contractor*]

Parent Company means [REDACTED];

Parent Company Guarantee means the guarantee given by the Parent Company in respect of the obligations of the Major Sub-contractor in favour of, amongst others, the Contractor;

Power means any power, right, authority, discretion or remedy, whether express or implied;

Project Agreement means that agreement dated on or around the date of this Deed, between the Contractor and the Transport Agency, with respect to the Project;

Proposed Novation Date has the meaning given to it in clause 11.1(b);

Proposed Novation Notice has the meaning given to it in clause 11.1(a);

Proposed Substitute has the meaning given to it in clause 11.1(a)(iii);

Related Loss has the meaning given to it in clause 23.11 (Related Loss);

Revised Proposed Novation Notice has the meaning given to it in clause 11.3(e)(i);

Services means the services required to be performed by the Major Sub-contractor, for the Contractor, pursuant to the terms of the Major Sub-contract;

Statement Beneficiary means the Transport Agency or an Additional Obligor;

Step-in Date means the date on which the Major Sub-contractor receives notice from the Transport Agency of the exercise of any Step-in Right;

Step-in Period has the meaning given to it in clause 8.1(b);

Step-in Right means each right exercisable by the Transport Agency and/or an Additional Obligor pursuant to clause 8.1(a);

Step-out means the Transport Agency ceasing to exercise its Step-in Rights;

Step-out Date means the date on which Step-out occurs;

Sub-contractor means a person engaged by the Major Sub-contractor to act as a sub-contractor for the purposes of the Project;

Successor Governmental Entity means any Governmental Entity that is the transferee or successor in title to the rights and obligations of the Transport Agency under the Project Agreement; and

Termination Grounds has the meaning given to it in clause 6.3 (Termination Grounds).

2. Interpretation

2.1 Interpretation

In this Deed, unless the context otherwise requires:

- (a) a reference to a clause is a reference to a clause of this Deed;
- (b) a gender includes each other gender;
- (c) the singular includes the plural and vice versa;
- (d) a reference to a person includes:
 - (i) a partnership and also a body of persons, whether corporate or unincorporated; and
 - (ii) its respective successors in title and permitted assigns;
- (e) a reference to documentation includes:
 - (i) a reference to that document as varied, supplemented, novated or substituted from time to time; and
 - (ii) a reference to that documentation in any form, whether paper based or in electronic form encoded on or as part of any form of media;
- (f) a reference to materials means a reference to materials of any kind whether in the form of documentation, software, hardware, componentry or otherwise;
- (g) any agreement not to do a thing also constitutes an agreement not to suffer or permit or cause that thing to be done;
- (h) any reference to a consent requires the prior written consent of the party required to give that consent;
- (i) whenever the words “includes” or “including” are used in this Deed, they are deemed to be followed by the words “without limitation”;
- (j) a reference to any legislation includes a modification of that legislation or legislation enacted in substitution for that legislation and a regulation, order-in-council and other instrument from time to time issued or made under that legislation;
- (k) headings and the table of contents are included for the purpose of ease of reference only and are not to have any effect on construction and interpretation;
- (l) the “Introduction” forms part of this Deed;
- (m) a reference to days, other than Business Days, is a reference to any calendar day of the year;
- (n) a reference to currency is a reference to New Zealand currency;
- (o) if an obligation falls to be performed or a right is to be exercised on or by a day that is not a Business Day then, unless otherwise specified, that obligation is due to be performed or that right may be exercised on the Business Day next following that day;

- (p) a reference to a right or obligation of any two or more persons confers that right, or imposes that obligation, as the case may be, jointly and severally;
- (q) none of the terms nor any of the parts of this Deed are to be construed against a party, by reason of the fact that that term or that part was first proposed or was drafted by that party; and
- (r) a party who has an obligation is to perform that obligation at its own cost, unless a term of this Deed expressly provides otherwise.

2.2 **Priority of documents**

- (a) To the extent of any inconsistency between this Deed and the Major Sub-contract, this Deed will prevail.
- (b) To the extent of any inconsistency between this Deed and the Project Agreement, the Project Agreement will prevail.

2.3 **Joint and several liability**

If the Major Sub-contractor comprises more than one person:

- (a) the obligations of those persons are joint and several;
- (b) a reference to the Major Sub-contractor is a reference to each of those persons separately, so that (for example), a representation, warranty or undertaking is given by each of them separately; and
- (c) the Contractor or the Transport Agency may proceed against any or all of them for any failure of the Major Sub-contractor to comply with any obligation under this Deed or otherwise.

2.4 **Construction Contracts Act 2002**

If and to the extent that the Major Sub-contract comprises a construction contract as defined in the Construction Contracts Act 2002, this Deed will be subject to the Construction Contracts Act 2002.

2.5 **Commencement**

The rights and obligations of the parties under this Deed commence on Financial Close.

2.6 **Contractor's role**

The Contractor is bound by, and must co-operate in the implementation of, this Deed. It acknowledges that this Deed is intended to benefit the Major Sub-contractor and the Transport Agency and does not in any way affect any obligation of the Contractor under the Major Sub-contract or under any Project Document.

Part 2 – Acknowledgements

3. Acknowledgements by Major Sub-contractor

- (a) The Major Sub-contractor acknowledges the Transport Agency's rights under the Project Agreement.
- (b) The Major Sub-contractor agrees with the Transport Agency that the Major Sub-contractor will use its best endeavours to exercise its rights under the Major Sub-contract in a way that facilitates the effective exercise by the Transport Agency of the Transport Agency's rights under the Project Agreement and will on reasonable notice permit one or more delegates of the Transport Agency to have access to, and take copies of, the records, reports, documents and other papers to which the Transport Agency is entitled to have access pursuant to the Project Agreement to the extent that:
 - (i) such items are in the possession of the Major Sub-contractor or any third party acting on its behalf; and
 - (ii) compliance with this clause 3(b) would not cause the Major Sub-contractor to breach any obligation of confidence that it owes to any other person or to infringe the Intellectual Property rights of any third party,

and subject always to the Transport Agency entering into a confidentiality undertaking in a form reasonably acceptable to the Major Sub-contractor prior to the Major Sub-contractor being required to provide access to such records, reports, documents and other papers.

- (c) During the period in which the Transport Agency is exercising its Step-in Rights under Part 17 (Termination) of the Project Agreement, the Transport Agency may in accordance with the Project Agreement require the suspension or the continuation of performance by the Major Sub-contractor of its obligations under the Major Sub-contract subject to and in accordance with the terms of the Major Sub-contract and, if it does so, the Major Sub-contractor agrees that it will comply with this requirement and with all reasonable directions of the Transport Agency made in accordance with this Deed or the Major Sub-contract in relation to the performance of the Major Sub-contract by the Major Sub-contractor during such period.
- (d) The requirement of the Transport Agency that the Major Sub-contractor either suspend or continue to perform its obligations under the Major Sub-contract and the giving of any direction under clause 3(c) by the Transport Agency will not, except to the extent expressly acknowledged by the Transport Agency in writing, be construed as an assumption by the Transport Agency of any obligations of the Major Sub-contractor under or in relation to the Major Sub-contract and will not in itself constitute a breach by the Major Sub-contractor of the Major Sub-contract.
- (e) The Major Sub-contractor will not subcontract any of its obligations under the Major Sub-contract without the prior written consent of the Transport Agency where so required pursuant to clause 16 (Sub-contractors) of the Project Agreement.
- (f) The Major Sub-contractor acknowledges and agrees that any payment by the Transport Agency of a sum outstanding under the Major Sub-contract shall be deemed to constitute payment of such sum by the Contractor for the purposes of the Construction Contracts Act 2002.

4. Acknowledgements in relation to Major Sub-contract

The Contractor and the Major Sub-contractor acknowledge and agree that:

- (a) any information, data and documents (including Transport Agency Information) provided by the Transport Agency:
 - (i) are provided for information purposes only (except any specific reports that the Transport Agency may procure directly for the benefit of, and reliance on by, the Contractor, as may be advised by the Transport Agency prior to the date of this Deed, and subject to any limitations specified by the Transport Agency) and all of the Transport Agency's or Transport Agency Related Persons' Intellectual Property rights therein remain the property of the Transport Agency or the Transport Agency Related Person (as the case may be); and
 - (ii) do not form part of this Deed or constitute an invitation, offer or recommendation by or on behalf of the Transport Agency or any Transport Agency Related Person;
- (b) to the extent permitted by Law, neither the Transport Agency nor any Transport Agency Related Person will have any Liability to the Major Sub-contractor or any of its Affiliates, nor will the Major Sub-contractor or any of its Affiliates be entitled to make, continue or enforce any Claim against, or seek, pursue or obtain an indemnity against or contribution to Liability from the Transport Agency or any of the Transport Agency Personnel arising out of or in respect of or in connection with:
 - (i) the provision of any information, data and documents (including the Transport Agency Information) referred to in clause 4(a);
 - (ii) any reference to the Transport Agency in the Major Sub-contract; or
 - (iii) any review of, comments on, or approval of the form or substance of the Major Sub-contract (or any associated documentation) by the Transport Agency;
- (c) where the Major Sub-contractor is expressed in the Major Sub-contract to have a right (or possible right) to compensation or relief that is dependent on or determined by reference to the Project Agreement:
 - (i) this does not of itself expand the Contractor's rights, or the Transport Agency's Liability, under the Project Agreement to include the compensation or relief to which the Major Sub-contractor is or may become entitled under the Major Sub-contract; and
 - (ii) the Contractor's rights, and the Transport Agency's Liability, under the Project Agreement will be determined solely in accordance with the terms of the Project Agreement;
- (d) as between the Transport Agency (on the one hand) and the Contractor and the Major Sub-contractor (on the other hand), the Contractor and the Major Sub-contractor accept and will bear the risk of any ambiguity, discrepancy or inconsistency between the terms of the Major Sub-contract and the Project Agreement; and
- (e) notwithstanding anything to the contrary in the Major Sub-contract but except as expressly contemplated by this Deed, the Major Sub-contractor has no right to deal directly with the Transport Agency or participate in any meeting, consultation or process (including negotiation or dispute resolution) unless:
 - (i) expressly provided to the contrary in the Project Agreement; or

- (ii) the Transport Agency consents.

5. **Acknowledgements in relation to Parent Company Guarantee**

The Contractor and the Major Sub-contractor acknowledge and agree:

- (a) the Parent Company Guarantee must at all times comply with clause 4.2 (Parent Company Guarantees – mandatory terms) of the Project Agreement; and
- (b) where and for so long as the Transport Agency has exercised its Step-in Rights under this Deed, and subject to the Financier Direct Deed:
 - (i) the Transport Agency will be entitled to exercise the rights of the Contractor under the Parent Company Guarantee;
 - (ii) the Transport Agency exercising the rights of the Contractor under the Parent Company Guarantee will in no way prejudice or limit the Parent Company's Liability under the Parent Company Guarantee; and
 - (iii) that they will not take any steps to prejudice, restrict or otherwise limit the Transport Agency's rights, and the Parent Company's obligations, under and in connection with the Parent Company Guarantee.

Part 3 – Termination, suspension and Step-in

6. Restrictions on termination and suspension

6.1 Subject to the Transport Agency's rights

The Major Sub-contractor's rights to exercise a Power to terminate, rescind, accept the repudiation of, or suspend the performance of any or all of its obligations under the Major Sub-contract are subject to the Transport Agency's rights under this Deed.

6.2 Termination or suspension with cause

The Major Sub-contractor may only exercise a Power to terminate, rescind, accept the repudiation of, or (subject to clause 6.5) suspend the performance of any or all of its obligations under the Major Sub-contract if:

- (a) the Major Sub-contractor has given to the Transport Agency prior notice (a **Default Event Notice**) setting out details of the Default Event giving rise to that proposed exercise in accordance with clause 7.2 (Major Sub-contractor Statements);
- (b) any remedy period available to the Security Trustee in respect of the Default Event under the [applicable Consent Deed] has expired without a remedy being achieved;
- (c) the Major Sub-contractor has given notice to the Transport Agency (a **Major Sub-contractor Notice**) confirming that either:
 - (i) the requirements of clause 6.2(b) are satisfied; or
 - (ii) the Major Sub-contractor's Power to terminate, rescind, accept the repudiation of, or suspend the performance of any or all of its obligations under the Major Sub-contract is not subject to any right of the Senior Lenders to remedy the Default Event;
- (d) one or more Termination Grounds exists; and
- (e) where an MSDD Dispute existed in relation to the applicable Termination Event, the Major Sub-contractor is entitled to exercise the relevant Power under clause 6.4.

6.3 Termination Grounds

For the purposes of this Deed, each of the circumstances set out in clauses 6.3(a) to 6.3(d) comprise **Termination Grounds**:

- (a) where a Default Event:
 - (i) is capable of remedy within ■■■ Business Days after the date on which the Transport Agency received the relevant Major Sub-contractor Notice (including by the payment of any sum); or
 - (ii) is not capable of remedy and the Default Event Notice contains a Claim for reasonable compensation for the Default Event,

and that Default Event has not been cured or remedied, or the compensation sum referred to in clause 6.3(a) paid, within ■■■ Business Days after the date on which the Transport Agency received the Major Sub-contractor Notice;

- (b) where a Default Event is not capable of remedy within ■■■ Business Days but is nevertheless reasonably capable of remedy, if the Transport Agency (or an Additional Obligor appointed under clause 8 (Step-in by the Transport Agency)) has not commenced remedying that Default Event within ■■■ Business Days after the date on which the Transport Agency received the Major Sub-contractor Notice or has not continued to diligently pursue that remedy following the expiry of that ■■■ Business Day period;
- (c) where:
 - (i) the Default Event is not reasonably capable of remedy; and
 - (ii) the Default Event Notice does not contain a Claim for reasonable compensation for the relevant Default Event,

the Transport Agency (or an Additional Obligor) does not commence and continue to perform the Contractor's obligations under the Major Sub-contract within ■■■ Business Days (or such longer period as is permitted under the Major Sub-contract) after the date on which the Transport Agency received the Major Sub-contractor Notice; or
- (d) the Transport Agency notifies the Major Sub-contractor in writing that it elects not to remedy (or procure the remedy of) the relevant Default Event and not to perform the Contractor's obligations under the Major Sub-contract.

6.4 MSDD Disputes

Where the Transport Agency notifies the Major Sub-contractor of an MSDD Dispute in relation to a Termination Ground:

- (a) where that MSDD Dispute relates to any aspect of the Termination Ground other than the payment of compensation or any other sum to remedy or otherwise resolve a Default Event:
 - (i) during the period of dispute resolution, all parties must continue to perform their obligations under this Deed and the Project Documents; and
 - (ii) the Major Sub-contractor must not exercise a Power to terminate, rescind, accept the repudiation of, or suspend the performance of any or all of its obligations under the Major Sub-contract unless the Transport Agency fails to comply with the Independent Expert's determination within ■■■ Business Days after its delivery to the parties; and
- (b) where that MSDD Dispute relates to the payment of compensation or any other sum to remedy or otherwise resolve a Default Event:
 - (i) the relevant Statement Beneficiary must pay the amount (if any) not in dispute;
 - (ii) upon resolution of the dispute under clause 18 (Dispute resolution), the parties must make payments as determined by the Independent Expert;
 - (iii) during the period of dispute resolution, all parties must continue to perform their obligations under this Deed and the Project Documents; and
 - (iv) the Major Sub-contractor must not exercise a Power to terminate, rescind, accept the repudiation of, or suspend the performance of any or all of its obligations under the Major Sub-contract unless the relevant Statement Beneficiary has not paid any sum determined as payable by the Independent Expert within ■■■ Business Days after the Expert's determination.

6.5 Termination or suspension without cause

If there is no Default Event, the Major Sub-contractor may only exercise a right to terminate, or suspend the performance of its obligations under, the Major Sub-contract to the extent that the Contractor is entitled to terminate the Project Agreement or suspend its corresponding obligations under the Project Agreement.

7. Notices by Major Sub-contractor

7.1 Notices

The Major Sub-contractor must give the Transport Agency:

- (a) Default Event Notices; and
- (b) Major Sub-contractor Notices,

as required by clause 6.2 (Termination or suspension with cause).

7.2 Major Sub-contractor Statements

As part of any Default Event Notice, the Major Sub-contractor must submit statements (**Major Sub-contractor Statements**) to the Transport Agency (for the reliance of the Statement Beneficiaries) of:

- (a) all amounts due and payable to the Major Sub-contractor under the Major Sub-contract on or before the date of the Default Event Notice but remaining unpaid at such date;
- (b) the nature and, to the best of the Major Sub-contractor's knowledge and belief, the amount of any monetary Claim asserted by the Major Sub-contractor under or arising out of the Major Sub-contract against the Contractor; and
- (c) where the Major Sub-contractor intends to terminate the Major Sub-contract due to a default or breach of condition of a non-financial nature or intends to claim damages or to seek some other form of relief from the Contractor under the Major Sub-contract:
 - (i) the provisions of the Major Sub-contract alleged to have been breached or not fulfilled;
 - (ii) sufficient information to enable the Transport Agency to identify the material facts;
 - (iii) the steps reasonably required to remedy the Default Event (if reasonably capable of remedy);
 - (iv) the time within which the specified steps can reasonably be expected to be taken;
 - (v) if applicable, the amount of damages claimed and the manner in which the amount has been calculated; and
 - (vi) if applicable, the other relief to be sought.

7.3 Warranty of accuracy

The Major Sub-contractor warrants to each Statement Beneficiary that the Major Sub-contractor Statements submitted by it will be, subject to unintended error that the Major Sub-contractor agrees to rectify, true, complete and accurate statements of the amounts to which the Major Sub-contractor considers itself entitled.

7.4 Major Sub-contractor Statements to be conclusive evidence

- (a) Each Statement Beneficiary is entitled to rely on the Major Sub-contractor Statements for the purpose of determining the extent of the matters occurring prior to a Default Event that are required to be cured or remedied and the requirements to effect the remedy of that Default Event by a Statement Beneficiary (if it elects to remedy).
- (b) The Major Sub-contractor Statements will, to the extent provided in clauses 7.2 and 7.3, be conclusive evidence in favour of any Statement Beneficiary that the Major Sub-contractor has waived and abandoned all other Claims then known or that ought reasonably to have been known to the Major Sub-contractor arising out of or in connection with the Major Sub-contract prior to the date of the Default Event Notice (other than Claims set out in the Major Sub-contractor Statements).
- (c) Clauses 7.4(a) and 7.4(b) are without prejudice to the rights of the Major Sub-contractor to pursue any Claims against the Contractor following the end of the Step-in Period.
- (d) For the avoidance of doubt, a Major Sub-contractor Statement will not prevent any Statement Beneficiary from commencing a MSDD Dispute disputing the amount of any Claim by the Major Sub-contractor or the existence of any default by the Contractor under the Major Sub-contract.

8. Step-in by the Transport Agency

8.1 The Transport Agency's rights

- (a) On or after receipt of a Major Sub-contractor Notice or at any time at or after which the Transport Agency is permitted under any Project Document to do so, the Transport Agency may, but is not obliged to:
 - (i) remedy, or procure the remedy of, the relevant Default Event;
 - (ii) if the Default Event is not capable of remedy, to commence and continue to perform the obligations of the Contractor under the Major Sub-contract;
 - (iii) take such other action permitted pursuant to Part 17 (Transport Agency Step-in) of the Project Agreement or any similar action permitted under the Project Agreement (and the receipt of the Major Sub-contractor Notice will be deemed to be a ground for step-in under clause 63 (When Step-in Applies) of the Project Agreement); or
 - (iv) by notice to the Major Sub-contractor (**Additional Obligor Step-in Notice**), procure that an Additional Obligor assumes jointly and severally with the Contractor all of the Contractor's rights and obligations under the Major Sub-contract and the Major Sub-contract Documentation.
- (b) The **Step-in Period** is the period from the date on which the Transport Agency provides the Major Sub-contractor with notice of the exercise of any Step-in Right to the earliest of:

- (i) the Additional Obligor Step-out Date;
 - (ii) the date on which the Major Sub-contractor validly terminates the Major Sub-contract;
 - (iii) the date of any novation under clause 11 (Transport Agency's novation rights); and
 - (iv) the Step-out Date.
- (c) The Major Sub-contractor acknowledges that the exercise by the Transport Agency of a Step-in Right will not of itself contravene, or constitute a Default Event under, the Major Sub-contract or entitle the Major Sub-contractor to exercise any Power (including termination) under the Major Sub-Contract.

8.2 Step-in by the Transport Agency

- (a) The Transport Agency may (subject to the Financier Direct Deed), at any time after the Transport Agency has given notice to the Major Sub-contractor notifying it of the Transport Agency's exercise of its Step-in Rights, exercise all or any of the Contractor's Powers and perform all or any of the obligations of the Contractor under or in relation to the Major Sub-contract and the Major Sub-contract Documentation, as if it were the Contractor, to the exclusion of the Contractor. Where the Transport Agency notifies the Major Sub-contractor that it is to exercise its Step-in Rights under this Deed, it will also notify the Major Sub-contractor of the Transport Agency Personnel that are authorised to exercise such rights on its behalf.
- (b) The Contractor and the Major Sub-contractor acknowledge and agree that, subject to clause 9(b) and the Project Agreement, neither the Transport Agency, any Transport Agency Personnel nor any Transport Agency Related Persons will have any Liability, nor will the Contractor or the Major Sub-contractor be entitled to make, continue or enforce any Claim against the Transport Agency, any Transport Agency Personnel or any Transport Agency Related Persons arising out of or in respect of or in connection with, the Major Sub-contract, the Major Sub-contract Documentation or this Deed by reason only of exercise of any of the Contractor's Powers, or performing any of the Contractor's obligations in accordance with the Major Sub-contract or the Major Sub-contract Documentation (as permitted by the Project Documents) other than, and then only to the extent of, Liability for fraudulent, unlawful, negligent or wilful acts or omissions of the Transport Agency, any Transport Agency Personnel or any Transport Agency Related Persons.

8.3 Transport Agency Step-out

The Transport Agency may Step-out at any time, in accordance with Part 17 (the Transport Agency Step-in) of the Project Agreement. The Transport Agency shall provide not less than 10 Business Days' prior written notice to the Major Sub-contractor informing it of the Step-out Date.

9. Step-in using Additional Obligor

- (a) The Transport Agency shall ensure that the Additional Obligor will become a party to the Major Sub-contract on the date on which the Additional Obligor Step-in Notice is given to the Major Sub-contractor, or such later date as the Major Sub-contractor and the Transport Agency may agree (**Assumption Date**).
- (b) During the Step-in Period:

- (i) the Transport Agency shall ensure that the Additional Obligor will be jointly and severally:
 - (A) entitled with the Contractor to exercise the rights, powers and discretions of the Contractor under the Major Sub-contract and the Major Sub-contract Documentation (excluding any accrued rights of the Contractor in respect of any damage, loss, cost, charge, expense, outgoing or payment to the extent that the rights arose prior to the Assumption Date) (the **Contractor's Rights**); and
 - (B) liable with the Contractor for the performance or non-performance of all the Contractor's obligations under the Major Sub-contract and the Major Sub-contract Documentation arising on or after the Assumption Date, except as released in accordance with clause 9(e);
 - (ii) as between the Contractor, the Major Sub-contractor and the Additional Obligor, only the Additional Obligor is authorised to deal with the Major Sub-contractor and to exercise the Contractor's Rights but for the avoidance of doubt, this shall not extend to any right to surrender, terminate or suspend the Major Sub-contract, except where the Project Agreement has been terminated or otherwise in accordance with the terms of the Major Sub-contract;
 - (iii) the Contractor acknowledges that it will be legally bound by all the acts and omissions of the Additional Obligor in so dealing with the Major Sub-contractor and in exercising the Contractor's Rights;
 - (iv) the Transport Agency shall ensure that the Additional Obligor is bound by any earlier decision, directions, approvals or consents given or made prior to the Assumption Date;
 - (v) clause 20 (Notices) will apply to the Major Sub-contractor and the Additional Obligor as if the address, facsimile number and email address of the Additional Obligor were set out in addition to those of the Contractor; and
 - (vi) the Major Sub-contractor will owe its obligations under the Major Sub-contract to the Contractor and the Additional Obligor jointly but the performance by the Major Sub-contractor in favour of either the Contractor or the Additional Obligor will be a good discharge of the relevant obligations under the Major Sub-contract.
- (c) The Additional Obligor will have no obligation to cure, and no Liability in respect of remedying, any default or breach of the Contractor under the Major Sub-contract arising prior to the Assumption Date.
 - (d) The Additional Obligor may at any time give the Major Sub-contractor notice terminating the Additional Obligor's rights and obligations under the Major Sub-contract and the Major Sub-contract Documentation (without affecting the continuation of the Contractor's obligations or Liabilities towards the Major Sub-contractor under the Major Sub-contract). The Transport Agency shall ensure that such notice specifies the date on which it takes effect, which must be:
 - (i) a date not less than 30 days after the date of the notice; or
 - (ii) if a Proposed Novation Notice has been given, the Proposed Novation Date, (being the **Additional Obligor Step-out Date**).
 - (e) On and from the Additional Obligor Step-out Date, between the Major Sub-contractor and the Additional Obligor, each of the Additional Obligor and the Major Sub-

contractor will be released from all obligations under the Major Sub-contract and the Major Sub-contract Documentation (except for those obligations that have arisen during the Step-in Period, whether or not a Claim has been made in respect of those obligations or they have not fallen due to be performed or have not been performed).

10. Indemnity by Contractor

Subject to clause 58.4 (Limits on indemnity cover) of the Project Agreement, the Contractor indemnifies the Transport Agency, all Transport Agency Personnel and all Transport Agency Related Persons against any Claim or Liability (including any Claim made by, or Liability to, a third party) the Transport Agency, any Transport Agency Personnel or any Transport Agency Related Person suffers or incurs arising in connection with:

- (a) taking any action under clause 8.2 (Step-in by the Transport Agency) or clause 8.3 (Transport Agency Step-out) (except in respect of any action taken by the Transport Agency under Part 17 (Transport Agency Step-in) of the Project Agreement, which action shall be subject to the rights and remedies of the Transport Agency set out in Part 17 of the Project Agreement instead); and/or
- (b) taking any action (including the payment of any sum) to prevent, or as a result of, the Major Sub-contractor suspending or, following the expiry of the requisite notice and/or remedy period, threatening to suspend the performance of its obligations under the Major Sub-contract where the Major Sub-contractor is entitled to do so under the Construction Contracts Act 2002.

11. Transport Agency's novation rights

11.1 Proposed Novation Notice

- (a) The Transport Agency may at any time on or after the issue of a Major Sub-contractor Notice:
 - (i) while it is entitled to exercise its Step-in Rights; or
 - (ii) during the Step-in Period,
 give notice (a **Proposed Novation Notice**) to the Major Sub-contractor that:
 - (iii) it wishes itself or another person (in either case, a **Proposed Substitute**) to assume, by way of sale, transfer or other disposal, the rights and obligations of the Contractor under the Major Sub-contract and the Major Sub-contract Documentation; and
 - (iv) it wishes full legal and equitable title to any retention account, or other guarantee or security or assurance constituting Major Sub-contract Documentation that is held by the Contractor to secure the obligations of the Major Sub-contractor under the Major Sub-contract to vest in the Proposed Substitute, subject to any rights or interests over the same held by or on behalf of the Senior Lenders.
- (b) The Proposed Novation Notice shall specify a date on which the proposed novation is to take effect (the **Proposed Novation Date**). The Proposed Novation Date must fall not later than 30 Business Days after the date of the Proposed Novation Notice.
- (c) Without prejudice to (and except as permitted by) clause 11.6 and/or clause 12 (Rights to terminate – Intervention Failure), the Major Sub-contractor will not exercise

or seek to exercise any Power that may be or become available to it to terminate or treat as terminated or repudiated the Major Sub-contract or discontinue or suspend the performance of any obligations under the Major Sub-contract and that is the subject of a Major Sub-contractor Notice:

- (i) during the notice period specified in a Proposed Novation Notice; or
 - (ii) against any Proposed Substitute that is party to a Novation Agreement.
- (d) The Major Sub-contractor acknowledges that the exercise by the Transport Agency of its rights under this clause 11 does not of itself contravene, or entitle the Major Sub-contractor to exercise any right or remedy (including any right to terminate) under the Major Sub-contract.
- (e) Nothing in this clause 11 operates to require the Transport Agency to assume any obligations or Liabilities arising, or which are required to be performed under the Major Sub-contract, except to the extent expressly provided in this clause 11.

11.2 Proposed Substitute

Where the Proposed Substitute is not the Transport Agency or a Successor Governmental Entity, the Transport Agency shall (as soon as practicable) supply the Major Sub-contractor with the following information:

- (a) the name and registered address of the Proposed Substitute;
- (b) the names of the directors of the Proposed Substitute; and
- (c) the technical competency and resources (including financial resources, key personnel and contractual arrangements) that are to be available to the Proposed Substitute to enable it to perform its obligations under the Major Sub-contract.

11.3 Consent to novation

- (a) Where the Proposed Substitute is the Transport Agency or a Successor Governmental Entity, the Major Sub-contractor will be deemed to have given its consent to the novation. In that case, the Major Sub-contractor irrevocably:
- (i) appoints the Transport Agency and the Transport Agency's nominees from time to time, jointly and severally, as the Major Sub-contractor's attorney with full power and authority to sign on its behalf all documents the Transport Agency requires to legally effect the novation of the Major Sub-contract Documentation to the Transport Agency or the Successor Governmental Entity, provided the terms of the novation are in accordance with clause 11.4 of this Deed; and
 - (ii) agrees to ratify and confirm whatever action is taken by that attorney or those attorneys for the purposes of giving legal effect to that novation.
- (b) Where the Proposed Substitute is not the Transport Agency or a Successor Governmental Entity, the Major Sub-contractor must consent to the proposed novation, unless the Major Sub-contractor demonstrates to the Transport Agency's reasonable satisfaction that:
- (i) the Proposed Substitute does not have the legal capacity, power and authorisation to become a party to and perform the obligations of the Contractor under the Major Sub-contract;

- (ii) the technical competence and financial standing of, and the technical and financial resources available to, the Proposed Substitute are not sufficient to perform the obligations of the Contractor under the Major Sub-contract; or
 - (iii) the Major Sub-contractor would be placed in breach of Law by the proposed novation.
- (c) Where the Proposed Substitute is not the Transport Agency or a Successor Governmental Entity, within 10 Business Days of the later of receipt of a Proposed Novation Notice and all information required under clause 11.2, the Major Sub-contractor must:
- (i) notify the Transport Agency in writing as to whether or not it consents to the novation of the Major Sub-contract Documentation; and
 - (ii) where that request for consent is not approved, provide an explanation of the reasons why.
- (d) The Major Sub-contractor is deemed to have given its consent to the novation of the Major Sub-contract Documentation to the Proposed Substitute for the purposes of clause 11.3(c) if the Major Sub-contractor fails to serve notice in writing on the Transport Agency within the period required by that sub-clause.
- (e) If, in accordance with this clause 11.3, the Major Sub-contractor withholds its consent to a Proposed Novation Notice:
- (i) the Transport Agency shall be entitled to give one or more subsequent Proposed Novation Notices, pursuant to the provisions of clause 11.1 and clause 11.2, (a **Revised Proposed Novation Notice**) containing changed particulars relating to the same Proposed Substitute or particulars relating to another Proposed Substitute, provided that:
 - (A) only one Proposed Novation Notice may be outstanding at any one time; and
 - (B) any revised Proposed Novation Date shall be a date falling not later than 15 Business Days after the date of the Revised Proposed Novation Notice but on or prior to the end of the Step-in Period;
 - (ii) the Major Sub-contractor will not:
 - (A) exercise or seek to exercise any right that may be or become available to it to terminate or treat as terminated or repudiated the Major Sub-contract; or
 - (B) discontinue or suspend the performance of any obligations under the Major Sub-contract,

during the notice period specified in a Revised Proposed Novation Notice; and
 - (iii) clauses 11.3(b), 11.3(c) and 11.3(d) will apply in relation to that Revised Proposed Novation Notice, as if that notice was a Proposed Novation Notice.

11.4 Implementation of novation

- (a) Promptly following the date on which the Major Sub-contractor consents or is deemed to have consented to a novation of the Major Sub-contract pursuant to a Proposed Novation Notice or a Revised Proposed Novation Notice (the **Consent Date**), the

Contractor must (subject to the Proposed Substitute first providing a confidentiality undertaking in a form reasonably acceptable to the Major Sub-contractor) give the Proposed Substitute an updated copy of all information in the possession of the Contractor in relation to the Major Sub-contract.

- (b) Within three Business Days of the Consent Date:
- (i) the Transport Agency shall procure that the Proposed Substitute shall become a party to, or beneficiary of the Major Sub-contract Documentation in place of the Contractor and, thereafter, shall be treated as if it was and had always been named as a party or beneficiary of the Major Sub-contract Documentation in place of the Contractor; and
 - (ii) the Major Sub-contractor and the Contractor shall enter into a novation agreement (the **Novation Agreement**) and any other requisite agreements, in form and substance satisfactory to the Major Sub-contractor (acting reasonably) and the Transport Agency (acting reasonably) and the Transport Agency shall procure that the Proposed Substitute validly executes such Novation Agreement and any other requisite agreements, pursuant to which:
 - (A) the Proposed Substitute shall be granted all of the rights of the Contractor under the Major Sub-contract Documentation and this Deed (including those arising prior to the end of the Step-in Period); and
 - (B) the Proposed Substitute shall assume all of the obligations and Liabilities of the Contractor under the Major Sub-contract and this Deed.
- (c) Unless otherwise agreed, the assumption by the Proposed Substitute of the obligations and Liabilities of the Contractor under the Major Sub-contract will:
- (i) not include:
 - (A) any payment obligations of the Contractor that are in dispute as at the Consent Date, provided that the Transport Agency shall, on the determination of such dispute, procure that the Proposed Substitute shall assume such obligation in accordance with that determination; and
 - (B) any payment for the performance of the Services that the Transport Agency has already paid for under the terms of the Project Agreement; and
 - (ii) only include (in relation to any other obligation of the Contractor (not being an obligation to pay money which the Proposed Substitute must pay under clause 11.4(b)(ii)(B))) those obligations that fall due to be performed as at or following the Consent Date.
- (d) On and after the Novation Effective Date, the Major Sub-contractor shall owe its obligations under the Major Sub-contract to the Proposed Substitute and will be bound by and must comply with the terms of the Major Sub-contract binding on it, for the benefit of the Proposed Substitute as if the Proposed Substitute were the Contractor.
- (e) The Transport Agency and the Major Sub-contractor shall use all reasonable endeavours to agree and the Transport Agency shall use reasonable endeavours to procure that the Proposed Substitute agrees any amendments to the Major Sub-contract necessary to reflect this clause 11 and the fact that the Project Agreement may have terminated at the time of the Novation Effective Date.
- (f) For the avoidance of any doubt the total Liability incurred by the Major Sub-contractor to the Proposed Substitute under the Major Sub-contract as at the Novation Effective

Date shall be identical to the total Liability incurred by the Major Sub-contractor to the Contractor up to and immediately prior to the Novation Effective Date, and the entering into of the Novation Agreement shall not reduce, limit or otherwise affect the total aggregate Liability incurred by the Major Sub-contractor under the Major Sub-contract in any way.

11.5 Contractor's obligations to continue

Until completion of a novation pursuant to clause 11.4, the Contractor shall continue to be liable for all its obligations and Liabilities, whenever occurring, under or arising from the Major Sub-contract notwithstanding:

- (a) the service of a Proposed Novation Notice or any Revised Proposed Novation Notice; or
- (b) any other provision of this Deed.

11.6 Termination after Novation

After the Novation Effective Date, the Major Sub-contractor shall only be entitled to exercise its rights of termination under the Major Sub-contract:

- (a) in respect of any Contractor Default arising after that date in accordance with the Major Sub-contract; or
- (b) if the Proposed Substitute does not discharge, within 20 Business Days following the Novation Effective Date, the obligations and Liabilities assumed by it under clause 11.4(b) (read subject to clause 11.4(c)) that relate to matters arising prior to the Novation Effective Date,

(in each case subject to the terms of this Deed as it applies after the Novation Effective Date).

12. Rights to terminate – Intervention Failure

12.1 Rights preserved

Notwithstanding the other terms of this Deed, the Major Sub-contractor shall be entitled:

- (a) to exercise all of its rights under the Major Sub-contract and act upon any and all grounds for termination available to it in relation to the Major Sub-contract whenever occurring; and/or
- (b) to pursue any and all Claims and exercise any and all rights and remedies against the Contractor,

in any of the circumstances described in clause 12.2 (an **Intervention Failure**).

12.2 Intervention Failures

An Intervention Failure constitutes circumstances where:

- (a) no Proposed Novation Notice (including a Revised Proposed Novation Notice) is given before the date or by the expiry of the period in which the Transport Agency is entitled to serve the same pursuant to clause 11.1(a) in accordance with the terms of this Deed;

- (b) the Step-in Period ends before the occurrence of the Novation Effective Date;
- (c) (in circumstances in which the Major Sub-contractor is entitled not to consent under this Deed) the Major Sub-contractor does not consent to a novation pursuant to a Proposed Novation Notice and to any Revised Proposed Novation Notice; or
- (d) the Transport Agency or an Additional Obligor exercises its right to Step-out (in which case, an Intervention Failure exists from the Step-out Date or the Additional Obligor Step-out Date (as applicable)), in each case where Termination Grounds continue to subsist at the relevant time.

Part 4 – Warranties and Undertakings

13. Warranties and acknowledgments

13.1 General warranties

The Major Sub-contractor warrants and represents to the Transport Agency:

- (a) it is properly constituted and incorporated under the Companies Act 1993 and has the corporate power to own its assets and to carry on its business as it is now being conducted;
- (b) neither it nor any of its assets enjoys any immunity from set off, suit or execution;
- (c) it has the corporate power to enter into and to exercise its rights and perform its obligations under this Deed and the other Project Documents to which it is party;
- (d) all actions necessary on its part have been taken to authorise the execution of and the performance of its obligations under this Deed and the other Project Documents to which it is party;
- (e) the obligations expressed to be assumed by it under this Deed and the other Project Documents to which it is party, are, or in the case of any Project Document executed after the date of this Deed, will be, on their execution, legal, valid, binding and, subject to laws affecting creditors' rights generally and equitable principles, enforceable;
- (f) this Deed and each other Project Document to which it is party is in proper form for enforcement in New Zealand; and
- (g) the execution, delivery and performance by it of this Deed and the other Project Documents to which it is party do not contravene any provision of:
 - (i) any existing Laws either in force, or enacted but not yet in force, that are binding on it;
 - (ii) its constitution;
 - (iii) any order or decree of any court or arbitrator that is binding on it; or
 - (iv) any obligation that is binding upon it or upon any of its assets or revenues.

13.2 Additional warranties

The Major Sub-contractor further warrants, represents and undertakes to the Transport Agency that:

- (a) the Major Sub-contract to which it and the Contractor are party, has been entered into on Arms' Length Terms;
- (b) it has complied with and fulfilled and shall continue to comply with and fulfil its duties and obligations arising under or by virtue of the Major Sub-contract;
- (c) without limiting the other terms of this Deed:
 - (i) it is aware of those terms of the Project Agreement that apply to it, in its capacity as a Major Sub-contractor or as a Contractor Related Person; and

- (ii) it will ensure at all times that:
 - (A) it shall not by act, do or by omission fail to do (to the extent of its obligations under the Major Sub-contract only), anything that would result in the Contractor being in breach or being put in breach of its obligations under the Project Agreement; and
 - (B) it will co-operate and assist the Transport Agency and/or the Contractor to facilitate (and will not impede or frustrate) the Contractor's compliance with its obligations under the Project Agreement;
- (d) there are no documents or agreements in existence or contemplated as at the date of this Deed to which the Major Sub-contractor is or would be a party that have not been or will not be disclosed to the Transport Agency that (in each case) is or would:
 - (i) be material in the context of this Deed and the other Project Documents to which it is a party;
 - (ii) be, or be likely to be, material in the context of the Project; or
 - (iii) have the effect of varying this Deed or any other Project Document,

and in respect of this Deed or the Project Documents, performance of which by the Major Sub-contractor would have a material adverse effect on the ability of the Major Sub-contractor to perform and observe its obligations under any this Deed or any other Project Document;
- (e) all information provided to the Transport Agency by the Major Sub-contractor under this Deed constitutes true, accurate and complete statements of the Major Sub-contractor; and
- (f) in entering into this Deed and the other Project Documents to which it is a party, it relied upon its own investigations and has not relied upon any representation or warranty about its subject matter by:
 - (i) the Transport Agency; or
 - (ii) the Contractor or any other person (unless otherwise expressly stated in the Major Sub-contract).

14. General Undertakings

The Major Sub-contractor undertakes to the Transport Agency that it must:

- (a) notify the Transport Agency of any Contractor Default promptly after it gives notice of that Contractor Default pursuant to the Major Sub-contract;
- (b) in relation to documents:
 - (i) promptly give the Transport Agency a copy of all documents issued by the Major Sub-contractor to the Contractor in relation to a Contractor Default; and
 - (ii) return a copy of all plans, drawings, specifications and other documents that come into its possession for the purpose of the Project to the Transport Agency at the expiration or termination of the Major Sub-contract;
- (c) not, without first obtaining the consent of the Transport Agency:

- (i) make or permit any material amendment, replacement of, or addition to;
- (ii) subject to the terms of this Deed, terminate, surrender, rescind or accept repudiation of (provided that such consent will be deemed to have been given where the Major Sub-contractor is expressly permitted to do so under this Deed);
- (iii) permit the novation, assignment or substitution of its rights, obligations or interest in; or
- (iv) allow any express waiver of its material rights and obligations under,

the Major Sub-contract, provided that the Transport Agency will not withhold its consent to an amendment that corresponds to an amendment to which it has consented in accordance with the Project Agreement;

- (d) not novate, assign or substitute any of its rights, obligations or interest in the Major Sub-contract without first procuring that the proposed novatee, assignee or substitute executes a deed in favour of the Transport Agency (in form and substance approved by the Transport Agency) pursuant to which the novatee, assignee or substitute agrees to accept and be bound by this Deed as if it were the Major Sub-contractor;
- (e) in relation to records and meetings:
 - (i) when reasonably requested by the Transport Agency, attend meetings with the Transport Agency or any Transport Agency Related Person;
 - (ii) subject to the relevant persons entering into confidentiality undertakings with the Major Sub-contractor on terms reasonably acceptable to the Major Sub-contractor, when reasonably requested by the Transport Agency, provide the Transport Agency, or any Transport Agency Related Person authorised by the Transport Agency, with such information, records or documents that the Transport Agency (acting reasonably) requires in relation to the carrying out of Services or compliance with the Major Sub-contract; or
 - (iii) subject to the relevant persons entering into confidentiality undertakings with the Major Sub-contractor on terms reasonably acceptable to the Major Sub-contractor, permit the Transport Agency or any Transport Agency Related Person authorised by the Transport Agency to do so, to inspect all records, reports, plans, programmes, specifications and design documents prepared or kept by the Major Sub-contractor in relation to the Project and supply the Transport Agency or any Transport Agency Related Person with a copy of any such report or document they may require from time to time,

provided that nothing in this clause 14(e) shall require the Major Sub-contractor to breach any obligation of confidence which it owes to any other person or to infringe the Intellectual Property rights of any third party;

- (f) to the extent provided in the Project Agreement, permit the Transport Agency, any Transport Agency Related Person and the Independent Reviewer to attend all tests and inspections to be carried out in connection with the Project in accordance with the terms of the Project Agreement and/or the Major Sub-contract;
- (g) subject to the Independent Reviewer entering into confidentiality undertakings with the Major Sub-contractor on terms reasonably acceptable to the Major Sub-contractor, provide the Independent Reviewer with all such access to the TG Project and to the Major Sub-contractor and its records as the Independent Reviewer may reasonably require to perform its obligations under the Project Agreement and the Independent Reviewer Agreement;

- (h) take all steps reasonably practical to mitigate and minimise Sub-contractor Breakage Costs in respect of any Termination Date; and
- (i) not contract with the Contractor otherwise than on Arms' Length Terms.

Part 5 – General

15. Relationship of parties

15.1 Relationship of parties

Nothing in, or contemplated by, this Deed will be construed or interpreted as:

- (a) constituting a relationship between the Transport Agency and the Major Sub-contractor or the Contractor or any other person, as partners, joint venturers, fiduciaries, employer and employee or principal and agent;
- (b) imposing any general duty of good faith on the Transport Agency to the Major Sub-contractor or the Contractor or any Major Sub-contractor Affiliate or Contractor Affiliate in relation to or arising out of the Project, other than to comply with the obligations (if any) expressly stated to be assumed by the Transport Agency under the Project Documents on a good faith basis; or
- (c) unlawfully restricting or otherwise unlawfully affecting the unfettered discretion of the Transport Agency to exercise any of its executive or statutory powers or functions under any Law.

15.2 Limitation of Transport Agency's obligations

The Major Sub-contractor and the Contractor each acknowledge and agree that:

- (a) anything that the Transport Agency or any Governmental Entity does, fails to do or purports to do pursuant to its executive or statutory functions and powers will be deemed not to be or cause an act or omission by the Transport Agency under this Deed and will not entitle the Contractor or the Major Sub-contractor to make any Claim against the Transport Agency under this Deed;
- (b) notwithstanding clause 4.2(a)(i) (Parent Company Guarantees – mandatory terms) of the Project Agreement, the Transport Agency is not relieved from any Claim that the Major Subcontractor may have against the Transport Agency for exercising any of its executive or statutory functions or powers under any law in a manner contrary to an express obligation of the Transport Agency under this Deed and the existence of such obligations, and the existence and the amount of such Claim is to be assessed in accordance with the terms of this Deed;
- (c) notwithstanding anything else contained or implied in the Project Documents to the contrary, the Transport Agency is not obliged, in performing any of the duties and obligations of the Transport Agency under the Project Documents, to exercise a power, function or duty which is granted to or within the responsibility of any other Governmental Entity, or to influence, over-ride or direct any other Governmental Entity in the proper exercise and performance of its legal duties and functions;
- (d) if there is any statement in this Deed that the Transport Agency will use "reasonable endeavours" in relation to an outcome then it means that the Transport Agency will take steps to bring about the relevant outcome so far as it is reasonably able to do so having regard to its resources and other responsibilities but the Transport Agency cannot guarantee the relevant outcome; and
- (e) nothing in or contemplated by this Deed or any other Project Document, including any reasonable "endeavours obligation" imposed on the Transport Agency, will be construed or interpreted as restricting or otherwise affecting the unfettered discretion of the Transport Agency or any other Governmental Entity to exercise any of its

executive or statutory powers or functions under any Law, or to require the Transport Agency or any Governmental Entity to:

- (i) interfere with or influence the exercise of any statutory power or discretion by any body, including a Governmental Entity;
- (ii) exercise a power or discretion in a manner that promotes the objectives and expected outcomes of this Deed if the Transport Agency regards that exercise as not in the public interest;
- (iii) develop or implement new policy in a manner that is only consistent with the objectives and expected outcomes of this Deed;
- (iv) procure legislation in the future in a manner that is only consistent with the objectives and expected outcomes of this Deed; or
- (v) act in any other way that the Transport Agency regards as not in the public interest.

16. Termination

- (a) This Deed will terminate upon the performance and satisfaction of all of the obligations under the Major Sub-contract.
- (b) The termination of this Deed does not affect the rights of any party that have accrued to that party before the date of termination.

17. Insurance

- (a) Notwithstanding anything else, the Major Sub-contractor will:
 - (i) take out all insurances as are required under the Major Sub-contract; and
 - (ii) otherwise comply with all of its obligations in relation to insurance in the Major Sub-contract.
- (b) The Major Sub-contractor must ensure that it does not do or omit to do anything or does not permit anything to be done or omitted to be done whereby any insurance policy required under the Major Sub-contract may be prejudiced.
- (c) If any default is made by the Major Sub-contractor in effecting or maintaining any insurance policy required under the Major Sub-contract or if any such insurance policy becomes void or voidable, the Transport Agency may (but is not obliged to) effect or maintain that insurance policy at the cost of the Major Sub-contractor or, failing the Major Sub-contractor paying such costs, at the cost of the Contractor (but only to the extent that the relevant insurance policy required to be effected and maintained by the Major Subcontractor is also a Required Insurance as defined under the Project Agreement).
- (d) If required by the Project Agreement in respect of any insurance policy taken out by the Major Sub-contractor, the Major Sub-contractor will ensure that the Transport Agency is specified as a person to whom the insurance cover provided by any applicable insurance policy extends.
- (e) Subject to the provisions of the Project Agreement in respect of the Contractor and the provisions of the Major Sub-contract in respect of the Major Sub-contractor, each will

do all things reasonably necessary and (subject to the Transport Agency providing a confidentiality undertaking in a form reasonably acceptable to the Major Sub-contractor) provide all documents, evidence and information reasonably necessary to enable the Transport Agency to collect or recover any moneys due or to become due in respect of any insurance policy to which the Transport Agency is an insured party at the cost of the Major Sub-contractor or, failing the Major Sub-contractor paying such costs, at the cost of the Contractor (but only to the extent that the relevant insurance policy required to be effected and maintained by the Major Subcontractor is also a Required Insurance as defined under the Project Agreement).

- (f) Without prejudice to the above requirements, the Major Sub-contractor will not cause or take any steps to bring about the cancellation, lapse, material change, reduction or any rescinding of any insurance policy required under the Major Sub-contract unless it has first obtained the written consent of the Transport Agency after giving 60 days' prior written notice to the Transport Agency.
- (g) The Major Sub-contractor will immediately notify the Transport Agency of any cancellation, lapse, material change, reduction, or any rescinding of any insurance policy required under the Major Sub-contract, and of the occurrence of any event giving rise to any claim under any such insurance policy.
- (h) Notwithstanding clause 17(g), but subject to the obligations of the Contractor under the terms of the Project Agreement, the obligations of the Contractor and the Major Sub-contractor in this clause 17 shall be several.

18. Dispute resolution

If there is a dispute arising in relation to this Deed between the Transport Agency and the Major Sub-contractor (a **MSDD Dispute**), then:

- (a) the party wishing to invoke this Deed's dispute resolution procedure provisions may serve a notice (a **Notice of MSDD Dispute**) on the other party, together with its submissions in relation to the MSDD Dispute;
- (b) each such MSDD Dispute is to be treated as a dispute to which the Accelerated Dispute Resolution Procedures will apply;
- (c) the terms of clause 89 (Accelerated Dispute Resolution Procedures) of the Project Agreement are accordingly deemed incorporated by reference into this Deed, except that all references to a "party" or "parties" are deemed to be references to the Transport Agency and/or the Major Sub-contractor and all references to the "Contractor" are deemed to be a reference to the Major Sub-contractor; and
- (d) the parties shall keep confidential any information received by them pursuant to this clause 18 except to the extent that disclosure is permitted under clause 56 (Confidential Information) of the Project Agreement which clause shall be deemed incorporated by reference into this Deed for these purposes, except that all references to a "party" or "parties" shall be deemed to be reference to the parties to this Deed and all references to the "Contractor" shall be deemed to be references to the Contractor or the Major Sub-contractor as applicable.

19. Assignment

- (a) Except as expressly contemplated by this Deed, neither the Contractor nor the Major Sub-contractor may assign or transfer any of its rights or obligations under this Deed or the Major Sub-contract without the Transport Agency's consent.

- (b) Clause 19(a) does not apply to any assignment by way of security under the Financing Agreements (in respect of the Contractor only) or any direct agreement entered into between the Contractor, the Senior Lenders, the Security Trustee and the Major Sub-contractor (in respect of the Contractor and the Major Sub-contractor).
- (c) The Transport Agency shall not assign or transfer its rights or obligations under this Deed except to a permitted assignee under and in accordance with clause 90.2 (Assignment by the Transport Agency) of the Project Agreement.

20. Notices

20.1 Method of giving notices

A notice, consent, approval or other communication (each a **Notice**) under this Deed must:

- (a) be in writing addressed to the address of the recipient from time to time designated for the purpose by the addressee to the other parties. The initial address of each party is set out under its name on the execution pages of this Deed; and
- (b) be signed by an authorised representative of the sender.

20.2 Notice effective

- (a) No notice or other communication is to be effective until it is received.
- (b) A communication will be deemed to be received:
 - (i) in the case of a letter, on the second Business Day after posting (with all postage paid);
 - (ii) in the case of an email, on the Business Day on which it arrives in the recipient's information system (provided that if it is received in that system after 5.00pm on a Business Day, then it will be deemed to be received on the next Business Day), provided that if there is any dispute as to whether an email has been received, the email shall only be deemed to have been received at that time where the party giving notice produces a printed copy of the email which evidences that the email was sent to the email address of the party given notice; and
 - (iii) in the case of personal delivery, when delivered.

■ [REDACTED]

[REDACTED]

■ [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

■ [REDACTED]

[REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

[REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

23. General

[Clause 23.1 is only applicable for the Direct Deed with the Construction Sub-contractor]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

23.2 Limitation of Liability

- (a) Subject to clause 23.2(b), but despite any other provision in this Deed, the maximum aggregate Liability of the Major Sub-contractor and the Parent Company to the Contractor, the Transport Agency and any Additional Obligor in respect of any Claim or Loss (including in respect of a Claim under clause 23.1):
 - (i) under, arising out of or in connection with the Services, the Works Provisioning, this Deed and the Major Sub-contract;
 - (ii) in tort (including negligence);

- (iii) under any statute; and
- (iv) otherwise at law,

and irrespective of how it arises, is limited to the Major Sub-contractor's cap on liability as set out in the Major Sub-contract.

- (b) The maximum aggregate liability stated in clause 23.2(a) is subject to the same limitations set out in clause [●] of the Major Sub-contract.
- (c) Without prejudice to clause 23.2(a), the Major Sub-contractor shall owe no duty, obligation or Liability to the Transport Agency and/or the Contractor under this Deed which is greater or of longer duration than that which it would owe to the Transport Agency and the Contractor under the Major Sub-contract had the Transport Agency and the Contractor jointly appointed the Major Sub-contractor to perform the obligations of the Major Sub-contractor under the Major Sub-contract.
- (d) Without prejudice to its rights under clause 18 (Dispute resolution), except to the extent necessary to enable the Transport Agency to exercise its rights of cure and step-in under Part 3 of this Deed, the Transport Agency shall only be entitled to make a Claim against the Major Sub-Contractor for breach of this Deed (including any warranty), if:
 - (i) the Project Agreement has terminated; or
 - (ii) the Claim is for specific performance and/or injunctive relief,

provided that:

 - (iii) this clause does not prejudice the Transport Agency's rights to make any Claim under the Parent Company Guarantee where it is permitted to do so under this Deed and the other Project Documents; and
 - (iv) if and to the extent that the Transport Agency has been compensated for any Losses under the Project Agreement, the Transport Agency shall not be entitled to claim or recover Moneys Owing for a breach of this Deed from the Major Sub-contractor.
- (e) The Major Sub-contractor shall be entitled to raise the same defences to any Claim made against it by the Contractor or the Transport Agency under this Deed as it would be entitled to raise under the Major Sub-contract if the Contractor and the Transport Agency had jointly appointed the Major Sub-contractor to perform its obligations under the Major Sub-contract.

23.3 Counterparts

This Deed may be signed in any number of counterparts all of which, when taken together, constitute one and the same instrument. A party may enter into this Deed by executing any counterpart.

23.4 Severability

If any provision of this Deed is or becomes unenforceable, illegal or invalid for any reason, the relevant provision shall be deemed to be modified to the extent necessary to remedy such unenforceability, illegality or invalidity. If such modification is not possible, then such provision shall be severed from this Deed without affecting the enforceability, legality or validity of any other provision of this Deed.

23.5 **Waiver**

Any delay, failure or forbearance by a party to exercise (in whole or in part) any right, power or remedy under, or in connection with, this Deed shall not operate as a waiver of such right, power or remedy. A waiver of any breach of any provision of this Deed shall not be effective unless that waiver is in writing and is signed by the party against whom that waiver is claimed. A waiver of any breach shall not be, or be deemed to be, a waiver of any other or subsequent breach.

23.6 **Public disclosure**

All public disclosure by the Contractor or the Major Sub-contractor relating to this Deed including promotional or marketing material (but not including any announcement intended solely for internal distribution or any disclosure required by legal, accounting or regulatory requirements) shall be co-ordinated with and must first be approved in writing by the Transport Agency prior to its release.

23.7 **Entire agreement**

This Deed and the other Project Documents constitute the entire agreement between the parties and together supersede and extinguish all prior agreements and understandings between the parties about their respective subject matters.

23.8 **Amendments in writing**

No amendment to this Deed will be effective unless it is in writing and signed by duly authorised signatories of the Transport Agency, the Contractor and the Major Sub-contractor.

23.9 **Governing Law and jurisdiction**

This Deed is governed, and is to be construed in accordance with, the Laws of New Zealand. Each party irrevocably submits to the non-exclusive jurisdiction of the New Zealand courts for the purpose of hearing and determining all disputes under or in connection with this Deed.

23.10 **Contracts (Privity) Act 1982**

- (a) This Deed is not intended to create any obligation enforceable at the suit of any person who is not a party to this Deed.
- (b) A person who is not a party to this Deed shall have no right under the Contracts (Privity) Act 1982 to enforce any term of this Deed. This clause does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.

23.11 **Related Loss**

Notwithstanding any other provision of this Deed or the Project Agreement, to the extent that the Transport Agency is liable to the Contractor for any Claim arising under the Project Agreement, the Transport Agency will not be entitled to avoid or reduce its Liability to the Contractor on the basis that the Contractor has not suffered all or part of the relevant loss or damage (**Related Loss**) solely because such Related Loss is incurred by a sub-contractor (of any tier) of the Contractor or because the sub-contractor's right to recover such Related Loss from the Contractor or any other sub-contractor is deferred, suspended or dependent upon recovery or entitlement from the Transport Agency, the Contractor or any other sub-contractor or is dependent upon determination of any such entitlement.

Execution

[Execution blocks to be added.]

Annexure 3: Independent Reviewer Agreement

Independent Reviewer Agreement

relating to

Transmission Gully PPP

**The New Zealand Transport Agency, a crown entity established on
1 August 2008 by section 93 of the Land Transport Management
Act 2003**

Transport Agency

and

Wellington Gateway Partnership No.2 LP

PPP Contractor

and

an unincorporated joint venture between:

- (1) **Leighton Contractors Pty Limited**; and
- (2) **HEB Construction Limited**,

together the Construction Sub-contractor

and

Leighton Contractors Pty Limited

O&M Sub-contractor

and

Aurecon New Zealand Limited

Independent Reviewer

Date

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This **Independent Reviewer Agreement** is made on 2014

between (1) **The New Zealand Transport Agency, a crown entity established on 1 August 2008 by section 93 of the Land Transport Management Act 2003 (Transport Agency)**

and (2) **Wellington Gateway Partnership No.2 LP (PPP Contractor)**

and (3) an unincorporated joint venture between:

(A) **Leighton Contractors Pty Limited**; and

(B) **HEB Construction Limited**,

(together, the **Construction Sub-contractor**)

and (4) **Leighton Contractors Pty Limited (O&M Sub-contractor)**

and (5) **Aurecon New Zealand Limited (Independent Reviewer)**

Introduction

- A. The Transport Agency invited tenderers to bid to undertake the Project on behalf of the Transport Agency.
- B. The PPP Contractor is the successful tenderer and the Transport Agency has agreed to enter into the Project Agreement in which the PPP Contractor has agreed with the Transport Agency, among other things, to finance, design, construct and commission the TG Project, undertake the Works Provisioning and deliver the Operational Services.
- C. The PPP Contractor and the Construction Sub-contractor have entered into a construction contract for, among other things, the carrying out and completion of the Works Provisioning (the **Construction Contract**).
- D. The PPP Contractor and the O&M Sub-contractor have entered into a services contract for, among other things, the carrying out of the Operational Services (the **O&M Contract**).
- E. For the purposes of the Project Agreement, the Transport Agency and the PPP Contractor have agreed to appoint the Independent Reviewer, and the Independent Reviewer has agreed to act as independent reviewer and certifier on the terms and conditions contained in this Agreement.

It is agreed

1. Definitions and interpretation

1.1 Defined terms

In this Agreement any word, expression, reference or term used that is defined in the Project Agreement and is not specifically defined in clause 1.2 will, unless the context requires otherwise, have the same meaning in this Agreement.

1.2 Definitions

The following words or phrases, where they appear in this Agreement, have the following meaning unless the context requires otherwise:

Agreement means this agreement, including the Schedules;

Additional Services means the provision of additional reports or services (that are not Base Services) requested under clause 8.5;

Associate means any officers, agents, advisers, consultants, contractors, sub-contractor and employees of the applicable Party;

Author has the meaning given to it in clause 18.10;

Background Documents means the O&M Contract and the Interface Agreement;

Base Fee is the monthly fee payable for the Base Services for the Term calculated in accordance with the Schedule of Rates (but not including the Time Cost Fee), which is subject to the Maximum Monthly Amounts for each relevant month as set out in the Contract Particulars;

Base Services means:

- (a) all of the functions conferred on the Independent Reviewer under any Relevant Document, including the functions identified in Schedule 3;
- (b) all other things or tasks that the Independent Reviewer must do to comply with its obligations under this Agreement; and
- (c) without limiting paragraph (b), all other things and tasks not described in this Agreement or any other Relevant Document, if those things and tasks should have been reasonably anticipated by an experienced and competent professional provider of the Base Services as being necessary for the performance of the Base Services or that are otherwise capable of inference from any Relevant Document;

Claimed Amount has the meaning given to it in clause 12.2(a);

Confidential Information means:

- (a) all information and trade secrets already communicated or subsequently communicated under or in connection with this Agreement or with respect to the Independent Reviewer Services or otherwise with respect to the subject matter of this Agreement including (without limitation) any information obtained:
 - (i) in the course of negotiations leading to the conclusion of this Agreement; or
 - (ii) in the performance of this Agreement;
- (b) any information about the business or property of a person including (without limitation) any information:
 - (i) relating to the financial position of that person; or
 - (ii) concerning that person's suppliers and customers or its agents or brokers; or

- (iii) relating to that person's internal management, structure, personnel or strategies; or
 - (iv) comprising the terms of this Agreement;
- (c) all information in respect of any materials in which that person has Intellectual Property rights in accordance with the terms of any Project Document or Ancillary Document; and
- (d) all information otherwise defined as "confidential information" within any Project Document or Ancillary Document;

Construction Contract has the meaning given to it in the Introduction;

Contract Material is all material:

- (a) provided to the Independent Reviewer by any Project Party (including Design Documentation); or
- (b) brought or required to be brought into existence by the Independent Reviewer as part of, or for the purpose of, performing the Independent Reviewer Services including documents, equipment, reports, technical information, plans, charts, drawings, calculations, tables, schedules and data (stored by any means); or
- (c) provided to the Independent Reviewer or acquired by the Independent Reviewer in connection with, or during the performance of, the Independent Reviewer Services;

Contract Particulars means the particulars set out in Schedule 1;

Financiers' Certifier means Aurecon New Zealand Limited;

Financiers' Certifier Agreement means the agreement entitled 'Financiers' Certifier Agreement' between Bank of New Zealand, the PPP Contractor, the Construction Sub-contractor and the Financiers' Certifier dated on or about the date of this Agreement;

Fee is the sum of the Base Fees and the Time Cost Fees (if any);

GST means tax as defined in the GST Act;

GST Act means the Goods and Services Tax Act 1985;

Independent Reviewer Services means the Base Services and the Additional Services;

Independent Reviewer's Representative is the person named in the Contract Particulars or any other person appointed by the Independent Reviewer with the approval of the Project Parties from time to time to replace that person;

Interface Agreement means the agreement entered into between the PPP Contractor, the Construction Sub-contractor and the O&M Sub-contractor in connection with the matters the subject of the Construction Contract and the O&M Contract;

Joint Notice means a Notice signed by both the Project Parties' Representatives (or their duly authorised nominees);

Key People means the people identified as key people in the Contract Particulars;

Liability Cap has the meaning given to it in clause 11.4;

Maximum Monthly Amount is the amount described as such in item 4 of the Contract Particulars in respect of each relevant month of the Term, as adjusted in accordance with the terms of this Agreement;

Mediation Notice has the meaning given to it in clause 16.4;

Non-Project Party means each Party to this Agreement that is not a Project Party;

Notice has the meaning given to it in clause 17.1;

O&M Contract has the meaning given to it in the Introduction;

Parties means the parties to this Agreement, namely the Transport Agency, the PPP Contractor, the Construction Sub-contractor, the O&M Sub-contractor and the Independent Reviewer, and **Party** is any one of them;

Payment Period means each month following Financial Close until the expiry or earlier termination of this Agreement;

Personal Information has the meaning given to it in the Privacy Act 1993;

PPP Contractor's Proportion means:

- (a) ■% of the Base Fee, as determined in respect of each Payment Period in accordance with clause 12.3;
- (b) the Time Cost Fee for any Additional Services requested by the Contractor in accordance with clause 8.5 and completed during the relevant Payment Period; and
- (c) ■% of the Time Cost Fee for any Variation (to the extent that paragraph (b) does not apply) that the Independent Reviewer carries out pursuant to a Variation Direction given in accordance with clause 14.1(a);

PPP Contractor's Representative is the person named in the Contract Particulars or any other person nominated by the PPP Contractor under this Agreement to replace that person and advised in writing to the Transport Agency and the Independent Reviewer;

Progress Report means a monthly report covering the issues set out in clause 8.2 in a form to be agreed by the Parties, all acting reasonably;

Project Agreement means the project agreement in relation to Transmission Gully entered into between the Transport Agency and the PPP Contractor dated on or about the date of this Agreement;

Project Parties are the Transport Agency and the PPP Contractor, and **Project Party** is either one of them;

Project Parties' Representatives means the Transport Agency's Representative and the PPP Contractor's Representative collectively;

Project Party's Proportion means either the PPP Contractor's Proportion or the Transport Agency's Proportion (as the context may require);

Quality Assurance System means the quality assurance system that the Independent Reviewer must plan, develop and implement in accordance with clause 9.1;

Recipient has the meaning given to it in clause 13.1;

Relevant Documents means this Agreement, the Project Agreement and the Construction Contract;

Revenue has the meaning given to it in clause 13.4;

Schedule of Rates is the document that sets out rates and prices, as adjusted from time to time pursuant to this Agreement, for the calculation of the Base Fee and Time Cost Fee, attached in Schedule 2 to this Agreement;

Sub-Independent Reviewer means Aurecon New Zealand Limited as appointed in that capacity pursuant to the Sub-Independent Reviewer Agreement;

Sub-Independent Reviewer Agreement means the agreement entitled 'Sub-Independent Reviewer Agreement' between the PPP Contractor, the Construction Sub-contractor and the Sub-Independent Reviewer dated on or about the date of this Agreement;

Supplier has the meaning given to it in clause 13.1;

Tax includes all forms of taxation (whether direct or indirect), duties, charges, dues, imposts, levies, rates or other governmental impositions of whatever nature, imposed in New Zealand or elsewhere;

Tax Invoice has the meaning given to that term in the GST Act;

Taxation Authority means any governmental authority that is responsible for administering or levying Tax, whether in New Zealand or elsewhere, including (without limitation) New Zealand Inland Revenue;

Term means the period specified as such in the Contract Particulars, or any extended period notified by the Project Parties under clause 4.2 or as may be agreed between the Parties.

Time Cost Fee is the amount payable for:

- (a) any Additional Services; or
- (b) any Variation that the Independent Reviewer carries out after being given a Variation Direction in accordance with clause 14.1; or
- (c) any suspension under clause 10.3,

in each case calculated and assessed on the basis of the Schedule of Rates;

Transport Agency's Proportion means:

- (a) ■% of the Base Fee, as determined in respect of each Payment Period in accordance with clause 12.3;
- (b) the Time Cost Fee for any Additional Services requested by the Transport Agency in accordance with clause 8.5 and completed during the relevant Payment Period; and

- (c) ■% of the Time Cost Fee for any Variation (to the extent that paragraph (b) does not apply) that the Independent Reviewer carries out pursuant to a Variation Direction given in accordance with clause 14.1(a);

Transport Agency's Representative is the person named as such in the Contract Particulars or any other person nominated by the Transport Agency under this Agreement to replace that person and advised in writing to the PPP Contractor and the Independent Reviewer;

Variation means a material change in the nature or scope of the Base Services that will result in a material increase in the resourcing levels required to provide, or the costs of the Independent Reviewer in providing, the Base Services;

Variation Direction means a direction given in accordance with clause 14.1(a);

Works Completion Test(s) means those tests described or referred to as such in Schedule 10 (Completion Requirements) to the Project Agreement (including any additional tests and re-run tests requested by the Independent Reviewer pursuant to the Project Agreement) and includes all Close-out Tests referred to in the Project Agreement; and

Wilful Default means:

- (a) fraud, including fraudulent concealment or dishonesty; or
- (b) wilful misconduct; or
- (c) a breach of this Agreement or any statutory duty by the Independent Reviewer (or its Associates) in circumstances in which the Independent Reviewer (or its Associates) acts with an intentional, conscious or reckless disregard.

1.3 Interpretation

In this Agreement, headings are inserted for convenience of reference only and will be ignored in construing this Agreement and unless the context otherwise requires:

- (a) words importing the singular number include the plural and vice versa, a gender includes both genders and words importing persons include partnerships, trusts, corporations, joint ventures, unincorporated associations, unincorporated or statutory bodies, other entities and Governmental Entities;
- (b) references to clauses and Schedules are references to clauses of, and schedules to, this Agreement, in each case unless expressly stated otherwise;
- (c) references to any legislation or to any section or provision of any legislation include any modification or re-enactment of, or any legislative provision substituted for, and all legislation, regulations and statutory instruments under, such legislation;
- (d) references to any agreement or document (including this Agreement) are to the agreement or document as amended, novated, supplemented, or replaced from time to time, except to the extent prohibited by this Agreement or that other agreement or document;
- (e) references to a notice, notification, record, report, consent, agreement, disclosure, evidence or approval or any variation of those words, are references to a notice, notification, record, report, consent, agreement, disclosure, evidence or approval or any variation of those words, in writing;

- (f) a reference to writing includes any method of representing or reproducing words, figures, drawings or symbols in a visible form (including facsimile);
- (g) references to conduct include an omission, statement or undertaking, whether or not in writing;
- (h) references to an authority, institute, association, instrumentality, statutory body or body politic (each a person) are:
 - (i) if that person is reconstituted, renamed or replaced, deemed to refer to that person as reconstituted, renamed or replaced; or
 - (ii) if the powers or functions of that person are transferred to, or assumed by, another person, deemed to refer to that other person; or
 - (iii) if that person ceases to exist, deemed to refer to the person which substantially serves the same purposes or object of that person who has ceased to exist;
- (i) references to any party to this Agreement or any other document includes its successors, permitted substitutes and permitted assigns (and, where applicable, the party's legal personal representatives);
- (j) a reference to months is a reference to calendar months;
- (k) where a word or phrase is defined, any other capitalised grammatical form of that word or phrase has a corresponding meaning;
- (l) nothing in this Agreement is to be interpreted against a party solely on the ground that the party put forward this Agreement or any part of it;
- (m) a reference to an agreement includes any undertaking, deed, agreement or legally enforceable arrangement, whether or not in writing, and a reference to a document includes an agreement (as so defined) in writing and any certificate, notice, instrument and document of any kind;
- (n) a reference to dollars and \$ is to New Zealand currency;
- (o) whenever the words "includes" or "including" are used in this Agreement, they are deemed to be followed by the words "without limitation";
- (p) where a right or remedy is conferred on the Transport Agency under this Agreement, that right or remedy is in addition to, and not in substitution of or to be limited or affected by, a right or remedy conferred on the Transport Agency in another provision of this Agreement or otherwise at Law; and
- (q) the term **may** when used in the context of a right or remedy exercisable by the Transport Agency or a delegate of the Transport Agency means that the Transport Agency or its delegate can exercise that right or remedy in its sole and absolute discretion and the Transport Agency or its delegate has no obligation to the PPP Contractor or the Independent Reviewer to do so unless expressly stated.

1.4 Consents or approvals

A consent or approval under this Agreement from the Transport Agency or any delegate of the Transport Agency may be given or withheld, or may be given subject to such conditions, as the Transport Agency or the delegate of the Transport Agency (in its absolute discretion) thinks fit, unless this Agreement expressly provides otherwise.

1.5 **Priority of documents**

To the extent of any inconsistency between this Agreement and the Project Agreement, the Project Agreement prevails.

1.6 **Business Day**

Where the day on or by which any payment is to be made under this Agreement is not a Business Day, it will be made on the next Business Day.

2. **Conditions Precedent**

- (a) This Agreement (other than this clause 2 and clauses 11, 18.7, 18.8, 18.11, 18.15 and 18.19) is conditional upon:
 - (i) the satisfaction or waiver of the Conditions Precedent in accordance with clause 10.4 (Conditions Precedent) of the Project Agreement; and
 - (ii) all Probity Investigations in respect of the Independent Reviewer required to be conducted by Law having been conducted and found acceptable by the Transport Agency.
- (b) If the Conditions Precedent are not satisfied or waived in accordance with the Project Agreement, this Agreement shall automatically terminate and none of the Parties shall have any liability to other Parties or each other arising out of or relating to any such termination.

3. **Relationships and roles**

3.1 **Relationship of Parties**

- (a) Nothing in, or contemplated by, this Agreement will be construed or interpreted as:
 - (i) constituting a relationship between the Parties, or any other person, of partners, joint venturers, fiduciaries, employer and employee or principal and agent; or
 - (ii) imposing any general duty of good faith on the Transport Agency to the other Parties or any of their Associates in relation to or arising out of the Project, other than where this is expressly stated to be the case under this Agreement; or
 - (iii) unlawfully restricting or otherwise unlawfully affecting the unfettered discretion of the Transport Agency to exercise any of its executive or statutory powers or functions under any Law.
- (b) The Independent Reviewer, its officers, employees, servants and agents and any other persons engaged by the Independent Reviewer in the performance of the Independent Reviewer Services will not by virtue of this Agreement or the performance of the Independent Reviewer Services become in the service or employment of any of the other Parties for any purpose.
- (c) The Independent Reviewer will be responsible for all matters relating to its position as employer or otherwise in relation to such officers, employees, servants and agents and other persons who are so engaged.

3.2 Limitation of Transport Agency's obligations

Each of the Parties acknowledges and agrees that:

- (a) nothing in or contemplated by this Agreement will be construed or interpreted as restricting or otherwise affecting the unfettered discretion of the Transport Agency or any other Governmental Entity to exercise any of its executive or statutory powers or functions under any Law, or to require the Transport Agency or any Governmental Entity:
 - (i) to interfere with or influence the exercise of any statutory power or discretion by any person, including the Transport Agency or a Governmental Entity; or
 - (ii) to exercise a power or discretion in a manner that promotes the objectives and expected outcomes of this Agreement, if the Transport Agency regards that exercise as not in the public interest; or
 - (iii) to develop or implement new policy in a manner that is only consistent with the objectives and expected outcomes of this Agreement; or
 - (iv) to procure legislation in the future in a manner that is only consistent with the objectives and expected outcomes of this Agreement; or
 - (v) to act in any other way that the Transport Agency regards as not in the public interest;
- (b) anything that the Transport Agency or any Governmental Entity does, or fails to do pursuant to its executive or statutory functions and powers will be deemed not to be or cause an act or omission by the Transport Agency under this Agreement, and will not entitle any other party to make any claim against the Transport Agency under this Agreement;
- (c) notwithstanding clause 3.2(b), the Transport Agency is not relieved from any claim that any other party may have against the Transport Agency for its exercising any of its executive or statutory functions or powers under any Law in a manner contrary to an express obligation of the Transport Agency under this Agreement. The existence of such obligations, and the existence and amount of such claim is to be assessed in accordance with the express terms of this Agreement; and
- (d) notwithstanding clause 3.2(a) or clause 3.2(b) or anything else contained or implied in this Agreement to the contrary, the Parties expressly acknowledge and agree that the Transport Agency is not obliged, in performing any of the duties and obligations of the Transport Agency under this Agreement, to exercise a power, function or duty which is granted to or within the responsibility of any other Governmental Entity, or to influence, override or direct any Governmental Entity in the proper exercise and performance of its legal duties and functions.

3.3 Non-Project Parties

- (a) No Non-Project Party shall be entitled or authorised to instruct the Independent Reviewer to undertake any additional services under this Agreement.
- (b) Nothing in this Agreement shall make any Non-Project Party liable to the Independent Reviewer for any payment due to the Independent Reviewer pursuant to clause 12.
- (c) The Non-Project Parties hereby acknowledge and agree that their sole rights under this Agreement are to obtain the benefit of the warranties and undertakings of the Independent Reviewer under clauses 4.1(b), 4.1(c)(iii), 4.3, 4.4, 4.8, 4.9(a), 18.8(a),

18.8(b) and 18.9(b), each of which shall be enforceable by the Non-Project Parties in accordance with the terms of this Agreement. For the avoidance of doubt, to the extent that clause 11.6 applies with respect to a breach by the Independent Reviewer of any of those clauses, the relevant Non-Project Party shall also be entitled to enforce clause 11.6 in relation to such breach.

4. Role of Independent Reviewer generally

4.1 Engagement

- (a) The Independent Reviewer is engaged:
 - (i) as an independent professional experienced in:
 - (A) the provision of services in the nature of the Independent Reviewer Services; and
 - (B) projects in the nature of the Project; and
 - (ii) to carry out the Independent Reviewer Services for the Term in accordance with this Agreement.
- (b) The Independent Reviewer warrants to the other Parties that it will comply with all Law in the provision of the Independent Reviewer Services.
- (c) The Independent Reviewer:
 - (i) acknowledges that it has been provided with a complete copy of each of the Relevant Documents and the Background Documents and shall be deemed to have studied the same;
 - (ii) acknowledges that any breach by it of this Agreement may result in one or more of the other Parties incurring Losses and/or Liabilities under or in respect of the Relevant Documents and/or the Background Documents; and
 - (iii) shall, subject to its overriding duty of independent judgment set out in clause 4.4, perform its obligations under this Agreement so that no negligent act, omission or default, breach of this Agreement or Wilful Default on its part shall cause or contribute to any breach or default by any other Party of its obligations under the applicable Relevant Documents.

4.2 Extension of Term

The Project Parties may, but are under no obligation to, extend the Term by a further period or periods by a Joint Notice to the Independent Reviewer of their intention to do so before the end of the Term, which specifies the date to which the Term is extended.

4.3 Standard of care

- (a) The Independent Reviewer warrants and undertakes for the benefit each of the other Parties that it shall exercise the standard of skill, care, foresight, prudence and diligence in the performance of the Independent Reviewer Services that would be expected of a professional experienced in providing similar services for projects similar to the Project.

- (b) The Independent Reviewer acknowledges that each of the other Parties is relying upon and shall continue to rely upon such exercise of skill, care, foresight, prudence and diligence in the performance of the Independent Reviewer Services.
- (c) The Independent Reviewer must keep the Project Parties fully and regularly informed as to all matters affecting or relating to the Independent Reviewer Services.

4.4 Duty of independent judgment

- (a) In exercising its functions and performing its duties under the Relevant Documents, the Independent Reviewer undertakes for the benefit of each of the other Parties:
 - (i) to act professionally, independently and in a timely manner;
 - (ii) subject to the terms of the Relevant Documents, to arrive at a reasonable measure or value of work, quantities or time;
 - (iii) to exercise its functions impartially, honestly, reasonably and fairly;
 - (iv) to exercise the powers, duties, discretions and authorities as an independent reviewer, assessor and valuer, and not as agent for any of the other Parties; and
 - (v) to take into account any submissions made by the Project Parties in accordance with the Relevant Documents in a manner consistent with its obligations in clause 4.3(a) and the remainder of this clause 4.4(a).
- (b) The Independent Reviewer acknowledges and agrees that each of the other Parties is relying upon and shall continue to rely upon the Independent Reviewer's compliance with the above undertakings in the performance of the Independent Reviewer Services.
- (c) No Party is to improperly interfere with or attempt to improperly influence the Independent Reviewer in the performance of the Independent Reviewer Services.

4.5 Conflict of interest

- (a) The Independent Reviewer warrants for the benefit of each of the Project Parties that:
 - (i) at the date of execution of this Agreement, no conflict of interest (actual or perceived) exists or is likely to arise in the performance of its obligations under this Agreement or the Project Agreement;
 - (ii) it will not, during the Term, undertake any activities, work or provide any services that may give rise to a conflict or risk of conflict of interest; and
 - (iii) if, during the Term, without limiting clause 4.5(a)(ii), any conflict or risk of conflict of interest arises, the Independent Reviewer will notify the Project Parties' Representatives immediately of that conflict or risk and take such action to avoid or mitigate the conflict or risk of conflict of interest as the Project Parties' Representatives may require.
- (b) Subject to clause 4.5(c), without the prior consent of the Transport Agency's Representative, the Independent Reviewer will not be appointed or accept any appointment to act:
 - (i) in any other role under or relating to the Construction Contract, the O&M Contract or any other sub-contract; or

- (ii) for any other person in respect of the Project.
- (c) NZTA hereby approves the appointment of the Independent Reviewer as Sub-Independent Reviewer and Financiers' Certifier.

4.6 **Communication with Project Parties**

- (a) The Independent Reviewer must ensure that a copy of all written communications, reports, opinions and notices provided by or on behalf of any other Party to the Independent Reviewer, or by or on behalf of the Independent Reviewer to any other Party, is forwarded to each Project Party.
- (b) Without limiting clause 4.6(a), the Independent Reviewer must provide to the Transport Agency not less than two Business Days' written notice of the expected performance of any Works Completion Test.

4.7 **Authority to act**

The Independent Reviewer:

- (a) is an independent consultant and is not, and must not purport to be, a partner, joint venturer or agent of any other Party;
- (b) other than as expressly set out in a Relevant Document, has no authority to give any directions to any other Party or its Associates; and
- (c) has no authority to waive or alter any terms of the Project Documents, nor to discharge or release a party from any of its obligations under the Project Documents.

4.8 **Knowledge of requirements under Relevant Documents**

The Independent Reviewer warrants for the benefit of each Project Party that:

- (a) it has informed and will be deemed to have informed itself fully of the requirements of the Relevant Documents;
- (b) without limiting clause 4.8(a), it has and will be deemed to have informed itself fully of all time limits and other requirements for any function that the Independent Reviewer has to carry out under the Relevant Documents;
- (c) it has and will be deemed to have informed itself completely of the nature of the work necessary for the performance of the Independent Reviewer Services and (to the maximum extent possible) the means of access to and facilities within the TG Project Site including any restrictions on any such access;
- (d) it has satisfied itself as to the correctness and sufficiency of its tender for the Independent Reviewer Services and that the Fee covers the cost of complying with all of its obligations under this Agreement and of all matters and things necessary for the due and proper performance and completion of the Independent Reviewer Services; and
- (e) it will, in performing the Independent Reviewer Services, comply with the Relevant Documents (insofar as such Relevant Documents are directly applicable to the scope or provision of the Independent Reviewer Services) in accordance with the duties and obligations imposed under this Agreement.

4.9 **Coordination by Independent Reviewer**

The Independent Reviewer must, during the period of the Project:

- (a) fully cooperate with the Project Parties and their Associates and the Project Parties' Representatives;
- (b) carefully coordinate the Independent Reviewer Services with the work and services performed by the other Parties and the Project Parties' Representatives; and
- (c) perform the Independent Reviewer Services so as to avoid interfering with, disrupting or delaying, the Works Provisioning to be performed under the applicable Relevant Documents except to the extent the interference, disruption or delay is as an unavoidable consequence of performing the Independent Reviewer Services in accordance with this Agreement.

4.10 **Effect of Schedule of References to functions of Independent Reviewer**

The Project Parties and the Independent Reviewer each acknowledge that Schedule 3:

- (a) is indicative only;
- (b) is not intended to be a complete description of functions of the Independent Reviewer under the Project Agreement or any other document; and
- (c) does not limit or otherwise affect the Base Services or the performance of the Base Services.

5. **Role of Project Parties**

5.1 **Information and Independent Reviewer Services**

- (a) The Project Parties must as soon as practicable make available to the Independent Reviewer all information, documents and particulars relating to the Independent Reviewer Services.
- (b) The Project Parties must ensure that the Independent Reviewer is provided with all information, assistance, documents and particulars:
 - (i) required under the Relevant Documents to be provided by either of the Project Parties to the Independent Reviewer or as otherwise reasonably required by the Independent Reviewer within the time (if any) required by the Relevant Document, or, where no period is specified, as soon as reasonably practicable; and
 - (ii) as may be reasonably requested by the Independent Reviewer to enable it to perform the Independent Reviewer Services effectively and otherwise in accordance with this Agreement, including any relevant documents prepared by or on behalf of the other Parties, including, where requested by the Independent Reviewer, electronic copies in application format of such information, documents or particulars.

5.2 **Access to PPP Contractor's systems**

Without limiting the obligations of the PPP Contractor under clause 5.1, the PPP Contractor, the Construction Sub-contractor and the O&M Sub-contractor must provide the Independent

Reviewer with such access to their books, records and systems, including, where requested by the Independent Reviewer, electronic access to such books, records and systems as required to enable the Independent Reviewer to perform the Independent Reviewer Services.

5.3 Additional information

- (a) If:
- (i) any information, documents or particulars are reasonably required to enable the Independent Reviewer to perform the Independent Reviewer Services; and
 - (ii) the information, documents or particulars are not provided by the relevant Party,
- then:
- (iii) the Independent Reviewer must give notice to the Project Parties' Representatives of the details of that information, documents or particulars and demonstrate the need and the reasons why they are required; and
 - (iv) if the Transport Agency and the PPP Contractor are satisfied that the need and the reasons have been demonstrated to their satisfaction, then at its own cost, the PPP Contractor (if the information, documents or particulars are in its possession or the possession of the Construction Sub-contractor or the O&M Sub-contractor) or otherwise the Transport Agency (if the information, documents or particulars are in its possession) must ensure that the Independent Reviewer is provided with the required information, documents or particulars.
- (b) Nothing in this clause 5.3 (including any notice from the Independent Reviewer under clause 5.3(a)(iii)) limits or otherwise affects the Independent Reviewer's obligations under this Agreement.

5.4 Right to enter, inspect and test

- (a) The Independent Reviewer must attend (with personnel of appropriate experience and expertise) all of the Works Completion Tests as required under the terms of the Project Agreement.
- (b) The Independent Reviewer (and any person authorised by the Independent Reviewer) may enter the TG Project Site and any other place where the Works Provisioning is being performed or materials are being prepared or stored and inspect and test, or witness any test of, any part of the Works Provisioning undertaken under the Project Agreement at any time, conditional, however, upon the Independent Reviewer:
- (i) giving reasonable notice to the PPP Contractor (except in the case of any emergency, in which case no notice will be required);
 - (ii) observing and complying with (and ensuring that any such authorised person observes and complies with) the Site Access Protocols and any other reasonable rules or requirements of the PPP Contractor in relation to safety or security on the TG Project Site and any other place where the Works Provisioning is being carried out or materials are being prepared or stored that are applied generally by the PPP Contractor or its Major Sub-contractors;
 - (iii) not delaying (and ensuring that any authorised person does not delay) the carrying out of the Works Provisioning, except to the extent that any such delay

is the unavoidable consequence of the proper performance of the Independent Reviewer Services; and

- (iv) not damaging (and ensuring that any authorised person does not damage) the Works Provisioning, the TG Project Site or any adjoining land in connection with the exercise or purported exercise of rights under this clause 5.4.
- (c) The PPP Contractor and the Construction Sub-contractor must each give such reasonable assistance as is required by the Independent Reviewer in respect of any inspection or testing under this clause 5.4, including:
 - (i) providing access to such part of the Works Provisioning and/or the TG Project Site and all relevant Design Documentation as may be reasonably required by the Independent Reviewer;
 - (ii) preparing samples of materials used in connection with the Works Provisioning to the reasonable satisfaction of the Independent Reviewer; and
 - (iii) forwarding the samples prepared under clause 5.4(c)(ii) to the Independent Reviewer or such other place as notified by the Independent Reviewer.

5.5 Access to premises of others

The PPP Contractor, the Construction Sub-contractor and the O&M Sub-contractor must each ensure that at all reasonable times:

- (a) provided that it has received reasonable notice from the Independent Reviewer, the Independent Reviewer's Representative (or any person authorised in writing by the Independent Reviewer's Representative) is given access to premises it occupies, or occupied by any other Sub-contractor of the PPP Contractor, the Construction Sub-contractor or the O&M Sub-contractor, to inspect any works or Services or the performance of such Services relating to the Project, subject to all such persons complying with the Site Access Protocols and any other reasonable rules of the Construction Sub-contractor regarding safety on site as notified, from time to time, in writing to the Independent Reviewer; and
- (b) where persons referred to in clause 5.5(a) inspect any works or Services or any relevant information or material relating to the Services, that they are able to do so in the presence of persons authorised by the Construction Sub-contractor (if the relevant works or Services, information or materials relate to the works carried out under the Construction Contract).

5.6 Coordination with Independent Reviewer

The PPP Contractor, the Construction Sub-contractor and the O&M Sub-contractor must ensure that:

- (a) during the carrying out of the Project, it, any advisor, consultant and Sub-contractor engaged by it:
 - (i) fully co-operates with the Independent Reviewer; and
 - (ii) provides the Independent Reviewer with whatever information and support as is reasonable to facilitate the performance of the Independent Reviewer Services in accordance with the Relevant Documents;
- (b) it is aware of the matters referred to in clauses 5.5 and 5.6(a); and

- (c) the respective contracts under which any Sub-contractor is engaged contain terms that require those parties to comply with the matters referred to in clauses 5.5 and 5.6(a).

5.7 Facilities for Independent Reviewer

- (a) The PPP Contractor shall, until Works Completion, provide the Independent Reviewer with up to three hot desks or workstations (**Workstations**) in the serviced construction or administration office located at the TG Project Site (where **serviced** means the provision of electricity, lighting and internet connections).
- (b) The Workstations will be provided to the Independent Reviewer free of charge. However, the PPP Contractor shall not be responsible for supplying any computers or IT equipment at the Workstations.
- (c) The Independent Reviewer shall procure that all of the Independent Reviewer's employees or authorised persons who utilise the Workstations comply with the Site Access Protocols (and all other obligations set out in clauses 5.4(b) and 5.5) whilst on the Site.
- (d) The Independent Reviewer acknowledges and agrees that the Workstations will be located in a multi-purpose office and that the Independent Reviewer's employees or authorised persons who utilise the Workstations may be privy to Confidential Information. Accordingly, the Independent Reviewer shall procure that all such employees and authorised persons comply with clause 18.8 in relation to any such Confidential Information to which they become privy.

5.8 Acknowledgement

Nothing in this clause 5 obliges the PPP Contractor to act, or omit to act, where to do so, or to omit to do so, may delay the execution of, or cause or result in damage to, the Works Provisioning, unless such delay or damage is an unavoidable consequence of facilitating the Independent Reviewer Services.

6. Representatives

6.1 Independent Reviewer's Representative

The Independent Reviewer:

- (a) has nominated the Independent Reviewer's Representative as the person to act as its representative for the Project;
- (b) may, from time to time, in writing nominate another person to act as the Independent Reviewer's Representative, subject to the Project Parties' approval (in their sole and absolute discretion), in which case that person will be the relevant representative in lieu of the person named in the Contract Particulars; and
- (c) confirms that the Independent Reviewer's Representative has the power and authority to bind the Independent Reviewer.

6.2 Project Parties' Representatives

The Transport Agency and the PPP Contractor respectively:

- (a) have appointed the Transport Agency's Representative and the PPP Contractor's Representative as the persons to act as their respective representatives for the purposes of this Agreement;
- (b) may, from time to time, in accordance with the terms of the Project Agreement, in writing nominate another person to act as the Transport Agency's Representative or the PPP Contractor's Representative (as the case may be), in which case that person will be the relevant representative in lieu of the person named in the Contract Particulars; and
- (c) confirm that the Transport Agency's Representative and the PPP Contractor's Representative respectively have the power and authority to bind the Transport Agency and the PPP Contractor (as the case may be) for all purposes in connection with this Agreement.

6.3 Key People

The Independent Reviewer must:

- (a) ensure that the Key People perform the functions in the Contract Particulars and, unless reasonably directed otherwise by the Project Parties' Representatives, ensure that they are committed to the Project for the percentage of time specified in the Contract Particulars;
- (b) subject to clauses 6.1(b) and 6.3(c), not replace any of the Key People without the Project Parties' Representatives' approval, which approval will not be unreasonably withheld;
- (c) without limiting clause 6.3(a), use its best endeavours to ensure that none of the Key People resign or otherwise become unavailable to perform their functions as required by clause 6.3(a); and
- (d) if any of the Key People dies, becomes seriously ill, resigns from or is no longer employed by the Independent Reviewer or is on leave of absence, replace them as soon as practicable with persons of at least equivalent experience and expertise approved by the Project Parties' Representatives (in their sole and absolute discretion).

6.4 Restriction on delegation and sub-contracting

- (a) The Independent Reviewer must not delegate or sub-contract any of its powers, duties, obligations, responsibilities or discretions under this Agreement without prior written consent of the Project Parties, which consent may be given or withheld at the Project Parties' discretion.
- (b) The Independent Reviewer will remain liable to the Transport Agency and the PPP Contractor for any acts or omissions of any person to whom it has delegated or sub-contracted any of its powers, duties, obligations, responsibilities or discretions (even if that delegation or sub-contract has been consented to by the Project Parties).
- (c) The Independent Reviewer remains fully responsible for the Independent Reviewer Services notwithstanding that the Independent Reviewer has delegated or sub-contracted the performance of any part of the Independent Reviewer Services.

7. Conduct of Independent Reviewer

- (a) Other than the Contractor under clause 25.5(c) of the Construction Contract, and save to the extent that the Independent Reviewer is performing Additional Services for a Party (in which case that Party may be liable), no Party (excluding the Independent Reviewer) will be liable to another Party (excluding the Independent Reviewer) for any act or omission by the Independent Reviewer whether under or purportedly under a provision of this Agreement or the Relevant Documents, or otherwise.
- (b) This clause 7 does not limit the right of:
 - (i) either the Transport Agency or the PPP Contractor to dispute a determination of the Independent Reviewer under the Project Agreement; or
 - (ii) the Construction Sub-contractor to dispute a determination of the Independent Reviewer under clause 25.5(c) of the Construction Contract,

or the remedies available to such Parties as a result of the determination of that dispute.

8. Obligations of Independent Reviewer

8.1 Obligations under Project Agreement

The Independent Reviewer must perform each obligation and discharge each duty and function of the Independent Reviewer described in the Relevant Documents.

8.2 Progress Reports

The Independent Reviewer must submit written monthly Progress Reports to each of the Project Parties:

- (a) each month, at least two Business Days before each scheduled meeting of the Relationship Management Group;
- (b) that set out details of the general progress of the Works Provisioning up to the date of the report including:
 - (i) the results of the review of the Construction Programme or any sub-programme and of the progress of the Works Provisioning as against the Construction Programme, and any sub-programme, and any matters or departures notified, or directions given under the Project Agreement;
 - (ii) the results of review of any placement, location, relocation or installation of equipment, and any matters or departures notified, under the Project Agreement;
 - (iii) the results of any Works Completion Test, carrying out of sampling, measuring or other testing and any matters or departures notified or additional tests required under the Project Agreement;
 - (iv) any notices or reports given by the PPP Contractor, the Construction Sub-contractor or the O&M Sub-contractor to the Independent Reviewer, any further testing requested by the Independent Reviewer, and any notices or certificates issued, any list, comments or amendments provided or approval given, by the Independent Reviewer under the Project Agreement;

- (v) the results of the review of the progress of the Works Provisioning, and any determinations (including in relation to disputes), notices or certifications, by the Independent Reviewer and any notices or submissions by the Project Parties under the Project Agreement;
 - (vi) any claims made by the PPP Contractor, the Construction Sub-contractor or the O&M Sub-contractor to the Independent Reviewer;
 - (vii) any determination made, or extensions of time granted or reduced, under clauses 35 (Extension Events) and 38 (General provisions relating to Events) of the Project Agreement;
 - (viii) any certifications by the Independent Reviewer under the Project Agreement;
 - (ix) whether the Construction Programme and sub-programmes accurately reflect the progress of the Works Provisioning; and
 - (x) any other matter or issue that the Independent Reviewer is aware of in relation to the Works Provisioning or the Works Completion Tests; and
- (c) in a form and covering such other matters in respect of the performance of the Independent Reviewer Services and the Project as may be required by either of the Project Parties and notified to the Independent Reviewer. The Independent Reviewer must promptly and fully respond to any questions that a Project Party asks in relation to any such report from time to time.

8.3 Form of notices and certificates

Any notice or certificate given by the Independent Reviewer pursuant to the Project Agreement must be in the form (if any) prescribed under the Project Agreement and otherwise in a form acceptable to the Transport Agency and the PPP Contractor (each acting reasonably).

8.4 Meetings

- (a) The Independent Reviewer acknowledges that the Project Governance Group and the Relationship Management Group will be established under the Project Agreement.
- (b) The Independent Reviewer must:
 - (i) attend each meeting of the Relationship Management Group;
 - (ii) attend each meeting of the Project Governance Group when requested by any member of the Project Governance Group;
 - (iii) present and explain each Progress Report at the relevant meetings;
 - (iv) provide such other information as is necessary to ensure that the Project Governance Group is and the Relationship Management Group are kept well informed as to the progress of the Independent Reviewer Services and the Project generally; and
 - (v) at such meetings where it requires instructions from the Project Parties, do everything to facilitate the giving of such instructions.
- (c) The other Parties must attend any further meetings with the Independent Reviewer, as the Independent Reviewer may reasonably request (and must procure the attendance

of any other representatives and Associates of those Parties reasonably requested by the Independent Reviewer):

- (i) to provide such assistance to the Independent Reviewer in carrying out the Independent Reviewer Services as is reasonably necessary; and
 - (ii) to provide such explanations and additional information relating to any document, notice or information provided to the Independent Reviewer.
- (d) The Independent Reviewer must attend any further meetings with the Project Parties as the Project Parties may request, and if required by the Project Parties must procure the attendance of any sub-contractor, employee or representative of the Independent Reviewer at any meeting between the Independent Reviewer and the Project Parties.

8.5 Additional Services requested by one Project Party

- (a) A Project Party may require the Independent Reviewer to provide Additional Services that are not contemplated by the Relevant Documents. Where so requested, the Independent Reviewer must within five Business Days of such request:
- (i) confirm whether the Independent Reviewer (acting reasonably) is of the opinion that it would be inappropriate, in light of the performance and nature of the Independent Reviewer Services, for the Independent Reviewer to undertake those Additional Services; or
 - (ii) provide an estimate (**Estimate**) for the provision of such Additional Services, based on the fees set out in the Schedule of Rates (broken down into the anticipated hours of each of the relevant Key People) if it is reasonably capable of doing so.
- (b) Upon receipt of the Estimate, the Project Party requesting the Additional Services under clause 8.5(a) shall as soon as reasonably practicable confirm whether the Estimate is accepted and thereupon the Independent Reviewer shall commence the work necessary to provide the Additional Services.
- (c) The Project Party requesting the Additional Services under clause 8.5(a) is solely responsible for the payment of the Time Cost Fee in respect of an Additional Service and any reasonable disbursements or expenses of the Independent Reviewer in providing the Additional Services, and such Time Cost Fee (together with the disbursements and expenses) must not exceed the amount of the Estimate unless otherwise agreed between such Project Party and the Independent Reviewer.
- (d) For the avoidance of doubt:
- (i) the request by one of the Project Parties to the Independent Reviewer to provide Additional Services under clause 8.5(a) is not a Variation to the Independent Reviewer Services under this Agreement.
 - (ii) notwithstanding that one Project Party has paid the Time Cost Fee in respect of the Additional Services in accordance with this clause 8.5, the Independent Reviewer must provide a copy of the report or other material (if any) prepared by the Independent Reviewer to the other Project Party, and each Project Party may rely upon the content of any such additional report or other material (if any).

8.6 Health and safety

Without limiting clause 5.4(b)(ii), the Independent Reviewer is responsible for health and safety issues relating to the provision of the Independent Reviewer Services. The Independent Reviewer must have in place a health and safety management plan that is appropriate for the Independent Reviewer Services and must comply with any health and safety plan and processes operated by the PPP Contractor, the Construction Sub-contractor or any party in control of the TG Project Site.

9. Quality

9.1 Quality Assurance System

The Independent Reviewer must:

- (a) plan, develop and implement a Quality Assurance System:
 - (i) complying with all requirements of the relevant AS/NZS ISO Standards published by Standards New Zealand as and when they are published; and
 - (ii) that is otherwise satisfactory to the Project Parties' Representatives, in respect of the Independent Reviewer Services;
- (b) within 14 days of the date of this Agreement, provide the Project Parties' Representatives with details of the Quality Assurance System it proposes; and
- (c) if satisfactory to the Project Parties' Representatives, implement the Quality Assurance System.

9.2 Quality assurance not to relieve Independent Reviewer

The Independent Reviewer will not be relieved of any responsibilities or obligations in respect of the performance of the Independent Reviewer Services and will remain solely responsible and liable for them notwithstanding:

- (a) the obligation of the Independent Reviewer to plan, develop and implement a Quality Assurance System; or
- (b) any comment or direction upon, review or acceptance of, approval to proceed with or request to vary any part of the Quality Assurance System by a Project Party's Representative.

9.3 Non-compliant Independent Reviewer Services

The Independent Reviewer must, at its own cost:

- (a) unless directed otherwise in writing by the Project Parties, re-perform all Independent Reviewer Services that have not been performed in accordance with this Agreement; and
- (b) take all such steps as may be reasonably necessary:
 - (i) to mitigate the effect on the Project Parties of the failure to perform the Independent Reviewer Services in accordance with this Agreement; and

- (ii) to put the Project Parties (as closely as possible) in the positions in which they would have been had the Independent Reviewer performed the Independent Reviewer Services in accordance with this Agreement, including all such steps as may be reasonably directed by the Project Parties in writing.

10. Time and suspension

10.1 Timely provision of Independent Reviewer Services

- (a) The Independent Reviewer must perform the Independent Reviewer Services in a timely manner:
 - (i) in accordance with the times prescribed under the Relevant Documents; or
 - (ii) if no time is prescribed, within a time period that the Independent Reviewer determines is reasonably necessary to enable the Independent Reviewer to properly perform that Independent Reviewer Service in accordance with its obligations under this Agreement and so as not to prejudice the Project Parties' rights and obligations under the Project Agreement.
- (b) During Works Provisioning, the Independent Reviewer must be available to perform the Independent Reviewer Services on Business Days between the hours of 8:00am and 5:00pm so as to ensure that Works Provisioning is not delayed due to the Independent Reviewer's unavailability.

10.2 Suspension notice

The Independent Reviewer Services (or any part of the Independent Reviewer Services) may be suspended at any time by Joint Notice from the Project Parties:

- (a) if the Independent Reviewer fails to comply with its obligations under this Agreement, immediately by giving notice to the Independent Reviewer; or
- (b) by giving five Business Days' notice to the Independent Reviewer.

10.3 Costs of suspension

The Independent Reviewer will:

- (a) subject to clause 10.3(b), have no right to be paid any costs, expenses or damages (including any amount otherwise payable under clause 12 or clause 13) arising from a suspension under clause 10.2; and
- (b) subject to the Independent Reviewer complying with clause 14, be entitled to recover the costs reasonably incurred by the Independent Reviewer by reason of a suspension directed under clause 10.2(b), valued as a Variation to the Independent Reviewer Services under clause 14.5.

10.4 Recommencement

The Independent Reviewer must immediately recommence the carrying out of the Independent Reviewer Services (or any part) on receipt of a notice from the Project Parties' Representatives requiring it to do so.

11. Insurance and liability

11.1 Professional indemnity insurance

- (a) The Independent Reviewer must have in place, during the period commencing on the date of this Agreement and ending on the cessation of the performance of the Independent Reviewer Services, professional indemnity insurance:
 - (i) in the amount referred to in the Contract Particulars;
 - (ii) with a deductible of no more than the amount referred to in the Contract Particulars;
 - (iii) from a Reputable Insurer; and
 - (iv) on terms satisfactory to the Project Parties (acting reasonably).

Such professional indemnity insurance must cover liability that the Independent Reviewer might incur as a result of a breach by it of its obligations under clause 4.3 or any other breach of a duty (including under statute) owed by the Independent Reviewer in a professional capacity.

- (b) Following the cessation of the performance of the Independent Reviewer Services and unless otherwise agreed in writing by the Project Parties, the Independent Reviewer shall renew its professional indemnity insurance annually for the period of 6 years following such cessation on substantially the same terms as required under clause 11.1(a) above, to the extent that such insurance is commercially available in the Australasian insurance market on commercially reasonable terms having regard to the time of each renewal.

11.2 Public liability insurance

The Independent Reviewer must have in place at the date of this Agreement public liability insurance

- (a) in the amount referred to in the Contract Particulars;
- (b) with a deductible of no more than the amount referred to in the Contract Particulars;
- (c) from a Reputable Insurer; and
- (d) on terms satisfactory to the Project Parties (acting reasonably).

11.3 Insurance policies

- (a) The Independent Reviewer must not, without obtaining the prior written consent of the Project Parties:
 - (i) materially alter the terms of; or
 - (ii) alter the risks covered by; or
 - (iii) reduce the sum insured under,

the professional indemnity insurance policy referred to in clause 11.1 or the public liability insurance policy referred to in clause 11.2 to the extent such changes have an

adverse effect on the insurance coverage provided by the Independent Reviewer under this Agreement.

- (b) The Independent Reviewer must provide the Project Parties, upon request from either Project Party, with:
 - (i) copies of the then-current certificate of currency of its insurance policies required under this Agreement;
 - (ii) information on any circumstances that may reasonably be expected to materially affect coverage under and in accordance with any of the policies of insurance required to be effected by the Independent Reviewer in accordance with this Agreement; and
 - (iii) evidence in the form of a broker's letter of confirmation (or such other evidence as is satisfactory to the Project Parties) that the premiums payable under each policy of insurance required to be effected by the Independent Reviewer in accordance with this Agreement have been paid and that each policy of insurance required to be effected by the Independent Reviewer in accordance with this Agreement is in full force and effect in accordance with the requirements of this Agreement.
- (c) If, after being notified by a Project Party to do so, the Independent Reviewer fails to produce the evidence required by paragraph 11.3(b) of compliance with its insurance obligations under this clause 11 to the reasonable satisfaction of the Project Parties within 10 Business Days of that notice, either Project Party may effect and maintain the relevant insurance and pay the premiums for that insurance. Any amount paid by a Project Party will be a debt due from the Independent Reviewer to that Project Party payable on demand.
- (d) Except to the extent prohibited by Law, the Independent Reviewer must ensure that:
 - (i) whenever the insurer gives to or serves upon the Independent Reviewer, or any of its Associates, a notice of cancellation or other notice concerning the policy which has an adverse effect on the insurance coverage provided by the Independent Reviewer under this Agreement, at the same time to give to the Project Parties a copy of the notice that has been given or served upon the Independent Reviewer or its Associates; and
 - (ii) whenever the Independent Reviewer fails to renew the policy or to pay a premium, to give notice of that failure to the Project Parties prior to the insurer giving any notice of cancellation or non-renewal.
- (e) If a claim, or claims, in any one period of professional indemnity insurance exhausts any first aggregate limit under such policy, the Independent Reviewer must immediately give the Project Parties written notice of this to the extent this has an adverse effect on the insurance coverage provided by the Independent Reviewer under this Agreement.
- (f) The Independent Reviewer warrants and represents that, as at the date of this Agreement:
 - (i) there are no claims or threatened claims that could exhaust or materially reduce the extent of the insurances required hereunder that are available to meet claims in respect of the Project; and
 - (ii) there are no other circumstances that may reasonably be expected to materially affect coverage under any of the insurances required hereunder,

and undertakes to notify the Project Parties promptly upon any of the circumstances set out above occurring.

11.4 Limitation of liability

- (a) Subject to clause 11.4(b) and clause 11.4(c), the Independent Reviewer's total liability to the Parties under all Claims against the Independent Reviewer to the extent:
 - (i) under, arising out of, or in connection with this Agreement; or
 - (ii) arising otherwise at law or in equity including:
 - (A) any statute (insofar as it is possible to exclude such liability); or
 - (B) in tort for negligence or otherwise,

in respect of any fact, matter or thing under, arising out of or in connection with the Independent Reviewer Services, the Project or any Relevant Document (but without limiting the Independent Reviewer's liability in its capacity as the Sub-Independent Reviewer under the Sub-Independent Reviewer Agreement or as the Financiers' Certifier under the Financier's Certifier Agreement) is limited in aggregate to [REDACTED].

- (b) The Independent Reviewer's liability in respect of the following is not limited by clause 11.4(a), and is not counted towards the Liability Cap:
 - (i) any Wilful Default;
 - (ii) any abandonment of the Independent Reviewer Services;
 - (iii) any liability that cannot be excluded by Law; and/or
 - (iv) any breach of clauses 4.5, 11.6(c), 18.8 or 18.10.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

■ [REDACTED]
[REDACTED]

■ [REDACTED]
[REDACTED]
[REDACTED]

■ [REDACTED]
[REDACTED]

■ [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

11.6 Independent Reviewer's indemnity

The Independent Reviewer indemnifies and shall keep indemnified each of the Project Parties, all Transport Agency Personnel, the Construction Sub-contractor and the O&M Sub-contractor (each an **Indemnified Person**), against all actions, claims, charges, expenses, liabilities, losses, damages and costs (including legal costs on an indemnity basis and whether incurred by or awarded against that Indemnified Person) that the Indemnified Person may sustain or incur in respect of:

- (a) loss of or damage to any property (including the TG Project); or
- (b) Claims by any person in respect of personal injury or death; or
- (c) any Claim or Liability, whether direct or indirect, arising out of a Claim by a third party that the use of any Contract Material falling within paragraph (b) of the definition of Contract Material by the Indemnified Persons, or the use of any Intellectual Property licensed by the Independent Reviewer to the Indemnified Persons in accordance with this Agreement, infringes any Intellectual Property rights, Moral Rights or other rights of a third party,

arising out of or in connection with:

- (i) the negligent performance or non-performance of the Independent Reviewer Services; or
- (ii) the Independent Reviewer's breach of this Agreement; or
- (iii) the Independent Reviewer's Wilful Default.

11.7 Contributory actions

The Independent Reviewer's liability to indemnify an Indemnified Person, or their respective Associates, shall be reduced proportionally to the extent that an act or omission by that Indemnified Person (or its Associates) contributed to the loss, damages, death or injury, and to the extent that the relevant Indemnified Person failed to take reasonable steps to mitigate the loss, damage, death or injury.

11.8 Survival

The Parties acknowledge and agree that the terms of this clause 11 shall survive the expiry and/or termination of this Agreement.

12. Payment for Independent Reviewer Services

12.1 Fee

- (a) In consideration of the Independent Reviewer performing the Independent Reviewer Services in accordance with this Agreement, the Independent Reviewer will be paid the Fee (comprising the Base Fee and the Time Cost Fee (if any)).
- (b) The Fee includes all disbursements and expenses (including accommodation, equipment, car hire and travel expenses), overheads and profit required to perform the Independent Reviewer Services.
- (c) The Fee is inclusive of all Tax, charges, imports and fees of any nature, but exclusive of any GST.
- (d) The Base Fee payable each month shall not exceed the relevant Maximum Monthly Amount.

12.2 Payment claim

- (a) The Independent Reviewer must, within five Business Days of the expiry of each Payment Period prepare and submit to the Project Parties' Representatives for approval a payment claim for that Payment Period setting out:
 - (i) a breakdown of the Base Services (in a form and including such information as either Project Party may require from time to time) actually carried out during that Payment Period;
 - (ii) a breakdown of any Additional Services (in a form and including such information as either Project Party may require from time to time) undertaken in that Payment Period, including the identity of the requesting Project Party for each such Additional Service;
 - (iii) a breakdown of any Variations (in a form and including such information as either Project Party may require from time to time) undertaken in that Payment Period;
 - (iv) the Base Fee then-payable; and
 - (v) any Time Cost Fee then-payable (in respect of any Additional Services, Variation or any suspension under clause 10.3), and the basis for, and components of, the Time Cost Fee,

(the **Claimed Amount**), and setting out the Independent Reviewer's professional opinion of the Transport Agency's Proportion and the PPP Contractor's Proportion of the Claimed Amount;
- (b) provide to the Project Parties' Representatives all supporting documentation that they may reasonably require; and
- (c) allow the Project Parties' Representatives access to all records relating to the Independent Reviewer Services in order to check the accuracy of the Claimed Amount.

12.3 Payment

Within 30 days of the Project Parties receiving a payment claim, subject to clauses 12.1, 12.5 and 12.6:

- (a) the Transport Agency will pay the Transport Agency's Proportion of the Fee; and
- (b) the PPP Contractor will pay the PPP Contractor's Proportion of the Fee,

to the Independent Reviewer in respect of the Independent Reviewer Services performed by the Independent Reviewer during the relevant Payment Period. The Transport Agency's and the PPP Contractor's obligation to make payment under this clause is several only, and not joint and several.

12.4 Agreement of amounts payable for Additional Services and Variations

- (a) Where the Project Parties receive a payment claim from the Independent Reviewer under clause 12.2, the Project Parties' Representatives must, subject to clause 12.4(b), seek to agree the amount payable to the Independent Reviewer with respect to any Variation within 20 days of the Project Parties receiving the payment claim.
- (b) Where the Project Parties' Representatives are unable to agree on the amount payable to the Independent Reviewer in respect of any Variation within the time required under clause 12.4(a):
 - (i) the amount payable to the Independent Reviewer will be determined by the Transport Agency in accordance with this Agreement;
 - (ii) the amount payable as determined by the Transport Agency under clause 12.4(b)(i) will be paid by the Transport Agency;
 - (iii) the PPP Contractor will reimburse the Transport Agency one half of the amount paid by the Transport Agency under clause 12.4(b)(ii), subject to clause 12.5; and
 - (iv) if the PPP Contractor wishes to dispute any amount paid by the Transport Agency under clause 12.4(b)(ii), it must:
 - (A) first, reimburse the Transport Agency in accordance with clause 12.4(b)(iii); and
 - (B) then refer the dispute for resolution in accordance with the Project Agreement as if it were a dispute arising under the Project Agreement.
- (c) Where either of the Project Parties does not agree with the amount claimed by the Independent Reviewer with respect to any Time Cost Fee for Additional Services provided by the Independent Reviewer to that Project Party, that Project Party shall pay the undisputed portion to the Independent Reviewer, and clause 12.6 shall apply to the unpaid portion.

12.5 Set-off

Notwithstanding any other provision of this Agreement, each of the Project Parties may set off or deduct from any moneys payable by the relevant Project Party to the Independent Reviewer, under this Agreement or otherwise, any amounts:

- (a) for which the Independent Reviewer must reimburse that Project Party; or

- (b) that the relevant Project Party pays on the Independent Reviewer's behalf; or
- (c) that are then due and payable by the Independent Reviewer to that Project Party (whether or not such amounts are expressed to be a debt due from the Independent Reviewer to that Project Party), under or in connection with this Agreement or arising out of or in respect of or in connection with the Independent Reviewer Services; or
- (d) on account of Tax required by Law to be deducted or withheld from payments made by that Project Party to the Independent Reviewer.

12.6 Disputed payments

- (a) If either of the Project Parties, in good faith, disputes the accuracy of the Claimed Amount (in respect of that Project Party's Proportion), that Project Party shall, within 10 Business Days after receipt of the relevant payment claim under clause 12.2, give notice of that fact to the Independent Reviewer, copied to the other Project Party.
- (b) Any notice under clause 12.6(a) shall state the basis of the dispute and give relevant supporting details.
- (c) The relevant Project Party shall pay the undisputed portion of any Claimed Amount (in respect of that Project Party's Proportion) and may withhold payment of the portion disputed. If the disputed payment is not agreed between that Project Party and the Independent Reviewer within 30 days of the date of the payment claim, the dispute shall be determined in accordance with clause 16.

12.7 Payment on account only

The payment of moneys to the Independent Reviewer by the Project Parties is not evidence of the value of the Independent Reviewer Services provided, an admission of liability or evidence that the Independent Reviewer Services were executed properly but are paid on account only.

12.8 Conditions Precedent to Payment

Notwithstanding anything to the contrary in this clause 12 or otherwise in this Agreement, the payment obligations imposed on the Project Parties by this clause 12 are conditional upon:

- (a) the Independent Reviewer demonstrating that the required insurances are in full force and effect;
- (b) the provision of a valid tax invoice in the amount of the payment claim;
- (c) the provision of registration numbers and other details necessary for the Project Parties to comply with taxation legislation in respect of payments; and
- (d) the Independent Reviewer planning, developing and implementing the Quality Assurance System in accordance with clause 9 of this Agreement.

13. Goods and Services Tax

13.1 Payment

Subject to clause 13.3, if GST is chargeable on any supply made by one Party (the **Supplier**) to another Party (the **Recipient**) under or in connection with this Agreement, the Recipient of that supply will pay to the person making that supply an amount equal to the

GST chargeable on that supply in addition to and at the same time as any other consideration payable to the Supplier for that supply, or if there is no consideration otherwise payable for that supply then, no later than the day before the Supplier is required to account to the Taxation Authority for GST on that supply.

13.2 Excess or deficiency

Subject to clause 13.3, if the amount of GST shown in the Tax Invoice issued by the Supplier:

- (a) is more than the GST charged on that taxable supply, then the Supplier shall refund the excess to the Recipient; and
- (b) is less than the GST charged on that taxable supply, then the Recipient shall pay the deficiency to the Supplier.

13.3 GST documentation

The Recipient is not obliged to pay any amount in respect of GST to the Supplier under clause 13.1 unless and until the Supplier issues a Tax Invoice to the Recipient in respect of the taxable supply. No payment is required under clause 13.2 unless and until the Supplier issues a debit note or credit note (as applicable) to the Recipient in respect of the taxable supply.

13.4 Revenue net of GST

Any reference in this Agreement to price, value, sales, revenue, profit or a similar amount (**Revenue**), will be a reference to the GST-exclusive component of that Revenue net of GST unless the contrary intention is expressed.

14. Notification of claims and Variations

14.1 Variations

- (a) The Project Parties may, by Joint Notice, give a written direction entitled **Variation Direction** to the Independent Reviewer to carry out a Variation. Subject to clause 14.1(b), the Independent Reviewer must comply with that direction. The Independent Reviewer must not carry out a Variation except as directed by the Project Parties under this clause 14.1(a).
- (b) If the Independent Reviewer believes a direction by one or both of the Project Parties will involve a Variation, notwithstanding that it is not expressly stated to be a "Variation Direction", it must notify both of the Project Parties accordingly within two Business Days of receiving the direction and before complying with the direction. The Independent Reviewer's notice must include the information required under clause 14.2(b). The Project Parties may on receipt of the Independent Reviewer's notice confirm or revoke the direction by Joint Notice.
- (c) Subject to giving a notice in accordance with clause 14.1(b), if applicable, and to any revocation of a direction under and in accordance with clause 14.1(b), the Independent Reviewer must continue to perform the Independent Reviewer Services in accordance with this Agreement and all directions, including any direction in respect of which notice has been given under this clause, notwithstanding that the Independent Reviewer has issued a notice under this clause 14.1.

14.2 Prescribed notices

Without limiting clause 14.1, if the Independent Reviewer wishes to make a Claim (other than a claim for payment under clause 12.2 for any part of the Fee previously agreed or determined under this Agreement) against the Project Parties under, arising out of, or in connection with, this Agreement, the Independent Reviewer Services or the Project, it must give the Project Parties:

- (a) within seven days of the first occurrence of the events on which the Claim is based, a notice that it proposes to make the Claim and of the events upon which the Claim will be based; and
- (b) within 21 days of giving the notice under clause 14.2(a), a written claim including:
 - (i) detailed particulars concerning the events on which the Claim is based;
 - (ii) the legal basis for the Claim, whether based on a term of this Agreement or otherwise, and if based on a term of this Agreement, clearly identifying the specific term;
 - (iii) the facts relied upon in support of the Claim in sufficient detail to permit verification; and
 - (iv) details of the amount claimed and how it has been calculated (including all supporting documentation that the Project Parties may reasonably require to substantiate the quantum and extent of the amount claimed).

14.3 Continuing events

If the events upon which the Claim under clauses 14.1 or 14.2 is based or the consequences of the events are continuing, the Independent Reviewer must continue to give the information required by clause 14.2(b) every 28 days (or such other time period as the Project Parties may require by Joint Notice) after the written claim under clauses 14.1 or 14.2(b) (as the case may be) was submitted or given, until after the events or the consequences have ceased.

14.4 No Claim or adjustment

If the Independent Reviewer fails to comply with clauses 14.1, 14.2 and 14.3 (as the case may be):

- (a) the Fee will not be adjusted as a result of; and
- (b) the Project Parties will not be liable upon any Claim by the Independent Reviewer arising out of or in connection with,

the relevant direction or fact, matter or thing (as the case may be).

14.5 Cost of Variation

Subject to clause 14.4, the Independent Reviewer will be entitled to be paid the Time Cost Fee in respect of a Variation. The Time Cost Fee will be calculated for all Variations to the Independent Reviewer Services or suspensions under clause 10.3 carried out by the Independent Reviewer by:

- (a) an amount determined by the Project Parties' Representatives, acting reasonably, using any rates or prices that are applicable and appear in the Schedule of Rates; or

- (b) if the rates referred to in clause 14.5(a) are not applicable, a reasonable amount to be agreed between the Independent Reviewer and the Project Parties or, failing agreement, determined by the Project Parties' Representatives on the basis of prevailing market rates at the time.

14.6 **Payment under Schedule of Rates**

- (a) The rates and prices in the Schedule of Rates will be deemed to cover all labour, materials, overheads and profit and include, in accordance with clause 12.1(b) of this Agreement, all disbursements and expenses (including accommodation, equipment, car hire and travel expenses) which do not exceed, in aggregate for the Variation, [REDACTED], required to perform all of the Independent Reviewer Services and any Variation in the Independent Reviewer Services, valued in accordance with clause 14.5.
- (b) The Independent Reviewer must obtain the approval of the Project Parties' Representatives prior to incurring any disbursements or expenses that, in aggregate for that Variation, exceed [REDACTED] (such approval not to be unreasonably withheld or delayed). If the Project Parties' Representatives approval is not obtained, the Project Parties will not be liable to pay for those disbursements and expenses.

14.7 **Assistance for dispute resolution/technical advice**

Subject to receipt of a Variation Direction, without limiting clause 14.1, the Independent Reviewer must if requested by the Project Parties provide:

- (a) such independent assistance to the Project Parties as may be required for the purposes of the determination of any dispute or difference under the Relevant Documents; and
- (b) such specific technical advice, not otherwise required to be provided under this Agreement, on any matter relating to the Project within the time, in the form and covering such matters as may be required by the Project Parties.

15. **Termination**

15.1 **Breach**

- (a) If the Independent Reviewer commits a breach of this Agreement, either Project Party may give notice to the Independent Reviewer:
 - (i) specifying the breach; and
 - (ii) directing its rectification within the period specified in the notice.
- (b) If the Independent Reviewer fails to rectify such breach within the period specified in the notice issued under clause 15.1(a), the Project Parties may, without prejudice to any other rights of the Project Parties, by Joint Notice immediately terminate this Agreement.

15.2 **Termination for insolvency or Probity Event**

The Project Parties may, without prejudice to any other rights which the Project Parties may have, terminate this Agreement immediately by Joint Notice if an Insolvency Event or a Probity Event occurs in relation to the Independent Reviewer, whether or not the Independent Reviewer is then in breach of this Agreement.

15.3 Termination for convenience

Notwithstanding anything to the contrary in this Agreement:

- (a) this Agreement does not terminate automatically upon the termination of the Project Agreement; and
- (b) the Project Parties may at any time by Joint Notice for their convenience terminate this Agreement upon 10 Business Days' written notice to the Independent Reviewer and appoint another person to act as the Independent Reviewer.

15.4 Independent Reviewer's rights upon termination for convenience

- (a) Upon a termination under clause 15.3, the Independent Reviewer will:
 - (i) be entitled to be reimbursed by the Project Parties:
 - (A) any amount already due to it (and not yet paid) under a payment claim submitted under clause 12.2; and
 - (B) a reasonable amount in respect of any work performed by it that is not covered by any such payment claim; and
 - (ii) not be entitled to make any other Claim against the Project Parties arising out of or in connection with the termination, this Agreement, the Independent Reviewer Services or the Project.
- (b) Notwithstanding anything else in this Agreement or this clause, the Independent Reviewer will not be prevented from seeking contribution from a Project Party where a third party (including another Project Party) has issued legal proceedings against the Independent Reviewer and that Project Party has contributed to the loss sustained by that third party.

15.5 Procedure upon termination

Upon termination of this Agreement under clauses 15.1, 15.2 or 15.3 or upon expiry of the Term, the Independent Reviewer must:

- (a) co-operate with the Project Parties;
- (b) hand to the Project Parties' Representatives all Contract Material and all other information concerning the Project held by the Independent Reviewer;
- (c) prepare and submit a written report to the Project Parties if requested by a Project Party covering the matters requested; and
- (d) as and when reasonably required by the Project Parties' Representatives, meet with them and such other persons nominated by them with a view to providing them (including any replacement provider of the Independent Reviewer Services) with sufficient information to enable the Project Parties to execute the Project or the persons nominated by them to provide the Independent Reviewer Services.

15.6 No effect

Subject to clause 15.4, nothing in this clause 15 or that either Project Party does or fails to do pursuant to this clause 15 will prejudice the right of that Project Party to exercise any right

or remedy (including terminating this Agreement and/or recovering damages) that it may have where the Independent Reviewer breaches (including repudiates) this Agreement.

16. Dispute resolution

16.1 Notice of dispute

If any dispute arises between the Parties in respect of any fact, matter or thing arising out of or in connection with the Independent Reviewer Services or this Agreement, any Party may give notice to the other relevant Parties specifying:

- (a) the dispute or difference;
- (b) particulars of the reasons for that dispute or difference; and
- (c) the position that is believed to be correct.

16.2 Executive negotiation

The dispute or difference identified in the notice given under clause 16.1 is to be referred to the relevant persons of the Parties involved in the dispute, as described in the Contract Particulars who must:

- (a) meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference; and
- (b) if they cannot resolve the dispute or difference, endeavour to agree upon a procedure to resolve the dispute or difference.

16.3 Mediation

If the relevant persons described in the Contract Particulars cannot resolve, or agree upon a procedure to resolve, the dispute or difference within 10 Business Days after the date a notice is given under clause 16.1, or within such longer period of time as these persons may agree, the dispute or difference is to be submitted to mediation in accordance with the following clause.

16.4 Mediation Notice

- (a) If the Party that gave the notice under clause 16.1 requires the dispute or difference to be referred to mediation, it must give to the other Parties within five Business Days of the expiration of the period referred to in clause 16.3 a notice in writing (**Mediation Notice**) stating that the dispute will within five Business Days of the date of the Mediation Notice (unless the dispute is meanwhile resolved) be referred for mediation to a person appointed by the President of the New Zealand Law Society (or his or her delegate).
- (b) The place of mediation will be Wellington. The language will be English.
- (c) Failing any agreement to the contrary between the relevant Parties, the costs of the mediation (including any fees charged by the mediator) will be shared equally between the Parties.

16.5 Arbitration

- (a) If, after 20 Business Days, or such longer period as the Parties may agree, from the referral of a dispute to mediation in accordance with clause 16.4, the dispute or difference remains unresolved in any respect, any Party may refer the dispute or difference to arbitration in accordance with this clause 16.5.
- (b) Provided always that the dispute has first been referred to the executives in accordance with clause 16.2 and to mediation in accordance with clause 16.4, then any Party may require the dispute to be referred to arbitration in accordance with the Arbitration Act 1996.
- (c) For the purposes of any arbitration conducted pursuant to this clause 16.5:
 - (i) the place of arbitration shall be Wellington and the language will be English;
 - (ii) the provisions of the Second Schedule of the Arbitration Act 1996 shall apply; and
 - (iii) there shall be a single arbitrator appointed by agreement between the parties, provided that, if the Parties cannot agree on an arbitrator within five Business Days of a Party proposing an arbitrator, any Party may request that an arbitrator is appointed by the President of the New Zealand Law Society (or his/her nominee) or its successor body.
- (d) Each of the parties to this Agreement irrevocably consents and agrees to be joined, and for each other party to be joined, to any arbitration under this Agreement if reasonably required by any other party on a basis that entitles all parties to fully participate as a party to such arbitration, provided that no party shall be required to participate in an arbitration if all relevant parties and third parties to the matter the subject of the arbitration are unable to be joined as fully participating parties.

16.6 Interlocutory or injunctive relief

This clause does not affect any Party's right to seek urgent interlocutory and/or injunctive relief from any Court of competent jurisdiction.

16.7 Independent Reviewer Services to continue

The Independent Reviewer must continue to perform the Independent Reviewer Services in accordance with this Agreement notwithstanding the existence of a dispute referred to in clause 16.1.

17. Notices

17.1 Method of giving notices

A notice, consent, approval or other communication (each a **Notice**) under this Agreement must:

- (a) be in writing addressed to the address of the recipient from time to time designated for the purpose by the addressee to the other Parties. The initial address of each Party is set out under its name on the execution pages of this Agreement; and
- (b) be signed by an authorised representative of the sender.

17.2 Notice effective

- (a) No notice or other communication is to be effective until it is received.
- (b) A communication will be deemed to be received:
 - (i) in the case of a letter, on the second Business Day after posting (with all postage paid);
 - (i) in the case of email, when accessible by the recipient during a Business Day between the hours of 8.30am and 5.00pm at the email address designated in the address block beneath that party's execution block; and
 - (ii) in the case of personal delivery, when delivered.

18. General

18.1 Several liability

- (a) Notwithstanding any other provision of this Agreement, the liability of the Parties under this Agreement shall be several and shall not be joint or joint and several.
- (b) If a provision of this Agreement binds two or more Parties, that provision binds those parties severally and not jointly or jointly and severally.

18.2 Entire agreement

This Agreement (together with the Project Agreement) constitutes the entire agreement between the Parties and supersedes and extinguishes all prior agreements and understandings between the Parties about their respective subject matter.

18.3 Waiver

Any delay, failure or forbearance by a Party to exercise (in whole or in part) any right, power or remedy under, or in connection with, this Agreement shall not operate as a waiver of such right, power or remedy. A waiver of any breach of any provision of this Agreement shall not be effective unless that waiver is in writing and is signed by the Party against whom that waiver is claimed. A waiver of any breach shall not be, or be deemed to be, a waiver of any other or subsequent breach.

18.4 Amendments

No amendment to this Agreement will be effective unless it is in writing and signed by duly authorised signatories of all the Parties.

18.5 Assignment

Except as expressly contemplated by this Agreement, the Independent Reviewer may not assign or transfer any of its rights or obligations under this Agreement or any Relevant Document.

18.6 Set-off

Without limiting the Transport Agency's rights under the Project Agreement, all moneys which the Transport Agency may pay or incur and for which the PPP Contractor is liable

under the terms of the Project Agreement or in respect of which it is under this Agreement liable to make reimbursement to or indemnify the Transport Agency, may be deducted by the Transport Agency from all moneys due, becoming due or to become due from it to the PPP Contractor under the Project Agreement or may be recovered from the PPP Contractor by action at law or otherwise.

18.7 **Governing law**

This Agreement is governed, and is to be construed in accordance with, the Laws of New Zealand. Each Party irrevocably submits to the non-exclusive jurisdiction of the New Zealand courts for the purpose of hearing and determining all disputes under or in connection with this Agreement.

18.8 **Confidentiality**

- (a) The Independent Reviewer must ensure that:
- (i) neither it nor any of its officers, employees, servants and agents disclose, or otherwise make public, any Contract Material or any other information or material acquired in connection with or during the performance of the Independent Reviewer Services without the prior approval of the Project Parties and, where the Contract Material or other information or material originated from a Non-Project Party, that Non-Project Party; and
 - (ii) no Contract Material is used, copied, supplied or reproduced for any purpose other than for the performance of the Independent Reviewer Services under this Agreement.
- (b) Subject to clause 18.8(c), the Independent Reviewer shall treat as confidential and not disclose to any third party nor use for its own benefit (other than for the purposes of this Agreement) any Confidential Information of another person.
- (c) Clause 18.8(b) does not preclude the disclosure of Confidential Information:
- (i) if that information was known, or becomes known, to the public through no act or default of the Independent Reviewer; or
 - (ii) that the Independent Reviewer is required by Law to disclose so long as the Independent Reviewer provides the Project Parties with written notice of the required disclosure promptly upon receipt of notice of the required disclosure (if it is permitted to do so by Law); or
 - (iii) that was lawfully known to the Independent Reviewer prior to the date it was received, provided that the Independent Reviewer has no reason to believe that such disclosure would cause a Party to breach an obligation of confidence; or
 - (iv) that becomes available to the Independent Reviewer from a source other than the person that disclosed that information, provided that the Independent Reviewer has no reason to believe, having made due enquiry, that such source is itself bound by an obligation of confidence to the person that disclosed that information or is otherwise prohibited under Law from disclosing such information; or
 - (v) that has been or is independently developed by the Independent Reviewer; or
 - (vi) as required by the rules of any recognised stock exchange on which the Independent Reviewer's securities are listed; or

- (vii) to the extent that such disclosure is authorised by this Agreement; or
- (viii) if such disclosure is approved for release with the prior written consent of the person from whom the Confidential Information is first received.

18.9 Contract Material

- (a) All Contract Material falling within paragraph (a) of the definition of Contract Material remains the property of the Party providing the Contract Material.
- (b) The Independent Reviewer retains any Intellectual Property rights in any original ideas, equipment, processes or systems created outside the terms of this Agreement and used in performing the Independent Reviewer Services. The Independent Reviewer grants a perpetual, irrevocable, royalty-free and non-exclusive licence to each of the other Parties to exercise such Intellectual Property rights for any purpose.
- (c) Subject to clauses 18.9(a) and 18.9(b), all Intellectual Property rights created in respect of any Contract Material vest in the Project Parties upon their creation. The Independent Reviewer must do everything necessary to perfect such vesting.
- (d) To the extent any Intellectual Property rights that exist in or relate to the Contract Material are created under this Agreement and are not capable of being vested in the Project Parties because the Independent Reviewer does not have such Intellectual Property rights, the Independent Reviewer must ensure that the Project Parties are granted a perpetual, irrevocable, royalty-free and non-exclusive licence to exercise such Intellectual Property rights for any purpose connected with the Project.

18.10 Moral Rights

The Independent Reviewer must, at its own expense, procure from every person (including its officers, employees, contractors or agents) who is the author of any Contract Material falling within paragraph (b) of the definition of Contract Material in which Intellectual Property subsists under or by virtue of the Copyright Act 1994 (each person being called an **Author**), an unconditional, irrevocable consent to the Project Parties, or persons authorised by the Project Parties, doing, or omitting to do, with respect to any Contract Material falling within paragraph (b) of the definition of Contract Material (or a substantial part or adaptation of them), any act that the Project Parties require.

18.11 Publicity

- (a) The Independent Reviewer must not, and must ensure that each of its Associates do not, make any public announcements or statements in relation to the Project without the prior written consent of the Transport Agency to the proposed announcement or statement (including its wording and timing). The Transport Agency may withhold its consent in its discretion.
- (b) The Transport Agency may at any time disclose Confidential Information and the contents of the Project Documents, including:
 - (i) where disclosure is made in the course of the official duties of the Transport Agency or the Minister;
 - (ii) to satisfy the requirements of parliamentary accountability;
 - (iii) in annual reports of the Transport Agency; and

- (iv) pursuant to the Official Information Act and the PPP Contractor and the Independent Reviewer will use all reasonable endeavours to assist the Transport Agency to meet its public disclosure obligations.
- (c) The Transport Agency, where practicable, will use reasonable endeavours to notify the Independent Reviewer of any intention to disclose any Confidential Information of the Independent Reviewer.
- (d) The contents of the Project Documents may be published on a New Zealand government website.

18.12 Further obligations

The Independent Reviewer must:

- (a) collect, use, disclose, store or otherwise handle Personal Information in a manner as directed by the Transport Agency from time to time, provided that the direction does not cause the Independent Reviewer to breach any legislation, principle, industry codes or policies by which the Independent Reviewer is bound; and
- (b) notify the Transport Agency immediately if it becomes aware that it has or will breach any of the terms of this Agreement.

18.13 Further assurance

Each Party must sign, execute, deliver and do all such acts and things as may reasonably be required of it to carry out and give full effect to the Project Documents and the rights and obligations of the parties to them.

18.14 Counterparts

This Agreement may be signed in any number of counterparts all of which, when taken together, constitute one and the same instrument. A party may enter into this Agreement by executing any counterpart.

18.15 Surviving provisions

- (a) An indemnity given under this Agreement survives the termination of this Agreement.
- (b) The obligations of the parties under clauses 11.1(b), 18.8, 18.9, 18.10 and 18.11, and any obligations that are expressed to survive termination of this Agreement, will survive the termination of this Agreement.
- (c) Any rights or obligations accrued as a result of a breach of this Agreement survive termination of this Agreement.

18.16 Severability of provisions

If any provision of this Agreement is or becomes unenforceable, illegal or invalid for any reason, the relevant provision shall be deemed to be modified to the extent necessary to remedy such unenforceability, illegality or invalidity. If such modification is not possible, then such provision shall be severed from this Agreement without affecting the enforceability, legality or validity of any other provision of this Agreement.

18.17 No merger

The rights and obligations of the parties will not merge on the completion of any transaction contemplated by this Agreement. They will survive the execution and delivery of any assignment or other document entered into for the purpose of implementing a transaction.

18.18 Cost of performing obligations

A party who has an obligation to do anything under this Agreement must perform that obligation at its own cost and expense, unless a provision of this Agreement expressly provides otherwise.

18.19 Representations and warranties

Each party represents and warrants to each other party that:

- (a) it has the power to execute, deliver and perform its obligations under or as contemplated by this Agreement and all necessary action has been taken to authorise its execution, delivery and performance;
- (b) this Agreement constitutes its valid and binding obligations enforceable against it in accordance with its terms, subject to applicable bankruptcy, reorganisation, insolvency, moratorium or similar laws affecting creditors' rights generally and subject to the availability of equitable remedies; and
- (c) the execution by it of, the performance by it of its obligations under, and the compliance by it with the provisions of, this Agreement does not and will not contravene any existing Law to which it is subject.

Execution

Executed as an agreement.

SIGNED by The New Zealand Transport Agency, a crown entity established on 1 August 2008 by section 93 of the Land Transport Management Act 2003 by

Geoff Dangerfield

Signature

in the presence of:

Witness signature

Print name

Witness occupation

Place of residence

Address of the New Zealand Transport Agency

Address	The Transport Agency's Representative	Email	TGPPP@nzta.govt.nz
	Contract NZTA 699N		
	New Zealand Transport Agency Level 9, PSIS House 20 Ballance Street, PO Box 5084 Wellington 6145, New Zealand		
Facsimile	+64 (4) 894 3305		

SIGNED on behalf of **Wellington Gateway Partnership No. 2 LP** by its general partner **Wellington Gateway General Partner No. 2 Limited** by its authorised attorney:

Signature of attorney

Witness

Name of attorney

Full name of witness

Occupation of witness

Address of witness

**The witness must not be party to this agreement*

Address of Wellington Gateway Partnership No. 2 LP

Address

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HEB Construction Limited by

Director

Director

Print name

Print name

Address of HEB Construction Limited

Address [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Facsimile [REDACTED]

Attention [REDACTED]

Telephone [REDACTED]

Signed sealed and delivered for and on behalf
of **Leighton Contractors Pty Limited**

by its Attorneys under a Power of Attorney

dated _____

(and the Attorneys declare that the Attorneys
have not received any notice of the revocation
of such Power of Attorney)

in the presence of:

sign here ▶

Attorney

Attorney

print name _____

in the presence of

sign here ▶

Witness

Witness

print name _____

Occupation _____

Address of Leighton Contractors Pty Limited

Address

██████████
██████████

Facsimile

██████████

Attention

██████████

Signed sealed and delivered for and on behalf
of **Leighton Contractors Pty Limited**

by its Attorneys under a Power of Attorney

dated _____

(and the Attorneys declare that the Attorneys
have not received any notice of the revocation
of such Power of Attorney)

in the presence of:

sign here ►

Attorney

Attorney

print name _____

in the presence of

sign here ►

Witness

Witness

print name _____

Occupation _____

Address of Leighton Contractors Pty Limited

Address

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Attention

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Telephone

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Aurecon New Zealand Limited by

Director

Director

Print name

Print name

Address of Aurecon New Zealand Limited

Address [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Facsimile [REDACTED]

Attention [REDACTED]

Telephone [REDACTED]

Schedule 1: Particulars

1. Particulars

Item	Reference	Details
1	Transport Agency's Representative (Definitions)	Craig Nicholson
2	Independent Reviewer's Representative (Definitions)	[REDACTED]
3	PPP Contractor's Representative (Definitions)	David Low
4	Maximum Monthly Amount (Definitions)	As set out in Schedule 1 clause 2.
5	Term (Definitions)	The period beginning on the date of this Agreement and ending on the date that is 12 months after the issue of the last Close-out Certificate or any extended period notified to the Independent Reviewer under the terms of this Agreement.
6	Professional Indemnity Insurance (clause 11.1(a))	[REDACTED] [REDACTED] [REDACTED]
7	Public liability insurance (clause 11.2)	[REDACTED] [REDACTED] [REDACTED]
8	Executive Negotiations (clause 16.2)	Transport Agency: Rod James, State Highway Manager PPP Contractor: David Low [REDACTED]

2. Fee schedule

Month	Maximum Monthly Amount (NZ\$)	Month	Maximum Monthly Amount (NZ\$)
August 2014	[REDACTED]	January 2018	[REDACTED]
September 2014	[REDACTED]	February 2018	[REDACTED]

Month	Maximum Monthly Amount (NZ\$)	Month	Maximum Monthly Amount (NZ\$)
October 2014	██████	March 2018	██████
November 2014	██████	April 2018	██████
December 2014	██████	May 2018	██████
January 2015	██████	June 2018	██████
February 2015	██████	July 2018	██████
March 2015	██████	August 2018	██████
April 2015	██████	September 2018	██████
May 2015	██████	October 2018	██████
June 2015	██████	November 2018	██████
July 2015	██████	December 2018	██████
August 2015	██████	January 2019	██████
September 2015	██████	February 2019	██████
October 2015	██████	March 2019	██████
November 2015	██████	April 2019	██████
December 2015	██████	May 2019	██████
January 2016	██████	June 2019	██████
February 2016	██████	July 2019	██████
March 2016	██████	August 2019	██████
April 2016	██████	September 2019	██████
May 2016	██████	October 2019	██████
June 2016	██████	November 2019	██████
July 2016	██████	December 2019	██████
August 2016	██████	January 2020	██████
September 2016	██████	February 2020	██████
October 2016	██████	March 2020	██████
November 2016	██████	April 2020	██████
December 2016	██████	May 2020	██████
January 2017	██████	June 2020	██████

Month	Maximum Monthly Amount (NZ\$)	Month	Maximum Monthly Amount (NZ\$)
February 2017	██████	July 2020	██████
March 2017	██████	August 2020	██████
April 2017	██████	September 2020	██████
May 2017	██████	October 2020	██████
June 2017	██████	November 2020	██████
July 2017	██████	December 2020	██████
August 2017	██████	January 2021	██████
September 2017	██████	February 2021	██████
October 2017	██████	March 2021	██████
November 2017	██████	April 2021	██████
December 2017	██████		██████
Total maximum amount payable			██████

3. Key People

Position	Name	Estimated % FTE of time of anticipated involvement
Independent Reviewer	██████████████████	████
Independent Reviewer's Representative	██████████████████	████
Programmer	██████████████	████
Programme Support	██████████████	████
Administrator	██████████████████	████
Technical support/surveillance	████████	████

Schedule 2: Schedule of Rates

Role or discipline	Aurecon reference	Rate per hour (NZ\$)
Independent Reviewer		██████
Independent Reviewer's Representative		██████
Senior Site Inspectors		██████
Quality Assurance representative		██████
Programmer/Analyst		██████
Executives	█	██████
	█	██████
	█	██████
Specialist engineers (Bridges, highways, pavements, etc)	█	██████
	█	██████
	█	██████
	█	██████
	█	██████
	█	██████
	█	██████
Surveyors	█	██████
	█	██████
	█	██████
	█	██████
Administration	█	██████
	█	██████

The above rates apply for one year from the date of this Agreement. The rates shall be adjusted in accordance with the Transport Agency's published consultant rates adjustment policy (currently being the "Consultant Cost Index") on each anniversary of the date of this Agreement.

Schedule 3: References to functions of Independent Reviewer

Clause of Project Agreement	Description
Clause 19.2	The Contractor will, on reasonable notice and at reasonable times, provide the Independent Reviewer (and any person authorised by the independent reviewer) with access to any of the Contractor's premises used for providing the Services for the purposes set out 19.2(b), clause 19.2(c) and clause 19.3.
Clause 25.5	The Independent Reviewer is required to perform the powers, duties and functions in this Agreement honestly, impartially and reasonably for the benefit of both the Transport Agency and the Contractor as an independent professional and not as an agent for either or both of them.
Clause 25.7(a)	The parties agree that the Independent Reviewer will monitor actual progress of Works Provisioning against the requirements of the Construction Programme. Where the Independent Reviewer considers that actual progress is not actually reflected in the Contractor's then-current Construction Programme, it shall notify both the Transport Agency and the Contractor of that view and the reasons why.
Clause 25.7(b)	The Transport Agency may at any time during Works Provisioning require the Independent Reviewer to review progress of the Works Provisioning to determine whether the status and progress of the Works Provisioning is likely to have a material adverse effect on the ability of the Contractor to achieve the Planned Service Commencement Date or, if that date has passed, the Last Service Commencement Date.
Clause 25.7(c)	If the Independent Reviewer, following a review under clause 25.7(b), is of the view that either the Planned Service Commencement Date or the Last Service Commencement Date will not be met (in accordance with the requirements set out in clause 25.7(c)), the Independent Reviewer must issue a notice to the Transport Agency and to the Contractor to this effect.
Clause 29.3(d)	The Independent Reviewer must attend and observe the Works Completion Tests and may take samples, make measurements and otherwise carry out whatever tests or checks the Independent Reviewer may reasonably require in connection with the Works Completion Tests.
Clause 29.3(f)	When the Contractor considers that it has done everything necessary for the Independent Reviewer to issue the Works Completion Certificate, it will give to the Transport Agency and the Independent Reviewer the completion report, which must meet the requirements for that report as set out in the Works Completion Plan. The Independent Reviewer is to review the report to ensure it meets the relevant requirements.
Clause 29.3(h)	Where the Independent Reviewer, following its receipt of the completion report from the Contractor under clause 29.3(f) and any representation and submission from the Transport Agency under clause 29.3(g): <ul style="list-style-type: none"> • does not believe that the Works Completion Tests have been satisfied such that there is an Outstanding Issue, then clause 29.3(i) applies (see below); or • is satisfied that the Works Completion Tests have been satisfied, then clause 29.3(k)(ii) or 29.3(k)(iii) (as applicable) applies (see below).
Clause 29.3(i)	Where the Independent Reviewer has identified an Outstanding Issue, the Independent Reviewer must, within 10 Business Days of receiving the report referred to in clause 29.3(f), notify the Contractor and the Transport Agency and consult with these parties in relation to the nature of the issue and the steps reasonably necessary to resolve it. The Independent Reviewer may, within two Business Days following this consultation, request that the Contractor repeat any failed steps and/or conduct any additional tests as the Independent Reviewer reasonably considers necessary to resolve the Outstanding Issue.
Clause 29.3(k)	The Independent Reviewer must issue the Works Completion Certificate to the Contractor and the Transport Agency:

Clause of Project Agreement	Description
	<ul style="list-style-type: none"> • within two Business Days after making its determination under clause 29.3(j)(i) that the Works Completion Tests have been satisfied (irrespective of any Snagging Defects); • within seven Business Days after receiving the first or any subsequent report under clause 29.3(f), where: <ul style="list-style-type: none"> ○ the Transport Agency has not made a submission to the Independent Reviewer under clause 29.3(g); and ○ clause 29.3(h)(ii) applies; or • within 15 Business Days after receiving the first or any subsequent report under clause 29.3(f), where: <ul style="list-style-type: none"> ○ the Transport Agency has made a submission to the Independent Reviewer under clause 29.3(g); and ○ clause 29.3(h)(ii) applies
Clause 29.3(l)	<p>The Works Completion Certificate must state that, in the reasonable opinion of the Independent Reviewer, the Contractor has satisfactorily completed the Works Completion Tests, the date on which Works Completion has been achieved; and include or attach, where Snagging Defects exist, a full list detailing those Snagging Defects.</p> <p>The Independent Reviewer must do all preparation work that is required to enable it to form a view on whether Works Completion has been achieved in accordance with the requirements of the Project Agreement.</p>
Clause 29.4	<p>The Contractor must, within five Business Days after the issue of the Works Completion Certificate (if that certificate includes a list of Snagging Defects determined by the Independent Reviewer), provide a written programme for the Independent Reviewer's approval for rectification of those Snagging Defects. The Independent Reviewer may approve the programme or propose amendments to that programme. The Contractor must then rectify the Snagging Defects to the reasonable satisfaction of the Independent Reviewer in accordance with that programme and the requirements of the Project Agreement.</p> <p>The Independent Reviewer must review and comment on the proposed programme for rectification of the Snagging Defects, ensure compliance by the Contractor with the agreed programme and undertake all tests necessary to provide compliance with the programme and rectification of all such Snagging Defects.</p>
Clause 29.5(a)	<p>The Independent Reviewer must not withhold the issue of the Works Completion Certificate solely on the grounds of any Snagging Defects.</p>
Clause 29.7(c)	<p>The Independent Reviewer must attend and observe the Close-out Tests and take samples, make measurements and otherwise carry out whatever tests or checks the Independent Reviewer reasonably requires in connection with the Close-out Tests.</p>
Clause 29.7(e)	<p>When the Contractor considers that it has done everything necessary for the Independent Reviewer to issue the Close-out Certificate, it will give to the Transport Agency and the Independent Reviewer the close-out report, which must meet the requirements for that report as set out in the Close-out Plan. The Independent Reviewer is to review the report to ensure it meets the relevant requirements.</p>
Clause 29.7(g)	<p>Where the Independent Reviewer, following its receipt of the Close-out report from the Contractor under clause 29.7(e) and any representation and submission from Transport Agency under clause 29.7(f):</p> <ul style="list-style-type: none"> • does not believe that the Close-out Tests have been satisfied such that there is an outstanding issue then clause 29.7(h) applies (see below). • If the Independent Reviewer is satisfied that the Close-out Tests have been satisfied then clause 29.7(j)(ii) or 29.7(j)(iii) (as applicable) will apply (see below).

Clause of Project Agreement	Description
Clause 29.7(h)	<p>Where the Independent Reviewer has identified an Outstanding Issue, the Independent Reviewer must, within 10 Business Days of receiving the report referred to in clause 29.3(e), notify the Contractor and the Transport Agency and consult with these parties in relation to the nature of the issue and the steps reasonably necessary to resolve it.</p> <p>The Independent Reviewer may, within two Business Days following this consultation, request that the Contractor repeat any failed steps and/or conduct any additional tests as the Independent Reviewer reasonably considers necessary to resolve the Outstanding Issue.</p>
Clause 29.7(j)	<p>The Independent Reviewer will be required to issue the Close-out Certificate to the Contractor and the Transport Agency:</p> <ul style="list-style-type: none"> • within two Business Days after making its determination under clause 29.7(i)(i) that the Close-out Tests have been satisfied; • within seven Business Days after receiving the first or any subsequent report under clause 29.7(e), where: <ul style="list-style-type: none"> ○ the Transport Agency has not made a submission to the Independent Reviewer under clause 29.7(f); and ○ clause 29.7(g)(ii) applies; or • within 15 Business Days after receiving the first or any subsequent report under clause 29.7(e), where: <ul style="list-style-type: none"> ○ the Transport Agency has made a submission to the Independent Reviewer under clause 29.7(f); and ○ clause 29.7(g)(ii) applies.
Clause 29.7(k)	<p>The Close-out Certificate must state that, in the reasonable opinion of the Independent Reviewer, the Contractor has satisfactorily completed the Close-out Tests; and the date on which Close-out has been achieved.</p> <p>The Independent Reviewer must do all preparation work that is required to enable it to form a view on whether Close-out has been achieved in accordance with the requirements of the Project Agreement.</p>
Clause 35.3(a)	<p>Extension Events – Relief available: If the Contractor has complied with its obligations under clause 35.2, then subject to clause 38 (General Provisions Relating to Events) the Relevant Service Commencement Date shall be postponed by such time as the Independent Reviewer considers reasonable to account for the Extension Event, taking into account the likely effect of the delay but disregarding any period for which the delay could reasonably be expected to have been avoided or mitigated by acting in accordance with Good Industry Practice. The Independent Reviewer must notify each of the Transport Agency and the Contractor of the revised Relevant Service Commencement Date (if any) as soon as reasonably practicable.</p> <p>The Independent Reviewer must take all steps necessary to assess the impact of the event, both in actual terms and the degree to which it could have been avoided or mitigated.</p>
Clause 38.7	<p>Extension Events – Partial relief: Where there are multiple causes of a delay, to which clause 35 (Extension Events) would apply and at least one of those causes is not an Event, the Contractor will only be granted relief under clause 35 (Extension Events) for the causes that constitute an Event. The Independent Reviewer will be required to apportion the delay and/or the Change in Costs accordingly.</p>
Clause 70.11(b)	<p>Where the Contractor demonstrates to the reasonable satisfaction of the Independent Reviewer that an ALOP Event has occurred, the Independent Reviewer must provide a written notice to the Contractor and the Transport Agency setting out that an ALOP Event has occurred, whether that ALOP Event is a Seismic ALOP Event or a Non-Seismic ALOP Event and the number of days of delay the Independent Reviewer assesses that the Contractor has suffered as a result of such ALOP Event.</p>

Clause of Project Agreement	Description
Schedule 7, Clause 3.5(b)	During Works Provisioning, the Independent Reviewer shall be required to attend all meetings of the Relationship Management Group where his or her monthly report (verbal or written) will be considered, unless otherwise agreed by the Transport Agency's Representative and the Contractor's Representative in advance of the meeting.
Schedule 10	Refer to Schedule 10 for the Works Completion Tests, Close-out Tests and the Independent Reviewer's role with respect to each such test.
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

[REDACTED]

Annexure 4: TG Project Lease

DEED OF LEASE

The New Zealand Transport Agency, a crown entity established on 1 August 2008 by section 93 of the Land Transport Management Act 2003 (the **Lessor**) **LEASES** to Wellington Gateway Partnership No. 2 LP (the **Lessee**) all the Land for the Term, from the Commencement Date, at the rent and upon the other terms as set out in the First Schedule and the Lessor and the Lessee covenant as set out in the Second Schedule.

AND THE LESSEE ACCEPTS this lease of the Land to be held by the Lessee as tenant and subject to the conditions, restrictions and covenants referred to above.

FIRST SCHEDULE

LAND:	The TG Operating Site as shown on the Plan together with and subject to the easements or interests registered against that land, subject to adjustment in accordance with clause 6.
TERM:	25 years.
COMMENCEMENT DATE:	[<i>Service Commencement Date</i>].
RENT:	The Rental Prepayment as provided for and to be paid in the manner described in the Agreement.

SECOND SCHEDULE

1. Definitions and interpretation

1.1 Definitions

In this Lease, unless the context otherwise requires:

Actual Termination Date has the meaning set out in the Agreement;

Agreement means the project agreement relating to the Transmission Gully PPP Project entered into between the Lessor and the Lessee and dated [];

Ancillary Documents has the meaning set out in the Agreement;

Close-out Deliverable has the meaning set out in the Agreement;

Compensation Sum has the meaning set out in the Agreement;

Execution Date has the meaning set out in the Agreement;

First Schedule means the schedule described as such and forming part of the Lease;

Land means that land described in the First Schedule;

Lease means this instrument, the First Schedule, the Second Schedule and any attached plans;

Lessee includes the successors and where not repugnant to the context, includes the officers, employees, contractors, agents and invitees of the Lessee;

Lessor includes the successors and where not repugnant to the context, includes the officers, employees, contractors, agents and invitees of the Lessor;

Plan means the plan attached as Appendix 1 to this Lease;

Permitted Security Interest has the meaning set out in the Agreement;

Project Documents has the meaning set out in the Agreement;

Rental Prepayment has the meaning set out in the Agreement;

Second Schedule means the schedule described as such and forming part of this Lease;

Site Access Protocols has the meaning set out in the Agreement;

Term means the term described in the First Schedule;

TG Operating Site has the meaning set out in the Agreement; and

TG Project has the meaning set out in the Agreement.

1.2 Interpretation

In this Lease, unless the context otherwise requires:

- (a) words importing the singular shall include the plural and vice versa;
- (b) headings shall be ignored;
- (c) references to clauses are references to clauses in the Second Schedule and references to parties are references to the parties of this Lease unless expressly stated otherwise; and
- (d) any reference in this Lease to any statute is deemed to include all amendments, revisions, substitutions or consolidations made from time to time to that statute.

2. Term

2.1 In consideration of the rent payable under this Lease, and of the Lessee's covenants, terms and agreements, express and implied, contained in this Lease and the Agreement, the Lessor leases to the Lessee all the Land and the improvements, fixtures and infrastructure comprising the TG Project on the Land for the term set out in the First Schedule.

2.2 The expiry date shall be the earlier of the date which is 25 years from the Commencement Date and the Actual Termination Date.

3. Rent

3.1 The Lessee shall pay the rent specified in the First Schedule in the manner described in the First Schedule.

- 3.2 For the avoidance of doubt, in the event this Lease is terminated prior to the Actual Termination Date, the Lessor will have no obligation to apportion or repay any rent paid in advance other than through payment of the Compensation Sum calculated in accordance with the Agreement.

4. Use of the Land

The Lessee shall use the Land only for the purposes set out in the Agreement.

5. Quiet enjoyment

Provided the Lessee complies with all of its obligations under this Lease and the Agreement, the Lessee shall be entitled to quietly hold and enjoy possession of the Land throughout the term without any interruption by the Lessor, subject to any right of access or inspection the Lessor has under the Agreement.

6. Survey and Land Transfer Title

- 6.1 Under the Agreement the Lessee is required, as a Close-out Deliverable, to survey and take or procure the steps required to legalise the boundaries of the TG Operating Site (**Survey**).
- 6.2 As soon as practicable following completion of the Survey:
- (a) the Lessee will prepare, for the Lessor's approval, a plan representing the TG Operating Site following the formal survey of its boundaries (the **Final Lease Plan**); and
 - (b) following the Lessor's approval of the Final Lease Plan (not to be unreasonably withheld or delayed) the parties will substitute the Final Lease Plan for the Plan and:
 - (i) the Lessee surrenders and assigns to the Lessor its interest in the Lease to the extent that the Lease relates to any land specified in the Plan which is not incorporated in the Final Lease Plan, as from the time of adoption of the Final Lease Plan, for no additional consideration payable by either party; and
 - (ii) the Lease will otherwise continue in accordance with its terms in relation to the land specified in the Final Lease Plan; and
 - (iii) for the avoidance of doubt, no adjustment will be made to the Rental Prepayment as a result of the partial surrender of Lease in accordance with this clause 6.2.
- 6.3 If the Lessee requires registration of this Lease in accordance with clause 12.2 (Entry into the TG Project Lease) of the Agreement, each party agrees to authorise its respective solicitors to register this lease with Land Information New Zealand. The parties acknowledge the need for, and agree to, minor changes being made to the form of this Lease in order to attach this Lease to a Land Information New Zealand e-Dealing and lodge it for registration including:
- (a) Amend the definition of land to refer to the relevant survey plan reference and delete the words, "subject to adjustment in accordance with clause 6" from the definition of Land.
 - (b) Substitute the definition of "Plan" for the relevant survey plan reference.
 - (c) Delete the execution blocks.
 - (d) Delete this clause 6.

7. Cancellation of Computer Interest Register

At the expiry or earlier termination of this Lease, the Lessor shall arrange for cancellation of any Computer Interest Register associated with this Lease (if any). The Lessee must provide all reasonable assistance required by the Lessor to enable the cancellation of any Computer Interest Register associated with this Lease.

8. Rights Reserved to the Lessor

The Lessee acknowledges that the Lessor may install, operate and maintain tolling gantries on part of the Land provided that the installation, operation and maintenance of tolling gantries will be dealt with as a Transport Agency initiated Change under Part 12 (Changes) of the Agreement. The Lessee grants to the Lessor the right to access the Land to install, operate and maintain the gantries together with any associated infrastructure required in order to operate the gantries. The gantries will be owned, operated and maintained by the Lessor. The Lessor will act reasonably in determining the placement of the gantries, having particular regard to any potential safety implications associated with the placement of the gantries and will consult with the Lessee before selecting a location. The Lessor's right of access to install, operate and maintain the gantries and associated infrastructure will be subject to the Site Access Protocols.

9. Protection of Public Access

The parties acknowledge that the Land is leased to the Lessee pursuant to section 63 of the Land Transport Management Act 2003 to enable the Lessee to operate a new public road which will form the MacKays to Linden segment of the Wellington Northern Corridor which runs from Levin to Wellington Airport. The parties further acknowledge that, from the Commencement Date, the road will be available for public use subject to any restrictions contained in the Agreement or any applicable statutory or regulatory requirements.

10. Prohibition Subletting Restriction on Assignment

10.1 This Lease shall bind the parties and their respective successors and permitted assigns.

10.2 The Lessee shall not:

- (a) without the prior written consent of the Lessor and otherwise in accordance with clause 90 (Assignment) of the Agreement, assign or transfer; or
- (b) mortgage or charge except by way of Permitted Security Interest,

the Land or any part of the Land.

10.3 Subject to clause 10.2, the Lessee shall not sublet, sublicense or otherwise part with possession of the Land or any part of the Land.

10.4 Clauses 10.2 and 10.3 do not apply to the extent that the assignment, transfer, mortgage or charge, sublet, sublicense or other parting of possession of the whole or any part of the Land is contemplated under the:

- (a) Project Documents; or
- (b) Ancillary Documents, to the extent that these have been reviewed and approved by the Lessor prior to the Execution Date.

11. Authority for entry into Lease

This Lease is entered into by the Lessor, as a Road Controlling Authority, under section 63 (Leasing) of the Land Transport Management Act 2003.

12. Property Law Act 2007

To the extent permitted by law, the covenants and conditions set out in section 218 and 219 of the Property Law Act 2007 are excluded from this Lease.

13. Project Agreement

- (a) The Lessee will comply with its obligations under the Agreement as if all such provisions were set out in full in this Lease and will, without limitation, allow the Lessor such access to and rights over the Land as are reserved under the Agreement.
- (b) The parties agree that:
 - (i) if the Agreement is cancelled or terminated for any reason then this Lease is immediately terminated and of no further effect; and
 - (ii) this Lease can only be terminated in the circumstances described in paragraph 13(b)(i).

Executed as a Deed

[Execution blocks and Appendix incorporating Plan to be added.]

Annexure 5: Third Party Interface Protocols

Third Party Interface Protocols

1. Scope

- (a) These Third Party Interface Protocols apply only where the Transport Agency:
 - (i) engages a third party to provide works or services on the TG Project Site; or
 - (ii) where permitted to under the Base Agreement, engages a third party to provide Services,

(an **Other Provider**).
- (b) The Contractor will be responsible for any agreements required to facilitate interface and access requirements with any third party other than a third party to which paragraph 1(a) applies, including any Utility Service Provider.

2. Obligations when an Other Provider accesses TG Project Site

2.1 Coordination and interface agreement

Prior to any Other Provider entering the TG Project Site, the Contractor and the Other Provider will enter into a co-ordination and interface agreement, as required by clause 14.4 (Co-ordination with other contractors) of the Base Agreement, to establish co-ordination and interface procedures and processes that provide for:

- (a) any consents that may be required when urgent access to the TG Project Site or the Work Site (as defined in paragraph 2.3(a)(i)) of the Other Provider is required;
- (b) hours of work, including when noisy work can be carried out;
- (c) agreed access points and designated access routes for Other Provider workers;
- (d) the handling of material through public areas;
- (e) accessing areas outside the designated Work Site;
- (f) the key points of contact for day to day coordination;
- (g) risk management strategies when accessing the TG Project Site and any Work Site of any Other Provider; and
- (h) all other requirements set out in these Third Party Interface Protocols.

2.2 Access to TG Project Site

- (a) Where the Contractor and the Other Provider each require access to a part of the TG Project Site, the Contractor and the Other Provider shall act reasonably to discuss and coordinate its access and other requirements with the other. Neither shall prevent or materially hinder or disrupt the other in the implementation of the TG Project, or adversely affect or prejudice the other's performance of its works or services.

- (b) Subject to paragraph 2.2(d), where the Contractor or an Other Provider unreasonably prevents or delays access by the other, that person shall be liable for any damage, costs, losses, liabilities, delays or similar suffered by the other person as a result.
- (c) The Other Provider and the Contractor will each be responsible for their own actions and any damage or loss caused by their actions in respect of the TG Project Site. This responsibility shall extend at all times to the actions of its own personnel and invitees (excluding in the case of the Contractor and for the avoidance of doubt, the Transport Agency and all Transport Agency Personnel) on the TG Project Site.
- (d) If a dispute arises between the Contractor and the Other Provider regarding access, the Contractor will first seek to address this directly with the Other Provider. Where the dispute cannot be resolved to the satisfaction of the Contractor and the Other Provider, the Contractor may refer the Dispute to the Dispute Resolution Procedures. The Transport Agency must procure the Other Provider's participation in, and agreement to any determination made under, the Dispute Resolution Procedures.

2.3 Obligations in relation to specific Work Site

- (a) Where the Transport Agency engages any Other Provider:
 - (i) where the Contractor and the Transport Agency agree in relation to a particular Other Provider's works that that party's work or service areas shall be considered a separate site (a work site within the TG Project Site), the parties will agree (acting reasonably) to the specific work site within the TG Project Site that will be used by the Other Provider (a **Work Site**);
 - (ii) to the extent reasonably practicable without the Contractor being prevented, materially hindered or disrupted in the implementation of the TG Project, or adversely affected or prejudiced in the performance of the Services, the Contractor will not enter the Work Site during the period the Other Provider is operating in that Work Site;
 - (iii) that Other Provider will seek to minimise disruptions to the Contractor as far as reasonably possible;
 - (iv) the Contractor will seek to minimise disruptions to the Other Provider as far as reasonably possible;
 - (v) the Contractor must comply with all reasonable directions issued to the Contractor by the relevant Other Provider in relation to its Work Site; and
 - (vi) that Other Provider must comply with all reasonable directions issued to the Other Provider by the Contractor.
- (b) Before any Other Provider first accesses its designated Work Site, it must:
 - (i) delineate and secure its Work Site to ensure entry is restricted, including preventing the unauthorised movement of workers, materials and equipment;
 - (ii) comply with the Contractor's requirements when crossing the remainder of the TG Project Site (including all inductions required by the Contractor);
 - (iii) have its own health and safety plan and procedures in place on its Work Site; and
 - (iv) be responsible for health and safety within its Work Site.

- (c) The Contractor will not have any responsibility whatsoever for health and safety within the specific and separated Work Site being utilised by the Other Provider while the Other Provider has been granted access to the Work Site by the Transport Agency, except that where the Contractor or any of its personnel access the Work Site, such persons must comply with the reasonable instructions of the relevant Other Provider at all times while on that Work Site.

2.4 Other Provider's obligations on TG Project Site

While accessing the TG Project Site, the Other Provider must strictly comply with the following requirements (and must ensure that its employees, agents, subcontractors and visitors comply with the following):

- (a) comply with and observe all relevant Consent Conditions;
- (b) observe and comply with any third party rights (including public rights) that may exist from time to time in respect of land comprising and adjoining the TG Project Site;
- (c) ensure that works and/or services being provided are carried out in such a way as not to unnecessarily or unreasonably interfere with access to and use and occupation of public or private roads or footpaths by any person who is entitled to any such access, use or occupation, other than where such interference is permitted under any applicable regional plan or Consent;
- (d) not use or occupy the TG Project Site for any purpose other than for the purposes of the works and/or services;
- (e) not (without obtaining the Contractor's prior written consent and only to the extent reasonably required for works and/or services):
 - (i) cause any damage to the TG Project Site or any Utilities Infrastructure or any appurtenances, services, fittings, Fixtures or other items on the TG Project Site;
 - (ii) cause any disruption to any Utility Services that has not been agreed with the supplier of those Utility Services and the owner of any equipment or structures used in the delivery of those Utility Services; or
 - (iii) dispose of any earth, clay, sand, gravel, chalk or other material from the TG Project Site or permit or suffer the same to be removed;
- (f) at the Other Provider's expense, transport all surplus materials arising from works and/or services and arrange for the recycling or tipping of the same at such places as may lawfully be used for recycling or tipping (as the case may be);
- (g) not use the TG Project Site so that:
 - (i) any Industrial Waste or Hazardous Substances are abandoned or dumped on the TG Project Site and/or Adjoining Properties;
 - (ii) any Industrial Waste or Hazardous Substances are handled in a manner that is likely to cause damage to the Environment; or
 - (iii) except to the extent agreed by the Contractor in writing, any other substance is released, deposited or emanates from the TG Project Site that results in Contamination affecting the TG Project Site and/or Adjoining Properties;
- (h) ensure that all of its vehicles leaving the TG Project Site are adequately cleaned to prevent the deposit of waste materials and debris on the Adjoining Property and if any

such material or debris is so deposited, the Other Provider shall employ such measures as necessary to remove the material and debris and to clean and reinstate the Adjoining Property to the reasonable satisfaction of the owners or occupiers of the Adjoining Property;

- (i) not permit or suffer the blockage of any rivers, ditches or Utilities Infrastructure by reason of anything done or omitted on the TG Project Site by the Other Provider (or its employees, agents or subcontractors etc);
- (j) comply, at the Other Provider's expense, with any legal, regulatory, or planning requirements so far as such requirements relate to, or affect its works and/or services being undertaken;
- (k) procure that those parts of the TG Project Site that are from time to time occupied by the Other Provider and its employees, agents, subcontractors and visitors for the purpose of carrying out its works and/or services are, so far as practicable having regard to the nature of works and/or services, maintained in a clean, orderly, safe and secure state, and its working areas on the TG Project Site are secure against trespassers and clean and tidy;
- (l) on completion of the works and/or services being undertaken by the Other Provider, clear from the TG Project Site, to the reasonable satisfaction of the Contractor, all temporary structures, rubbish and all building and surplus material and equipment of the Other Provider or any of its employees, agents, subcontractors or visitors and in default of that, the Contractor shall be entitled to employ an alternative contractor to clear them and shall be entitled to be reimbursed by the Other Provider for any costs reasonably incurred in clearing or procuring the clearing of them;
- (m) not, without the written consent of the Contractor (not to be unreasonably withheld or delayed), erect any signage, advertising or temporary structure; and
- (n) take all practicable steps in accordance with any Laws for ensuring that the health and safety of all:
 - (i) occupants of the TG Project Site;
 - (ii) individuals invited on to the TG Project Site; and
 - (iii) occupants of Adjoining Properties,

is not adversely impacted upon by the works and/or services it is undertaking.