

Model Utility Agreement Guidelines

Prepared by the Minister for Roads and Road Safety as Project Minister for the West Gate Tunnel Project in accordance with section 231 of the *Major Transport Projects Facilitation Act 2009* (Vic).

Dated 14 September 2018

Guidelines

Introduction

1. This document is the model utility guidelines for the purposes of section 231 of the *Major Transport Projects Facilitation Act 2009* (Vic) (the **Act**) for the West Gate Tunnel Project and comprises these guidelines and the attached draft agreement.
2. These model utility guidelines have been prepared by the Project Minister to provide guidance in respect of the form and content of commercial arrangements that the Project Minister considers appropriate to govern utility agreements entered into in accordance with the Act for the purposes of the West Gate Tunnel Project.
3. Where required, it is envisaged that separate utility agreements will be entered into between the project authority of the West Gate Tunnel Project, being the Secretary of the Department of Economic Development, Jobs, Transport and Resources (**Project Authority**) and individual utilities (**Utility**) whose infrastructure is located on the Project Area.
4. The draft agreement comprising part of these guidelines provides a range of differing options and alternative terms in relation to the commercial arrangements and risk allocation between the Project Authority and the Utility. Paragraphs 8 - 17 of these guidelines set out the arrangements addressed in the draft agreement.
5. The Project Authority and a Utility may negotiate alternative terms and conditions in a utility agreement, whether based on the draft agreement or otherwise.
6. The draft agreement acknowledges that the project company is responsible to the State for the delivery of the West Gate Tunnel Project (**Project Co**) and may be required by the State or the Project Authority to execute a deed of accession in relation to a utility agreement. Once Project Co executes the deed of accession, the agreement will be deemed to be read as if references to the Project Authority were followed by the words 'or Project Co' and references to the parties in the context of the Project Authority means the Project Authority or Project Co.
7. Unless the context requires otherwise, words used in these guidelines that have a specific meaning in the Act or the attached draft agreement, have the same meaning in these guidelines.

Utility Works

8. The draft agreement sets out the proposed arrangements in respect of the carrying out of works in respect of utility infrastructure which will be affected by the carrying out of the West Gate Tunnel Project (**Utility Infrastructure Works**).
9. Under the draft agreement, the Project Authority must issue the Utility with a Utility Infrastructure Works Proposal, which must set out the relevant details in respect of the Utility Infrastructure Works (including the design, methodology, technical standards, proposed timing, payment arrangements, party to carry out the Utility Infrastructure Works and the method of certification).
10. The Utility must then issue the Project Authority with a Utility Infrastructure Works Response which indicates the extent to which the Utility agrees with the proposal from the Project Authority. If the Utility does not agree, it must set out an alternative proposal, following which the parties must enter into good faith negotiations to agree and document each of the matters set out in the Utility's alternative proposal. If the

parties are not able to agree, the matters will be determined in accordance with a dispute resolution process set out in the draft agreement.

11. The Utility Infrastructure Works must be carried out by the Project Authority and/or the Utility as agreed or determined and the obligations of each party are set out in alternative provisions depending on the party or parties required to carry out the Utility Infrastructure Works.
12. The draft agreement contemplates three options for the performance of the Utility Infrastructure Works, being performance by:
 - (a) both each of the Project Authority and the Utility;
 - (b) the Project Authority; or
 - (c) the Utility.

Utility Infrastructure Works Objectives

13. In preparing a Utility Infrastructure Works Proposal or an alternative proposal, the relevant party must have regard to the objectives of minimising the:
 - (a) impact of the Utility Infrastructure Works on the design, construction, commissioning, carrying out and completion of the West Gate Tunnel Works;
 - (b) scope, cost and duration of any Utility Infrastructure Works to be carried out by the Utility or the Project Authority (as applicable); and
 - (c) disruption to services provided by the relevant utility infrastructure.

Unnotified Utility Infrastructure

14. The draft agreement contains a regime to deal with Unnotified Utility Infrastructure which is generally consistent with the Project Authority's rights under Division 5 of Part 7 of the *Major Transport Projects Facilitation Act 2009* (Vic). That regime is without prejudice to the Project Authority's rights under Division 5 of Part 7 of the Act with respect to unnotified utility infrastructure.

Payment

15. If the Utility will be undertaking any Utility Infrastructure Works, the Utility will be entitled to be paid either:
 - (a) Alternative A:
 - (i) a reasonable, competitive, arm's length market price for doing so, which will comprise all of its reasonable direct and overhead costs and will be calculated on a fully open book basis under which the Utility provides the Project Authority with all such information and documents as the Project Authority may reasonably require to ensure that those costs represent a reasonable, competitive, arm's length market price for the Utility Infrastructure Works; and
 - (ii) a margin of 10%; or
 - (b) Alternative B:

- (i) an agreed fixed lump sum.

Safety

16. The Utility is responsible for ensuring its personnel (including its employees, agents, contractors and nominated representatives) comply with:
- (a) the OHS Legislation, all OHS Regulations and any other relevant health and safety legislation; and
 - (b) the reasonable directions, procedures and policies of the "principal contractor" under the OHS Legislation, OHS Regulations and any other relevant health and safety legislation,
- whenever the Utility's personnel access the Project Area.

Insurance

17. Each party who carries out Utility Infrastructure Works in connection with the draft agreement must effect and maintain (or cause to be effected and maintained) at all times during which it carries out those works Contract Works Insurance (Public Liability), Workers Compensation Insurance and Contract Works (Material Damage) insurances and such other insurances that a prudent and experienced contractor would obtain and maintain for works similar to the Utility Infrastructure Works.

Utility Agreement

[Name of party 1]
Project Authority

[Name of party 2]
Utility

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Utility Agreement

Date

Parties [Name of party 1] [insert] of [insert address] (**Project Authority**)
 [Name of party 2] [insert] of [insert] (**Utility**)

Background

- A. The Project Authority is the project authority under the Relevant Legislation, to facilitate the delivery of the West Gate Tunnel Works for and on behalf of the State of Victoria.
- B. The Utility is an entity which owns, operates or controls Relevant Utility Infrastructure which will be affected by the West Gate Tunnel Works.
- C. The Parties agree that their respective rights and obligations, in respect of Relevant Utility Infrastructure which is affected by the West Gate Tunnel Works, will be governed in accordance with the terms of this Agreement.

Operative provisions

1. Definitions and interpretations

1.1 Definitions

In this Agreement, unless the context otherwise requires:

Agreed Amount has the meaning given in clause 19(a).

Agreement means this agreement and includes all schedules, exhibits, attachments and annexures to it.

Associate or **Associates** means, in relation to a person, any officer, agent, adviser, consultant, contractor or employee of that person and:

- (a) in the case of Project Co, includes the Associates of Project Co as defined in the Project Agreement;
- (b) in the case of State, includes the Associates of State as defined in the Project Agreement.

Authority means:

- (a) any government or any governmental, semi-governmental or local government authority, local council, administrative or judicial body or tribunal, department, commission, public authority, agency, minister, statutory corporation or instrumentality; and
- (b) any person having jurisdiction over, or ownership of, the Utility Infrastructure Works.

Business Day means a day in Melbourne that is not:

- (a) a Saturday or Sunday; or
- (b) a public holiday for Melbourne pursuant to the *Public Holidays Act 1993 (Vic)*.

Business Hours means between 9:00am and 5:00pm on a Business Day.

Claim includes any claim, action, demand or proceeding whether for the payment of money (including damages) or any other relief or remedy:

- (a) under, arising out of, or in connection with, this Agreement; or
- (b) arising out of, or in connection with, the West Gate Tunnel Works or Utility Infrastructure Works or any party's conduct prior to the date of this Agreement; or
- (c) otherwise at Law or in equity, including:
 - (i) by statute;
 - (ii) in tort for negligence or otherwise, including negligent misrepresentation; or
 - (iii) for restitution, including restitution based on unjust enrichment.

Commencement Date means the date of this Agreement.

Consequential Loss means:

- (a) pure economic loss;
- (b) loss of profit;
- (c) loss of revenue;
- (d) loss of opportunity;
- (e) loss of anticipated savings; and
- (f) change to goodwill or reputation,

and excludes loss arising from:

- (g) personal injury, nervous shock or death;
- (h) property damage;
- (i) third party liability claims in respect of property damage, personal injury, nervous shock or death; and
- (j) criminal acts or fraud,

and excludes all costs of the type described in sections 233(8) and 234(7) of the Relevant Legislation incurred by the Project Proponent or Project Co as a result of a delay in carrying out the Utility Infrastructure Works.

Confidential Information means in respect of a party (**Discloser**), information about or pertaining to the business, operations or affairs of the Discloser that is provided by the Discloser or its Associates to the other party (**Recipient**) or its Associates in accordance or in connection with this Agreement (whether prior to or after the date of this Agreement) or which otherwise comes to the knowledge of the Recipient or its Associates in connection with this Agreement, and which a reasonable person would (having regard to the nature of that information) consider confidential, but in all cases excludes any of information:

- (a) which is in or becomes part of the public domain other than through breach of this Agreement or an obligation of confidence owed from one party to the other; or

- (b) which the Recipient can prove by contemporaneous written documentation was already known to it at the time of disclosure by the Discloser or its Associates (or the information otherwise coming to the Recipient's knowledge), unless such knowledge arose from a disclosure of information which the Recipient ought reasonably to have known was in breach of an obligation of confidentiality or was itself the subject of confidentiality obligations.

Cost has the meaning given in clause 19(e).

Deed of Accession means the document set out in Annexure A.

Expert Determination Agreement means Schedule 14 of the Project Agreement.

Expiry Date means the date 6 years from the Commencement Date.

Force Majeure Event means each of the following events:

- (a) earthquake, tropical cyclone, natural disaster, landslide, seismic activity, tsunami or mudslide;
- (b) a flood which might, at the date of this Agreement be expected to occur less frequently than once in every 100 years;
- (c) war, act of a public enemy (whether war is declared or not), civil war, rebellion, revolution, military usurped power, military insurrection, military commotion or other like hostilities;
- (d) chemical, nuclear or biological contamination;
- (e) ionising radiation or contamination by radioactivity;
- (f) fire or explosion caused by events referred to in paragraph (a) or (c); or
- (g) an act of terrorism,

which:

- (h) occurs at or directly in the vicinity of the Key Off-Site Areas, Construction Areas, Maintenance Areas, CityLink Maintenance Land, Leased Areas, CityLink Construction Land or Key Operational Areas (as those terms are defined in the Project Agreement); and
- (i) prevents a Party from carrying out all or a material part of the Utility Infrastructure Works in accordance with this Agreement.

GST Law has the meaning given in the means the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

Insolvency Event means any of the following events:

- (a) in relation to a corporation:
 - (i) **(liquidator, administrator or receiver appointed)**: a liquidator, administrator, trustee in bankruptcy, receiver or receiver and manager or similar officer is appointed in respect of the corporation or any asset of the corporation;
 - (ii) **(distress or execution)**: a distress, attachment or other execution is levied or enforced upon or against any assets of the corporation and in

the case of a writ of execution or other order or process requiring payment, it is not withdrawn or dismissed within 10 Business Days;

- (iii) **(winding up)**: an order is made for the administration, dissolution or winding up of the corporation, or an application to the courts is made (and not stayed or dismissed within 20 Business Days after being made) or a resolution is passed for the administration or winding up of the corporation other than for the purposes of a solvent reconstruction or amalgamation on terms approved by the Project Authority;
 - (iv) **(cessation of business)**: the corporation ceases, or threatens to cease, to carry on its business or payment of its debts generally, other than for the purposes of a solvent reconstruction or amalgamation on terms approved by the Project Authority;
 - (v) **(arrangement or compensation)**: the corporation enters, or resolves to enter into any scheme of arrangement or composition with its creditors generally, or any class of its creditors, other than for the purposes of a solvent reconstruction or amalgamation on terms approved by the Project Authority;
 - (vi) **(inspector)**: an inspector is appointed under any companies legislation to investigate all or any part of the affairs of the corporation in relation to a possible contravention by the corporation of that legislation and the appointment:
 - A. is not withdrawn within 10 Business Days; and
 - B. in the reasonable opinion of the Project Authority, may have a material adverse effect;
 - (vii) **(insolvency)**: the corporation is unable to pay its debts when they fall due, or is deemed unable to pay its debts under any applicable law (other than as a result of a failure to pay a debt or claim which is the subject of a good faith dispute); or
 - (viii) **(deregistration)**: for a registered corporation under the Corporations Act, a step taken under section 601AA, 601AB or 601AC of the Corporations Act to cancel its registration; or
- (b) in relation to a trust:
- (i) **(application to court)**: an application or order is sought or made (and is not stayed or dismissed within 20 Business Days after being sought or made) in any court for the property of the trust to be brought into court or administered by the court or brought under its control; or
 - (ii) **(assets insufficient)**: the assets of the trust are not sufficient to satisfy the trustee's debts as and when they become due and payable in respect of which it has a right to be indemnified out of the assets of the trust.

Law means:

- (a) those principles of common law and equity established by decisions of courts;
- (b) all other statutes, regulations, by-laws, ordinances and subordinate legislation of the Commonwealth, the State or an Authority; and
- (c) Approvals (including any conditions or requirements under them).

Liability means any debt, obligation, claim, action, cost, (including legal costs, deductibles or increased premiums) expense, loss (whether direct or indirect), damage, compensation, charge or liability of any kind (including fines or penalties), whether it is:

- (a) actual, prospective or contingent; or
- (b) currently ascertainable or not,

and whether under this Agreement, any other Project Document or arising at law.

OHS Legislation means all Laws in connection with occupational health and safety including the *Occupational Health and Safety Act 2004 (Vic)*, the OHS Regulations and all other regulations made under the *Occupational Health and Safety Act 2004 (Vic)*.

OHS Regulations means the *Occupational Health and Safety Regulations 2017 (Vic)*.

Party means either the Utility, the Project Authority or any other person who has executed the Deed of Accession and **Parties** means each of them.

Project means the West Gate Tunnel Project.

Project Agreement means the document entitled "Project Agreement West Gate Tunnel" between the State and Project Co dated 11 December 2017.

Project Area means the project area designated by the Victorian Minister for Planning under the Relevant Legislation, including any variations to the project area in accordance with the Relevant Legislation.

Project Co means the entity appointed under the Project Agreement as Project Co.

Public Disclosure Obligations has the meaning given in clause 18.1(a).

Recipient has the meaning given in clause 19(b)(i).

Relevant Legislation means the *Major Transport Projects Facilitation Act 2009 (Vic)*.

Relevant Utility Infrastructure means any part of the supply, distribution or reticulation network owned, operated or controlled by a utility, including poles, pipes, cables, wires, conduits and tunnels.

Renewed Term means a period of 2 years, commencing on the Expiry Date.

Representatives has the meaning given in clause 15.2.

Revenue has the meaning given in clause 19(d).

State means the Crown in right of the State of Victoria and the Project Authority where it is acting in its capacity as a party to a State Project Document.

State Project Documents means those Project Documents (as defined in the Project Agreement) to which the State or the Project Authority is a party (other than the D&C Subcontract (as defined in the Project Agreement)).

Supplier has the meaning given in clause 19(b).

Term means the period referred to under clause 4.1 or as otherwise extended in accordance with clause 4.2.

Unnotified Utility Infrastructure has the meaning given to it in section 209 of the Relevant Legislation.

Utility Infrastructure means any part of the supply, distribution or reticulation network owned, operated or controlled by the Utility, including poles, pipes, pipeline, cables, wires, conduits, tunnels, aqueduct, electrical installation, telecommunications plant, water channel, and railway and electronic communications systems but not including communications systems provided as part of the Works and includes the Relevant Utility Infrastructure.

Utility Infrastructure Works means the physical things and works which the Project Authority or Utility (as applicable) must design, supply, construct, install, produce, commission or complete in connection with the construction, modification relocation, protection or rectification of Relevant Utility Infrastructure in accordance with the Utility Infrastructure Works Order and this Agreement.

Utility Infrastructure Works Objectives means minimising the:

- (a) impact of the Utility Infrastructure Works on the design, construction, commissioning, carrying out and completion of the West Gate Tunnel Works;
- (b) scope, cost and duration of any Utility Infrastructure Works to be carried out by the Utility; and
- (c) disruption to services provided by the Relevant Utility Infrastructure.

Utility Infrastructure Works Order means a document in the form of Schedule 4.

Utility Infrastructure Works Proposal means a document in the form of Schedule 2.

Utility Infrastructure Works Response means a document in the form of Schedule 3.

West Gate Tunnel Works means the physical things and works which Project Co must design, construct, commission or complete in accordance with the Project Agreement.

1.2 Interpretation

In this Agreement:

- (a) **(headings)**: headings (including any heading at the beginning of any subclause) are for convenience only and do not affect interpretation;

and unless the context otherwise requires:

- (b) **(count and gender)**: a word importing the singular includes the plural and vice versa and a word indicating a gender includes every other gender;
- (c) **(Agreement and Schedule references)**: a reference to:
 - (i) a party, clause, Schedule, Exhibit, or Annexure is a reference to a party, clause, Schedule, Exhibit or Annexure of or to this Agreement; and
 - (ii) a section is a reference to a section of a Schedule;
- (d) **(Agreement as amended)**: a reference to this Agreement or to any other deed, agreement, document or instrument includes a reference to this Agreement or such other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (e) **(party)**: a reference to a party includes that party's legal representatives, trustees, executors, administrators, successors and permitted substitutes and assigns, including any persons taking part by way of novation;

- (f) **(person)**: a reference to a person includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (g) **(legislation)**: a reference to legislation includes its delegated legislation and a reference to such legislation or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (h) **(definitions)**: if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (i) **("includes")**: "includes" will be read as if followed by the phrase "(without limitation)";
- (j) **("or")**: the meaning of "or" will be that of the inclusive, being one, some or all of a number of possibilities;
- (k) **(information)**: a reference to information includes information, representations, statements, data, samples, calculations, assumptions, deductions, determinations, drawings, design specifications, models, plans and other documents in all forms including the electronic form in which it was generated;
- (l) **("\$")**: a reference to "\$", AUD or dollar is to Australian currency;
- (m) **(time)**: a reference to time is a reference to time in Melbourne, Australia;
- (n) **(rights)**: a reference to a right includes any benefit, remedy, function, discretion, authority or power;
- (o) **(obligations and liabilities)**: a reference to an obligation or a liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;
- (p) **("may")**: the term "may", when used in the context of a power, right or remedy exercisable by the Project Authority or the State, means that the Project Authority or the State can exercise that power, right or remedy in its absolute and unfettered discretion and the Project Authority or the State has no obligation to do so;
- (q) **(construction)**: where there is a reference to an Authority, institute or association or other body referred to in this Agreement which:
 - (i) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity, this Agreement is deemed to refer to that other entity; or
 - (ii) ceases to exist, this Agreement is deemed to refer to that new entity which serves substantially the same purpose or object as the former entity;
- (r) **(remedy or cure)**: the use of the words "remedy" or "cure" or any form of such words in this Agreement means that the event to be remedied or cured must be remedied or cured or its effects overcome; and
- (s) **(contra proferentem rule not to apply)**: each provision will be interpreted without disadvantage to the party who (or whose representative) drafted or proffered that provision.

1.3 Approvals, directions and notices in writing

Unless otherwise expressly provided in this Agreement or agreed between the parties, all approvals, consents, directions, requirements, requests, claims, notices, agreements and demands must be given in writing.

2. Acknowledgment

The Parties acknowledge that this Agreement is a utility agreement for the purposes of section 210 of the Relevant Legislation.

3. [Not used]

4. Term

4.1 Term of Agreement

This Agreement commences on the Commencement Date and, subject to clause 4.2, will terminate on the Expiry Date.

4.2 Renewal option

If the Project Authority:

- (a) **(renewal)**: wishes to renew this Agreement for the Renewed Term to commence immediately after the Expiry Date; and
- (b) **(written notice)**: gives notice to the Utility not less than 1 month before the Expiry Date,

this Agreement will be extended for the Renewed Term on the same terms, except that this clause 4.2 will not apply.

5. Role of the Parties

The Parties acknowledge and agree that:

- (a) **(Project Co responsibility)**: under the Project Agreement, Project Co will be responsible for:
 - (i) the design, construction, commissioning and completion of the West Gate Tunnel Works, in accordance with the Project Agreement; and
 - (ii) making all arrangements in respect of the carrying out of the Utility Infrastructure Works in accordance with the Project Agreement;
- (b) **(Deed of Accession under the Project Agreement)**: if requested by either the State or the Project Authority (as the Project Proponent (as defined under the Project Agreement)) under clause 13.5(e)(vii) of the Project Agreement, Project Co must execute the Deed of Accession within 10 Business Days of being requested to do so;
- (c) **(Deed of Accession)**: if requested by either the State or the Project Authority, the Utility must execute the Deed of Accession within 10 Business Days of being requested to do so, and do all things necessary to give effect to the Deed of Accession; and

- (d) **(Project Co to assume obligations and liabilities)**: upon execution of the Deed of Accession:
- (i) this Agreement will be deemed to be read as if, subject to clauses 3.2 to 3.5 of the Deed of Accession:
 - A. a reference to the Project Authority is followed by a reference to "or Project Co"; and
 - B. a reference to a Party or the Parties in the context of the Project Authority means the Project Authority or Project Co; and
 - (ii) subject to clause 13.5 of the Project Agreement, the obligations and liabilities assumed by and the rights conferred on the Project Authority and Project Co will bind and benefit them jointly and severally.

6. Utility Infrastructure Works

6.1 Utility Infrastructure Works Proposal

Unless otherwise agreed by the Parties in writing and subject to clauses 6.4(b) and 6.6, prior to commencing any Utility Infrastructure Works, the Project Authority must issue the Utility with a Utility Infrastructure Works Proposal, which must set out:

- (a) **(details of affected Relevant Utility Infrastructure)**: details of the Relevant Utility Infrastructure which is (or is likely to be) affected by the West Gate Tunnel Works;
- (b) **(nature of Utility Infrastructure Works)**: the nature of any Utility Infrastructure Works required to be carried out as a result of the West Gate Tunnel Works;
- (c) **(timing)**: the proposed timing of the Utility Infrastructure Works;
- (d) **(standards)**: the proposed standards to which the Utility Infrastructure Works are to be carried out;
- (e) **(method)**: the proposed method for carrying out (including the entity which will carry out) the Utility Infrastructure Works;
- (f) **(estimate of costs)**: if the Utility is to carry out all or part of the Utility Infrastructure Works, the proposed estimate of costs for the Utility Infrastructure Works to be carried out by the Utility;
- (g) **(minimise disruption)**: the means by which disruption to services provided by the Relevant Utility Infrastructure will be minimised; and
- (h) **(method of certifying)**: the proposed method for certification of the Utility Infrastructure Works,

having regard to the Utility Infrastructure Works Objectives.

6.2 Response to Utility Infrastructure Works Proposal

Within 10 Business Days of the receipt of a Utility Infrastructure Works Proposal, the Utility must issue the Project Authority with the Utility Infrastructure Works Response, which must:

- (a) **(agreement)**: confirm those aspects of the Utility Infrastructure Works Proposal with which it agrees (acting reasonably);

- (b) **(alternative proposal)**: in respect of each aspect of the Utility Infrastructure Works Proposal with which the Utility does not agree, set out an alternative proposal, which must set out in detail:
 - (i) the reasons why the Utility does not so agree; and
 - (ii) the reasons why its alternative proposal is preferable,
 having regard to the Utility Infrastructure Works Objectives; and
- (c) **(additional information)**: without limiting clauses 6.2(a) or 6.2(b), set out:
 - (i) the extent to which the Utility proposes to have a role in carrying out the Utility Infrastructure Works;
 - (ii) the proposed reasonable cost of any Utility Infrastructure Works to be carried out by the Utility; and
 - (iii) the method of payment of the proposed reasonable cost referred to in clause 6.2(c)(ii).

6.3 Alternative proposals

If:

- (a) **(negotiate in good faith)**: the Utility submits an alternative proposal in accordance with clause 6.2(b), the Project Authority and the Utility must undertake genuine good faith negotiations to agree and document each of the matters set out in the Utility's alternative proposal within 10 Business Days of the receipt of the alternative proposal, having regard to the Utility Infrastructure Works Objectives; and
- (b) **(dispute resolution)**: the Project Authority and the Utility are unable to agree each of the matters set out in the Utility's alternative proposal within 10 Business Days of the receipt of the alternative proposal, then a Party may refer the matter for resolution in accordance with clause 15.

6.4 Utility Infrastructure Works Order

If:

- (a) **(agreement)**: the Project Authority and the Utility are able to agree "with" or "on" the matters set out in the:
 - (i) Utility Infrastructure Works Proposal; or
 - (ii) Utility's alternative proposal in its Utility Infrastructure Works Response;
- (b) **(no Utility Infrastructure Works Proposal)**: the Utility Infrastructure Works need to be carried out but the Project Authority and the Utility have agreed that the Project Authority does not need to issue a Utility Infrastructure Works Proposal, in accordance with clause 6.1; or
- (c) **(unable to agree)**: the Project Authority and the Utility are unable to agree the matters referred to in clause 6.4(a) in accordance with clause 6.3, but the matters are determined in accordance with clause 15,

then the Parties must promptly (and in any event, within 10 Business Days of the agreement or determination) prepare and each sign the Utility Infrastructure Works Order recording the terms on which the Utility Infrastructure Works will be carried out, as agreed or determined.

6.5 Performance of and payment for Utility Infrastructure Works

Alternative A - if the Utility Infrastructure Works are to be carried out by the Project Authority and the Utility

- (a) **(Utility Infrastructure Works Order):** After the Utility Infrastructure Works Order has been signed under clause 6.4:
 - (i) the Project Authority and the Utility must carry out the Utility Infrastructure Works in accordance with the Utility Infrastructure Works Order and this Agreement; and
 - (ii) the Utility will be paid for carrying out the Utility Infrastructure Works in accordance with the Utility Infrastructure Works Order and clause 6.7 of this Agreement.

- (b) **(obligations):** The Project Authority and the Utility must, in carrying out the Utility Infrastructure Works:
 - (i) ensure that the Utility Infrastructure Works are carried out in a sound and workmanlike manner with due care and skill;
 - (ii) comply with all authorisations necessary in order to undertake the Utility Infrastructure Works;
 - (iii) undertake the Utility Infrastructure Works in a manner consistent with the manner in which the Utility Infrastructure Works would be undertaken by a prudent, efficient and experienced utility provider and infrastructure manager;
 - (iv) ensure that the Utility Infrastructure Works are undertaken with due expedition and without unreasonable or unnecessary delay;
 - (v) comply with all regulatory and mandatory standards imposed by Law, together with all standards which a prudent, efficient and experienced utility infrastructure manager, construction manager or project manager (as the case may be) exercising due care, skill and diligence would comply with, having regard to the nature of the Utility Infrastructure Works; and
 - (vi) ensure that the Utility Infrastructure Works are fit for their intended purpose as identified in or reasonably inferred from the Utility Infrastructure Works Order.

Alternative B - if the Utility Infrastructure Works are to be carried out by the Project Authority

- (a) **(Utility Infrastructure Works Order):** After the Utility Infrastructure Works Order has been signed under clause 6.4, the Project Authority must carry out the Utility Infrastructure Works in accordance with the Utility Infrastructure Works Order and this Agreement; and

- (b) **(obligations):** The Project Authority must, in carrying out the Utility Infrastructure Works:
 - (i) ensure that the Utility Infrastructure Works are carried out in a sound and workmanlike manner with due care and skill;
 - (ii) comply with all authorisations necessary in order to undertake the Utility Infrastructure Works;

- (iii) undertake the Utility Infrastructure Works in a manner consistent with the manner in which the Utility Infrastructure Works would be undertaken by a prudent, efficient and experienced utility provider and infrastructure manager;
- (iv) ensure that the Utility Infrastructure Works are undertaken with due expedition and without unreasonable or unnecessary delay;
- (v) comply with all regulatory and mandatory standards imposed by Law, together with all standards which a prudent, efficient and experienced utility infrastructure manager, construction manager or project manager (as the case may be) exercising due care, skill and diligence would comply with, having regard to the nature of the Utility Infrastructure Works; and
- (vi) ensure that the Utility Infrastructure Works are fit for their intended purpose as identified in or reasonably inferred from the Utility Infrastructure Works Order.

Alternative C - if the Utility Infrastructure Works are to be carried out by the Utility

- (a) **(Utility Infrastructure Works Order):** After the Utility Infrastructure Works Order has been signed under clause 6.4:
 - (i) the Utility must carry out the Utility Infrastructure Works in accordance with the Utility Infrastructure Works Order and this Agreement; and
 - (ii) the Utility will be paid for carrying out the Utility Infrastructure Works in accordance with the Utility Infrastructure Works Order and clause 6.7 of this Agreement.
- (b) **(obligations):** The Utility must, in carrying out the Utility Infrastructure Works:
 - (i) ensure that the Utility Infrastructure Works are carried out in a sound and workmanlike manner with due care and skill;
 - (ii) comply with all authorisations necessary in order to undertake the Utility Infrastructure Works;
 - (iii) undertake the Utility Infrastructure Works in a manner consistent with the manner in which the Utility Infrastructure Works would be undertaken by a prudent, efficient and experienced utility provider and infrastructure manager;
 - (iv) ensure that the Utility Infrastructure Works are undertaken with due expedition and without unreasonable or unnecessary delay;
 - (v) comply with all regulatory and mandatory standards imposed by Law, together with all standards which a prudent, efficient and experienced utility infrastructure manager, construction manager or project manager (as the case may be) exercising due care, skill and diligence would comply with, having regard to the nature of the Utility Infrastructure Works; and
 - (vi) ensure that the Utility Infrastructure Works are fit for their intended purpose as identified in or reasonably inferred from the Utility Infrastructure Works Order.

6.6 Unnotified Utility Infrastructure

- (a) **(Unnotified Utility Infrastructure notice):** Upon becoming aware of any Unnotified Utility Infrastructure, the Project Authority must issue the Utility with a notice, which must:
- (i) identify and describe; and
 - (ii) specify the location of,
the Unnotified Utility Infrastructure;
 - (iii) state that:
 - A. the Project Authority intends to remove, relocate or protect the Unnotified Utility Infrastructure (as the case may be); and
 - B. the Utility has 5 Business Days within which to either:
 - 1) agree to the Project Authority carrying out the Utility Infrastructure Works required to remove, relocate or protect the Unnotified Utility Infrastructure; or
 - 2) carry out the Utility Infrastructure Works required to remove, relocate or protect the Unnotified Utility Infrastructure itself; and
 - (iv) set out details of the proposed:
 - A. estimate of costs for any Utility Infrastructure Works required to remove, relocate or protect the Unnotified Utility Infrastructure, which are to be carried out by the Utility; and
 - B. method for certification of the Utility Infrastructure Works required to remove, relocate or protect the Unnotified Utility Infrastructure.
- (b) **(Unnotified Utility Infrastructure Works response):** Within 5 Business Days of the receipt of the notice under clause 6.6(a), the Utility must issue the Project Authority with a notice, which sets out whether the Utility:
- (i) agrees to allow the Project Authority to carry out the Utility Infrastructure Works; or
 - (ii) proposes to carry out the Utility Infrastructure Works itself and the date by which it expects to complete the Utility Infrastructure Works,
required to remove, relocate or protect the Unnotified Utility Infrastructure.
- (c) **(Performance of the Utility Infrastructure Works):** If the Utility:
- (i) agrees to allow the Project Authority to carry out the Utility Infrastructure Works, then the Project Authority may immediately commence carrying out the Utility Infrastructure Works;
 - (ii) agrees, in its notice given under clause 6.6(b) to itself carry out the Utility Infrastructure Works required to remove, relocate or protect the Unnotified Utility Infrastructure, then it:

- A. must immediately carry out and complete the Utility Infrastructure Works as soon as reasonably practicable; and
 - B. will be paid for carrying out the Utility Infrastructure Works in accordance with clause 6.7; or
- (iii) fails to:
- A. respond to the notice given by the Project Authority under clause 6.6(a) within 5 Business Days;
 - B. carry out the Utility Infrastructure Works in accordance with its notice given under clause 6.6(b) within 5 Business Days; or
 - C. agree as to the Utility Infrastructure Works to be carried out to remove, relocate or protect the Unnotified Utility Infrastructure within 5 Business Days,
- then:
- D. the Project Authority may carry out the Utility Infrastructure Works required to remove, relocate or protect the Unnotified Utility Infrastructure; and
 - E. the Utility indemnifies and will keep the Project Authority indemnified against any action, suit, claim, demand, Liability, cost or expense arising out of or in connection with the exercise by the Project Authority of its rights under this clause 6.6(c)(iii).

6.7 Cost of Utility Infrastructure Works to be carried out by the Utility

Alternative A - Payment of open book costs plus margin

Where the Utility carries out Utility Infrastructure Works in accordance with this clause 6, it will be entitled to be paid:

- (a) **(arm's length)**: a reasonable, competitive, arm's length market price for doing so, which will comprise all of its reasonable direct and overhead costs and will be calculated on a fully open book basis under which the Utility provides the Project Authority with all such information and documents as the Project Proponent may reasonably require to ensure that those costs represent a reasonable, competitive, arm's length market price for the Utility Infrastructure Works; and
- (b) **(margin)**: a margin of 10%.

Alternative B - Payment of fixed cost

Where the Utility carries out Utility Infrastructure Works in accordance with this clause 6, it will be entitled to be paid the fixed lump sum set out in the Utility Infrastructure Works Order.

6.8 Insurances

Each Party who carries out Utility Infrastructure Works in connection with this Agreement must effect and maintain (or cause to be effected and maintained) at all times during which it carries out those works Contract Works Insurance (Public Liability), Workers Compensation Insurance and Contract Works (Material Damage) in the amounts set out in the Utility Infrastructure Works Order and such other insurances that a prudent and experienced contractor would obtain and maintain for works similar to the Utility Infrastructure Works.

7. Access to the Project Area

7.1 Grant of licence

Subject to clauses 7.2 and 8.2 and agreeing the relevant Utility Infrastructure Works Order, the Project Authority grants to the Utility, including its employees, agents, contractors and nominated representatives, a licence to access, occupy and use the Project Area (at no charge) for the purposes of carrying out the Utility Infrastructure Works.

7.2 Non-exclusive access

Subject to clause 7.3, the grant of the licence to the Utility under this clause 7:

- (a) **(access for the Project Authority and Associates)**: does not prevent the Project Authority or any of its Associates and nominated representatives from accessing and using the Project Area for any other purpose; and
- (b) **(licence)**: is subject to the licences granted to Project Co to access, occupy and use the Project Area for the purposes of the West Gate Tunnel Works.

7.3 Non-interference

- (a) **(written authorisation)**: The Project Authority must not, and must ensure that its employees, agents, contractors and nominated representatives do not, under any circumstances, interfere with, disrupt or damage the Relevant Utility Infrastructure without authorisation from the Utility, except in the event of an emergency which in the reasonable opinion of the Project Authority:
 - (i) poses an imminent threat to public or environmental safety; or
 - (ii) subject to the terms of this Agreement, is likely to result in interference, disruption or damage to the:
 - A. Relevant Utility Infrastructure; or
 - B. West Gate Tunnel Works.
- (b) **(obligations)**: The Utility must, in carrying out any Utility Infrastructure Works:
 - (i) not cause any damage to the Project Area, the West Gate Tunnel Works or any other infrastructure, plant, equipment, machinery, services, fixtures or other items on the Project Area, except to the extent necessary to remove, relocate or protect Utility Infrastructure in accordance with this Agreement;
 - (ii) only access and use the Project Area for the purpose of carrying out the Utility Infrastructure Works;
 - (iii) without limiting any of its obligations under this Agreement, at all times comply with all reasonable site access and safety protocols made known to the Utility by the Project Authority from time to time;
 - (iv) minimise nuisance and prevent unreasonable noise, dust, vibration and disturbance; and
 - (v) remove all rubbish and debris from the Project Area caused or created by it carrying out the Utility Infrastructure Works.

8. Personnel

8.1 Qualified persons

The Project Authority and the Utility must ensure that its personnel (including its employees, agents, contractors and nominated representatives) who carry out Utility Infrastructure Works under this Agreement:

- (a) **(personnel to be properly trained and qualified)**: are properly trained and qualified and appropriately experienced to perform the duties allocated to them, and exhibit a high standard of work and conduct; and
- (b) **(regular training)**: are provided with regular training to ensure that their skills and qualifications are maintained to the then current industry standards applicable to the provision of the Utility Infrastructure Works.

8.2 Access to the Project Area

Whenever the Utility's personnel (including its employees, agents, contractors and nominated representatives) access the Project Area under clause 7.1, the Utility will ensure that those personnel:

- (a) **(training and induction)**: attend any training or induction program required by the Project Authority;
- (b) **(compliance with health and safety obligations)**: are acquainted with and comply with the OHS Legislation, all OHS Regulations and any other relevant health and safety legislation;
- (c) **(standards)**: are made aware of the importance that the Project Authority places on establishing and maintaining high standards in relation to workplace health and safety and protection of the environment;
- (d) **(compliance)**: comply with reasonable directions, procedures and policies made known to the Utility (including those of the "principal contractor" under the OHS Legislation, OHS Regulations and any other relevant health and safety legislation);
- (e) **(responsible and businesslike manner)**: act in a responsible and businesslike manner on and around the Project Area;
- (f) **(avoid interference)**: carry out the Utility Infrastructure Works so as to avoid interfering with, disrupting, damaging or delaying the West Gate Tunnel Works; and
- (g) **(emergency response plan)**: give the Project Authority a copy of the emergency response plan in relation to any Relevant Utility Infrastructure erected or installed on the Project Area during any access to the Project Area by the Utility.

9. Payment

- (a) **(Invoicing)**: When providing an invoice under this Agreement, the Utility or the Project Authority (the **Payee**) must invoice the other Party (the **Payer**) for the carrying out of the Utility Infrastructure Works in accordance with the terms of payment agreed in the relevant Utility Infrastructure Works Order under clause 6.4 and as set out under clause 6.7.
- (b) **(Payment)**: The Payer must pay a correctly rendered invoice within 20 Business Days of receipt of that invoice, except when it disputes all or part of that invoice in which case it will pay the undisputed portion of the invoice. The Payee will

immediately credit the portion of the invoice in dispute and the matter must be referred for resolution in accordance with clause 15.

10. Records, access and audits

10.1 Records

The Utility must keep full, true, auditable and up to date books of account, records and documentation relating:

- (a) **(carrying out of Utility Infrastructure Work)**: to the Utility Infrastructure Works carried out in accordance with this Agreement; and
- (b) **(amounts payable)**: to amounts payable by the Project Authority in respect of the carrying out of Utility Infrastructure Works by the Utility, including complete and accurate records of and supporting documentation for all invoices submitted to the Project Authority and all payments made by the Project Authority under this Agreement, including the amount and manner of calculation of any amounts proposed by the Utility under clause 6.7 or agreed or determined to be payable under clause 6.4.

10.2 Audit

The Project Authority may conduct an audit of the Utility for the purpose of auditing the Utility's compliance with its obligations under this Agreement, including the amount and manner of calculation of any amounts payable by the Project Authority in respect of the carrying out of Utility Infrastructure Works.

10.3 Incorrect invoicing

Without limiting or otherwise affecting the Project Authority's rights, where any invoice rendered by the Utility under clause 9 is found to have been incorrect after payment has been made by the Project Authority, the overpayment will be recovered from the Utility by payment to the Project Authority or offset against a subsequent invoice.

10.4 Documentation to be provided following completion of Utility Infrastructure Works

Where the Project Authority or the Utility undertakes any Utility Infrastructure Works, it must, as soon as reasonably practicable, but in any event no later than 10 Business Days after receipt of payment in respect of the Utility Infrastructure Works, provide the Project Authority or the Utility with all data, drawings, information, records, plans and other material relating to those Utility Infrastructure Works.

11. Step-In

11.1 Step-In

If the Utility:

- (a) **(default by Utility)**: is in default of a material term of this Agreement and fails to remedy that default within 10 Business Days after its receipt of a notice of default from the Project Authority (or such other period the Parties may agree in writing); or
- (b) **(Utility subject to Insolvency Event)**: commits, suffers or is the subject of an Insolvency Event,

then the Project Authority may by further notice to the Utility, elect to:

- (c) **(management and control by the Project Authority of Utility)**: temporarily or permanently assume total or partial management and control of the whole or part of the Utility Infrastructure Works; and
- (d) **(take steps to carry out Utility Infrastructure Works)**: take such other steps as are necessary in the reasonable opinion of the Project Authority to carry out the Utility Infrastructure Works.

11.2 No Claim

The Utility will have no Claim, action, demand or entitlement to institute any proceedings against the Project Authority, whether for the payment of money or any other relief or remedy, arising out of or in connection with the exercise by the Project Authority of its step-in rights under clause 11.1.

11.3 Indemnity

The Utility indemnifies and will keep the Project Authority indemnified against any action, suit, Claim, demand, Liability, cost or expense arising out of or in connection with the exercise by the Project Authority of its step-in rights under clause 11.1.

11.4 Utilities to assist the Project Authority

The Utility must provide the Project Authority with all necessary assistance in a timely manner to enable it to exercise its step-in rights under clause 11.1 effectively and expeditiously.

12. Force Majeure Events

12.1 Non-performance excused

Non-performance by the Project Authority or the Utility of any obligation or condition required by this Agreement to be performed will be excused during the time and to the extent that such performance is prevented, wholly or in part, by a Force Majeure Event.

12.2 Notification and diligence

- (a) **(Force Majeure Event)**: Where the Project Authority or the Utility is, by reason of a Force Majeure Event, unable to perform any obligation or condition required by this Agreement to be performed, it must:
 - (i) notify the other Party, as soon as practical after becoming aware of the Force Majeure Event, of:
 - A. reasonably full particulars of the event or circumstance of the Force Majeure Event;
 - B. where possible, an estimate of the period of time required to enable it to resume full performance of its obligations; and
 - C. where possible, the means proposed to be adopted to remedy or abate the Force Majeure Event;
 - (ii) use all reasonable diligence and employ all reasonable means to remedy or abate the Force Majeure Event as expeditiously as possible; and
 - (iii) notify the other Party when the Force Majeure Event has terminated or abated to an extent which permits resumption of performance to occur.
- (b) **(Effect)**: No Party will, by virtue of this clause 12, be required against its will to:

- (i) adjust or settle any strike, lockout, ban or other industrial disturbance; or
 - (ii) make payment of, or otherwise provide compensation in response to, or as a consequence or in settlement of, any native title or cultural heritage claim by or on behalf of indigenous peoples.
- (c) **(Lack of funds):** No Party may claim lack of funds as a Force Majeure Event in accordance with this clause 12 or withhold moneys due and payable whether or not a Force Majeure Event exists.

13. Effect of Force Majeure

Where the Utility carries out Utility Infrastructure Works in accordance with clause 6, the period of time during which the Utility's performance of any obligation or condition is prevented by a Force Majeure Event will not be added to the time provided in this Agreement for the performance of that obligation or condition nor to the time required for the performance by the Utility of any act dependent thereon.

14. Limitation of liability and indemnities

14.1 Liability and indemnities

- (a) **(Indemnity):** Subject to clause 14.1(b), each of the Project Authority and the Utility indemnifies and will keep each other indemnified against any action, suit, Claim, demand, Liability, cost or expense arising out of or in connection with any failure by the Project Authority or the Utility (as the case may be) to comply with:
- (i) any applicable Law; or
 - (ii) the terms of this Agreement.
- (b) **(Proportionate liability):** The liability of the Project Authority or the Utility (as the case may be) will be reduced proportionately to the extent to which the liability is caused or contributed to by the Utility or the Project Authority (respectively).

14.2 Limitation of liability

Notwithstanding any other provision in this Agreement, the Project Authority and the Utility will not be liable to each other for any Consequential Loss.

14.3 Survival of indemnities

Each indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations of the Parties and survives termination of this Agreement.

14.4 Release

- (a) **(Utility Infrastructure Works carried out by the Project Authority):** Upon certification of Utility Infrastructure Works which have been carried out by the Project Authority, the Utility releases the Project Authority from any action, suit, claim, demand, Liability, cost or expense in respect of any fact, matter or thing arising out of, or in any way in connection with, the Relevant Utility Infrastructure or the Utility Infrastructure Works.
- (b) **(Utility Infrastructure Works carried out by the Utility):** Upon receipt of payment in respect of Utility Infrastructure Works which have been carried out by the Utility, the Utility releases the Project Authority from any action, suit, claim, demand, Liability, cost or expense in respect of any fact, matter or thing arising out of, or in any way in connection with, the Relevant Utility Infrastructure or the Utility

Infrastructure Works, except for any claim included in the invoice under clause 9 to which the Utility Infrastructure Works relates, which is given to the Project Authority within the time required by, and in accordance with the terms of, clause 9.

15. Dispute Resolution

15.1 Procedure for resolving disputes

- (a) **(Disputes to be resolved):** Any dispute between the Parties arising under this Agreement must be resolved in accordance with this clause 15.
- (b) **(Dispute resolution procedure):** The procedure that is to be followed to resolve a dispute is as follows:
 - (i) firstly, the dispute must be the subject of negotiation as required by clause 15.2;
 - (ii) secondly, if the dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 15.2(c)(i) the Parties may agree that the dispute must be referred to an expert for determination in accordance with clauses 15.4 to 15.8 (inclusive) or to arbitration in accordance clause 16; and
 - (iii) thirdly, if:
 - A. the dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 15.2(c)(i) and irrespective of whether the Parties failed to meet as required by that clause or whether having so met the Parties fail to agree whether the dispute should be referred to an expert or to arbitration within 20 Business Days after the expiration of the period for negotiation referred to in clause 15.2(c)(i);
 - B. the dispute has been referred to expert determination and a determination is not made by the expert within 30 days after the expert's acceptance of appointment; or
 - C. the dispute is referred to expert determination and a notice of dissatisfaction is given in accordance with clause 15.6(a),

then the dispute must be referred to arbitration in accordance with clause 16.

15.2 Negotiation

- (a) **(Notification):** If a dispute arises then a Party may give notice to the other Party requesting that the dispute be referred for resolution by negotiation between the Project Authority or nominee of the Project Authority and the chief executive officer (or equivalent) of the Utility (**Representatives**).
- (b) **(Contents of Notice):** A notice under clause 15.2(a) must:
 - (i) state that it is a notice under this clause 15; and
 - (ii) include or be accompanied by particulars of the matters which are the subject of the dispute.
- (c) **(Attempt to resolve dispute):** If a dispute is referred for resolution by negotiation under clause 15.2(a), then:

- (i) the Representatives must meet and attempt in good faith to resolve the dispute (in whole or in part) within 10 Business Days of the date on which the notice under clause 15.2(a) is received (or such later date as the Parties may agree); and
- (ii) any agreement reached between the Representatives will be reduced to writing, signed by or on behalf of each Party and will be contractually binding on the Parties.

15.3 Expert determination

If:

- (a) **(dispute unresolved by Representatives)**: a dispute which has been referred to the Representatives for negotiation in accordance with to clause 15.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 15.2(c)(i); and
- (b) **(referral to expert)**: the Parties agree within 20 Business Days after the expiration of the period for negotiation referred to in clause 15.2(c)(i), that the dispute be referred to an expert for determination,

then those parts of the dispute which remain unresolved will be referred to an expert for determination under clauses 15.4 to 15.8. For the avoidance of doubt, a dispute may only be referred to an expert for determination by agreement of the Parties.

15.4 Selection of expert

- (a) **(Exchange of lists of 3 preferred experts)**: Within 7 Business Days after the date on which the Parties agree to refer a dispute to an expert for determination under clause 15.3, the Parties must exchange lists of 3 persons (in order of preference) who, if appointed, would satisfy the requirements of clause 15.4(d), from whom the expert is to be chosen.
- (b) **(Appointment of person who appears on both lists)**: Any person that appears on both lists under clause 15.4(a) will be appointed as the expert to determine a dispute and if more than one person appears on both lists the person given the highest order of priority by the party that gave the notice under clause 15.2(a) will be appointed.
- (c) **(Appointment if no person appears on both lists)**: If no person appears on both lists, the party which gave the notice under clause 15.2(a) must procure:
 - (i) the president (or the senior non-executive officer, howsoever described) of the institute or governing body for the technical or professional discipline the subject of the relevant dispute to nominate the expert, having regard to, but not being bound by, those persons proposed by the Parties under clause 15.4(a); or
 - (ii) if there is no governing body for the technical or professional discipline the subject of the relevant dispute or such governing body advises that it will not nominate an expert, the President of the Australian Centre for International Commercial Arbitration to nominate a person to act as the expert, having regard to, but not being bound by, those persons proposed by the Parties under clause 15.4(a).
- (d) **(Appropriate skills)**: It is the intention of the Parties that the expert appointed to determine a dispute will be an independent person with appropriate skills having regard to the nature of the matters in dispute.

- (e) **(No entitlement to challenge appointment):** Neither Party will be entitled to challenge the appointment of an expert under this clause 15.4 on the basis that the expert does not satisfy the requirements of clause 15.4(d).
- (f) **(Not an arbitration agreement):** Any agreement for expert determination under this Agreement will not constitute an arbitration agreement for the purposes of the *Commercial Arbitration Act 2011 (Vic)*.
- (g) **(Agreement):** Once an expert is appointed, the Parties must enter into an agreement with the expert on the terms of the Expert Determination Agreement or such other reasonable terms as the expert may require.

15.5 Rules of expert determination

The expert determination process will be administered, and the expert will be required to act, under the terms of the Expert Determination Agreement.

15.6 Expert finding

- (a) **(Notification):** The determination of the expert must be in writing and will be final and binding on the Parties unless, within 10 Business Days of receipt of the determination, a Party gives notice to the other Party of its dissatisfaction and intention to refer the matter to arbitration under clause 16.
- (b) **(Amendment to determination):** Upon submission by any Party, the expert may amend the determination to correct:
 - (i) a clerical mistake;
 - (ii) an error from an accidental slip or omission;
 - (iii) a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or
 - (iv) a defect in form.

15.7 Liability of expert

- (a) **(Liability of expert):** The Parties agree:
 - (i) that the expert will not be liable in connection with the expert determination, except in the case of fraud on the part of the expert; and
 - (ii) to indemnify the expert against any Claims or Liability in connection with the expert determination, except in the case of fraud on the part of the expert, in which case a Claim may be made against him or her by any person who is a party to the dispute.
- (b) **(Engagement):** The Parties will jointly engage the expert services in connection with the expert determination proceedings and each party will seek a separate tax invoice equal to its share of the costs of the expert.

15.8 Costs

The Parties must:

- (a) bear their own costs in connection with the expert determination proceedings; and
- (b) pay an equal portion of the costs of the expert.

16. Arbitration

16.1 Reference to Arbitration

- (a) **(Dispute):** If:
- (i) a dispute:
 - A. which has been referred to the Parties' Representatives for negotiation in accordance with clause 15.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 15.2(c)(i); and
 - B. the Parties do not agree to refer the dispute to an expert for determination; or
 - (ii) in the case of a dispute which the Parties agree to refer to expert determination under clause 15.3:
 - A. a determination is not made within 30 days of the expert's acceptance of the appointment; or
 - B. a notice of dissatisfaction is given in accordance with clause 15.6,
- then either Party may notify the other that it requires the dispute to be referred to arbitration.
- (b) **(Referral):** Upon receipt by the other Party of a notice under clause 16.1(a)(ii)B, the dispute will be referred to arbitration.

16.2 Arbitration

- (a) **(ACICA Rules):** Arbitration in accordance with this clause 16 will be conducted in accordance with the arbitration rules of the Australian Centre for International Commercial Arbitration (known as the ACICA Rules) and as otherwise set out in this clause 16.
- (b) **(Seat):** The seat of the arbitration will be Melbourne, Victoria.
- (c) **(Language):** The language of the arbitration will be English.

16.3 Appointment of arbitrator

The Parties will endeavour to agree on the arbitrator or arbitrators (if the parties agree to appoint three arbitrators), but if no such agreement is reached within 14 Business Days of the dispute being referred to arbitration in accordance with clause 16.1(b), the arbitrator or arbitrators will be appointed by the Australian Centre for International Commercial Arbitration.

16.4 General Principles for conduct of arbitration

- (a) **(Conduct of arbitration):** The Parties agree that:
- (i) they have chosen arbitration for the purposes of achieving a just, quick and cost-effective resolution of any dispute;
 - (ii) any arbitration conducted in accordance with this clause 16 will not necessarily mimic court proceedings of the seat of the arbitration or the place where hearings take place (if different), and the practices of those

courts will not regulate the conduct of the proceedings before the arbitrator; and

- (iii) in conducting the arbitration, the arbitrator must take into account the matters set out in clauses 16.4(a)(i) and 16.4(a)(ii).
- (b) **(Evidence in writing):** All evidence in chief must be in writing unless otherwise ordered by the arbitrator.
- (c) **(Evidence and discovery):** The rules for evidence and discovery will be the IBA Rules on the Taking of Evidence in International Arbitration current at the date of arbitration.
- (d) **(Oral hearing):** The oral hearing must be conducted as follows:
 - (i) any oral hearing must take place in Melbourne, Victoria and all outstanding issues must be addressed at the oral hearing;
 - (ii) the date and duration of the oral hearing must be fixed by the arbitrator at the first preliminary conference. The arbitrator must have regard to the principles set out in clause 16.4(a) when determining the duration of the oral hearing;
 - (iii) oral evidence in chief at the hearing will be permitted only with the permission of the arbitrator for good cause;
 - (iv) the oral hearing must be conducted on a stop clock basis with the effect that the time available to the Parties must be split equally between the Parties so that each Party has the same time to conduct its case unless, in the opinion of the arbitrator, such a split would breach the rules of natural justice or is otherwise unfair to one of the Parties;
 - (v) not less than 28 days prior to the date fixed for oral hearing each Party must give notice of those witnesses (both factual and expert) of the other Party that it wishes to attend the hearing for cross examination;
 - (vi) in exceptional circumstances the arbitrator may amend the date of hearing and extend the time for the oral hearing set in accordance with clause 16.4(d)(ii);
 - (vii) a Party will not be bound to accept the written evidence of a witness submitted on behalf of the opposing party which is not challenged in cross examination; and
 - (viii) each Party is expected to put its case on significant issues in cross examination of a relevant witness called by the opposing Party or, where it seeks to challenge the evidence of a witness not called for cross-examination by reference to other evidence, to identify that evidence in its written opening submissions so that the opposing Party may know the nature of and basis for the challenge to the witness' written evidence.
- (e) **(Experts):** Unless otherwise ordered each Party may only rely upon one expert witness in connection with any recognised area of specialisation.

16.5 Proportional liability

To the extent permitted by Law, the arbitrator will have no power to apply or to have regard to the provisions of any proportional liability legislation which might, in the absence of this clause 16.5, have applied to any dispute referred to arbitration in accordance with this clause 16.

16.6 Extension of ambit of arbitration proceedings

- (a) **(Extending Disputes):** Where:
- (i) a dispute between the Parties to this Agreement is referred to arbitration in accordance with this clause 16; and
 - (ii) there is some other dispute also between the Parties to and in accordance with this Agreement (whenever occurring),
- the arbitrator may, upon application being made to the arbitrator by one or both of the Parties at any time before a final award is made in relation to the first-mentioned dispute, make an order directing that the arbitration be extended so as to include the other dispute.
- (b) **(Arbitrator's order):** An arbitrator may make an order in accordance with clause 16.6(a) on such terms and conditions (if any) as the arbitrator thinks fit.

16.7 Award final and binding

- (a) **(Final and binding):** Subject to clause 16.7(b), any award will be final and binding on the Parties.
- (b) **(Appeal):** Each Party consents to any appeal to a court where that appeal is made under the *Commercial Arbitration Act 2011* (Vic) on a question of law arising in connection with an arbitral award made in accordance with this clause 16.

16.8 Continue to perform

Notwithstanding the existence of a dispute, each Party must continue to carry out its obligations in accordance with this Agreement.

16.9 Governing law of arbitration agreement

The Law governing the arbitration agreement is the law of Victoria, Australia.

16.10 Interlocutory relief

This clause 16 does not prevent a Party from seeking urgent interlocutory relief from a court of competent jurisdiction where, in that Party's reasonable opinion, that action is necessary to protect that Party's rights.

17. Assignment

17.1 No assignment

- (a) **(No assignment):** Subject to clause 17.2, the Project Authority and the Utility must not assign or otherwise deal with this Agreement or any right or obligation under this Agreement except in accordance with a security interest granted in favour of a financier or with the prior consent of the other Party, which consent will not be unreasonably withheld or delayed provided that:
- (i) the assignee has agreed in writing to be bound by the terms of this Agreement by an appropriate deed of assignment in a form reasonably acceptable to the other Party; and
 - (ii) the Project Authority or the Utility (as the case may be) has demonstrated to the reasonable satisfaction of the other Party that the assignee is reputable, of good financial standing and is capable of

fulfilling all the obligations of the Project Authority or the Utility (as the case may be) under this Agreement for the Term.

- (b) **(Consent)**: Consent to an assignment will not prejudice or in any way reduce any right that the Project Authority and the Utility may have as against the other Party (whether positive or negative) which had accrued to their benefit prior to the date of the assignment.

17.2 Assignment by Project Authority

The Project Authority may assign, transfer or otherwise dispose of its rights and obligations under this Agreement where:

- (a) **(details of transferee)**: it has provided details of the proposed transferee and the terms and conditions of the proposed transferee to the Utility;
- (b) **(nature of the transferee)**: the proposed transferee is an agent of, or the obligations of which are supported by the Crown in the right of the State of Victoria; and
- (c) **(agreement to be bound)**: the proposed transferee has agreed to be bound by this Agreement.

18. Confidential Information and disclosure

18.1 Confidential Information and disclosure by Project Authority

- (a) **(Public Disclosure Obligations)**: The Project Authority may disclose any information in connection with the Project in accordance with its Public Disclosure Obligations and the Utility must use all reasonable endeavours to assist the Project Authority in meeting its Public Disclosure Obligations.
- (b) **(Other purposes)**: The Project Authority may disclose any information in connection with the Project in connection with the requirements of the State Project Documents (as defined in the Project Agreement) (including any tender process required to be conducted under the Termination Payments Schedule or the Change Compensation Principles of the Project Agreement).
- (c) **(Project Authority's rights)**: In meeting its Public Disclosure Obligations, the Project Authority may publish, disclose or make generally available this Agreement on a Victorian Government website.

18.2 Confidential Information and disclosure by the Utility

- (a) **(Confidentiality obligation)**: Subject to clause 18.2(b), the Utility must treat as secret and confidential all Confidential Information (including Confidential Information of the State and of Project Co).
- (b) **(Disclosure of Confidential Information)**: Without limiting the Utility's obligation under clause 18.2(a) and subject to clause 18.2(c), the Utility may disclose Confidential Information to its Associates to the extent necessary for the purpose of its obligations in accordance with this Agreement.
- (c) **(Confidentiality deed)**: Before disclosing any Confidential Information, the Utility must ensure that the person to whom the information is disclosed enters into a confidentiality deed with the Utility on terms reasonably acceptable to the Project Authority.

18.3 Disclosure by the Utility

- (a) **(Utility's disclosure obligations):** Subject to clause 18.3(b), the Utility must:
- (i) not make any public disclosures, announcements or statements in relation to the Project or the State's or any of the State's Associates' involvement in the Project without the State's and Project Co's prior consent;
 - (ii) comply with any terms and conditions the State or Project Co imposes and must use all reasonable endeavours to agree with the State and Project Co the wording and timing of all public disclosures, announcements or statements by it or any of its Associates relating to the Project or the State's or any of the State's Associates' involvement in the Project before the relevant disclosure, announcement or statement is made; and
 - (iii) as soon as practicable, give to the Project Authority a copy of any public disclosure, announcement or statement agreed to or approved by the Project Authority in accordance with this clause 18.3(a) or for which the Project Authority's consent or approval was not required in accordance with clause 18.3(b).
- (b) **(Permitted disclosure):** For the purposes of clause 18.3(a), the Utility will not be required to obtain the Project Authority's consent or approval to the extent that any disclosure, announcement or statement is:
- (i) required by Law, provided that it:
 - A. notifies the Project Authority of the requirement to make that disclosure; and
 - B. takes all reasonable steps to minimise the extent of the disclosure and to ensure the information is disclosed on a basis that the recipient agrees to maintain the confidentiality of the information;
 - (ii) required to obtain legal or other advice from its advisers;
 - (iii) required to be made to a court in the course of proceedings to which the Utility is a party; or
 - (iv) required by a relevant stock exchange, subject to:
 - A. such disclosure, announcement or statement not referring to the State's or any of its Associates' involvement in the Project; and
 - B. the Utility having used all reasonable endeavours to obtain the Project Authority's consent within a timeframe sufficient to allow it to meet the timeframe imposed by the relevant stock exchange.

19. GST General

- (a) **(GST exclusive amounts):** Unless otherwise expressly stated to include GST, any amounts payable for a taxable supply that are referred to in any other provision of this Agreement are exclusive of any GST (**Agreed Amount**).

- (b) **(GST payable by Supplier):** If GST becomes payable on any taxable supply made by a party (**Supplier**) under or in connection with this Agreement:
- (i) unless the Agreed Amount is expressly stated to include GST, an additional amount will be payable by the party which is the recipient of the taxable supply (**Recipient**), equal to the amount of GST payable by the Supplier on that taxable supply as calculated by the Supplier in accordance with the GST Law, which will be payable at the same time and in the same manner as for the Agreed Amount; and
 - (ii) the Supplier will provide a tax invoice to the Recipient in connection with that supply, either at the time expressly set out in any other provision of this Agreement or no later than the time at which the Agreed Amount for that taxable supply is to be provided in accordance with this Agreement. The Recipient is not obliged to pay any amount in accordance with this clause 19 unless and until a tax invoice is received by the Recipient in connection with the taxable supply except where the Recipient is required to issue the tax invoice.
- (c) **(Variation in GST payable):** If for any reason, the GST payable by the Supplier in connection with a supply it makes under or in connection with this Agreement (incorporating any increasing adjustments or decreasing adjustments relating to that supply) varies from the additional amount it received from the Recipient under clause 19(b) in connection with that supply, the Supplier will provide a refund or credit to, or will be entitled to receive from, the Recipient (as appropriate) the amount of this variation. Where an adjustment event occurs in relation to a supply and except where the Recipient is required to issue the adjustment note:
- (i) the Supplier will issue an adjustment note to the Recipient in connection with that supply within 14 days after becoming aware of that adjustment event occurring; and
 - (ii) no additional amount will be payable by the Recipient unless and until an adjustment note is received by the Recipient.
- (d) **(Revenue net of GST):** Any reference in this Agreement to price, value, sales, revenue, profit or a similar amount (**Revenue**), is a reference to the GST exclusive component of that Revenue, unless the contrary intention is expressed.
- (e) **(Cost net of GST):** Any reference in this Agreement to cost, expense, liability or other similar amount (**Cost**) of a party, including in the context of an entitlement to recovery, reimbursement or compensation for any Costs of a party, is a reference to that Cost reduced by the Input Tax Credits to which the party is entitled in respect of such Cost, unless the contrary intention is expressed.
- (f) **(GST Groups):** For the purposes of this Agreement, a reference to GST payable on a taxable supply made by a party includes any corresponding GST payable by the representative member of any GST group of which that party is a member and a reference to an Input Tax Credit entitlement of a party includes any corresponding Input Tax Credit entitlement of the representative member of any GST group of which that party is a member.
- (g) **(Definitions):** In this clause 19, unless otherwise defined in this Agreement, terms used have the meanings given to them in the GST Law.
- (h) **(Non-monetary consideration):** Where two parties in accordance with this Agreement exchange non-monetary consideration:
- (i) notwithstanding clause 19(b), the additional amount payable on any taxable supply by the Recipient to the Supplier shall be limited to an amount calculated as the monetary consideration provided by the

Recipient for the taxable supply being made by the Supplier multiplied by the applicable GST rate; and

- (ii) the parties agree to value the non-monetary consideration on an equal and GST-inclusive basis and swap tax invoices accordingly.

20. Notices

All communications (including approvals, consents, directions, requirements, requests, claims, notices, agreements and demands) in connection with this Agreement:

- (a) **(in writing)**: must be in writing;
- (b) **(addressed)**: must be addressed as set out below (or as otherwise notified by that Party to the other Party from time to time);

Utility:

Attention: [#]
Name: [#]
Address: [#]
Email: [#]

Project Authority:

Attention: [#]
Name: [#]
Address: [#]
Email: [#]

- (c) **(signed)**: must be signed by the Party making the communication or by the solicitor for, or any attorney, director, secretary or authorised agent of, that Party on its behalf;
- (d) **(form of delivery)**: must be delivered by hand or posted by prepaid express post to the address, or emailed (in the form agreed by both Parties) to the email address of the addressee set out in clause 20(b); and
- (e) **(taken to be received)**: are taken to be received by the addressee at the address set out in clause 20(b):
 - (i) in the case of delivery by hand, on delivery at the address of the addressee, unless that delivery is outside Business Hours, in which case that communication is taken to be received at 9.00 am on the next Business Day;
 - (ii) in the case of prepaid express post, on the third Business Day after the date of posting to an address within Australia and on the fifth Business Day after the date of posting by airmail to an address outside Australia; and
 - (iii) in the case of email, the first to occur of:
 - A. receipt by the sender of any email acknowledgement from the addressee's information system showing that the communication has been delivered to the email address of that addressee;
 - B. the time that the communication enters an information system which is under the control of the addressee; or

- C. the time that the communication is first opened or read by the addressee,

unless the result is that the communication would be taken to be given or made at a time which is outside Business Hours at the local time in the place of receipt of the email, in which case that communication is taken to be received at 9.00 am on the next Business Day.

21. Miscellaneous

21.1 Governing Law and jurisdiction

- (a) **(Governing Law):** This Agreement is governed by, and must be construed according to, the Laws of Victoria, Australia.
- (b) **(Jurisdiction):** Without limiting clauses 15 to 16, each Party irrevocably submits to the non-exclusive jurisdiction of the courts of Victoria, and the courts competent to determine appeals from those aforementioned courts, with respect to any proceedings that may be brought in connection with this Agreement.

21.2 Entire agreement

To the extent permitted by Law and in relation to its subject matter, this Agreement:

- (a) **(entire understanding):** embodies the entire understanding of the Parties, and constitutes the entire terms agreed by the Parties; and
- (b) **(prior agreements):** supersedes any prior Agreement between the Parties.

21.3 Further acts and documents

Each party must promptly do all further acts and execute and deliver all further documents (in such form and content reasonably satisfactory to both parties) required by Law or reasonably requested by another party to give effect to this Agreement.

21.4 Survival of certain provisions

- (a) **(Surviving clauses):** All provisions of this Agreement which, expressly or by implication from their nature, are intended to survive the rescission, termination or expiration of this Agreement will survive the rescission, termination or expiration of this Agreement, including any provision in connection with:
- (i) the Project Authority's rights to set-off and recover money;
 - (ii) confidentiality or privacy;
 - (iii) intellectual property rights;
 - (iv) any obligation to make any records available to the Project Authority;
 - (v) any indemnity or financial security given in accordance with this Agreement; or
 - (vi) any right or obligation arising on termination of this Agreement.
- (b) **(Interpretation):** No provision of this Agreement which is expressed to survive the termination of this Agreement will prevent any other provision of this Agreement, as a matter of interpretation, also surviving the termination of this Agreement.

- (c) **(Survival of rights and obligations):** No right or obligation of any party will merge on completion of any transaction in accordance with this Agreement. All rights and obligations in accordance with this Agreement survive the execution and delivery of any transfer or other document which implements any transaction in accordance with this Agreement.

21.5 Waiver

- (a) **(No waiver):** Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of a right provided by Law or under this Agreement by the Project Authority or the Utility does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right provided by Law or under this Agreement.
- (b) **(Writing):** A waiver or consent given by the Project Authority or the Utility under this Agreement is only effective and binding if it is given or confirmed in writing by the Project Authority or the Utility.
- (c) **(No waiver of another breach):** No waiver of a breach of a term of this Agreement operates as a waiver of another breach of that term or of a breach of any other term of this Agreement.

21.6 Consents, approvals and directions

- (a) **(Project Authority):** A consent or approval required in accordance with this Agreement from the Project Authority may be given or withheld, or may be given subject to any conditions, as the Project Authority thinks fit, unless this Agreement expressly provides otherwise.
- (b) **(Utility):** A consent or approval required in accordance with this Agreement from Utility may not be unreasonably withheld or delayed, unless this Agreement expressly provides otherwise.

21.7 Amendments

Except as otherwise expressly provided in this Agreement and subject to clause 13.5(f)(i)I. of the Project Agreement, this Agreement may only be varied by a deed executed by or on behalf of each party.

21.8 Expenses

Except as otherwise expressly provided in this Agreement or (as between the State and Project Co) the Project Agreement, each party must pay its own costs and expenses in connection with negotiating, preparing, executing and performing this Agreement.

21.9 Severance

If, at any time, a provision of this Agreement becomes illegal, invalid or unenforceable in any respect under the Law of any jurisdiction, that will not affect or impair the legality, validity or enforceability of:

- (a) any other provision of this Agreement; or
- (b) that provision under the Law of any other jurisdiction.

21.10 Counterparts

This Agreement may be executed in any number of counterparts and by the parties in separate counterparts. Each counterpart constitutes the deed of each party who has executed

and delivered that counterpart. All such counterparts taken together will be deemed to constitute one and the same Agreement.

21.11 Moratorium legislation

Without limiting clause 5.4 of the Project Agreement, to the fullest extent permitted by Law, the provisions of all Laws which operate to lessen or affect in favour of the Utility any obligation under this Agreement, or to prejudicially affect the exercise by the Project Authority of any right, power or remedy under this Agreement, are expressly waived.

21.12 Proportionate liability

- (a) **(Excluded operation of Wrongs Act):** The operation of Part IVAA of the *Wrongs Act 1958* (Vic) is excluded in relation to all and any rights, obligations or liabilities of either Party under this Agreement whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.
- (b) **(Rights, obligations and liabilities):** Without limiting clause 21.12(a), the rights, obligations and liabilities of the parties (including those relating to proportionate liability) are as specified in this Agreement and not otherwise, whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.

Schedule 1 – Relevant Utility Infrastructure

[Note: To be inserted.]

Schedule 2 - Utility Infrastructure Works Proposal

UTILITY INFRASTRUCTURE WORKS PROPOSAL

To: *[#insert name of Utility]* (Utility)

This is a Utility Infrastructure Works Proposal issued under clause 6.1 of the Utility Agreement between the Project Authority, *[#insert name of other parties]* dated *[#insert date]* (**Utility Agreement**). Unless otherwise expressly defined, expressions used in this Utility Infrastructure Works Proposal have the meanings given to them in or for the purposes of the Utility Agreement.

[The Project Authority/Project Co] note the following, in respect of Relevant Utility Infrastructure that has been (or is likely to be) affected by the West Gate Tunnel Works:

1. Description of the Relevant Utility Infrastructure which is (or is likely to be) affected by the West Gate Tunnel Works:

[#insert]
2. Description of the nature of any Utility Infrastructure Works required to be carried out as a result of the West Gate Tunnel Works:

[#insert]
3. Proposed timing of the Utility Infrastructure Works:

[#insert]
4. Proposed standards to which the Utility Infrastructure Works are to be carried out:

[#insert]
5. Proposed method for carrying out (including the entity which will carry out) the Utility Infrastructure Works:

[#insert]
6. If the Utility is to carry out all or part of the Utility Infrastructure Works, the proposed budget for the Utility Infrastructure Works to be carried out by the Utility:

[#insert]
7. Description of the means by which disruption to services provided by the Relevant Utility Infrastructure will be minimised by the Utility:

[#insert]
8. Proposed method for final certification of the Utility Infrastructure Works:

[#insert]
9. Party(ies) to carry out the Utility Infrastructure Works

[#insert]
10. Proposed basis of payment

[#identify which of Alternative A or Alternative B in clause 6.7 applies and, if Alternative B applies, the fixed amount]

11. Insurances to be obtained and maintained by Party(ies) carrying out the Utility Infrastructure Works

[#insert]

Signed: _____

Date: _____

[PROJECT AUTHORITY/PROJECT CO]

Schedule 3 - Utility Infrastructure Works Response

UTILITY INFRASTRUCTURE WORKS RESPONSE

To: [the Project Authority/Project Co] (Project Authority/Project Co)

This is a Utility Infrastructure Works Response issued under clause 6.2 of the Utility Agreement between the Project Authority, [#insert name of other parties] dated [#insert date] (Utility Agreement). Unless otherwise expressly defined, expressions used in this Utility Infrastructure Works Response have the meanings given to them in or for the purposes of the Utility Agreement.

[#insert name of Utility] (Utility) notes the following, in respect of the Utility Infrastructure Works Proposal issued under clause 6.1 of the Utility Agreement:

1. Description of those aspects of the Utility Infrastructure Works Proposal with which the Utility agrees:

[#insert]

2. In respect of all aspects of the Utility Infrastructure Works Proposal with which the Utility does not agree, a description (having regard to the Utility Infrastructure Works Objectives) of the Utility's alternative proposal, including the reasons why the Utility does not so agree and the reasons why its alternative proposal is preferable:

[#insert]

3. If the Utility has submitted an alternative proposal, the extent to which the Utility proposes to have a role in carrying out the Utility Infrastructure Works and, if it is intended that the Utility will carry out part or all of the Utility Infrastructure Works, the proposed reasonable cost / reasonable fixed cost of any Utility Infrastructure Works to be carried out by the Utility and the proposed method of payment of that proposed reasonable cost / reasonable fixed cost:

[#insert]

Signed: _____ Date: _____

Utility

Schedule 4 - Utility Infrastructure Works Order

UTILITY INFRASTRUCTURE WORKS ORDER

This is a Utility Infrastructure Works Order issued under clause 6.4 of the Utility Agreement between the Project Authority, [insert name of other parties] dated [insert date] (**Utility Agreement**). Unless otherwise expressly defined, expressions used in this Utility Infrastructure Works Order have the meanings given to them in or for the purposes of the Utility Agreement.

The Parties have agreed the following (or alternatively, it has been determined by an expert in accordance with clause 15 of the Utility Agreement), in respect of Relevant Utility Infrastructure that has been (or is likely to be) affected by the West Gate Tunnel Works:

- 1. Description of the Relevant Utility Infrastructure which is (or is likely to be) affected by the West Gate Tunnel Works:
[insert]
- 2. Description of the nature of any Utility Infrastructure Works required to be carried out as a result of the West Gate Tunnel Works:
[insert]
- 3. Proposed timing of the Utility Infrastructure Works:
[insert]
- 4. Proposed standards to which the Utility Infrastructure Works are to be carried out:
[insert]
- 5. Proposed method for carrying out (including the entity which will carry out) the Utility Infrastructure Works:
[insert]
- 6. To the extent that the Utility will carry out all or part of the Utility Infrastructure Works, the amount payable to the Utility in respect of the carrying out of the Utility Infrastructure Works:
[insert]
- 7. Description of the means by which disruption to services provided by the Relevant Utility Infrastructure will be minimised by the Utility:
[insert]
- 8. Proposed method for final certification of the Utility Infrastructure Works:
[insert]
- 9. Party(ies) to carry out the Utility Infrastructure Works
[insert]
- 10. Proposed basis of payment
[identify which of Alternative A or Alternative B in clause 6.7 applies and, if Alternative B applies, the fixed amount]

11. Insurances to be obtained and maintained by Party(ies) carrying out the Utility Infrastructure Works

[#insert]

Signed: _____ Date: _____
Utility

Signed: _____ Date: _____
[PROJECT AUTHORITY/PROJECT CO]

Annexure A - Deed of Accession

Deed of Accession

West Gate Tunnel

[]

Project Authority

[]

Project Co

[]

Utility

Deed of Accession made on

Parties [] (Project Authority)
[] (Project Co)
[] (Utility)

Background

- A. The Project Authority has entered into the Utility Agreement with the Utility.
- B. Under the Project Agreement, Project Co has agreed to, upon request, execute this Deed and implement the Utility Infrastructure Works in accordance with its obligations under the Project Agreement and the Utility Agreement.

Operative provisions

1. Definitions and interpretation

1.1 Definitions

In this Deed, unless the context otherwise requires:

Authority means:

- (a) any government or any governmental, semi-governmental or local government authority, local council, administrative or judicial body or tribunal, department, commission, public authority, agency, minister, statutory corporation or instrumentality; and
- (b) any person having jurisdiction over, or ownership of, the Utility Infrastructure Works.

Deed means this deed and includes all schedules, exhibits, attachments and annexures to it.

Effective Date means the date of this Deed.

Law means:

- (a) those principles of common law and equity established by decisions of courts;
- (b) all other statutes, regulations, by-laws, ordinances and subordinate legislation of the Commonwealth, the State or an Authority; and
- (c) Approvals (including any conditions or requirements under them).

Liability means any debt, obligation, claim, action, cost, (including legal costs, deductibles or increased premiums) expense, loss (whether direct or indirect), damage, compensation, charge or liability of any kind (including fines or penalties), whether it is:

- (a) actual, prospective or contingent; or
- (b) currently ascertainable or not,

and whether under this Agreement, any other Project Document (as that term is defined in the Project Agreement) or arising at Law.

Party means any of the Project Authority, Project Co or the Utility and **Parties** means each of them.

Project means the West Gate Tunnel Project.

Project Agreement means the document entitled "Project Agreement West Gate Tunnel" between the State and Project Co dated 11 December 2017.

Project Area means the project area designated by the Victorian Minister for Planning under the Relevant Legislation, including any variations to the project area in accordance with the Relevant Legislation.

Relevant Utility Infrastructure means any part of the supply, distribution or reticulation network owned, operated or controlled by a utility, including poles, pipes, cables, wires, conduits and tunnels.

Utility Agreement means [*#insert details of Utility Agreement*].

Utility Infrastructure Works means the physical things and works which the Project Authority or Utility (as applicable) must design, supply, construct, install, produce, commission or complete in connection with the construction, modification or relocation of Relevant Utility Infrastructure in accordance with the Utility Infrastructure Works Order and this Agreement.

1.2 Interpretation

In this Deed:

- (a) **(headings)**: headings (including any heading at the beginning of any subclause) are for convenience only and do not affect interpretation;

and unless the context otherwise requires:

- (b) **(count and gender)**: a word importing the singular includes the plural and vice versa and a word indicating a gender includes every other gender;
- (c) **(Deed and Schedule references)**: a reference to:
- (i) a party, clause, Schedule, Exhibit, or Annexure is a reference to a party, clause, Schedule, Exhibit or Annexure of or to this Deed; and
 - (ii) a section is a reference to a section of a Schedule;
- (d) **(Deed as amended)**: a reference to this Deed or to any other deed, agreement, document or instrument includes a reference to this Deed or such other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (e) **(party)**: a reference to a party includes that party's legal representatives, trustees, executors, administrators, successors and permitted substitutes and assigns, including any persons taking part by way of novation;

- (f) (**person**): a reference to a person includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (g) (**legislation**): a reference to legislation includes its delegated legislation and a reference to such legislation or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (h) (**definitions**): if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (i) (**"includes"**): "includes" will be read as if followed by the phrase "(without limitation)";
- (j) (**"or"**): the meaning of "or" will be that of the inclusive, being one, some or all of a number of possibilities;
- (k) (**information**): a reference to information includes information, representations, statements, data, samples, calculations, assumptions, deductions, determinations, drawings, design specifications, models, plans and other documents in all forms including the electronic form in which it was generated;
- (l) (**"\$"**): a reference to "\$", AUD or dollar is to Australian currency;
- (m) (**time**): a reference to time is a reference to time in Melbourne, Australia;
- (n) (**rights**): a reference to a right includes any benefit, remedy, function, duty, obligation, Liability, interest, entitlement, title, discretion, authority or power;
- (o) (**obligations and liabilities**): a reference to an obligation or a liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;
- (p) (**construction**): where there is a reference to an Authority, institute or association or other body referred to in this Deed which:
 - (i) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity, this Deed is deemed to refer to that other entity; or
 - (ii) ceases to exist, this Deed is deemed to refer to that new entity which serves substantially the same purpose or object as the former entity;
- (q) (**remedy or cure**): the use of the words "remedy" or "cure" or any form of such words in this Deed means that the event to be remedied or cured must be remedied or cured or its effects overcome; and
- (r) (**contra proferentem rule not to apply**): each provision will be interpreted without disadvantage to the party who (or whose representative) drafted or proffered that provision.

2. Precedence of Project Agreement

Each of the Parties acknowledge and agree that to the extent of any inconsistency, ambiguity or discrepancy between its obligations under this Deed, and the Project Agreement, the terms of the Project Agreement will prevail.

3. Covenant

3.1 Project Co covenants

- (a) **(covenants):** Project Co:
 - (i) confirms that it has been supplied with a copy of the Utility Agreement; and
 - (ii) with effect from the Effective Date but subject to clauses 3.2, 3.4, 3.5 and 3.5, agrees to be bound by the Utility Agreement and to perform all of the obligations required to be performed by the Project Authority under the Utility Agreement:
 - A. as if Project Co was named in the Utility Agreement as the Project Authority; and
 - B. in accordance with clause 5(d) of the Utility Agreement.
- (b) **(utility covenant):** The Utility covenants with Project Co, with effect from the Effective Date, to comply with the provisions of, and to perform all its obligations under the Utility Agreement so far as they may remain to be observed and performed.

3.2 Access to the Project Area

The Project Authority and the Utility acknowledge and agree that, with effect from the Effective Date, clause 7.1 of the Utility Agreement will not apply to Project Co.

3.3 Assignment by Project Co

The Project Authority and the Utility acknowledge and agree that, with effect from the Effective Date, clause 17 of the Utility Agreement will not apply to Project Co.

3.4 Disclosure of Confidential Information by Project Co

The Project Authority and the Utility acknowledge and agree that, with effect from the Effective Date, clause 18.1 of the Utility Agreement will not apply to Project Co and the Utility Agreement will be deemed to include the following new clause 18.4:

“Clause 18.4 Disclosure of Confidential Information by Project Co

- (a) **(Disclosure of Confidential Information):** Subject to clause 18.4(b), Project Co may disclose Confidential Information of the Utility to:
 - (i) its Associates to the extent necessary for the purpose of undertaking the Project;
 - (ii) Transurban Funding Pty Ltd (ACN 609 949 337) or any prospective financier or equity investor of the Project, subject to

the Utility having been provided necessary information in respect of the proposed parties; or

- (iii) to obtain legal or other professional advice from its advisers who are subject to a duty to keep the information confidential.
- (b) **(Confidentiality deed):** Before disclosing any Confidential Information of the Utility in reliance on clause 18.4(a)(i) or clause 18.4(a)(ii), Project Co must ensure that the person to whom the information is disclosed enters into a confidentiality deed with Project Co on terms reasonably acceptable to the Utility.
- (c) **(Disclosure required by Law):** Project Co may disclose any Confidential Information of the Utility to the extent that the disclosure is:
 - (i) required by Law, provided that it:
 - A. notifies the Utility of the requirement to make that disclosure; and
 - B. takes all reasonable steps to minimise the extent of the disclosure and to ensure the information is disclosed on the basis that the recipient agrees to maintain the confidentiality of the information;
 - (ii) required to be made to a court in the course of proceedings to which Project Co is a party; or
 - (iii) required by a relevant stock exchange, subject to:
 - A. such disclosure, announcement or statement not referring to the Utility's involvement in the Project; and
 - B. Project Co having used all reasonable endeavours to obtain the Utility's consent within a timeframe sufficient to allow it to meet the timeframe imposed by the relevant stock exchange."

3.5 Notices

The Project Authority and the Utility acknowledge and agree that, with effect from the Effective Date, clause 20(b) of the Utility Agreement will be deemed to include the following notice details for Project Co:

"Project Co:

Attention: [#]
Name: [#]
Address: [#]
Email: [#]".

4. Miscellaneous

4.1 Governing Law and jurisdiction

- (a) **(Governing Law):** This Deed is governed by, and must be construed according to, the Laws of Victoria, Australia.

- (b) (**Jurisdiction**): Without limiting clauses 15 to 16 of the Utility Agreement, each Party irrevocably submits to the non-exclusive jurisdiction of the courts of Victoria, and the courts competent to determine appeals from those aforementioned courts, with respect to any proceedings which may be brought in connection with this Deed.

4.2 Entire Agreement

To the extent permitted by Law and in relation to their subject matter, this Deed and the Utility Agreement:

- (a) (**entire understanding**): embody the entire understanding of the Parties and constitute the entire terms agreed by the Parties; and
- (b) (**prior agreements**): supersede any prior agreement of the Parties.

4.3 Further acts and documents

Each Party must promptly do all further acts and execute and deliver all further documents (in such form and content reasonably satisfactory to both Parties) required by Law or reasonably requested by another Party to give effect to this Deed.

4.4 Waiver

- (a) (**Writing**): A waiver given by a Party in accordance with this Deed is only effective and binding on that party if it is given or confirmed in writing by that Party.
- (b) (**No waiver**): A failure to, a delay in or the partial exercise or enforcement of a right provided by Law or in accordance with this Deed by a Party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided by Law or in accordance with this Deed.
- (c) (**No waiver of another breach**): No waiver of a breach of a term of this Deed operates as a waiver of another breach of that term or of a breach of any other term of this Deed.

4.5 Consents, approvals and directions

- (a) (**Project Authority**): A consent or approval required in accordance with this Deed from the Project Authority may be given or withheld, or may be given subject to any conditions, as the Project Authority thinks fit, unless this Deed expressly provides otherwise.
- (b) (**Project Co**): A consent or approval required in accordance with this Deed from Project Co may not be unreasonably withheld or delayed, unless otherwise expressly provided in this Deed.
- (c) (**Utility**): A consent or approval required in accordance with this Deed from the Utility may not be unreasonably withheld or delayed, unless otherwise expressly provided in this Deed.

4.6 Amendments

Except as otherwise expressly provided in this Deed, this Deed may only be varied by a deed executed by or on behalf of each Party.

4.7 Expenses

Except as otherwise expressly provided in this Deed or (as between the State and Project Co) the Project Agreement, each Party must pay its own costs and expenses in connection with negotiating, preparing, executing and performing this Deed.

4.8 Severance

If, at any time, a provision of this Deed is or becomes illegal, invalid or unenforceable in any respect under the Law of any jurisdiction, that will not affect or impair the legality, validity or enforceability of:

- (a) any other provision of this Deed; or
- (b) that provision under the Law of any other jurisdiction.

4.9 Counterparts

This Deed may be executed in any number of counterparts and by the Parties in separate counterparts. Each counterpart constitutes the deed of each Party who has executed and delivered that counterpart. All such counterparts taken together will be deemed to constitute one and the same agreement.

4.10 Moratorium legislation

Without limiting clause 5.4 of the Project Agreement, to the fullest extent permitted by Law, the provisions of all Laws which operate to lessen or affect in favour of a Party other than the Project Authority any obligation under this Deed, or prejudicially affect the exercise by the Project Authority of any right, power or remedy under this Deed or otherwise, are expressly waived.

4.11 Proportionate liability

- (a) **(Excluded operation of Wrongs Act):** The operation of Part IVAA of the *Wrongs Act 1958* (Vic) is excluded in relation to all and any rights, obligations or liabilities of a Party under this Deed whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.
- (b) **(Rights, obligations and liabilities):** Without limiting clause 21.12(a), the rights, obligations and liabilities of the Parties (including those relating to proportionate liability) are as specified in this Deed and not otherwise, whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.

Executed as a deed

[Note: Execution blocks to be inserted]

Signed as an Agreement.

[Execution blocks to be inserted]