

Model Utility Agreement Guidelines for the Yan Yean Road Upgrade – Stage 2 and Frankston-Dandenong Road Bridge Upgrade Projects

Prepared by the Minister for Transport Infrastructure as Project Minister for the Yan Yean Road Upgrade – Stage 2 and Frankston-Dandenong Road Bridge Upgrade Projects, in accordance with section 231 of the *Major Transport Projects Facilitation Act 2009* (Vic).

Guidelines

Introduction

1. This document sets out the model utility agreement guidelines for [insert projects] (each a **Project**) for the purposes of section 231 of the *Major Transport Projects Facilitation Act 2009* (Vic) (the **MTPFA**) and comprises these guidelines and the attached draft agreement.
2. These model utility agreement guidelines have been prepared by the Project Minister to provide guidance in respect of the form and content that the Project Minister considers appropriate for utility agreements for the purposes of the Projects.
3. It is envisaged that a utility agreement (**Utility Agreement**) will be entered into between the project authority for the relevant Project, being the Secretary to the Department of Transport (**Project Authority**), and a utility whose infrastructure is expected to be impacted by that Project (**Utility**).
4. Under the Utility Agreement, upon request by the Project Authority, the Utility must enter into a further agreement in the form of a standing offer template and attachments (**Standing Offer Deed**) with an entity engaged, or proposed to be engaged, for the delivery of any part of the relevant Project (**Contractor**).
5. Under the Standing Offer Deed, upon issue by the Contractor of an order for a specific package of work forming part of the Project, the Utility will enter into an agreement with the Contractor for that package of work (**Services and Works Agreement**). The Standing Offer Deed contains the pre-agreed terms and conditions which will govern each Services and Works Agreement (**General Conditions**).
6. It is intended that the template Utility Agreement, the template Standing Offer Deed, the template General Conditions and the template Services and Works Agreement Particulars together form the draft agreement required by section 231(2) of the MTPFA (**Draft Agreement**).
7. The Draft Agreement provides a range of differing and alternative terms and conditions in relation to the matters identified in section 231(2) of the MTPFA.
8. Unless the context requires otherwise, words that have a specific meaning in the MTPFA or the attached Draft Agreement have the same meaning in these guidelines.

Draft Agreement

1. The Draft Agreement sets out the proposed arrangements for the carrying out of works in respect of utility infrastructure affected by the carrying out of the relevant Project (**Utility Infrastructure Works**).
2. Under the Draft Agreement, the State may, at any time, issue a written request to the Utility requiring the Utility to enter into a Standing Offer Deed with a named Contractor within a specified timeframe (**USO Request**). The Utility must then negotiate in good faith with the relevant Contractor and use its best endeavours to enter into a Standing Offer Deed within the timeframe stated in the USO Request. To the extent that the Contractor agrees to the terms of the template:
 - (a) Standing Offer Deed;
 - (b) General Conditions; and
 - (c) Services and Works Agreement Particulars,attached to the Utility Agreement, the Utility must agree to those terms and may not, without the consent of the State (not to be unreasonably withheld) reject those terms or insist on alternative terms. To the extent the Contractor does not agree to any of the terms of any template document, the Utility must negotiate in good faith with the Contractor and use its best endeavours to enter into a negotiated standing offer deed.
3. A Contractor engaged in respect of the relevant Project may issue to the Utility a set of Services and Works Agreement Particulars, which will set out the proposed details in respect of the relevant part of the Utility Infrastructure Works (including the design, specifications, parts of the Utility Infrastructure Works to be carried out by the Utility, parts of the Utility Infrastructure Works to be carried out by the Contractor, proposed timing, payment arrangements, insurance arrangements, OHS principal contractor arrangements and defects correction period).
4. The Contractor must complete the information in the Services and Works Agreement Particulars to the extent it is reasonably able to provide such information. The Utility must then, within a specified period, provide any further information which the Utility is to provide and either:
 - (a) accept the Services and Works Agreement Particulars; or
 - (b) request further information, if necessary.
5. If the Utility does not accept the Services and Works Agreement Particulars within the specified period, the parties must negotiate in good faith to make any adjustments to the Services and Works Agreement Particulars acceptable to both parties, after which the Contractor may submit a revised set of Services and Works Agreement Particulars.
6. If the Utility has not accepted the revised Services and Works Agreement Particulars within a specified period, either party may refer the matter for dispute resolution under a procedure specified in the Standing Offer Deed for the resolution of services and works agreement formation disputes. This procedure is intended to provide a contractual replication (with necessary amendments) of the procedure under Part 7 of the MTPFA.
7. The Utility Infrastructure Works must be carried out by the Contractor 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.

Payment

8. If the Utility will be undertaking any Utility Infrastructure Works, the Utility will be entitled to be paid as set out in the relevant Services and Works Agreement.

Safety

9. The Services and Works Agreement will specify whether the Utility or some other party is principal contractor for the purposes of the OHS legislation. To the extent that the Utility is not the principal contractor, the Utility must comply with all directions, policies and procedures of the principal contractor. To the extent that the Utility is named as principal contractor, the Utility must comply with and discharge all obligations attaching to a principal contractor under the relevant OHS legislation.
10. During the access period, the Contractor must comply with all laws relating to the safety of persons on or about the site, including without limitation the relevant OHS legislation.

Utility Agreement

[Insert] Project

The Secretary to the Department of Transport on behalf of the Crown in
right of the State of Victoria
The State

[Insert name of entity]
USP

Contents

- 1. Definitions and Interpretation 1**
 - 1.1 Definitions 1
 - 1.2 Interpretation..... 4
- 2. Term 5**
- 3. Standing Offer Deeds 5**
 - 3.1 Form of Standing Offer Deed 5
 - 3.2 Notice to USP to enter into Standing Offer Deed 5
 - 3.3 Acknowledgement of Relevant Contractor's discretion 5
 - 3.4 Failure to enter into Standing Offer Deed..... 6
 - 3.5 State to appoint expert 6
- 4. Subsequent Relevant Utility Infrastructure 6**
- 5. Unnotified Utility Infrastructure 7**
 - 5.1 Unnotified Utility Infrastructure 7
 - 5.2 Removal, relocation or protection of Unnotified Utility Infrastructure ... 8
 - 5.3 Damage to Unnotified Utility Infrastructure..... 10
 - 5.4 Unnotified Subsequent Relevant Utility Infrastructure 11
 - 5.5 Services and Works Agreements for Unnotified Utility Infrastructure and Unnotified Subsequent Relevant Utility Infrastructure..... 11
- 6. Confidentiality 11**
- 7. Insurance 12**
- 8. Limitation of Liability 12**
 - 8.1 Limitation - USP 12
 - 8.2 Limitation - State..... 12
 - 8.3 Exclusion of Indirect or Consequential Loss 12
 - 8.4 Exceptions 12
- 9. Disputes 13**
 - 9.1 Procedure for resolving disputes 13
 - 9.2 Negotiation..... 13
 - 9.3 Alternative 1 - Expert determination 14
 - 9.4 Selection of expert..... 14
 - 9.5 Rules of expert determination..... 15
 - 9.6 Expert finding..... 15
 - 9.7 Liability of expert..... 15
 - 9.8 Costs..... 15
- 10. Arbitration 16**
 - 10.1 Alternative 2 - Reference to Arbitration 16
 - 10.2 Arbitration 16
 - 10.3 Appointment of arbitrator 16
 - 10.4 General Principles for conduct of arbitration 16
 - 10.5 Proportional liability 17
 - 10.6 Extension of ambit of arbitration proceedings 17
 - 10.7 Award final and binding 17
 - 10.8 Continue to perform..... 18
 - 10.9 Governing law of arbitration agreement 18
 - 10.10 Interlocutory relief 18
- 11. Termination..... 18**
 - 11.1 Termination of Deed 18
 - 11.2 Termination of a Standing Offer Deed..... 18

12. Novation of Standing Offer Deed or Services and Works Agreement 18

13. Notices 18

13.1 Notices 18

13.2 Governing Law..... 19

13.3 Jurisdiction..... 19

13.4 Counterparts 19

13.5 Entire agreement 19

13.6 Amendments..... 20

13.7 Survival of certain provisions..... 20

13.8 Waiver..... 20

13.9 Consents, approvals and directions 20

13.10 Expenses 21

13.11 Severance..... 21

13.12 Moratorium legislation 21

13.13 Proportionate liability 21

13.14 Statutory rights, duties or functions 21

Schedule 1 – Key Details for Utility Agreement 23

Annexure A – Template Standing Offer Deed..... 24

Annexure B – Expert Determination Agreement..... 25

Utility Agreement

Date

Parties

The Secretary to the Department of Transport on behalf of the Crown in right of the State of Victoria [insert address] (the **State**)

[insert name of entity] ABN [insert] of [insert address] (the **USP**)

Background

- A **The Secretary to the Department of Transport** is the project authority for the [insert name of project] ("Project") which was declared under section 10 of the *Major Transport Projects Facilitation Act 2009* (Vic), as published in the Government Gazette on [insert].
- B The USP is an entity which owns, operates or controls utility infrastructure which may be affected by the Project ("**Relevant Utility Infrastructure**").
- C The USP agrees that it will enter into a standing offer deed with a Relevant Contractor ("**Standing Offer Deed**") upon request by the State for the purposes of:
- (a) enabling the Relevant Contractor to, or to engage the USP to, access, relocate, remove or protect Relevant Utility Infrastructure for the purposes of the Project; or
 - (b) enabling the Relevant Contractor to carry out work for the Project in proximity to Relevant Utility Infrastructure.
- D The parties have agreed to enter into this Deed in order to govern the terms on which the USP will enter into Standing Offer Deeds.

Operative provisions

1. Definitions and Interpretation

1.1 Definitions

In this Deed, defined terms have the same meaning as in the Template General Conditions (unless they are assigned a different meaning below) and the following terms have the meaning assigned to them below:

Agreed Pricing Principles has the meaning given in the Template Standing Offer Deed.

Approval means any licence, permit, authorisation, consent, assessment, approval, determination, certificate, accreditation, registration, clearance, permission or the like which must be obtained or satisfied (as the case may be) in connection with the Project.

Authority means any government, local government, public and statutory authority, body or entity including a Minister of the Crown.

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)*.

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 Deed;
- (b) arising out of, or in connection with, the Project or any party's conduct prior to the date of this Deed; 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 stated in Schedule 1.

Damaged Infrastructure has the meaning in clause 5.3(a).

Deed means this deed including all schedules and annexures.

Expert Determination Agreement means an agreement on the terms of the draft agreement at Annexure B, or on such other terms as the parties may agree.

Expiry Date means the date stated in Schedule 1.

Indirect or Consequential Loss means:

- (a) any loss of opportunity, profit, anticipated profit, income, bargain, production, contract, goodwill, business, business opportunities or revenue, loss caused by business interruption, the cost of obtaining new financing or maintaining existing financing or any failure to realise anticipated savings; and
- (b) any loss or damage of the nature set out above in paragraph (a) that is incurred or suffered by a third party.

Law means:

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

Legislation means:

- (a) legislation and delegated legislation;
- (b) all ordinances, by-laws, regulations of and other statutory instruments (however described) issued under the legislation or delegated legislation; and
- (c) consolidations, amendments, re-enactments and replacements of legislation or delegated legislation,

but excludes Approvals.

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 or in any way in connection with this Deed or arising at Law in connection with this Deed.

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

parties means the parties to this Deed.

Personnel means employees, agents, contractors and nominated representatives.

Project has the meaning in paragraph A of the Background.

Project Area means the project area designated under the MTPFA in respect of the Project.

Related Body Corporate has the meaning in the *Corporations Act 2001* (Cth).

Relevant Contractor means any entity:

- (a) engaged, or
- (b) proposed to be engaged,

for the delivery of any part of the Project, and may, where the State requires, include:

- (c) the State; or
- (d) any entity who is a respondent to a State procurement process for any part of the Project where the State notifies the USP in writing that the relevant respondent is to enter into an agreement with the USP.

Relevant Contractor Area means the area described in the plan at Annexure D of the Standing Offer Deed, being all those parts of the Project Area on which the Contractor will be carrying out its works forming part of the Project.

Relevant Utility Infrastructure has the meaning in paragraph B of the Background.

Required Timeframe has the meaning in clause 3.2(a).

Senior Representative has the meaning in clause 9.2(a).

Services and Works Agreement means any "Services and Works Agreement" formed under a Standing Offer Deed.

Standing Offer Deed has the meaning in paragraph C of the Background.

Subsequent Relevant Utility Infrastructure has the meaning in clause 4(a).

Template General Conditions means the conditions attached at Annexure A to the Template Standing Offer Deed.

Template Standing Offer Deed means the document at Annexure A.

Term means the period identified in clause 2.

Unnotified Utility Infrastructure has the meaning given in section 209(b) of the MTPFA.

USO Notice has the meaning in clause 3.2(a).

1.2 Interpretation

In this Deed:

(a) headings are for convenience only and do not affect interpretation;

and unless the context indicates a contrary intention:

(b) an obligation or liability assumed by, or a right conferred on, 2 or more persons forming one party to this Deed binds or benefits them jointly and severally;

(c) "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;

(d) a reference to a party includes a party's executors, administrators, successors and permitted assigns, including persons taking by way of novation and, in the case of a trustee, includes a substituted or additional trustee;

(e) a reference to a document (including this Deed) is to that document as varied, novated, supplemented, amended, ratified or replaced from time to time;

(f) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;

(g) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;

(h) a reference to a party, clause, schedule, exhibit, appendix, attachment or annexure is a reference to a party, clause schedule, exhibit, appendix, attachment or annexure to or of this Deed, and a reference to this Deed includes all schedules, exhibits, appendices, attachments and annexures to it;

(i) if the day on or which anything is to be done in accordance with this Deed is not a Business Day, then that thing must be done no later than the next Business Day;

(j) 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;

(k) "includes" in any form is not a word of limitation; and

- (l) a reference to "\$" or "dollar" is to Australian currency.

2. Term

The Term commences on the Commencement Date and expires on the Expiry Date, unless this Deed is terminated earlier in accordance with its terms, in which case the Term will expire on the date of such earlier termination.

3. Standing Offer Deeds

3.1 Form of Standing Offer Deed

Subject to clause 3.2, a Standing Offer Deed will be in the form of the Template Standing Offer Deed.

3.2 Notice to USP to enter into Standing Offer Deed

- (a) At any time during the Term, the State may issue a written notice to the USP ("**USO Notice**") requesting the USP to enter into an Standing Offer Deed with a named Relevant Contractor within the timeframe specified in the USO Notice ("**Required Timeframe**"), such timeframe not to be less than 10 Business Days.
- (b) Upon receipt of the USO Notice, the USP must negotiate in good faith with the Relevant Contractor and use its best endeavours to enter into a Standing Offer Deed with the Relevant Contractor within the Required Timeframe. For clarity, to the extent the Relevant Contractor agrees to the terms of the Template Standing Offer Deed, the USP must agree to those terms and may not, without the consent of the State (not to be unreasonably withheld), reject those terms or insist on alternative terms.
- (c) To the extent the Relevant Contractor does not agree to any term of the Template Standing Offer Deed, the USP must continue to negotiate in good faith with the Relevant Contractor and use its best endeavours to enter into a Standing Offer Deed with the fewest amendments that it can reasonably negotiate with the Relevant Contractor within the Required Timeframe.
- (d) For clarity, when negotiating in the circumstances referred to in clause 3.2(c), the USP must not propose or insist on any term which is less advantageous to the Relevant Contractor than the equivalent of any relevant term in the Template Standing Offer Deed, without the express agreement of the Relevant Contractor.
- (e) Within 5 Business Days after execution of a Standing Offer Deed by the USP and a Relevant Contractor, the USP must notify the State in writing that the relevant Standing Offer Deed has been entered into, and must as soon as reasonably practicable provide the State with a copy of the executed Standing Offer Deed in searchable electronic format.

3.3 Acknowledgement of Relevant Contractor's discretion

The USP acknowledges that, notwithstanding the USP's obligations under this Deed, a Relevant Contractor is under no obligation to enter into any agreement with the USP in the form of the Template Standing Offer Deed, and each Relevant Contractor has absolute discretion to seek to enter into agreements with the USP and any other utility service provider in any form it chooses.

3.4 Failure to enter into Standing Offer Deed

If, by the expiry of the Required Timeframe, the USP and the Relevant Contractor have not entered into a Standing Offer Deed, the USP must immediately (and in any event within 2 Business Days after the expiry of the Required Timeframe) inform the State in writing that the USP and the Relevant Contractor have not entered into a Standing Offer Deed.

3.5 State to appoint expert

The parties acknowledge and agree that:

- (a) under clause 7.1(b) and (c) of the Template Standing Offer Deed, the State has certain obligations in relation to appointing an expert; and
- (b) to the extent that the USP and a Relevant Contractor enter into an Standing Offer Deed substantially in the form of the Template Standing Offer Deed:
 - (i) the State accepts those obligations and undertakes to the USP to perform those obligations as if the State were a party to any Standing Offer Deed executed by the USP; and
 - (ii) the USP must pay to the State the expert's costs for which the USP is liable in accordance with clause 7.9(a) of a Standing Offer Deed executed by the USP.

4. Subsequent Relevant Utility Infrastructure

- (a) If, after complying with a notice issued by the State under section 211A of the MTPFA but prior to completion of the relevant Project, the USP intends to:
 - (i) construct any new Relevant Utility Infrastructure; or
 - (ii) modify, relocate, decommission or change the use of any existing Relevant Utility Infrastructure,

in the 'specified area' as defined in that section 211A notice ("**Subsequent Relevant Utility Infrastructure**"), the USP must promptly, and in any event before commencing any work to construct, modify, relocate, decommission or change the use of the Subsequent Relevant Utility Infrastructure:

- (iii) notify the State in writing, which notice must:
 - (A) include a description of the nature of the Subsequent Relevant Utility Infrastructure and its location; and
 - (B) attach to the notice a plan that shows the location of the Subsequent Relevant Utility Infrastructure; and
- (iv) if the Subsequent Relevant Utility Infrastructure is in a Relevant Contractor Area, provide a copy of the notice provided under clause 4(a)(iii) to the Relevant Contractor.

- (b) The USP must not commence any work in respect of any Subsequent Relevant Utility Infrastructure until the USP has:
 - (i) complied with clause 4(a); and
 - (ii) entered into good faith negotiations with the State to try to agree to a mutually satisfactory arrangement whereby:
 - (A) any delay or disruption to:
 - (1) the Project; and
 - (2) the statutory obligations of the USP;
 - (B) any physical risk of damage to any physical infrastructure:
 - (1) constructed or to be constructed as part of the Project; or
 - (2) owned, constructed or to be constructed by the USP; and
 - (C) the cost to either the State (and its Relevant Contractors) or the USP,

will be minimised to the extent possible.

- (c) The State may invite any Relevant Contractor to participate in any negotiations under clause 4(b)(ii) (including inviting any Relevant Contractor to attend meetings and requesting that documents in connection with the negotiations be provided by the USP to Relevant Contractors).

5. Unnotified Utility Infrastructure

5.1 Unnotified Utility Infrastructure

If the State discovers Unnotified Utility Infrastructure, the State may issue to the USP a notice which:

- (a) identifies and describes the utility infrastructure;
- (b) specifies the location of the utility infrastructure;
- (c) states that:
 - (i) the State intends to remove, relocate or protect the utility infrastructure (as the case requires); and
 - (ii) the utility that owns, operates or controls the utility infrastructure has 10 Business Days within which to:
 - (A) agree to the State carrying out works to remove, relocate or protect the infrastructure; or

- (B) produce a plan acceptable to the State specifying the:
 - (1) time period within which;
 - (2) method by which; and
 - (3) cost for which (which costs must be calculated in accordance with the Agreed Pricing Principles (to the extent applicable)),the utility will carry out the works to remove, relocate or protect the utility infrastructure; and
- (d) states that if the utility does not agree as to the works to be carried out, or does not itself carry out the works to remove, relocate or protect the utility infrastructure, the utility is liable to the project authority for the costs referred to in section 5.2(h).

5.2 Removal, relocation or protection of Unnotified Utility Infrastructure

- (a) This clause 5.2 applies if the Unnotified Utility Infrastructure is Relevant Utility Infrastructure and:
 - (i) the State does not receive any information from the USP as required under a notice issued under clause 5.1;
 - (ii) the State and the USP have not, within 10 Business Days after the issue of a notice under clause 5.1, agreed as to the works to be carried out to, as the case requires, remove, relocate or protect the infrastructure; or
 - (iii) the USP has failed to:
 - (A) provide the State with the plan required under clause 5.1(c)(ii)(B); or
 - (B) carry out the agreed works within the time period, and in accordance with the method, specified in the plan provided under clause 5.1(c)(ii)(B).
- (b) In the case referred to in clause 5.2(a)(i), the State may:
 - (i) in the case of utility infrastructure that is redundant, remove the infrastructure; and
 - (ii) in all other cases:
 - (A) relocate the infrastructure; or
 - (B) carry out works to protect the infrastructure.
- (c) In a case referred in clauses 5.2(a)(ii) or 5.2(a)(iii), the State:
 - (i) must give the USP a reasonable estimate of the costs that the State will incur each day the State cannot develop the relevant Project because the USP has not agreed to the works to be carried out, has not provided the required plan or has not carried out the agreed works (as the case may be); and

- (ii) may, with the consent of the USP:
 - (A) in the case of utility infrastructure that is redundant, remove the infrastructure; and
 - (B) in all other cases, either relocate the infrastructure or carry out works to protect the infrastructure.

- (d) The State must carry out an activity referred to in clauses 5.2(b) or 5.2(c) to a standard that results in the utility infrastructure having:
 - (i) the same or a similar technical capability after the carrying out of that activity; and
 - (ii) at least the same remaining operating life as it had before the carrying out of an activity referred to in clauses 5.2(b) or 5.2(c).

- (e) The State is liable to the USP for all direct costs incurred by the USP as a result of the carrying out of an activity referred to in clauses 5.2(b) or 5.2(c):
 - (i) that are fair and reasonable; and
 - (ii) on the basis that the utility makes all reasonable efforts to mitigate its loss.

- (f) However, the State is not liable for any loss or damage suffered by the USP as a result of the carrying out of an activity referred to in clauses 5.2(b) or 5.2(c) that:
 - (i) causes an interruption to any service provided by the USP by means of the utility infrastructure; or
 - (ii) prevents the USP from being able to provide a service by means of the utility infrastructure.

- (g) The USP releases and indemnifies the State in respect of any Claim by:
 - (i) the USP;
 - (ii) any customer of the USP; or
 - (iii) any Related Body Corporate of the USP,for any loss or damage that the USP, the customer or the Related Body Corporate suffers as a result of the carrying out of an activity referred to in clauses 5.2(b) or 5.2(c) that:
 - (iv) causes an interruption to any service provided by the USP by means of the utility infrastructure; or
 - (i) prevents the USP from being able to provide a service by means of the utility infrastructure.

- (h) The USP is liable to the State for all costs incurred by the State as a result of a delay in the carrying out of works for the relevant Project in order to remove, relocate or protect the utility infrastructure:
 - (i) that are fair and reasonable; and

- (ii) on the basis that the State makes all reasonable efforts to mitigate its loss.

5.3 Damage to Unnotified Utility Infrastructure

- (a) This clause 5.3 applies if the State causes damage to Unnotified Utility Infrastructure that is Relevant Utility Infrastructure during the course of carrying out works for a Project (“**Damaged Infrastructure**”).
- (b) The State may notify the USP of Damaged Infrastructure.
- (c) The State:
 - (i) must repair the damage caused to the utility infrastructure by the carrying out of the works; and
 - (ii) may protect, relocate or remove the utility infrastructure.
- (d) The State is liable to the USP for all direct losses suffered by the USP as a result of the damage caused to the utility infrastructure by the carrying out of the work.
- (e) The USP releases and indemnifies the State in respect of any Claim by:
 - (i) the USP;
 - (ii) any customer of the USP; or
 - (iii) any Related Body Corporate of the USP,for any loss or damage that the USP, the customer or the Related Body Corporate suffers as a result of the carrying out of works for the Project that damages the utility infrastructure and:
 - (iv) causes an interruption to any service provided by the USP by means of the utility infrastructure; or
 - (v) prevents the USP from being able to provide a service by means of the utility infrastructure.
- (f) The USP is liable to the State for all costs incurred by the State as a result of a delay in the carrying out of works in order to repair, protect, relocate or remove the damaged infrastructure:
 - (i) that are fair and reasonable; and
 - (ii) on the basis that the State makes all reasonable efforts to mitigate its loss.
- (g) If the damage results in an emergency situation:
 - (i) the State must take all steps that are reasonable in the circumstances to end the emergency; and
 - (ii) the USP is liable for the costs incurred by the State in taking those reasonable steps.

5.4 Unnotified Subsequent Relevant Utility Infrastructure

If either party becomes aware of any Subsequent Relevant Utility Infrastructure which has not been notified in accordance with clause 5.1, the parties acknowledge and agree that the USP must:

- (a) within 10 Business Days of receiving a written notice from the State:
 - (i) agree to the State or a Relevant Contractor nominated by the State carrying out the works to remove, relocate or protect the infrastructure; or
 - (ii) produce a plan acceptable to the State, acting reasonably, specifying the time period within which and the method by which the USP will carry out the works itself or remove, relocate or protect the infrastructure; and
- (b) comply fully with that plan.

5.5 Services and Works Agreements for Unnotified Utility Infrastructure and Unnotified Subsequent Relevant Utility Infrastructure

- (a) If the USP elects to produce a plan pursuant to clause 5.1(c)(ii)(B) or 5.4(a)(ii), the State may notify the USP and the Relevant Contractor in writing that a Services and Works Agreement with a Relevant Contractor is required for those works.
- (b) If the State notifies the USP in accordance with clause 5.5(a), then:
 - (i) if there is in place an applicable Standing Offer Deed with a Relevant Contractor notified by the State, the USP must within 10 Business Days use its best endeavours to agree a Services and Works Agreement with that Relevant Contractor under the provisions of the Standing Offer Deed; or
 - (ii) if there is not an applicable Standing Offer Deed in place, without limiting the State's rights under clause 3, the State may issue a USO Notice under clause 3.2(a).

6. Confidentiality

- (a) The USP must, and must ensure that its Personnel, keep confidential and not make, or cause to be made, any public announcement, public comment, press release or other disclosure directly or indirectly in connection with any USO Notice, this Deed, any Standing Offer Deed or any Services and Works Agreement to any person other than:
 - (i) as necessary to perform the USP's obligations under this Deed;
 - (ii) with respect to any matter already within the public domain;
 - (iii) to comply with any applicable Law or any requirement of any regulatory body (including any relevant stock exchange); or
 - (iv) with the State's prior written approval.
- (b) The USP must not disclose any information concerning this Deed for distribution through any communications media without the State's prior written approval. The USP must refer to the State any enquiries from any media concerning this Deed.

7. Insurance

- (a) The State must arrange for the following insurances to be effected and maintained in relation to the Project:
 - (i) public liability insurance with a level of cover not less than as stated in Schedule 1, which must be maintained until the expiry of the defects liability period applicable to the Project;
 - (ii) works insurance in respect of the Project Works with a level of cover not less than the value of the Project Works, which must be maintained until practical completion of the Project Works; and
 - (iii) professional indemnity insurance with a level of cover not less than the amount stated in Schedule 1, which must be maintained until the date stated in Schedule 1.
- (b) The State must ensure that the benefit of the insurance policies described in clause 7(a) extends to each Relevant Contractor.

8. Limitation of Liability

8.1 Limitation - USP

Notwithstanding any other provision of this Deed but subject to clauses 8.4 and 13.14, the maximum aggregate liability of the USP to the State, whether arising under or in connection with this Deed or the performance or non-performance thereof or anything incidental thereto, and whether by way of indemnity, by statute (excluding any liability under the Act), in tort (for negligence or otherwise) or on any basis in law or equity, is limited to the amount specified in Schedule 1.

8.2 Limitation - State

Notwithstanding any other provision of this Deed but subject to clauses 8.4 and 13.14, the maximum aggregate liability of the State to the USP, whether arising under or in connection with this Deed or the performance or non-performance thereof or anything incidental thereto, and whether by way of indemnity, by statute (excluding any liability under the Act), in tort (for negligence or otherwise) or on any basis in law or equity, is limited to the amount specified in Schedule 1.

8.3 Exclusion of Indirect or Consequential Loss

Subject to clauses 8.4 and 13.14, in no event will either party be liable to the other party for any Indirect or Consequential Loss arising out of or in connection with this Deed, and whether by way of indemnity, by statute, in tort (for negligence or otherwise) or on any basis in law or equity.

8.4 Exceptions

Clauses 8.1, 8.2 and 8.3 do not apply to limit or restrict in any way:

- (a) any Liability of the USP or the State for fraud or criminal conduct of the relevant party or its employees, subcontractors or agents;
- (b) any Liability that cannot be limited or excluded at law;
- (c) any Liability for death or personal injury;

- (d) any Liability of the USP or the State to the extent the USP or the State (as applicable) is paid or indemnified, or is entitled to be paid or indemnified, for the liability by an insurer under an insurance policy;
- (e) any Liability to the extent that the USP or the State is paid or indemnified, or is entitled to be paid or indemnified, by any third party for that liability; or
- (f) any Liability of the USP or the State under the MTPFA or clause 5.2.

9. Disputes

9.1 Procedure for resolving disputes

- (a) Any dispute between the parties arising under this Deed must be resolved in accordance with this clause 9.
- (b) 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 9.2; and
 - (ii) secondly, if the dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 9.2(c)(i):
 - (A) the parties may agree one of the following alternatives:
 - (1) **Alternative 1:** that the dispute be referred to an expert for determination in accordance with clauses 9.4 to 9.8 (inclusive);
 - (2) **Alternative 2:** that the dispute be referred to arbitration in accordance with clause 10; or
 - (3) **Alternative 3:** that the dispute be dealt with in such other forum and in accordance with such other procedure and timing as may be agreed by the parties; or
 - (B) either party may commence proceedings.

9.2 Negotiation

- (a) 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 representatives of the parties identified in Schedule 1 or such other persons as may be notified in writing by the relevant party to the other party from time to time ("**Senior Representatives**").
- (b) A notice under clause 9.2(a) must:
 - (i) state that it is a notice under this clause 9; and
 - (ii) include or be accompanied by particulars of the matters which are the subject of the dispute.
- (c) If a dispute is referred for resolution by negotiation under clause 9.2(a), then:

- (i) the Senior Representatives must, within 10 Business Days of the date on which the notice under clause 9.2(a) is received (or such later date as the parties may agree), meet and attempt in good faith to resolve the dispute (in whole or in part); and
- (ii) any agreement reached between the Senior Representatives will be reduced to writing, signed by or on behalf of each party and will be contractually binding on the parties.

9.3 Alternative 1 - Expert determination

If:

- (a) a dispute which has been referred to the Senior Representatives for negotiation in accordance with clause 9.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 9.2(c)(i); and
- (b) the parties agree within 20 Business Days after the expiration of the period for negotiation referred to in clause 9.2(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 9.4 to 9.8. For the avoidance of doubt, a dispute may only be referred to an expert for determination by agreement of the parties.

9.4 Selection of expert

- (a) Within 7 Business Days after the date on which the parties agree to refer a dispute to an expert for determination under clause 9.3, the parties must exchange lists of 3 persons (in order of preference) who, if appointed, would satisfy the requirements of clause 9.4(d), from whom the expert is to be chosen.
- (b) Any person that appears on both lists under clause 9.4(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 9.2(a) will be appointed.
- (c) If no person appears on both lists, the party which gave the notice under clause 9.2(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 9.4(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 9.4(a).
- (d) 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) Neither party will be entitled to challenge the appointment of an expert under this clause 9.4 on the basis that the expert does not satisfy the requirements of clause 9.4(d).
- (f) Any agreement for expert determination under this Deed will not constitute an arbitration agreement for the purposes of the *Commercial Arbitration Act 2011* (Vic).
- (g) 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.

9.5 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.

9.6 Expert finding

- (a) 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 10.
- (b) 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.

9.7 Liability of expert

- (a) 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) 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.

9.8 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.

10. Arbitration

10.1 Alternative 2 - Reference to Arbitration

If the parties choose Alternative 2 of clause 9.1(b)(ii)(A)(2) or the matter is referred to arbitration under clause 9.6(a), then this clause 10 will apply.

10.2 Arbitration

- (a) Arbitration in accordance with this clause 10 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 10.
- (b) The seat of the arbitration will be Melbourne, Victoria, Australia.
- (c) The language of the arbitration will be English.

10.3 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 9.1(b)(ii)(A)(2) or 9.6(a), the arbitrator or arbitrators will be appointed by the Australian Centre for International Commercial Arbitration.

10.4 General Principles for conduct of arbitration

- (a) 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 10 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 10.4(a)(i) and 10.4(a)(ii).
- (b) All evidence in chief must be in writing unless otherwise ordered by the arbitrator.
- (c) 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) 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 10.4(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 20 Business 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 10.4(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) Unless otherwise ordered, each party may only rely upon one expert witness in connection with any recognised area of specialisation.

10.5 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 10.5, have applied to any dispute referred to arbitration in accordance with this clause 10.

10.6 Extension of ambit of arbitration proceedings

- (a) Where:
- (i) a dispute between the parties to this Deed is referred to arbitration in accordance with this clause 10; and
 - (ii) there is some other dispute also between the parties to and in accordance with this Deed (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) An arbitrator may make an order in accordance with clause 10.6(a) on such terms and conditions (if any) as the arbitrator thinks fit.

10.7 Award final and binding

- (a) Subject to clause 10.7(b), any award will be final and binding on the parties.

- (b) 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 10.

10.8 Continue to perform

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

10.9 Governing law of arbitration agreement

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

10.10 Interlocutory relief

This clause 10 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.

11. Termination

11.1 Termination of Deed

- (a) Termination of this Deed will not prevent either party from relying on rights accrued under this Deed prior to such termination.
- (b) The State and the USP agree that if this Deed is terminated, discharged (including through expiry of the Term) or becomes frustrated, the separate Standing Offer Deeds formed in accordance with clause 3 of this Deed and any Services and Works Agreements will not be affected and must be fulfilled in accordance with the terms of the relevant Standing Offer Deeds and Services and Works Agreements, unless the parties otherwise agree in writing.

11.2 Termination of a Standing Offer Deed

The State and the USP agree that the termination, discharge or frustration of any Standing Offer Deed or Services and Works Agreement will not affect the operation of this Deed or the operation of any other Standing Offer Deed or Services and Works Agreement.

12. Novation of Standing Offer Deed or Services and Works Agreement

The USP acknowledges the effect of clause 3.3 of the Standing Offer Deed and undertakes to the State that it will comply with that provision, including when directed by the State to do so.

13. Notices

13.1 Notices

- (a) A notice will be deemed to have been given when it is received by the person to whom it is addressed or is delivered to the address of that person stated in Schedule 1 or last communicated in writing by that person to the person giving the notice, whichever is the earlier.
- (b) A notice under this Deed must be:
 - (i) in writing, in English, by a person duly authorised by the sender; and

- (ii) hand delivered, sent by pre-paid express post, or to the electronic address specified in Schedule 1, or where notice in writing of a new address or electronic mail address has been given by one party to the other, then to any such new address.
- (c) A notice given in accordance with clause 13.1(b) takes effect when taken to be received (or at such later time specified in the notice). Subject to clause 13.1(d), a notice is taken to be received:
 - (i) if delivered by hand, on the date it is delivered to the addressee;
 - (ii) if sent by pre-paid express post, on the sixth Business Day after the date of posting; or
 - (iii) if sent by electronic mail, when an acknowledgement that the mail has been successfully transmitted to the intended recipient is recorded on the sender's computer, but if the delivery receipt or transmission is not on a Business Day or is after 5.00 pm on a Business Day, the notice is taken to be received at 9.00 am the next Business Day.
- (d) Without limiting anything else in this clause, if the notice is a notice given under clause 9 or clause 10, such notice must also be delivered by hand or express post in addition to being delivered electronically and will be deemed to be received on the later of the relevant time periods set out in clause 13.1(c).
- (e) Without limiting the generality of 'notice', it includes a document.

13.2 Governing Law

This Deed is governed by and must be construed according to the Laws of Victoria, Australia.

13.3 Jurisdiction

Without limiting clauses 9 and 10, 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 Deed.

13.4 Counterparts

- (a) This Deed may be executed in any number of counterparts and by the parties on separate counterparts. Each counterpart constitutes an original of this Deed, and all together constitute one agreement.
- (b) A party who has executed a counterpart of this Deed may exchange that counterpart with another party by emailing the counterpart executed by it to that other party and, upon request by that other party, will thereafter promptly deliver by hand or post to that party the executed counterpart so exchanged by post or email, but delay or failure by that party to so deliver a counterpart of this Deed executed by it will not affect the validity of this Deed.

13.5 Entire agreement

This Deed constitutes the entire agreement and understanding between the parties and will take effect according to its tenor despite, and supersedes:

- (a) any prior agreement (whether in writing or not), negotiations and discussions between the parties in relation to the subject matter of this Deed; or

- (b) any correspondence or other documents relating to the subject matter of this Deed that may have passed between the parties prior to the Commencement Date and that are not expressly included in this Deed.

13.6 Amendments

This Deed may only be amended by a deed executed by or on behalf of both the State and the USP.

13.7 Survival of certain provisions

- (a) **(Surviving clauses):** All provisions of this Deed which, expressly or by implication from their nature, are intended to survive the rescission, termination or expiration of this Deed will survive the rescission, termination or expiration of this Deed, including any provision in connection with:
 - (i) confidentiality or privacy;
 - (ii) any indemnity given in accordance with this Deed; or
 - (iii) any right or obligation arising on termination of this Deed.
- (b) **(Interpretation):** No provision of this Deed which is expressed to survive the termination of this Deed will prevent any other provision of this Deed, as a matter of interpretation, also surviving the termination of this Deed.
- (c) **(Survival of rights and obligations):** No right or obligation of any party will merge on completion of any transaction in accordance with this Deed. All rights and obligations in accordance with this Deed survive the execution and delivery of any transfer or other document which implements any transaction in accordance with this Deed.
- (d) **(Survival of specific clauses):** Without limiting any other provision of this Deed, the provisions of clause 5 of this Deed will survive the rescission, termination or expiration of this Deed.

13.8 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 Deed by the State or the USP 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 Deed.
- (b) **(Writing):** A waiver or consent given by the State or the USP under this Deed is only effective and binding if it is given or confirmed in writing by the State or the USP.
- (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.

13.9 Consents, approvals and directions

- (a) **(State):** A consent or approval required in accordance with this Deed from the State may be given or withheld, or may be given subject to any conditions, as the State thinks fit, unless this Deed expressly provides otherwise.

- (b) **(USP):** A consent or approval required in accordance with this Deed from USP may not be unreasonably withheld or delayed, unless this Deed expressly provides otherwise.

13.10 Expenses

Except as otherwise expressly provided in this Deed, each party must pay its own costs and expenses in connection with negotiating, preparing, executing and performing this Deed.

13.11 Severance

If, at any time, a provision of this Deed 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.

13.12 Moratorium legislation

To the fullest extent permitted by Law, the provisions of all Laws which operate to lessen or affect in favour of the USP any obligation under this Deed, or to prejudicially affect the exercise by the State of any right, power or remedy under this Deed, are expressly waived.

13.13 Proportionate liability

- (a) **(Excluded operation of Wrongs Act):** To the extent permitted by Law, 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 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 13.13(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.

13.14 Statutory rights, duties or functions

Notwithstanding anything expressly stated or implied in this Deed to the contrary, nothing expressly stated or implied in this Deed has the effect of:

- (a) constraining the State, or placing any fetter on the State's discretion to exercise or not to exercise any of its executive or statutory rights, duties or functions; or
- (b) placing any limitation on any Liability of the USP in connection with any statutory duties or obligations.

Signing page

Executed as a deed.

Executed by an authorised representative of the **Secretary to the Department of Transport** on behalf of the Crown in Right of the State of Victoria in the presence of:

Signature of witness



Signature of authorised representative



Name of witness (print)

Name of authorised representative (print)

Executed by **[insert entity and ABN]** in accordance with section 127 of the Corporations Act 2001 (Cth):

Signature of director

Signature of company secretary/director

Full name of director

Full name of company secretary/director

Schedule 1 – Key Details for Utility Agreement

1.	Commencement Date (Clause 1.1)	[Upon execution by both parties]
2.	Expiry Date (Clause 1.1)	[insert]
3.	Details for Notices - the State (Clauses 3.4 and 13.1)	Contact Person and Role: Director - Delivery Address: [insert] Email address: [insert] Phone number: [insert]
4.	Details for Notices - the USP (Clauses 3.4 and 13.1)	Contact Person and Role: [insert] Address: [insert] Email address: [insert] Phone number: [insert]
5.	Public Liability Insurance (Clause 7)	Level of cover: [insert]
6.	Professional Indemnity Insurance (Clause 7)	Level of cover: [insert] Date until which the insurance must be maintained: [insert]
7.	Limitation - USP (Clause 8.1)	[\$insert]
8.	Limitation - State (Clause 8.2)	[\$insert]
9.	Senior Representatives (Clause 9.2(a))	State: USP: <i>[Drafting Note: USP to nominate an appropriate senior executive for the purposes of clause 9.2(a).]</i>

Annexure A – Template Standing Offer Deed

(Clauses 1.1 and 3.2)

[Drafting Note: See attached.]

[Insert Project] - Standing Offer Deed

Standing Offer Deed

[Insert] Project

[insert name of entity]

USP

[Insert name]

Contractor

CONTENTS

- 1. Definitions and Interpretation 1**
 - 1.1 Definitions 1
 - 1.2 Interpretation..... 4
- 2. Term 4**
- 3. Services and Works Agreements 5**
 - 3.1 General 5
 - 3.2 Process for creating Services and Works Agreements 5
 - 3.3 Novation..... 6
- 4. Confidentiality 6**
- 5. Disputes 7**
 - 5.1 Procedure for resolving Disputes 7
 - 5.2 Negotiation..... 7
 - 5.3 Alternative 1 - Expert determination 8
 - 5.4 Selection of expert 8
 - 5.5 Rules of expert determination..... 9
 - 5.6 Expert finding..... 9
 - 5.7 Liability of expert..... 9
 - 5.8 Costs..... 9
- 6. Arbitration 9**
 - 6.1 Alternative 2 - Reference to Arbitration 9
 - 6.2 Arbitration 10
 - 6.3 Appointment of arbitrator 10
 - 6.4 General Principles for conduct of arbitration 10
 - 6.5 Proportional liability 11
 - 6.6 Extension of ambit of arbitration proceedings 11
 - 6.7 Award final and binding 11
 - 6.8 Continue to perform..... 12
 - 6.9 Governing Law of arbitration agreement 12
 - 6.10 Interlocutory relief 12
- 7. Services and Works Agreement Formation Disputes 12**
 - 7.1 Failure to reach agreement 12
 - 7.2 Fees of, and costs incurred by, expert 13
 - 7.3 Immunity for expert..... 13
 - 7.4 Expert to commence dispute resolution within 5 Business Days after appointment..... 13
 - 7.5 Rules of expert determination..... 13
 - 7.6 Determination of expert resolving dispute 14
 - 7.7 Termination of approved Services and Works Agreement..... 14
 - 7.8 Expert may engage legal and other assistance 14
 - 7.9 Parties are liable to the Appointor for expert's costs paid by the Appointor 14
 - 7.10 Appeal to Supreme Court from a determination of expert..... 15
- 8. Termination..... 15**
 - 8.1 Termination where Utility Agreement terminated 15
 - 8.2 Termination of Deed 15
- 9. General 15**
 - 9.1 Notices 15
 - 9.2 Governing Law..... 16
 - 9.3 Jurisdiction..... 16
 - 9.4 Counterparts 16
 - 9.5 Entire agreement 16

- 9.6 Amendments.....17
- 9.7 Survival of certain provisions.....17
- 9.8 Waiver.....17
- 9.9 Consents, approvals and directions17
- 9.10 Amendments.....17
- 9.11 Expenses18
- 9.12 Severance.....18
- 9.13 Moratorium legislation18
- 9.14 Proportionate liability18

- Schedule 1 – Key Details for Standing Offer Deed19**
- Annexure A – General Conditions21**
- Annexure B – Template Services and Works Agreement Particulars22**
- Annexure C – Agreed Pricing Principles23**
- Annexure D – Relevant Contractor Area.....24**
- Annexure E – Expert Determination Agreement25**
- Annexure F – Form of deed of novation39**

This Deed is dated [insert]

Parties

Name: [insert name] ABN [insert] of [insert address] (Contractor)

Name [insert name of entity] ABN [insert] of [insert address] (USP)

Background

- A. The Secretary, Department of Transport, is the project authority for the [insert name of project], which was declared as a project under section 10 of the *Major Transport Projects Facilitation Act 2009* (Vic) ("**MTPFA**"), as published in the Government Gazette on [insert] ("**Project**").
- B. The USP is an entity which owns, operates or controls utility infrastructure which may be affected by the Project ("**Relevant Utility Infrastructure**").
- C. The Contractor is a Relevant Contractor.
- D. The USP has entered into a deed with the Secretary ("**Utility Agreement**") under which the USP has agreed that when required to do so by the Secretary, the USP will enter into a standing offer deed in an agreed form with a Relevant Contractor for the purposes of:
 - (a) enabling the Relevant Contractor to, or to engage the USP to, access, relocate, remove or protect Relevant Utility Infrastructure for the purposes of the Project; or
 - (b) enabling the Relevant Contractor to carry out work for the Project in proximity to Relevant Utility Infrastructure.
- E. The parties have agreed to enter into this standing offer deed in order to:
 - (a) govern the terms on which the Contractor and the USP will enter into one or more Services and Works Agreements; and
 - (b) set out the terms which will be included in any Services and Works Agreement.

Operative provisions

1. Definitions and Interpretation

1.1 Definitions

In this Deed defined terms have the same meaning as in the General Conditions (unless they are assigned a different meaning below) and the following terms have the meaning assigned to them:

Agreed Pricing Principles means the information and principles set out at Annexure C to this Deed.

Appointor means [insert].

Approval means any licence, permit, authorisation, consent, assessment, approval, determination, certificate, accreditation, registration, clearance, permission or the like which must be obtained or satisfied (as the case may be) in connection with the Project.

Authority means any government, local government, public or statutory authority, body or entity including a Minister of the Crown.

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 Deed;
- (b) arising out of, or in connection with, the Project or any party's conduct prior to the date of this Deed; 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 stated as such in Schedule 1.

Deed means this deed including all schedules and annexures.

Dispute means any dispute between the parties arising under this Deed other than a Services and Works Agreement Formation Dispute.

Expert Determination Agreement means an agreement on the terms of the draft agreement at Annexure E, or on such other terms as the parties may agree.

Expiry Date means the date stated as such in Schedule 1.

General Conditions means the conditions attached at Annexure A.

Law means:

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

Legislation means:

- (a) legislation and delegated legislation;
- (b) all ordinances, by-laws, regulations of and other statutory instruments (however described) issued under the legislation or delegated legislation; and
- (c) consolidations, amendments, re-enactments and replacements of legislation or delegated legislation,

but excludes Approvals.

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 or in any way in connection with this Deed or any Services and Works Agreement, or arising at Law in connection with this Deed or any Services and Works Agreement.

Model Utility Agreement Guidelines has the meaning in Part 7 of the MTPFA.

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

Personnel means employees, agents, contractors and nominated representatives.

Project has the meaning in paragraph A of the Background.

Project Area means the project area designated under the MTPFA in respect of the Project.

Relevant Contractor has the meaning given in the Utility Agreement.

Relevant Contractor Area means the area described in the plan at Annexure D, being all those parts of the Project Area on which the Contractor will be carrying out its works forming part of the Project.

Relevant Utility Infrastructure means utility infrastructure which is owned, operated or controlled by the USP.

Secretary means the Secretary to the Department of Transport, Victoria.

Senior Representative has the meaning in clause 5.2(a).

Services and Works Agreement means an agreement either agreed under clause 3.2 or approved under clause 7.6(b).

Services and Works Agreement Formation Dispute has the meaning in clause 7.1(a).

Services and Works Agreement Particulars means a document in the form of the Template Services and Works Agreement Particulars, as completed and issued by the Contractor to the USP.

State means the Secretary to the Department of Transport on behalf of the Crown in right of the State of Victoria.

Template Services and Works Agreement Particulars means the document attached at Annexure B.

Term means the period identified in clause 2.

Unnotified Utility Infrastructure has the meaning given to that term in the MTPFA.

USP Works Costs has the meaning in clause 3.2(c)(i).

Utility Agreement has the meaning in paragraph D of the Background.

1.2 Interpretation

In this Deed:

(a) headings are for convenience only and do not affect interpretation;

and unless the context indicates a contrary intention:

(b) an obligation or liability assumed by, or a right conferred on, 2 or more persons binds or benefits them jointly and severally;

(c) "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;

(d) a reference to a party includes a party's executors, administrators, successors and permitted assigns, including persons taking by way of novation and, in the case of a trustee, includes a substituted or additional trustee;

(e) a reference to a document (including this Deed) is to that document as varied, novated, supplemented, amended, ratified or replaced from time to time;

(f) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;

(g) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;

(h) a reference to a party, clause, schedule, exhibit, appendix, attachment or annexure is a reference to a party, clause schedule, exhibit, appendix, attachment or annexure to or of this Deed, and a reference to this Deed includes all schedules, exhibits, appendix, attachments and annexures to it;

(i) if the day on or which anything is to be done in accordance with this Deed is not a Business Day, then that thing must be done no later than the next Business Day;

(j) 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;

(k) "includes" in any form is not a word of limitation; and

(l) a reference to "\$" or "dollar" is to Australian currency.

2. Term

This Deed commences on the Commencement Date and expires on the Expiry Date.

3. Services and Works Agreements

3.1 General

Access to Sites will be governed by the relevant Services and Works Agreement in respect of each Site. Each Services and Works Agreement will comprise:

- (a) Services and Works Agreement Particulars; and
- (b) the General Conditions.

3.2 Process for creating Services and Works Agreements

- (a) This clause 3.2 sets out the process for agreeing a Services and Works Agreement during the Term.
- (b) The Contractor may (but is not obliged to), at any time during the Term, provide to the USP:
 - (i) Services and Works Agreement Particulars in the form of the Template Services and Works Agreement Particulars completed to include all information referred to in the Template Services and Works Agreement Particulars, to the extent the Contractor is able to provide such information; and
 - (ii) a notice specifying whether or not the Contractor requires a tender process to be carried out in respect of the proposed USP Works.
- (c) Within 5 Business Days of receiving Services and Works Agreement Particulars under clause 3.2(b), the USP must:
 - (i) to the extent that the Services and Works Agreement Particulars include USP Works, calculate and supply to the Contractor a reasonable amount for the costs of the proposed USP Works ("**USP Works Costs**") which must be based on:
 - A. the Agreed Pricing Principles to the extent that they are applicable and it is reasonable to use them; and
 - B. to the extent that clause 3.2(c)(i) does not apply, reasonable rates or prices, which will include a reasonable amount for profit and overheads;
 - (ii) review and consider the Services and Works Agreement Particulars and provide comments and any further information which the USP is to provide (including any additional information or details as requested by the Contractor); and
 - (iii) either:
 - A. request further information if necessary, in respect of the Services and Works Agreement Particulars including reasons why it does not yet accept the Services and Works Agreement Particulars; or

- B. accept the Services and Works Agreement Particulars by providing written notice to the Contractor of such acceptance and by signing the Services and Works Agreement Particulars.
- (d) If the USP has not accepted the Services and Works Agreement Particulars under clause 3.2(c)(iii)B, the parties must negotiate in good faith to make any adjustments to the Services and Works Agreement Particulars acceptable to both parties, after which (without limiting clause 3.2(b)) the Contractor may submit revised Services and Works Agreement Particulars.
- (e) If the USP has not accepted the revised Services and Works Agreement Particulars within 15 Business Days of the Contractor providing them in accordance with clause 3.2(b):
- (i) either party may refer the matter for dispute resolution under clause 7; and
- (ii) each party must give written notice to the State, using the contact details set out below:
- Contact position: [insert]
- Address: [insert]
- Email address: [insert]
- (f) The parties agree that on and from the date that both parties sign the Services and Works Agreement Particulars accepted under clause 3.2(c)(iii)B, a Services and Works Agreement is deemed to be formed.
- (g) The USP acknowledges and agrees that the Contractor is not obliged to provide to the USP, and the USP has no entitlement to receive, any Services and Works Agreement Particulars at all, and the USP will have no Claim against the Contractor in relation to the number of or lack of Services and Works Agreement Particulars provided by the Contractor.

3.3 Novation

When directed by the Contractor from time to time, the USP, without being entitled to compensation, must promptly execute a deed of novation of either this Deed, or of a Services and Works Agreement, as the Contractor may specify, in the form of Annexure F, such deed being between the USP, the Contractor and such other Relevant Contractor as the Contractor may nominate.

4. Confidentiality

- (a) Each party must not, and must ensure its Personnel do not make, or cause to be made, any public announcement, public comment, press release or other disclosure directly or indirectly in connection with any Services and Works Agreement or this Deed to any person other than:
- (i) as necessary to perform that party's obligations under this Deed;
- (ii) with respect to any matter already within the public domain;
- (iii) to comply with any applicable Law or any requirement of any regulatory body (including any relevant stock exchange); or

- (iv) with the other party's prior written approval.
- (b) Each party must not disclose any information concerning this Deed for distribution through any communications media without the other party's prior written approval. The USP must refer to the Contractor any enquiries from any media concerning this Deed.

5. Disputes

5.1 Procedure for resolving Disputes

- (a) Any Dispute must be resolved in accordance with this clause 5.
- (b) 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 5.2; and
 - (ii) secondly, if the Dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 5.2(c)(i):
 - A. the parties may agree one of the following alternatives:
 - 1) **Alternative 1:** that the Dispute be referred to an expert for determination in accordance with clauses 5.4 to 5.8 (inclusive);
 - 2) **Alternative 2:** that the dispute be referred to arbitration in accordance with clause 6; or
 - 3) **Alternative 3:** that the dispute be dealt with in such other forum and in accordance with such other procedure and timing as may be agreed by the parties; or
 - B. either party may commence proceedings.

5.2 Negotiation

- (a) 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 representatives of the parties identified in Schedule 1 or such other persons as may be notified in writing by the relevant party to the other party from time to time ("**Senior Representatives**").
- (b) A notice under clause 5.2(a) must:
 - (i) state that it is a notice under this clause 5; and
 - (ii) include or be accompanied by particulars of the matters which are the subject of the Dispute.
- (c) If a Dispute is referred for resolution by negotiation under clause 5.2(a), then:
 - (i) the Senior 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 5.2(a) is received (or such later date as the parties may agree); and

- (ii) any agreement reached between the Senior Representatives will be reduced to writing, signed by or on behalf of each party and will be contractually binding on the parties.

5.3 Alternative 1 - Expert determination

If:

- (a) a Dispute which has been referred to the Senior Representatives for negotiation in accordance with clause 5.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 5.2(c)(i); and
- (b) the parties agree within 20 Business Days after the expiration of the period for negotiation referred to in clause 5.2(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 5.4 to 5.8. For the avoidance of doubt, a Dispute may only be referred to an expert for determination by agreement of the parties.

5.4 Selection of expert

- (a) Within 7 Business Days after the date on which the parties agree to refer a Dispute to an expert for determination under clause 5.3, the parties must exchange lists of 3 persons (in order of preference) who, if appointed, would satisfy the requirements of clause 5.4(d), from whom the expert is to be chosen.
- (b) Any person that appears on both lists under clause 5.4(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 5.2(a) will be appointed.
- (c) If no person appears on both lists, the party which gave the notice under clause 5.2(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 5.4(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 5.4(a).
- (d) 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) Neither party will be entitled to challenge the appointment of an expert under this clause 5.4 on the basis that the expert does not satisfy the requirements of clause 5.4(d).
- (f) Any agreement for expert determination under this Deed will not constitute an arbitration agreement for the purposes of the *Commercial Arbitration Act 2011* (Vic).

- (g) 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.

5.5 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.

5.6 Expert finding

- (a) 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 6.
- (b) 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.

5.7 Liability of expert

- (a) 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) 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.

5.8 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.

6. Arbitration

6.1 Alternative 2 - Reference to Arbitration

If the parties choose Alternative 2 of clause 5.1(b)(ii)A.2) or the matter is referred to arbitration under clause 5.6(a), then this clause 6 will apply.

6.2 Arbitration

- (a) Arbitration in accordance with this clause 6 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 6.
- (b) The seat of the arbitration will be Melbourne, Victoria.
- (c) The language of the arbitration will be English.

6.3 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 5.1(b)(ii)A.2) or 5.6(a), the arbitrator or arbitrators will be appointed by the Australian Centre for International Commercial Arbitration.

6.4 General Principles for conduct of arbitration

- (a) 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 6 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 6.4(a)(i) and 6.4(a)(ii).
- (b) All evidence in chief must be in writing unless otherwise ordered by the arbitrator.
- (c) 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) 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 6.4(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 6.4(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) Unless otherwise ordered each party may only rely upon one expert witness in connection with any recognised area of specialisation.

6.5 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 6.5, have applied to any Dispute referred to arbitration in accordance with clause 5.1(b)(ii)A.2 or 5.6(a).

6.6 Extension of ambit of arbitration proceedings

- (a) Where:
- (i) a Dispute between the parties to this Deed is referred to arbitration in accordance with this clause 6; and
 - (ii) there is some other Dispute also between the parties to and in accordance with this Deed (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) An arbitrator may make an order in accordance with clause 6.6(a) on such terms and conditions (if any) as the arbitrator thinks fit.

6.7 Award final and binding

- (a) Subject to clause 6.7(b), any award will be final and binding on the parties.
- (b) 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 6.

6.8 Continue to perform

Notwithstanding the existence of a Dispute, each party must continue to carry out its obligations in accordance with this Deed.

6.9 Governing law of arbitration agreement

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

6.10 Interlocutory relief

This clause 6 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.

7. Services and Works Agreement Formation Disputes

7.1 Failure to reach agreement

- (a) If, pursuant to clause 3.2(e), a party wishes to refer a matter for dispute resolution under this clause 7 ("**Services and Works Agreement Formation Dispute**"), then:
- (i) that party must give written notice to the other party that a dispute exists to which this clause 7 applies;
 - (ii) the parties must use all reasonable endeavours to agree on a person to be appointed by the Appointor under clause 7.1(b); and
 - (iii) if, within 5 Business Days after the giving of a notice under clause 7.1(a)(i):
 - A. the parties have agreed on a person to be appointed by the Appointor under clause 7.1(b), the parties must notify, in writing, the Appointor of that outcome and the name of the person; or
 - B. the parties have not agreed on a person to be appointed by the Appointor under clause 7.1(b) the parties must notify, in writing, the Appointor of that outcome.
- (b) On receipt of a notice under clause 7.1(a)(iii):
- (i) the Appointor must appoint the person named in that notice as the expert; and
 - (ii) the Appointor must:
 - A. make the appointment within 5 Business Days after receipt of a notice under clause 7.1(a)(iii); and
 - B. notify, in writing, the parties of the appointment.

- (c) On receipt of a notice under clause 7.1(a)(iii)B, the Appointor must appoint a person as the expert in accordance with this clause 7.1(c):
 - (i) the person appointed under this clause 7.1(c) must:
 - A. have either of the following:
 - 1) at least 8 years' experience working in the construction industry; or
 - 2) at least 8 years' experience in working for utilities;
 - B. have at least 5 years' experience as an arbitrator or mediator;
 - C. be of reputable character; and
 - D. be available to hear the dispute during the period time within which the Services and Works Agreement Formation Dispute must be resolved; and
 - (ii) the Appointor must:
 - A. make an appointment within 5 Business Days after receipt of a notice under clause 7.1(a)(iii)B; and
 - B. notify, in writing, the parties of the appointment.

7.2 Fees of, and costs incurred by, expert

An expert appointed under clause 7.1(b) or 7.1(c) is entitled to be paid;

- (a) fees and allowances, as determined in the instrument of appointment; and
- (b) reasonable costs (including legal costs) incurred by the expert for the purpose of making a determination under clause 7.6.

7.3 Immunity for expert

The expert is not personally liable for anything done or omitted to be done in good faith:

- (a) in the exercise of a power or the discharge of a duty under this Deed; or
- (b) in the reasonable belief that the act or omission was in the exercise of a power or the discharge of a duty under this Deed.

7.4 Expert to commence dispute resolution within 5 Business Days after appointment

Within 5 Business Days after his or her appointment, the expert must commence the process under this clause 7 for the resolution of the dispute by giving written notice of that commencement to the parties.

7.5 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.

7.6 Determination of expert resolving dispute

Without limiting any provision of the Expert Determination Agreement:

- (a) in determining the terms and conditions for a Services and Works Agreement, the expert must have regard to the relevant Model Utility Agreement Guidelines and to this Deed and its Annexures; and
- (b) an approved Services and Works Agreement is taken to arise between the parties in accordance with the expert's determination.

7.7 Termination of approved Services and Works Agreement

An approved Services and Works Agreement taken to have arisen under clause 7.6(b) may not be terminated or revoked unless agreed by both parties or as expressly provided for in the Services and Works Agreement.

7.8 Expert may engage legal and other assistance

The expert may engage lawyers and other persons that the expert considers necessary to assist the expert for the purpose of making a determination under clause 7.6.

7.9 Parties are liable to the Appointor for expert's costs paid by the Appointor

- (a) The parties are liable to the Appointor for the expert's costs as provided in a determination under this clause 7.9(a) and the Appointor may recover those costs from the parties in a court of competent jurisdiction.
- (b) The expert may make a determination as to the apportionment of liability between the parties for the payment of the expert's costs under clause 7.9(a).
- (c) A determination under clause 7.9(b) must be fair and reasonable.
- (d) In determining what is fair and reasonable for the purpose of clause 7.9(c), the expert may have regard to:
 - (i) whether a party used all reasonable endeavours to negotiate a Services and Works Agreement in the period referred to in clause 3.2(e); and
 - (ii) the reasonableness of the submissions of a party, having regard to the nature of the dispute.
- (e) Clause 7.9(d) does not limit what may be had regard to in determining what is fair and reasonable for the purpose of clause 7.9(c).
- (f) A determination under clause 7.9(b) must:
 - (i) set out the reasons of the expert; and
 - (ii) be given to the Appointor and the parties.
- (g) In this clause 7.9, **expert's costs** means the fees, allowances and costs referred to in clause 7.2.

7.10 Appeal to Supreme Court from a determination of expert

- (a) A party to the dispute may appeal to the Supreme Court, on a question of law, from a determination of the expert under clause 7.6.
- (b) An appeal must be commenced:
 - (i) within 10 Business Days after a determination of the expert under clause 7.6; and
 - (ii) in accordance with the rules of the Supreme Court of Victoria.

8. Termination

8.1 Termination where Utility Agreement terminated

The Contractor and the USP agree that the termination, discharge or frustration of the Utility Agreement or any Services and Works Agreement will not affect the operation of this Deed or the operation of any other Services and Works Agreement.

8.2 Termination of Deed

- (a) Termination of this Deed will not prevent either party from relying on rights accrued under this Deed prior to such termination.
- (b) The Contractor and the USP agree that if this Deed is terminated, discharged (including through expiry of the Term) or becomes frustrated, the Utility Agreement and any separate Services and Works Agreements formed in accordance with clause 3 of this Deed will not be affected and must be fulfilled in accordance with the terms of the relevant Services and Works Agreements, unless the parties otherwise agree in writing.

9. General

9.1 Notices

All notices or other communications in connection with this Deed:

- (a) must be in writing;
- (b) must be addressed as specified in this Deed or to such other address as notified by the receiving party to the other party from time to time;
- (c) 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) must be delivered by hand or posted by prepaid express post or emailed to the email address of the addressee as referred to in clause 9.1(b); and
- (e) are taken to be received by the addressee:
 - (i) in the case of delivery by hand, on delivery at the address of the addressee as referred to in clause 9.1(b), unless that delivery is outside the hours of 9.00 am to 5.00 pm on a Business Day, 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, on 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.

9.2 Governing Law

This Deed is governed by and must be construed according to the Laws of Victoria, Australia.

9.3 Jurisdiction

Without limiting clauses 5 and 6, 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 Deed.

9.4 Counterparts

- (a) This Deed may be executed in any number of counterparts and by the parties on separate counterparts. Each counterpart constitutes an original of this Deed, and all together constitute one agreement.
- (b) A party who has executed a counterpart of this Deed may exchange that counterpart with another party by emailing the counterpart executed by it to that other party and, upon request by that other party, will thereafter promptly deliver by hand or post to that party the executed counterpart so exchanged by fax or email, but delay or failure by that party to so deliver a counterpart of this Deed executed by it will not affect the validity of this Deed.

9.5 Entire agreement

This Deed constitutes the entire agreement and understanding between the parties and will take effect according to its tenor despite, and supersedes:

- (a) any prior agreement (whether in writing or not), negotiations and discussions between the parties in relation to the subject matter of this Deed; or
- (b) any correspondence or other documents relating to the subject matter of this Deed that may have passed between the parties prior to the Commencement Date and that are not expressly included in this Deed.

9.6 Amendments

This Deed may only be amended by a deed executed by or on behalf of both the Contractor and the USP.

9.7 Survival of certain provisions

- (a) **(Surviving clauses):** All provisions of this Deed which, expressly or by implication from their nature, are intended to survive the rescission, termination or expiration of this Deed will survive the rescission, termination or expiration of this Deed, including any provision in connection with:
 - (i) confidentiality or privacy;
 - (ii) any indemnity given in accordance with this Deed; or
 - (iii) any right or obligation arising on termination of this Deed.
- (b) **(Interpretation):** No provision of this Deed which is expressed to survive the termination of this Deed will prevent any other provision of this Deed, as a matter of interpretation, also surviving the termination of this Deed.
- (c) **(Survival of rights and obligations):** No right or obligation of any party will merge on completion of any transaction in accordance with this Deed. All rights and obligations in accordance with this Deed survive the execution and delivery of any transfer or other document which implements any transaction in accordance with this Deed.

9.8 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 Deed by the Contractor or the USP 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 Deed.
- (b) **(Writing):** A waiver or consent given by the Contractor or the USP under this Deed is only effective and binding if it is given or confirmed in writing by the Contractor or the USP.
- (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.

9.9 Consents, approvals and directions

- (a) **(Contractor):** A consent or approval required in accordance with this Deed from the Contractor may not be unreasonably withheld or delayed unless this Deed expressly provides otherwise.
- (b) **(USP):** A consent or approval required in accordance with this Deed from USP may not be unreasonably withheld or delayed, unless this Deed expressly provides otherwise.

9.10 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.

9.11 Expenses

Except as otherwise expressly provided in this Deed, each party must pay its own costs and expenses in connection with negotiating, preparing, executing and performing this Deed.

9.12 Severance

If, at any time, a provision of this Deed 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.

9.13 Moratorium legislation

To the fullest extent permitted by Law, the provisions of all Laws which operate to lessen or affect in favour of the USP any obligation under this Deed, or to prejudicially affect the exercise by the Contractor of any right, power or remedy under this Deed, are expressly waived.

9.14 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 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 9.8(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.

Schedule 1 – Key Details for Standing Offer Deed

<p>1.</p>	<p>Commencement Date: (Clause 1.1)</p>	<p>Upon execution by both parties</p>
<p>2.</p>	<p>Expiry Date (Clause 1.1)</p>	<p> insert </p>
<p>3.</p>	<p>Senior Representatives (Clause 5.2(a))</p>	<p>USP: <i>[Drafting Note: USP to nominate an appropriate senior executive for the purposes of clause 5.2(a).]</i></p> <p>Contractor: <i>[Drafting Note: Contractor to nominate an appropriate senior executive for the purposes of clause 5.2(a).]</i></p>

Signing page

Executed as a deed.

Executed by [insert Contractor] in accordance with section 127 of the Corporations Act 2001 (Cth):

Signature of director

Signature of company secretary/director

Full name of director

Full name of company secretary/director

Executed by [insert name of USP and ABN] in accordance with section 127 of the Corporations Act 2001 (Cth):

Signature of director

Signature of company secretary/director

Full name of director

Full name of company secretary/director

Annexure A – General Conditions

[Drafting Note: General Conditions to be attached prior to execution of this Standing Offer Deed.]

Standing Offer General Conditions

Contents

1.	Definitions and Interpretation.....	1
1.1	Definitions	1
1.2	Interpretation	8
2.	Services and Works Agreements and Variations.....	9
2.1	Application and Benefit of Services and Works Agreements.....	9
2.2	Contractor Variations to Project Works	9
2.3	USP Variations to Project Works	10
2.4	Neither party to commence work	10
2.5	Variation Adjustment	11
3.	Design	11
4.	Construction.....	12
5.	Intellectual Property	12
5.1	Warranties	12
5.2	Licence.....	13
5.3	Moral Rights	14
6.	Conditions for access	14
7.	Defect Rectification	14
8.	Contestable and Non-Contestable Works	15
9.	USP Works and Right of Access	15
9.1	USP Works.....	15
9.2	Qualifying Causes of Delay	16
9.3	Subcontracting	17
9.4	Access to the Site.....	18
9.5	Access to land other than the Site	18
9.6	Interference	18
9.7	Completion of USP Works	18
9.8	General Completion Obligation.....	19
10.	USP Works Costs	19
10.1	Payment of the USP Works Costs.....	19
10.2	Payment due dates.....	19
11.	GST.....	19
12.	Contractor Works	20
12.1	Standards.....	20
12.2	Conditions for Commencement of Construction Work	21
12.3	Subcontracting	21
12.4	Cost of Contractor Works	21
13.	USP Requested Works.....	21

14.	Safety & OHS – Compliance and Principal Contractor	21
15.	Indemnity	22
16.	Limitation of Liability	23
16.1	Limitation - USP	23
16.2	Limitation - Contractor	23
16.3	Calculation of the value of the Project Works	Error! Bookmark not defined.
16.4	Exclusion of Indirect or Consequential Loss	23
16.5	Exceptions	23
17.	Damage to operating USP Assets	24
18.	Compliance with Laws	24
19.	Notification of incidents	24
20.	Site Conditions and Contamination	24
21.	Assignment and novation	26
21.1	Assignment	26
21.2	Novation	26
22.	Reinstatement of the Site and Assets	26
22.1	Reinstatement obligation	26
23.	Ownership of Assets	27
23.1	Ownership	27
23.2	Contractor Warranty	27
23.3	Condition of Retained USP Assets	27
24.	Practical Completion	27
24.1	Contractor to notify of Practical Completion	27
24.2	Inspection of USP Assets at Practical Completion	27
24.3	Provision of Handover Information	28
24.4	Defects Correction Period	28
25.	Further Agreements	28
26.	Further access	29
27.	Emergency	29
28.	Termination	30
28.1	Effect of termination on Services and Works Agreements	30
28.2	Termination for convenience	30
29.	Disputes	30
29.1	Procedure for resolving disputes	30
29.2	Negotiation	31
29.3	Expert determination	31
29.4	Selection of expert	32
29.5	Rules of expert determination	32
29.6	Expert finding	32
29.7	Liability of expert	33
29.8	Costs	33

30.	Notices	33
31.	General.....	34
31.1	Amendments	34
31.2	Waiver	34
31.3	Survival of certain provisions	34
31.4	No further rights.....	35
31.5	Parties to bear their own costs	35
31.6	Governing Law and jurisdiction.....	35
31.7	Proportionate liability	36
31.8	Relationship of parties	36
31.9	Severance	36
31.10	Counterparts.....	36
	Annexure A – Conditions for Commencement of Construction Work.....	37

1. Definitions and Interpretation

1.1 Definitions

In these General Conditions, capitalised terms have the meanings set out below, unless the context requires otherwise:

Acceptable Condition means a functional or working condition free from Defects, faults, or other problems, and which is not, or not likely to, cause any hazard, Contamination or other damage to the Site, the Existing USP Assets or the New USP Assets, or which would not (or would not be likely to) result in any other Loss or Damage to the USP.

Access Period means the period starting on the later of the date stated in the relevant Services and Works Agreement and the date on which the conditions set out in clause 6 have all been satisfied and ending on the date stated in the relevant Services and Works Agreement.

Agreed Pricing Principles means the information and principles set out at Annexure C to the Utilities Standing Offer Deed.

Application has the meaning in clause 26(a).

Approved Programme has the meaning in clause 9.1(f).

Authority means any government, local government, public and statutory authority, body or entity including a Minister of the Crown.

Best Development Practice means design, manufacture, supply, construction, installation, commissioning and repair practices which are carried out:

- (a) with the standard of skill, care and diligence which may reasonably be expected of a prudent, experienced and competent person carrying out design, manufacture, supply, construction, installation, commissioning and repair work similar to the Contractor Works or the USP Works, as applicable, in Australia;
- (b) in a manner safe to all people and the Environment;
- (c) with the intent of ensuring reliable long term, safe and efficient operation of the Project Assets and the USP Assets;
- (d) by prudent, experienced competent and trained personnel utilising high quality and safe and proper equipment, tools, procedures and industry standards;
- (e) with an adequate number of personnel, materials, resources and supplies; and
- (f) using suitable, new and high quality fixtures, fittings, finishes and materials which are free from defects and appropriate for the environment in which they are intended to be used under:
 - (i) normal conditions; and
 - (ii) abnormal conditions that would be anticipated by a prudent, experienced and competent person carrying out design, manufacture, supply, construction, installation, commissioning and repair work similar to the Contractor Works or the USP Works in Australia.

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, the relevant Services and Works Agreement;
- (b) arising out of, or in connection with, the Project Works or any party's conduct prior to the date of the relevant Services and Works 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.

Compensable Qualifying Cause of Delay means any of the following:

- (a) any act or omission (other than any act or omission permitted by the Services and Works Agreement) of, or breach of a Services and Works Agreement by, the Contractor or its employees, consultants, agents or other contractors;
- (b) if there is a court order against the Contractor;
- (c) failure of the Contractor to provide the USP with access to the Site or obtain any Consent or Approval which under the relevant Services and Works Agreement is the responsibility of the Contractor to obtain;
- (d) any delay to USP Works caused by delay in the performance of the Contractor Works, to the extent that it is stated in, or reasonably to be inferred from, the relevant Services and Works Agreement that the timing of the performance of the relevant USP Works is dependent upon completion of the relevant Contractor Works;
- (e) any delay by an Authority, beyond the timeframe that would typically apply, in granting:
 - (i) easements; or
 - (ii) to the extent that the USP Works involve the augmentation of a transmission asset, any Approval in respect of the augmentation,provided the USP has done all things reasonably required to obtain the relevant Approval; and
- (f) any delay by a third party, beyond the timeframe that would typically apply, in granting any necessary design Approval in respect of USP Works, provided the USP has done all things reasonably required to obtain the relevant Approval.

Condition Report means the condition report (if any) attached to the relevant Services and Works Agreement.

Conditions for Commencement of Construction Work means the conditions set out at, or referred to in, Annexure A.

Consent means a consent, approval, licence, permit, assessment, determination, certificate, accreditation, registration, clearance, permission and similar authorisation (however described) of any Authority or other person (for example land holders) for any reason (for example, by Law or under contract) which must be obtained or satisfied connection with the Project Works, but does not include any consent of the USP which is required other than in the course of the USP acting in accordance with any legislative or regulatory powers it may have.

Construction Requirements has the meaning in clause 4(b).

Contamination means a condition of land, air, soil or water including groundwater resulting from past or present Pollution.

Contestable Works has the meaning in clause 8(b).

Contractor has the meaning given in the relevant Services and Works Agreement.

Contractor Works means those parts of the Project Works described in the relevant Services and Works Agreement to be carried out by the Contractor, other than any USP Requested Works.

Contractor's Property means anything installed, placed, located or affixed on the Site, by or for the Contractor but excluding the Project Assets.

Defect includes:

- (a) any defect, omission, shrinkage or fault in the Contractor Works; and
- (b) any aspect of the Contractor Works, or any part thereof, which is not in accordance with the requirements of the relevant Services and Works Agreement.

Defects Correction Period means the period starting on the date of Practical Completion and ending on the date stated in the relevant Services and Works Agreement.

Defect Notice has the meaning in clause 7(d).

Delay Notice has the meaning in clause 9.2(b).

Design Requirements has the meaning in clause 3(b).

EHS Law means any Law which relates to any aspect of the Environment or Contamination, land use and planning, heritage, public or general health and safety, occupational health and safety (including the OHS Act), pollution, chemicals, hazardous materials and includes any standards or guidelines of relevant Authorities).

Environment means the physical factors of the surroundings of humans and other life forms, including the land, soil, plants, habitat, waters, atmosphere, climate, sounds, odours, tastes, biodiversity and the Site's social and aesthetic characteristics.

Existing USP Assets means the assets identified as such in the relevant Services and Works Agreement.

Expert Determination Agreement means an agreement on the terms of the draft agreement at Annexure E of the Utilities Standing Offer Deed, or on such other terms as the parties may agree.

Final Delay Notice has the meaning in clause 9.2(b).

Further Defect Notice has the meaning in clause 7(e).

General Conditions means this document.

GST Act has the meaning in clause 11(f).

GST Exclusive Consideration has the meaning in clause 11(a).

Handover Information has the meaning given in the relevant Services and Works Agreement.

Impacting Contractor Works means Contractor Works which:

- (a) interface with or affect USP Assets; or
- (b) upon completion, will be New USP Assets.

Indirect or Consequential Loss means:

- (a) any loss of opportunity, profit, anticipated profit, income, bargain, production, contract, goodwill, business, business opportunities or revenue, loss caused by business interruption, the cost of obtaining new financing or maintaining existing financing or any failure to realise anticipated savings; and
- (b) any loss or damage of the nature set out above in paragraph (a) that is incurred or suffered by a third party.

Intellectual Property Rights includes any and all intellectual and industrial property rights throughout the world, whether subsisting now or in the future, including rights of any kind in:

- (a) inventions, discoveries and novel designs, whether or not registered or registrable as patents, innovation patents or designs, including developments or improvements of equipment, technology, processes, methods or techniques;
- (b) literary works, dramatic works, musical works, artistic works, cinematograph films, television broadcasts, sound broadcasts, published editions of works and any other subject matter in which copyright (including future copyright and rights in the nature of or analogous to copyright) may, or may upon creation of the subject matter, subsist anywhere in the world;
- (c) registered and unregistered trademarks and service marks, including goodwill in the business concerned in the relevant goods and/or services;
- (d) trade, business or company names;
- (e) internet domain names; and
- (f) proprietary rights under the *Circuit Layouts Act 1989* (Cth),

whether created or in existence before or after the date of the relevant Services and Works Agreement.

Latent Condition means the physical condition of the Site and its near surrounds:

- (a) including the physical condition of artificial things (including any defects in USP Assets); but
- (b) excluding:
 - (i) weather conditions; and
 - (ii) any Unnotified Utility Infrastructure,

which differs materially from the physical conditions which should reasonably have been anticipated by the USP at the time the USP entered into the relevant Services and Works Agreement, if the USP had:

- (c) inspected:
 - (i) all written information made available by the Contractor prior to the parties entering into the relevant Services and Works Agreement;
 - (ii) all information relevant to the risk allocation in the relevant Services and Works Agreement and reasonably obtainable by the making of reasonable enquiries; and
 - (iii) the Site and its near surrounds; and
- (d) otherwise acted in accordance with Best Development Practices.

Law means:

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

Legislation means:

- (a) legislation and delegated legislation;
- (b) all ordinances, by-laws, regulations of and other statutory instruments (however described) issued under the legislation or delegated legislation; and
- (c) consolidations, amendments, re-enactments and replacements of legislation or delegated legislation,

but excludes Approvals.

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 or in any way in connection with any Services and Works Agreement or arising at Law in connection with a Services and Works Agreement.

Licensed Intellectual Property has the meaning in clause 5.2.

Loss or Damage means all liabilities, losses, damages, costs, expenses (including legal costs, whether incurred by or awarded against a party) or any loss of income or profits, whether arising in contract, tort (including negligence), under any Law or otherwise.

Minor Defects has the meaning given in clause 24.2(b)(i)(A)(2).

Moral Rights has the meaning given to it in the *Copyright Act 1968* (Cth).

New USP Assets means, when constructed, the assets identified as such in the relevant Services and Works Agreement, in respect of which title reverts to the USP in accordance with clause 24.

Non-Contestable Works has the meaning in clause 8(a).

Notifiable Defects has the meaning in clause 7(g).

OHS Act means the *Occupational Health and Safety Act 2004 (Vic)* and the *Occupational Health and Safety Regulations 2017 (Vic)*.

parties has the meaning given in the relevant Services and Works Agreement.

Plan means the plan identified as such in the relevant Services and Works Agreement.

Pollution includes any solid, liquid, gas, odour, heat, sound, vibration, radiation or substance present in any segment of the Environment (other than those naturally present in a given segment of the Environment) which alone or in combination makes or may make the Environment:

- (a) unsafe or unfit for habitation or occupation by persons or animals;
- (b) degraded in its capacity to support plant life;
- (c) contaminated; or
- (d) otherwise environmentally degraded.

Practical Completion has the meaning in clause 24.2(b)(i).

Practical Completion Information has the meaning given in the relevant Services and Works Agreement.

Principal Contractor has the meaning given in the OHS Act.

Project means the [insert].

Project Assets means the assets identified as such in the relevant Services and Works Agreement, and **Project Asset** means each asset comprised in the Project Assets.

Project Works means the work to be carried out on the Site as set out in the relevant Services and Works Agreement, which may include design, and includes any USP Works and Contractor Works.

Proposed Variation has the meaning given in clause 2.2.

Proposed USP Variation has the meaning in clause 2.3.

Proposed Works has the meaning in clause 26(a).

Qualifying Cause of Delay means any of the following:

- (a) any Compensable Qualifying Cause of Delay;
- (b) a variation to the USP Works agreed or determined under clause 2.3;
- (c) a Latent Condition;
- (d) a change in Australian Law which could not reasonably have been foreseen by the USP prior to entering into a Services and Works Agreement;
- (e) earthquake, natural disaster, bushfire, landslide, seismic activity, tsunami or mudslide;
- (f) ionising radiation or contamination by radioactivity;
- (g) confiscation, nationalisation, requisition, expropriation or embargo by or under the order of any government;

- (h) winds producing sustained surface winds in excess of 118 km/h and gusts in excess of 165 km/h, as recorded by the Bureau of Meteorology, Melbourne;
- (i) fire, flood or explosion (to the extent the explosion is caused by any of the events referred to in paragraph (e) of this definition); and
- (j) emergency repairs which the USP is reasonably required to carry to in order to ensure the continued operation of the USP Network in order to reasonably address an actual or imminent occurrence of an event, incident or threat which:
 - (i) in any way endangers or threatens to endanger the safety or health of any person;
 - (ii) destroys or damages or threatens to destroy or damage any property; or
 - (iii) disrupts the USP Network or the supply of gas.

Related Body Corporate has the meaning given to that term in section 50 of the *Corporations Act 2001* (Cth).

Representative of a party includes an employee, agent, customer, officer, director, auditor, adviser, partner, consultant, joint venturer, sub-licensee or sub-contractor of the party or any other person on the Site with the consent (express or implied) or at the invitation of the party.

Responsible Party (Construction) has the meaning in clause 4(a).

Responsible Party (Design) has the meaning in clause 3(a).

Retained USP Assets means the USP Assets, other than any New USP Asset which has reached Practical Completion in accordance with clause 24.2.

Senior Representative has the meaning given in the Utilities Standing Offer Deed.

Services and Works Agreement means an agreement either agreed under clause 3.2 of the Utilities Standing Offer Deed or approved under clause 7.6(b) of the Utilities Standing Offer Deed.

Services and Works Agreement Particulars means a document in the form of the Template Services and Works Agreement Particulars (as defined in the Utilities Standing Offer Deed), as completed and signed by both parties.

Site has the meaning given in the relevant Services and Works Agreement, including by reference to any Plan attached to the Services and Works Agreement.

Supplier has the meaning in in clause 11(a).

Unnotified Utility Infrastructure has the meaning given in the Utilities Standing Offer Deed.

USP has the meaning given in the relevant Services and Works Agreement.

USP Asset means:

- (a) an Existing USP Asset, until such time (if any) that title to the asset is transferred to a third party;
- (b) a New USP Asset after Practical Completion in accordance with clause 24.2; and
- (c) assets constructed by any USP Works.

USP Network means the distribution network and transmission network owned and/or operated by the USP.

USP Policies and Requirements means any corporate policies, application processes or guidelines of the USP as specified in the Services and Works Agreement Particulars.

USP Requested Works means any works which are not required to be carried out for the purposes of the Project, but which the USP wishes to procure to be carried out at the same time for the convenience of the USP.

USP Standard Application Forms means any standard forms specified in any relevant USP Policies and Requirements and required by the USP Policies and Requirements to be completed and submitted by the Contractor to the USP prior to commencement of access to the Site, or prior to commencement of construction work on the Site, including applications for access, interruptions of supply, outages, shutdowns, switching plans or any other relevant matters but does not include any standard form of contract drafted by or on behalf of a USP, whether published or unpublished.

USP Works means those parts of the Project Works described in the relevant Services and Works Agreement to be carried out by or on behalf of the USP (if any), other than any USP Requested Works. For clarity, all works on USP Assets will be USP Works.

USP Works Completion means when the Contractor issues a USP Works Completion Certificate.

USP Works Completion Certificate means a certificate issued by the Contractor stating that the USP Works satisfy the relevant USP Works Completion Tests.

USP Works Completion Test means a test:

- (a) required under a Services and Works Agreement, any USP Policies and Requirements or Best Development Practice; or
- (b) which the Contractor, as at the date of execution of the relevant Services and Works Agreement, knew or ought to have known was necessary,

to be carried out and passed prior to USP Works Completion.

USP Works Costs means the amount specified in the relevant Services and Works Agreement, as adjusted from time to time by any Variation Adjustment.

Utilities Standing Offer Deed means the deed of that name entered into by the parties in respect of the Project.

Variation Adjustment has the meaning in clause 2.5(a).

1.2 Interpretation

In these General Conditions, the following rules apply unless the context requires otherwise:

- (a) a reference to a statute, ordinance, code or other Law includes regulations and other instruments under it and consolidations, amendments or replacements of any of them;
- (b) the singular includes the plural and vice versa;
- (c) a reference to a person includes a firm, body corporate, an unincorporated body or any Authority;
- (d) a reference to a party includes the party's successors, executors, administrators and permitted assigns (and where applicable, the party's legal representatives);
- (e) headings are for convenience only and must not be used to interpret this any Services and Works Agreement;

- (f) if any part of these General Conditions is invalid, illegal or unenforceable, it will be severed and the remaining parts of these General Conditions will not be affected and will continue to be enforceable;
- (g) including and includes are not words of limitation and a list of examples is not limited to those items or to items of a similar kind;
- (h) a word that is derived from a defined word has a corresponding meaning;
- (i) a reference to a right or obligation of any 2 or more people comprising a single party confers that right, or imposes that obligation, as the case may be, on each of them severally and each 2 or more of them jointly. A reference to that party is a reference to each of those people separately; and
- (j) these General Conditions (or any part of them) are not to be construed against a party on the basis that the party or its lawyers were responsible for their drafting.

2. Services and Works Agreements and Variations

2.1 Application and Benefit of Services and Works Agreements

These General Conditions apply to each Services and Works Agreement entered into by the parties pursuant to clause 3 of the Utilities Standing Offer Deed, except to the extent agreed by the parties and expressly stated in the relevant Services and Works Agreement.

2.2 Contractor Variations to Project Works

The Contractor must promptly advise the USP in writing if the Contractor intends to make any material changes, amendments or alterations (including any omission or deletion) to the scope of the Project Works or the drawings, plans and specifications attached to or referred to in the relevant Services and Works Agreement ("**Proposed Variation**"). Within 15 Business Days of being so advised, the USP must:

- (a) by giving written notice to the Contractor:
 - (i) approve the Proposed Variation in which case the Project Works are deemed to include such Proposed Variation;
 - (ii) approve the Proposed Variation with conditions which are reasonable in the circumstances, in which case:
 - (A) if the Contractor notifies the USP that the conditions are acceptable, the Project Works are deemed to include the Proposed Variation with the conditions; or
 - (B) if the Contractor notifies the USP that the conditions are not acceptable, then either party may refer the matter to dispute resolution under clause 29; or
 - (iii) acting reasonably, reject the Proposed Variation.
- (b) If a Proposed Variation is rejected under clause 2.2(a)(iii), the Contractor may:
 - (i) elect not to proceed with the Proposed Variation;
 - (ii) amend the Proposed Variation and re-submit the notice to the USP under this clause 2.2, in which case the process under this clause 2.2 will apply again; or

- (iii) refer the matter to dispute resolution under clause 29.

2.3 USP Variations to Project Works

The USP must promptly advise the Contractor in writing, giving reasons, if the USP wishes to make any changes, amendments or alterations (including any omission or deletion) to the scope of the Project Works or the drawings, plans and specifications attached to or referred to in the relevant Services and Works Agreement ("**Proposed USP Variation**"). Within 15 Business Days of being so advised (or such longer period as is reasonably agreed by the parties), the Contractor must:

- (a) by giving written notice to the USP:
 - (i) approve the Proposed USP Variation, in which case the Project Works are deemed to include such Proposed USP Variation;
 - (ii) approve the Proposed USP Variation with conditions or proposed amendments which are reasonable in the circumstances, in which case:
 - (A) if the USP notifies the Contractor that the conditions or proposed amendments are acceptable, the Project Works are deemed to include the Proposed USP Variation with the conditions and proposed amendments; or
 - (B) if the USP notifies the Contractor that the conditions or proposed amendments are not acceptable, then either party may refer the matter to dispute resolution under clause 29; or
 - (iii) acting reasonably, reject the Proposed USP Variation.
- (b) If a Proposed USP Variation is rejected under clause 2.3(a)(iii), the USP may:
 - (i) elect not to proceed with the Proposed USP Variation;
 - (ii) amend the Proposed USP Variation and re-submit the notice to the Contractor under this clause 2.3, in which case the process under this clause 2.3 will apply again; or
 - (iii) refer the matter to dispute resolution under clause 29.

2.4 Neither party to commence work

- (a) Subject to clause 2.4(b), neither party may commence any work in relation to any Proposed Variation or Proposed USP Variation:
 - (i) unless and to the extent that the other party approves the Proposed Variation or Proposed USP Variation in accordance with clause 2.2 or 2.3 (as applicable); or
 - (ii) where the matter has been referred to dispute in accordance with the process under clause 29, except in accordance with the outcome of those processes.
- (b) To the extent that work referred to in clause 2.4(a) is design work, the Contractor or the USP (as applicable) may commence work despite neither of the conditions in clauses 2.4(a)(i) and 2.4(a)(ii) being fulfilled, but to the extent the Contractor or the USP (as applicable) commences and carries out any such design work, it does so at its own cost and risk.

2.5 Variation Adjustment

- (a) To the extent that a Proposed Variation or Proposed USP Variation is in respect of any changes, amendments or alterations (including any omission or deletion) to the USP Works, the USP must, at the relevant time specified in clause 2.5(b), notify the Contractor of any adjustment to the USP Works Costs reasonably required as a result of the Proposed Variation or Proposed USP Variation (as applicable) ("**Variation Adjustment**"), which must be based on:
- (i) the Agreed Pricing Principles to the extent that they are applicable and it is reasonable to use them; and
 - (ii) to the extent that clause 2.5(a)(i) does not apply, reasonable rates or prices, which must include a reasonable amount for profit and overheads.
- (b) For the purposes of clause 2.5(a) the relevant time is:
- (i) in respect of Proposed Variations, as soon as reasonably possible following approval of the Proposed Variation in accordance with clause 2.2; and
 - (ii) in respect of Proposed USP Variations, at the time the USP advises the Contractor of the Proposed USP Variation.

3. Design

- (a) Except to the extent specified otherwise in the relevant Services and Works Agreement, the party responsible for carrying out design for, respectively:
- (i) the Contractor Works, is the Contractor; and
 - (ii) any USP Works, is the USP,
- ("Responsible Party (Design)").**
- (b) The relevant:
- (i) design process to be followed (including any design review process);
 - (ii) requirements for procurement of consultants to carry out design work;
 - (iii) process for certification of completion of design;
 - (iv) obligations and liabilities of both the Responsible Party (Design) and the other party in relation to design of the Contractor Works or the USP Works as the case may be (to the extent they are additional to or more onerous than those contained in these General Conditions); and
 - (v) requirements regarding payment of costs of preparation of design, design review, and design certification;
- will be as set out in:
- (vi) any relevant Law;
 - (vii) any relevant USP Policies and Requirements; and

- (viii) the relevant Services and Works Agreement, including Attachment 2 to the relevant Services and Works Agreement Particulars,
("together, **"Design Requirements"**).

4. Construction

- (a) The party responsible for carrying out construction for, respectively:
 - (i) any Contractor Works, is the Contractor; and
 - (ii) any USP Works, is the USP,
("Responsible Party (Construction)").
- (b) The relevant:
 - (i) construction process to be followed;
 - (ii) requirements for procurement of contractors to carry out construction works;
 - (iii) process for certification of completion of construction;
 - (iv) requirements regarding payment of costs of construction and construction certification;
 - (v) obligations and liabilities of both the Responsible Party (Construction) and the other party in relation to construction of the Contractor Works or the USP Works as the case may be (to the extent they are additional to or more onerous than those contained in these General Conditions); and
 - (vi) requirements regarding payment of costs of construction,
are as set out in:
 - (vii) any relevant Law;
 - (viii) any relevant USP Policies and Requirements; and
 - (ix) the relevant Services and Works Agreement, including Attachment 3 to the relevant Services and Works Agreement Particulars,
(together, "Construction Requirements").

5. Intellectual Property

5.1 Warranties

Each party warrants to the other that:

- (a) no Intellectual Property Rights or Moral Rights or other rights of any person will be infringed or breached:
 - (i) in carrying out the Contractor Works or the USP Works; or
 - (ii) by the use or enjoyment of the USP Assets;

- (b) the party giving the warranty ("**First Party**") owns, or has the authority to grant the rights granted by that party in accordance with this clause 5, in connection with the Intellectual Property Rights licensed to the other party ("**Second Party**") in accordance with this clause 5, and neither:
- (i) the exercise of those rights by the Second Party; nor
 - (ii) the possession or use of any materials in which those rights subsist in connection with any Services and Works Agreement,
- will give rise to any Liability on the part of the Second Party or any person nominated or authorised by the Second Party to exercise those Intellectual Property Rights, including to pay any compensation (including any royalty) to any person, or give rise to a right entitling any person to make a Claim against the Second Party or any person nominated or authorised by the Second Party in connection with any Services and Works Agreement for any attribution or acknowledgement or rectification in relation to such Intellectual Property Rights or any materials in which they subsist, except to the extent such rights are exercised in a manner contrary to the terms of this clause 5;
- (c) it has all appropriate licence of, or title to, all Intellectual Property Rights that are required by it for the purpose of its obligations under any Services and Works Agreement; and
- (d) it has authority to assign, license or disclose (as the case may be) all Intellectual Property Rights granted to the Second Party under any Services and Works Agreement.

Each representation and warranty in this clause 5.1 is a continuing representation and warranty and will be repeated on each day while any obligation under any Services and Works Agreement remains outstanding, with reference to the facts and circumstances then subsisting.

5.2 Licence

Each party ("**First Party**") grants to the other party ("**Second Party**") a worldwide, permanent, perpetual, irrevocable, transferable royalty-free, non-exclusive licence (including the right to sub-license) to use the Intellectual Property Rights created by the First Party in the course of carrying out the Contractor Works or the USP Works as the case may be ("**Licensed Intellectual Property**"), for the following purposes:

- (a) to enable the Second Party to receive the benefit of the relevant Project Asset or USP Asset (as the case may be);
- (b) to carry out the Contractor Works or the USP Works (as the case may be);
- (c) to operate, maintain or modify the relevant Project Asset or USP Asset;
- (d) for the procurement, funding, financing, design, supply, construction, installation, production, commissioning, completion, operation, maintenance, repair and alteration of any thing (including any infrastructure, equipment, computer hardware, computer software and computer or telecommunications systems), which interfaces or interoperates with, or which is located (in whole or in part) under, on, above or adjacent to the relevant Project Asset or USP Asset; and
- (e) for any other purpose relating to the Project.

5.3 Moral Rights

To the extent permitted by Law, neither party may sue, enforce any Claim, bring any action or exercise any remedy in respect of any breach or alleged breach, infringement or other wrong doing (whether before or after the date of the relevant Services and Works Agreement) in respect of any person's Moral Rights in respect of Contractor Works, USP Works, Project Asset or USP Asset by:

- (a) the other party; or
- (b) any third party to whom the other party sub-licenses (whether that sub-licence is express or implied) or grants any other right to use, possess, vary or amend any Licensed Intellectual Property, or any rights in any Project Asset or USP Asset.

6. Conditions for access

The Access Period will commence on the later of the date stated in the relevant Services and Works Agreement and the day after all of the following have been satisfied:

- (a) the Contractor has obtained all Consents in accordance with clauses 9 and 18;
- (b) the USP has completed any USP Works stated in the Services and Works Agreement to be completed before the Access Period may commence; and
- (c) any other conditions precedent to the Access Period specified in the Services and Works Agreement,

unless otherwise specified in the relevant Services and Works Agreement.

7. Defect Rectification

- (a) The Contractor must correct all Defects in the Contractor Works of which it becomes aware prior to the expiry of the relevant Defects Correction Period.
- (b) Subject to and without limiting clause 26, during the Defects Correction Period, the Contractor may:
 - (i) continue to access the USP Assets, for the purposes of rectifying any Defects which access will be on the terms and conditions of the relevant Services and Works Agreement as a licence from month to month; and
 - (ii) rectify Defects in the Contractor Works at the Site.
- (c) The parties acknowledge and agree that during the Defects Correction Period, if rectification of Defects in the Contractor Works will impact on a USP Asset, any such rectification must be carried out in accordance with clause 26.
- (d) If the USP acting reasonably believes that the Contractor has not complied with clause 7(a), the USP may notify the Contractor in writing of that belief, such notice to include:
 - (i) details of the alleged non-compliance, including a detailed description of the relevant Defect; and
 - (ii) a reasonable period for rectification,("Defect Notice").

- (e) Subject to clause 7(g), if the Contractor does not rectify the Defect within the reasonable period stated in the Defect Notice, or such other period as may be agreed between the parties, the USP may provide the Contractor with a further notice, which must include a copy of the Defect Notice and including a further reasonable period for rectification ("**Further Defect Notice**").
- (f) If the Contractor does not rectify the Defect within the reasonable period stated in the Further Defect Notice, the USP may notify the State in writing of the Contractor's failure to comply with both the Defect Notice and the Further Defect Notice.
- (g) In the event of a Defect the existence of which may reasonably be expected to:
 - (i) endanger the safety of the general public, or
 - (ii) pose an operational risk, interruption to power supply or liability of the USP in respect of the relevant USP Asset,("Notifiable Defects") then the USP may, without the need to comply with clause 7(e), itself rectify the Notifiable Defect.
- (h) The Contractor will be liable to the USP as a debt due and payable for the USP's costs reasonably incurred in exercising its rights under clause 7(g) to be determined in accordance with the Agreed Pricing Principles.

8. Contestable and Non-Contestable Works

- (a) To the extent that any Law or any USP Policies and Requirements (or the definition of USP Works) require that any Project Works must be carried out by or on behalf of the USP ("**Non-Contestable Works**"), those Project Works will be USP Works.
- (b) In respect of Project Works that are not Non-Contestable Works ("**Contestable Works**"), at the Contractor's election, those Project Works will be carried out by either the Contractor or the USP, as stated in the relevant Services and Works Agreement.

9. USP Works and Right of Access

9.1 USP Works

- (a) Subject to clause 9.1(c), the Contractor must obtain and maintain all Consents required for the USP Works (if any) except to the extent specified otherwise in the relevant Services and Works Agreement.
- (b) The USP must assist the Contractor in obtaining and maintaining the Consents referred to in clause 9.1(a) at all times, and in any manner, the Contractor reasonably requires.
- (c) The USP must obtain and maintain all Consents required for the USP Works which only the USP is permitted by Law to obtain.

- (d) The USP must carry out the USP Works (if any):
 - (i) within the timeframes (if any) set out in the Services and Works Agreement, and in any programme approved by the Contractor under clause 9.1(e), and if none, within a reasonable time from the date of the relevant Services and Works Agreement to which those USP Works relate, or otherwise as agreed between the parties in writing;
 - (ii) in accordance with all applicable Laws and Consents and in accordance with Best Development Practice;
 - (iii) in accordance with the USP's own policies and procedures in respect of health, safety and the environment, which must meet or exceed the standards and requirements of all applicable Laws;
 - (iv) so as not to interfere with or cause damage to the Contractor Works, except to the extent contemplated by the USP Works, or cause injury or damage to any person or property;
 - (v) using materials which will:
 - (A) be fit for the purpose for which they were intended;
 - (B) be of sound quality, durability and workmanship; and
 - (C) conform to all relevant Laws and Australian standards; and
 - (vi) in accordance with all Design Requirements and Construction Requirements (as the case may be).
- (e) If the relevant Services and Works Agreement states that this clause 9.1(e) is to apply, the USP must prepare a programme for the USP Works, and must, prior to commencing any USP Works, obtain the approval of the Contractor, acting reasonably, to that programme.
- (f) To the extent the USP Works are Non-Contestable Works, the USP must prepare a programme for the USP Works, and must, prior to commencing any USP Works, obtain the approval of the Contractor, acting reasonably, to that programme, and must thereafter comply with the approved programme as it may be amended by agreement of the parties from time to time ("**Approved Programme**") at all times.

9.2 Qualifying Causes of Delay

- (a) The USP will be entitled to a reasonable extension of time to any timeframe set out in the relevant Services and Works Agreement or in any Approved Programme if the USP will be delayed by a Qualifying Cause of Delay in such a manner that it will be prevented from achieving any timeframe set out in the relevant Services and Works Agreement or in any Approved Programme, provided that the USP complies with all the requirements of this clause 9.2.

- (b) If the USP considers that it will be delayed by a Qualifying Cause of Delay in such a manner that it will be prevented from achieving any timeframe set out in the relevant Services and Works Agreement or in any Approved Programme, the USP must give written notice to the Contractor containing details of:
- (i) the Qualifying Cause of Delay;
 - (ii) the manner in which the USP considers it will cause delay to the relevant timeframe; and
 - (iii) the estimated number of days delay,
- ("Delay Notice"), within 10 Business Days of the commencement of the Qualifying Cause of Delay, and thereafter must give further Delay Notices regularly after the commencement of the delay, and a final Delay Notice upon the cessation of the Delay ("Final Delay Notice").
- (c) In the event a Qualifying Cause of Delay occurs, the USP must take all reasonable actions to minimise and mitigate any delay to a timeframe set out in the relevant Services and Works Agreement or in any Approved Programme, and the consequences of such delay.
- (d) The parties must negotiate in good faith to agree a reasonable extension of time within 10 Business Days of the receipt by the Contractor of the Final Delay Notice. If no agreement is reached within 10 Business Days of the receipt by the Contractor of the Final Delay Notice, either party may take the issue to dispute under clause 29.
- (e) To the extent that an extension of time is agreed in accordance with clause 9.2(d) or otherwise determined in accordance with clause 29 as a result of a Compensable Qualifying Cause of Delay, and the USP reasonably and actually incurs additional cost by reason of the relevant delay, the Contractor must pay to the USP those additional costs, which must be in accordance with:
- (i) the Agreed Pricing Principles to the extent that they are applicable and it is reasonable to use them; and
 - (ii) to the extent that clause 9.2(e)(i) does not apply, reasonable rates or prices, which must include a reasonable amount for profit and overheads.
- (f) Notwithstanding that the USP is not entitled to or has not claimed an extension of time, the Contractor may at any time and from time to time before issuing the USP Works Completion Certificate direct an extension of time.

9.3 Subcontracting

- (a) The USP may subcontract the performance of all or part of any USP Works at its sole discretion.
- (b) The engagement of any subcontractor will not relieve the USP from any Liability or obligation under the relevant Services and Works Agreement and the USP will be liable to the Contractor for the acts and omissions of any subcontractors (and agents and employees of those persons) as if they were acts or omissions of the USP.

9.4 Access to the Site

The Contractor acknowledges and agrees that, subject to clause 9.6, it must allow the USP, at any time after giving reasonable notice to the Contractor, to access the Site in order to:

- (a) inspect the Site;
- (b) carry out the USP Works (if any);
- (c) carry out any urgent or emergency works it considers necessary or desirable to safeguard the USP Assets;
- (d) carry out works it considers necessary or desirable to prevent Loss or Damage (whether actual or anticipated) to the USP or the USP Assets, or injury to any person or damage to any property; or
- (e) exercise any of USP's rights under the relevant Services and Works Agreement.

9.5 Access to land other than the Site

In the event that the USP Works are required to be carried out on land other than the Site the Contractor is responsible for procuring sufficient access to such other land in a timely manner so as to allow the USP to carry out the USP Works in accordance with the relevant Services and Works Agreement.

9.6 Interference

- (a) The Contractor must not unreasonably delay or interfere with the performance of any USP Works or the USP's access to the Site in accordance with clause 9.4.
- (b) The USP must minimise physical interference with the Site in undertaking any USP Works and whenever accessing the Site for any purpose. If the Contractor and USP carry out works at the same time, each party must use all reasonable endeavours to minimise disruption to the other's use of the Site, including to any works being carried out in accordance with the relevant Services and Works Agreement.

9.7 Completion of USP Works

Where stated in the relevant Services and Works Agreement that this clause 9.7 applies:

- (a) the USP must ensure that the relevant USP Works reach USP Works Completion, and that they do so by the date (if any) stated in the relevant Services and Works Agreement;
- (b) the USP must give the Contractor at least the number of days' written notice stated in the relevant Services and Works Agreement of the date upon which the USP considers that USP Works Completion will be reached;
- (c) when the USP is of the opinion that USP Works Completion has been reached, the USP must in writing request the Contractor to certify that the USP Works have reached USP Works Completion;
- (d) within the number of days stated in the relevant Services and Works Agreement after receiving the request, the Contractor must give the USP either a USP Works Completion Certificate evidencing the date of USP Works Completion or written reasons for not doing so;

- (e) if the Contractor is of the opinion that USP Works Completion has been reached, the Contractor may issue a USP Works Completion Certificate even though no request has been made; and
- (f) as soon as reasonably practicable after USP Works Completion, the USP must remove its equipment and unused materials from the Site.

9.8 General Completion Obligation

Where it is stated in the relevant Services and Works Agreement that clause 9.7 does not apply, the USP must:

- (a) diligently pursue completion of the USP Works; and
- (b) use reasonable endeavours to complete the USP Works within a reasonable time.

10. USP Works Costs

10.1 Payment of the USP Works Costs

The Contractor must pay to the USP the USP Works Costs at the due dates specified in the relevant Services and Works Agreement in the manner specified by the USP from time to time.

10.2 Payment due dates

If a Services and Works Agreement does not specify a due date in relation to a payment by the Contractor under the Services and Works Agreement, the due date will be deemed to be 30 Business Days from the date on which the USP notifies the Contractor in writing that the payment is due.

11. GST

- (a) To the extent that any supply made or to be made by either party ("**Supplier**") under or in connection with a Services and Works Agreement is a taxable supply, the amount payable or consideration to be provided for that supply ("**GST Exclusive Consideration**"), does not take into account the GST payable by the Supplier on that supply and must be increased in accordance with the provisions of clause 11(b).
- (b) The GST Exclusive Consideration for each taxable supply made or to be made by the Supplier under or in connection with the Utilities Standing Offer Deed or a Services and Works Agreement must be increased by an amount calculated by multiplying the GST Exclusive Consideration by the GST rate current at the time of making the supply (the increased consideration being referred to as GST inclusive consideration).
- (c) The GST inclusive consideration must be paid or provided without set-off or deduction from any other amount and without requirement for demand:
 - (i) at the same time; and
 - (ii) in the same manner,as the GST Exclusive Consideration for that supply was otherwise required to be paid or provided.
- (d) Where the Supplier is entitled to claim an input tax credit which relates directly to a cost, loss, liability or expense required to be reimbursed or indemnified under the

Utilities Standing Offer Deed or a Services and Works Agreement, the amount to be reimbursed or indemnified must exclude the amount which the Supplier is entitled to claim as an input tax credit.

- (e) The Supplier will issue a tax invoice in respect of any taxable supplies made by the Supplier in connection with the Utilities Standing Offer Deed or a Services and Works Agreement.
- (f) Any terms used in this clause 11 that are defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("**GST Act**"), have the meaning given to those terms in the GST Act. The term **GST rate** means the percentage of the value of the taxable supply that is the amount of GST.

12. Contractor Works

12.1 Standards

The Contractor must ensure that:

- (a) any Contractor Works are carried out:
 - (i) in accordance with Best Development Practice;
 - (ii) in accordance with all Design Requirements and Construction Requirements (as the case may be);
 - (iii) in accordance with all applicable Consents and applicable Law; and
 - (iv) so as not to interfere with or cause damage to the USP Assets, except to the extent contemplated by the Contractor Works, or cause injury or damage to any person or property;
- (b) any materials supplied in connection with the Contractor Works will:
 - (i) be fit for the purpose for which they were intended;
 - (ii) be of sound quality, durability and workmanship, and unless otherwise agreed, new;
 - (iii) be free from all liens, charges and encumbrances; and
 - (iv) conform to all relevant Laws and Australian standards; and
- (c) the Contractor and its subcontractors, their employees, agents and representatives are, or after their appointment will be, competent, properly qualified, accredited and have the necessary skills to provide the Contractor Works.

12.2 Conditions for Commencement of Construction Work

The Contractor must not commence any construction work in relation to the Contractor Works until all relevant conditions precedent set out at or referred to in:

- (a) Annexure A; and
- (b) the Services and Works Agreement,

have been satisfied.

12.3 Subcontracting

- (a) Except to the extent stated otherwise in the Construction Requirements, the Contractor may subcontract the performance of all or part of any Contractor Works at its sole discretion.
- (b) The engagement of any subcontractor will not relieve the Contractor from any liability or obligation under the relevant Services and Works Agreement and the Contractor will be liable to the USP for the acts and omission of any subcontractors (and agents and employees of those persons) as if they were acts and omissions of the Contractor.

12.4 Cost of Contractor Works

The Contractor undertakes the Contractor Works at its cost (including the costs required to be incurred to obtain Consents in accordance with clauses 9 and 18).

13. USP Requested Works

- (a) Except to the extent expressly set out in any Services and Works Agreement, these General Conditions will not apply to any USP Requested Works.
- (b) The Contractor is not obliged to negotiate with the USP in relation to, nor to carry out, any USP Requested Works.

14. Safety & OHS – Compliance and Principal Contractor

- (a) To the extent that the relevant Services and Works Agreement specifies that a party other than the USP has been appointed as Principal Contractor in respect of the Contractor Works or the USP Works:
 - (i) the USP acknowledges and agrees that the USP does not have management or control of the workplace in respect of the Contractor Works or the USP Works for the purposes of the OHS Act; and
 - (ii) to the extent that the USP accesses the Site for any purpose including for the carrying out of the USP Works, the USP must comply, and ensure that any persons for whom it is responsible comply, at all times with all directions, policies and procedures of the Principal Contractor relating to work health, safety and security in respect of the Site.

- (b) To the extent that the relevant Services and Works Agreement specifies that the USP is the Principal Contractor for the Contractor Works or the USP Works, then the USP must comply with and discharge all obligations attaching to a Principal Contractor under the OHS Act and the USP acknowledges that it has management and control of the workplace to the extent necessary to discharge the duties imposed on a Principal Contractor for the period of appointment as Principal Contractor.
- (c) To the extent that the relevant Services and Works Agreement specifies that a party other than the Contractor has been appointed as Principal Contractor in respect of the Contractor Works or the USP Works:
 - (i) the Contractor acknowledges and agrees that the Contractor does not have management or control of the workplace in respect of the Contractor Works or the USP Works for the purposes of the OHS Act; and
 - (ii) to the extent that the Contractor accesses the Site for any purpose including for the carrying out of the Contractor Works, the Contractor must comply, and ensure that any persons for whom it is responsible comply, at all times with all EHS Laws and all reasonable directions, policies and procedures of the Principal Contractor relating to work health, safety and security in respect of the Site.
- (d) To the extent that the relevant Services and Works Agreement specifies that the Contractor is the Principal Contractor for the Contractor Works or the USP Works, then the Contractor must comply with and discharge all obligations attaching to a Principal Contractor under the OHS Act and the Contractor acknowledges that it has management and control of the workplace to the extent necessary to discharge the duties imposed on a Principal Contractor for the period of appointment as Principal Contractor.

15. Indemnity

- (a) The Contractor indemnifies the USP from and against any and all claims made or brought against, or Loss or Damage suffered or incurred by, the USP as a result of a claim by a third party (including Loss or Damage suffered by a third party for which the USP becomes liable), arising out of or in connection with the Contractor Works or the Project Assets, in respect of any negligent acts or omissions of, or breach of the relevant Services and Works Agreement by, the Contractor.
- (b) The Contractor indemnifies the USP from and against any and all claims made or brought against, or Loss or Damage suffered or incurred by, the USP arising out of or in connection with any damage to the Site or to the USP Assets (other than to the extent contemplated by the Contractor Works) caused or contributed to by any negligent acts or omissions of, or breach of the relevant Services and Works Agreement by, the Contractor.
- (c) The Contractor's Liability under clause 15(a) and clause 15(b) is reduced proportionately to the extent that the claim by the third party, or the relevant Loss or Damage, is caused by the wilful misconduct of, or a negligent act or omission of, the USP or its consultants, agents or subcontractors, or a breach of the relevant Services and Works Agreement by the USP.

16. Limitation of Liability

16.1 Limitation - USP

Notwithstanding any other provision of the relevant Services and Works Agreement but subject to clause 16.4, the maximum aggregate liability of the USP to the Contractor, whether arising under or in connection with the relevant Services and Works Agreement or the performance or non-performance thereof or anything incidental thereto, and whether by way of indemnity, by statute, in tort (for negligence or otherwise) or on any basis in law or equity, is limited to the amount stated in the relevant Services and Works Agreement Particulars.

16.2 Limitation - Contractor

Notwithstanding any other provision of the relevant Services and Works Agreement but subject to clause 16.4, the maximum aggregate liability of the Contractor to the USP, whether arising under or in connection with the relevant Services and Works Agreement or the performance or non-performance thereof or anything incidental thereto, and whether by way of indemnity, by statute, in tort (for negligence or otherwise) or on any basis in law or equity, is limited to the amount stated in the relevant Services and Works Agreement Particulars.

16.3 Exclusion of Indirect or Consequential Loss

Subject to clause 16.4, in no event will either party be liable to the other party for any Indirect or Consequential Loss arising out of or in connection with a Services and Works Agreement, and whether by way of indemnity, by statute, in tort (for negligence or otherwise) or on any basis in law or equity.

16.4 Exceptions

Clauses 16.1, 16.2 and 16.3 do not apply to limit or restrict in any way:

- (a) any Liability of the USP or the Contractor for fraud or criminal conduct of the relevant party or its employees, subcontractors or agents;
- (b) any Liability that cannot be limited or excluded at law;
- (c) any Liability for death or personal injury;
- (d) any Liability of the USP or the Contractor to the extent the USP or the Contractor (as applicable) is paid or indemnified, or is entitled to be paid or indemnified, for the liability by an insurer under an insurance policy required by the Services and Works Agreement or otherwise;
- (e) any Liability of the USP or the Contractor to the extent the USP or the Contractor (as applicable) would have been entitled to be paid or indemnified for the liability by an insurer under an insurance policy required by any Services and Works Agreement, but for a failure by the USP or the Contractor (as applicable) to effect and maintain the insurance policy as required by the relevant Services and Works Agreement;
- (f) any Liability to the extent that the USP or the Contractor is paid or indemnified, or entitled to be paid or indemnified, by any third party, for that liability; or
- (g) any Liability of the USP or the Contractor in respect of any breach of warranty contained in clause 5.

17. Damage to operating USP Assets

Upon becoming aware of any damage to the USP Assets caused by the Contractor or its Representatives, other than to the extent contemplated by the Contractor Works, the Contractor must promptly rectify the damage.

18. Compliance with Laws

- (a) The Contractor must, at its cost:
 - (i) obtain and maintain all Consents required to carry out the Contractor Works and any other consents stated in the Services and Works Agreement as being the responsibility of the Contractor to obtain and maintain and provide copies to the USP upon request;
 - (ii) comply with all relevant Laws, including in connection with the Contractor's use of the Site in accordance with the relevant Services and Works Agreement, including EHS Laws;
 - (iii) comply with the Contractor's own policies and procedures in respect of health, safety and the environment, which must meet or exceed the standards and requirements of all applicable Laws, and
 - (iv) comply with all directions of any Authority, except where the Authority is the USP, and the direction is being given other than in the course of the USP acting properly in accordance with any legislative or regulatory powers it may have.
- (b) Nothing in these General Conditions or in any Services and Works Agreement will in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of the USP to exercise any of its statutory functions or power pursuant to any Law, or the ability of the USP to comply with Law.

19. Notification of incidents

The Contractor must immediately notify the USP if it becomes aware of:

- (a) any damage to any USP Asset;
- (b) any interference with any Existing USP Asset or New USP Asset; or
- (c) any hazard affecting or threatening the Site, any Existing USP Assets or any other New USP Assets, or arising from the Contractor's use of the Site,

except as expressly specified as part of the Contractor Works, or:

- (d) any Contamination; or
- (e) any occupational health and safety incident or personal injury,

which occurs on the Site in the carrying out of Contractor Works on or in connection with a USP Asset.

20. Site Conditions and Contamination

- (a) This clause 20 only applies to the extent that the USP is the owner of the Site.

- (b) During the Access Period and Defects Correction Period, the USP grants to the Contractor and the Contractor's Representatives a non-exclusive licence to access the Site to carry out the Contractor Works subject to the terms and conditions of the relevant Services and Works Agreement.
- (c) Notwithstanding that the licence granted under clause 20(b) is non-exclusive, and subject to its emergency rights under clause 27, if the USP proposes to grant any third party access to the Site during the Access Period or Defects Correction Period, it must:
 - (i) give the Contractor 10 Business Days prior written notice of the proposed access; and
 - (ii) ensure the terms of access require the third party to comply with directions of the Contractor and the Principal Contractor.
- (d) On and from the commencement of the Access Period and up to the expiry of the Defects Correction Period, the Contractor:
 - (i) accepts the Site in its existing state and condition including:
 - (A) any existing Contamination of the Site; and
 - (B) the condition of any existing improvements located on the Site;
 - (ii) acknowledges and agrees it is not entitled to make any claim against the USP in respect of the matters referred to in clause 20(a); and
 - (iii) acknowledges and agrees that the USP gives no warranty and makes no representation to the Contractor as to the physical condition of the Site or surrounding areas or that the Site is or will remain suitable for the Contractor Works.
- (e) The Contractor is responsible solely at the Contractor's cost for any investigations and works associated with the remediation of Contamination caused, contributed to, exacerbated, disturbed or released by it or its Representatives from the Site or Existing USP Assets, in the course of carrying out or arising from the Contractor Works or otherwise arising from any act, default or omission of the Contractor or its Representatives in carrying out the Contractor Works.
- (f) On and from the commencement of the Access Period and up to the expiry of the Defects Correction Period the Contractor must:
 - (i) ensure that no hazardous materials emanate from or spill into the Site or from the Site; and
 - (i) to the extent that the Contractor or its Representative has caused or contributed to Contamination of the Site or any adjacent land or water areas, immediately rectify that Contamination to the USP's reasonable satisfaction, and the Contractor acknowledges that the USP is not liable for any such Contamination to the extent that the Contractor or its Representative has caused or contributed to it.
- (g) The Contractor must not, and must ensure that its Representatives do not:
 - (i) dispose of any rubbish, plant, animal or other substance whatsoever in or on the Site or adjacent land;

- (ii) dispose of any contaminant, Pollution, chemicals or substance onto or into the Site or adjacent land;
 - (iii) do anything which will interfere with any structures in or about the Site generally except to the extent contemplated by the Contractor Works;
 - (iv) fail to comply with any EHS Laws; and
 - (v) do (or allow the doing of) anything on the Site, or bring (or allow the bringing of) anything onto the Site which will or may have the effect of making land or water unsafe, unfit or harmful for habitation, use or occupation by any person or animal or which may have the effect of making land or water not satisfy the criteria or standards published or adopted by the Victorian Environment Protection Authority (or other similar Authority).
- (h) If the USP, acting reasonably, believes that Contamination may have been caused, contributed to, exacerbated, disturbed or released by the Contractor, or the Contractor's Representatives, the USP by written notice to the Contractor may require the Contractor, at the Contractor's cost, to immediately undertake any investigations and works to determine whether Contamination may have so been caused, contributed to, exacerbated, disturbed or released by the Contractor or its Representatives and whether any remediation or other action is required. The Contractor must provide the USP with a copy of any report prepared in relation to such investigation or works promptly following issue of any such report.

21. Assignment and novation

21.1 Assignment

Each party may only assign its rights under the relevant Services and Works Agreement with the prior written consent of the other party (not to be unreasonably withheld).

21.2 Novation

When directed by the Contractor from time to time, the USP, without being entitled to compensation, must promptly execute a deed of novation of a Services and Works Agreement, as the Contractor may specify, in the form of Annexure F of the Utilities Standing Offer Deed, such deed being between the USP, the Contractor and such other contractor as the Contractor may nominate.

22. Reinstatement of the Site and Assets

22.1 Reinstatement obligation

- (a) On the expiration or earlier termination of the Access Period and again at the expiry of any Defects Correction Period, the Contractor must (to the USP's reasonable satisfaction):
 - (i) make good any damage to the Existing USP Assets or New USP Assets caused by or arising out of or in connection with the Contractor Works (except to the extent contemplated by the Contractor Works); and
 - (ii) to the extent the USP owns the Site:
 - (A) remove the Contractor's Property from the Site (excluding the Project Assets);

- (B) make good any damage to the Site caused by or arising out of or in connection with the Contractor Works;
 - (C) remove all Contamination brought on to the Site by the Contractor; and
 - (D) reinstate the Site to substantially the same condition the Site was in at the commencement of the Access Period, as may be detailed in the Condition Report (if any), except to the extent contemplated by the Contractor Works.
- (b) The Contractor must comply with clause 22.1(a) within a reasonable time from the date of the termination or expiration of the Access Period or the expiry of any Defects Correction Period, as applicable.

23. Ownership of Assets

23.1 Ownership

- (a) The parties agree that any New USP Assets will remain the property of the Contractor (whether or not the Project Asset has, either in whole or in part, become fixed to the Site or any nearby land) until Practical Completion in accordance with clause 24.2, at which time ownership will transfer to the USP.
- (b) Nothing in the Services and Works Agreement makes the USP the owner of any Project Asset.

23.2 Contractor Warranty

The Contractor warrants that at Practical Completion the Contractor will be able to transfer title in any New USP Assets and all materials forming part of such New USP Assets to the USP.

23.3 Condition of Retained USP Assets

- (a) The Contractor must keep the Retained USP Assets in the Acceptable Condition during the carrying out of the Project Works, except to the extent that any Retained USP Asset is not in the Acceptable Condition prior to commencement of the Project Works or due to any act or omission of the USP.
- (b) The Contractor must carry out inspections as often as may be required, and undertake repairs and maintenance and any other work required, in order to comply with clause 23.3(a).

24. Practical Completion

24.1 Contractor to notify of Practical Completion

The Contractor must give the USP written notice of 14 Business Days before the date that it anticipates that the Contractor Works will reach Practical Completion and that the Contractor Works will be ready for the Practical Completion inspection.

24.2 Inspection of USP Assets at Practical Completion

After receiving the Contractor's written notice under clause 24.1, the USP must:

- (a) promptly, and in any event no later than 10 Business Days after receiving such notice attend, jointly with the Contractor at an agreed date and time, a Practical

Completion inspection of the Contractor Works with all access and resources being provided by the Contractor; and

- (b) if:
 - (i) satisfied (acting reasonably) that the Contractor Works have reached the stage of being:
 - (A) either:
 - (1) complete; or
 - (2) complete except for minor defects which do not prevent the Impacting Contractor Works from being reasonably capable of being used for the intended purpose ("**Minor Defects**"); and
 - (B) maintainable, operable, accessible, clean and free of materials and/or blockages,

("**Practical Completion**"),

provide the Contractor with a written notice:
 - (C) confirming that the Contractor Works have reached Practical Completion; and
 - (D) containing a list of any Minor Defects; or
 - (ii) not satisfied (acting reasonably) that the Contractor Works have reached Practical Completion, provide the Contractor with a written notice with reasons for its opinion in which case, clause 24.1 applies anew.

Notwithstanding anything in this clause 24.2, prior to Practical Completion of a New USP Asset, the Contractor must provide to the USP the Practical Completion Information to the USP's satisfaction, acting reasonably.

24.3 Provision of Handover Information

Within three (3) calendar months of receiving a notice under clause 24.2(b)(i), the Contractor must, rectify all Minor Defects (if any) listed in clause 24.2(b)(i) and provide to the USP the Handover Information to the USP's satisfaction, acting reasonably.

24.4 Defects Correction Period

The Defects Correction Period will commence from the date of Practical Completion and will run for the period stated in the Services and Works Agreement.

25. Further Agreements

Each party must do everything (including executing agreements and documents) necessary or reasonably required by any other party to give full effect to the relevant Services and Works Agreement and the transactions contemplated by the relevant Services and Works Agreement (including any agreement necessary for the Project Assets to remain on the Site (if required)).

26. Further access

- (a) Whenever after the expiry of the Access Period the Contractor seeks to excavate, construct, replace, alter, rectify, upgrade or decommission a Project Asset in such a way that impacts on an Existing USP Asset or a New USP Asset ("**Proposed Works**") it must submit an application to the USP ("**Application**") for the USP's approval, which must contain:
 - (i) a detailed description, detailed design drawings, plans and specifications and other information that the USP reasonably requires of the Proposed Works; and
 - (ii) the proposed timeframe for the Proposed Works.
- (b) The USP must within the time stated in the Application, or if none, a reasonable time given the urgency of the Proposed Works, assess the Application and may, acting reasonably, reject, approve or provide conditional approval for an Application.
- (c) If the USP approves an Application, it must provide the Contractor with written notification that the Application has been approved and setting out the conditions upon which the USP, acting reasonably, grants the Application, including payment of any fee payable as reasonably determined by the USP.
- (d) The Contractor acknowledges and agrees that despite any approval given by the USP, the Contractor remains responsible for any required design and execution of Proposed Works. Any approval granted by the USP does not affect the obligations of the Contractor under the Utilities Standing Offer Deed or the relevant Services and Works Agreement.
- (e) The Contractor must not commence any Proposed Works until the USP has approved the Application and notified the Contractor in writing of its approval and any amendments required by the USP under clause 26(c).

27. Emergency

- (a) If the USP determines (acting reasonably) that there is a significant risk that the USP will incur any Loss or Damage arising in connection with a Project Asset or the Contractor's use of the Site, and the USP has notified the Contractor of the circumstances giving rise to the significant risk determined by the USP, but the Contractor is unable to (or fails to) attend the Site within 24 hours (or such other time as mutually agreed between the parties) from being notified, the USP may take any measures in relation to the Project Asset or to the Site which are reasonably required to ameliorate that risk or rectify the fault until the Contractor or the Contractor's Representatives attend the Site.
- (b) If the USP takes any measures under this clause 27:
 - (i) the USP must take reasonable care not to damage any Project Asset;
 - (ii) if the relevant Services and Works Agreement specifies that the USP is not the Principal Contractor for the Contractor Works or the USP Works, the USP must comply with directions issued by the Principal Contractor in its capacity as Principal Contractor; and
 - (iii) any cost, loss, Liability or expense reasonably incurred by the USP in exercising its rights under this clause 27 will be a debt due from the

Contractor to the USP, except to the extent that such cost, loss, liability or expense was incurred due to any act or omission of the USP.

28. Termination

28.1 Effect of termination on Services and Works Agreements

The Contractor and the USP agree that if the Utilities Standing Offer Deed is terminated, discharged (including through expiry) or becomes frustrated, the separate Services and Works Agreements formed in accordance with the provisions of the Utilities Standing Offer Deed will not be affected and must be fulfilled in accordance with the terms of the relevant Services and Works Agreements, unless the parties otherwise agree in writing.

28.2 Termination for convenience

- (a) The Contractor may, at any time for its sole convenience by written notice to the USP terminate a Services and Works Agreement from the date stated in the notice. The termination of a Services and Works Agreement pursuant to this clause 28.2 will be without prejudice to the rights of either party to recover damages in respect of any prior breach of contract by the other party.
- (b) If the Contractor terminates a Services and Works Agreement under this clause 28.2, the USP will be entitled to payment of:
 - (i) such reasonable costs as it would have been entitled to under the provisions of the relevant Services and Works Agreement, but only to the extent that such costs have been actually and properly incurred as at the date of the notice; and
 - (ii) such reasonable costs actually and properly incurred directly arising as a result of the termination (including any amounts actually and properly payable to the USP's subcontractors as a consequence of the termination),

being, in the aggregate, limited to such USP Works Costs which have not yet been paid as at the date of the notice.

29. Disputes

29.1 Procedure for resolving disputes

- (a) **(Disputes to be resolved):** Any dispute between the parties arising under a Services and Works Agreement must be resolved in accordance with this clause 29.
- (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 29.2;
 - (ii) secondly, if the dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 29.2(c)(i) the parties may agree that the dispute must be referred to an expert for determination in accordance with clauses 29.4 to 29.8 (inclusive); 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 29.2(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 within 20 Business Days after the expiration of the period for negotiation referred to in clause 29.2(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 29.6(a),

then either party may commence proceedings.

29.2 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 Senior Representatives.
- (b) **(Contents of Notice)**: A notice under clause 29.2(a) must:
 - (i) state that it is a notice under this clause 29; 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 29.2(a), then:
 - (i) the Senior 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 29.2(a) is received (or such later date as the parties may agree); and
 - (ii) any agreement reached between the Senior Representatives will be reduced to writing, signed by or on behalf of each party and will be contractually binding on the parties.

29.3 Expert determination

If:

- (a) **(dispute unresolved by Senior Representatives)**: a dispute which has been referred to the Senior Representatives for negotiation in accordance with clause 29.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 29.2(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 29.2(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 in accordance with clauses 29.4 to 29.8. For the avoidance of doubt, a dispute may only be referred to an expert for determination by agreement of the parties.

29.4 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 29.3, the parties must exchange lists of 3 persons (in order of preference) who, if appointed, would satisfy the requirements of clause 29.4(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 29.4(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 29.2(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 29.2(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 29.4(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 29.4(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 29.4 on the basis that the expert does not satisfy the requirements of clause 29.4(d).
- (f) **(Not an arbitration agreement):** Any agreement for expert determination under the relevant Services and Works 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.

29.5 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.

29.6 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 a notice of dissatisfaction to the other party.
- (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.

29.7 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.

29.8 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.

30. Notices

All notices or other communications in connection with a Services and Works Agreement:

- (a) **(in writing):** must be in writing;
- (b) **(addressed):** must be addressed as specified in the Services and Works Agreement or to such other addressee as notified by the receiving party to the other party from time to time;
- (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 or emailed to the email address of the addressee as referred to in clause 30(b); and
- (e) **(taken to be received):** are taken to be received by the addressee:
 - (i) in the case of delivery by hand, on delivery at the address of the addressee as referred to in clause 30(b), unless that delivery is outside the hours of 9am to 5pm on a Business Day, 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, on 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.

31. General

31.1 Amendments

Unless otherwise expressly provided in the relevant Services and Works Agreement, the relevant Services and Works Agreement may only be amended by a document executed by the parties.

31.2 Waiver

- (a) Other than where the waiver is already given expressly in the terms of the relevant Services and Works Agreement, a waiver that may be given by a party under the relevant Services and Works Agreement is only effective and binding on that party if it is given or confirmed in writing by that party.
- (b) A failure to exercise or enforce, a delay in the exercise or enforcement of or the partial exercise or enforcement of a right provided by Law or under the relevant Services and Works Agreement 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 provided by Law or under the relevant Services and Works Agreement.
- (c) No waiver of a breach of a term of the relevant Services and Works Agreement operates as a waiver of another breach of that term or of a breach of any other term of the relevant Services and Works Agreement.

31.3 Survival of certain provisions

- (a) All provisions of the relevant Services and Works Agreement which, expressly or by implication from their nature, are intended to survive the rescission, termination or expiration of the relevant Services and Works Agreement will survive the rescission, termination or expiration of the relevant Services and Works Agreement, including any provision in connection with:
 - (i) a party's rights to set-off and recover amounts;

- (ii) confidentiality or privacy;
 - (iii) Intellectual Property Rights;
 - (iv) any obligation to make any books and accounts and all other records or information available to a party;
 - (v) any indemnity, release or financial security given under the relevant Services and Works Agreement;
 - (vi) any limitation on Liability;
 - (vii) any obligation which the relevant Services and Works Agreement requires a party to undertake after the rescission, expiration or termination of the relevant Services and Works Agreement; or
 - (viii) any right or obligation arising on termination, rescission or expiry of the relevant Services and Works Agreement.
- (b) No provision of the relevant Services and Works Agreement which is expressed to survive the rescission, termination or expiration of the relevant Services and Works Agreement will prevent any other provision of the relevant Services and Works Agreement, as a matter of interpretation, also surviving the rescission, termination or expiration of the relevant Services and Works Agreement.
- (c) No right or obligation of any party will merge on completion of any transaction under the relevant Services and Works Agreement. All rights and obligations under the relevant Services and Works Agreement survive the execution and delivery of any transfer or other document which implements any transaction under the relevant Services and Works Agreement.

31.4 No further rights

The rights conferred on the Contractor by the relevant Services and Works Agreement are contractual only and nothing in the relevant Services and Works Agreement creates any tenancy between the USP and the Contractor or gives the Contractor any interest in the Site or any part of the Site (including occupation rights (other than under the relevant Services and Works Agreement), easements or rights of way of any kind).

31.5 Parties to bear their own costs

Each party must bear its own costs in connection with the use of the Site and compliance with the terms of the relevant Services and Works Agreement, including all costs and expenses in connection with negotiating, preparing, and executing the relevant Services and Works Agreement.

31.6 Governing Law and jurisdiction

- (a) The relevant Services and Works Agreement is governed by, and must be construed according to, the Laws of Victoria, Australia.
- (b) Each party irrevocably submits to the non-exclusive jurisdiction of the courts of Victoria, and the courts competent to determine appeals from the courts of Victoria, with respect to any proceedings which may be brought in connection with the relevant Services and Works Agreement.

31.7 Proportionate liability

- (a) 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 a Services and Works Agreement whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.
- (b) Without limiting clause 31.7(a), the rights, obligations and liabilities of the parties (including those relating to proportionate liability) are as specified in the relevant Services and Works Agreement and not otherwise, whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.

31.8 Relationship of parties

- (a) Neither party is authorised to bind or make representations on behalf of the other party, or to pledge its credit.
- (b) Nothing in any Services and Works Agreement is to be interpreted as creating an employment, agency, partnership or joint venture relationship between any parties.
- (c) If either party enters into a Services and Works Agreement as trustee of any trust then it does so both in its own right and as trustee of the relevant trust and represents and warrants to the other party that it has the power under the trust's constituent documents to enter into the Services and Works Agreement and that entering into the Services and Works Agreement is for the benefit of all the beneficiaries of the trust.

31.9 Severance

If, at any time, a provision of the relevant Services and Works Agreement 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 the relevant Services and Works Agreement; or
- (b) that provision under the Law of any other jurisdiction.

31.10 Counterparts

The relevant Services and Works Agreement may be executed in any number of counterparts and by the parties in separate counterparts. Each counterpart constitutes the relevant Services and Works Agreement of each party who has executed and delivered that counterpart. All such counterparts taken together will be deemed to constitute one and the same relevant Services and Works Agreement.

Annexure A – Conditions for Commencement of Construction Work

(clause 12.2)

1. The Contractor has:
 - (a) completed and submitted all USP Standard Application Forms, in a form which complies with the reasonable terms of the relevant USP Standard Application Form or USP Policies and Requirements, and within any reasonable timeframes specified in the relevant USP Standard Application Form or USP Policies and Requirements, and if none, within a reasonable time; and
 - (b) prepared and submitted any documents (including design documents) reasonably required to be submitted by the reasonable terms of any relevant USP Standard Application Form or USP Policies and Requirements, in a form which complies with those terms and within any reasonable timeframes specified in the relevant USP Standard Application Form or USP Policies and Requirements, and if none, within a reasonable time.
2. The USP, acting reasonably, has provided any consent reasonably required under the relevant USP Policies and Requirements, to all standard forms or documents submitted by the Contractor in accordance with sections 1(a) and 1(b) of this Annexure A. The USP must notify the Contractor, within 20 Business Days after submission of a document under section 1(a) or 1(b) of this Annexure A, that it:
 - (a) provides such consent; or
 - (b) does not provide such consent, in which case the USP must provide reasons for not providing consent.

Annexure B – Template Services and Works Agreement Particulars

[Drafting Note: Template Services and Works Agreement Particulars to be attached prior to execution of this Standing Offer Deed.]

[Insert Project] - Services and Works Agreement Particulars

Parties

[insert name] ABN **[insert]** of **[insert address]** (the **USP**)

[insert name] of ABN **[insert]** of **[insert address]** (the **Contractor**)

Services and Works Agreement Particulars – **[insert site name]**

Services and Works Agreement Particulars number – **[insert services and works agreement particulars number]**

The parties acknowledge and agree that upon execution by the parties this document, together with the General Conditions attached as Annexure A to the Utilities Standing Offer Deed entered into by the parties in respect of the Project, will form a binding agreement.

Access Period (clauses 1.1, 6 General Conditions)	Start date: [insert] End date: date of Practical Completion
Condition Report (clauses 1.1, 22.1(a) General Conditions)	Refer to Attachment 1.
Construction Requirements (clauses 1.1, 4(b) General Conditions)	Refer to Attachment 3.
Contractor Works (clauses 1.1, 12 General Conditions)	[insert]
Defects Correction Period – end date (clauses 1.1, 24.4 General Conditions)	End date: [insert]
Design Requirements (clauses 1.1, 3(b) General Conditions)	Refer to Attachment 2.

<p>Existing USP Assets</p> <p>(clause 1.1 General Conditions)</p>	<p>The Project Works are expected to impact on the following assets:</p> <p>[insert details of the existing USP assets that will be impacted upon by the interface works being conducted by the Contractor.]</p>
<p>Handover Information</p> <p>(clauses 1.1, 24.3 General Conditions)</p>	<p>[insert details of all information required by USP to be provided at the time stated in clause 24.3, including any requirements for as-built drawings and specifications.]</p>
<p>New USP Assets</p> <p>(clause 1.1 General Conditions)</p>	<p>The following assets in respect of which, when constructed, title will revert to the USP:</p> <p>[insert details of the new assets that will be handed over to the USP on completion, including all supports and structures associated with the assets e.g. brackets, conduits.]</p>
<p>Plan</p> <p>(clause 1.1 General Conditions)</p>	<p>See plan entitled [insert title of plan] attached to this Services and Works Agreement Particulars in Attachment 4 [Insert if applicable – see definition of "Site" in the Services and Works Agreement Particulars.]</p>
<p>Practical Completion Information</p> <p>(clause 1.1 General Conditions)</p>	<p>[insert details of all information required by USP for Practical Completion, including any requirements for as-built drawings and specifications.]</p>
<p>Project Assets</p> <p>(clause 1.1 General Conditions)</p>	<p>[insert details of the assets to be constructed, installed, upgraded or decommissioned at the Site.]</p>
<p>Project Works (including Contractor Works and USP Works)</p> <p>(clause 1.1 General Conditions)</p>	<p>(a) For Contractor Works (refer to Attachment 6);</p> <p>(b) For USP Works (refer to Attachment 5); and</p> <p>(c) Other: [insert details of the other works to be carried out on the Site, if any, or insert not applicable]</p>
<p>Site</p> <p>(clause 1.1 General Conditions)</p>	<p>[Description of location of the Project Works] – Australian Map Grid reference or being more particularly described in [Certificate of Title Volume [*] Folio [*] / Part Certificate of Title Volume [*] Folio [*] known as [insert address of Site] and being the area [insert description of how area is identified e.g. hatched or coloured yellow] on the Plan.</p>
<p>USP Policies and Requirements</p> <p>(clause 1.1 General Conditions)</p>	<p>[insert reference to applicable USP Policies and Requirements]</p>

<p>USP Works</p> <p>(clause 1.1 General Conditions)</p>	<p>Refer to Attachment 5.</p>
<p>USP Works Completion Test</p> <p>(clause 1.1 General Conditions)</p>	<p>[insert all Contractor's requirements to be satisfied in relation to USP Works in order for Contractor to issue Certificate of USP Works Completion in respect of USP Works]</p>
<p>USP Works Costs</p> <p>(clause 1.1, 10 General Conditions)</p>	<p>[\$[insert]].</p> <p><i>[Drafting note: refer to the relevant positions under the Standing Offer Deed, including Annexure C]</i></p>
<p>Changes to General Conditions</p> <p>(clause 2.1 General Conditions)</p>	<p>[insert any changes to terms specific to these Works (including, for example specific issues in relation to land/site, Approvals)]</p>
<p>USP Works to be completed before Access Period can commence</p> <p>(clause 6(b) General Conditions)</p>	<p>[insert details of USP Works which must be completed before Access Period can commence (if any) or insert not applicable]</p>
<p>Other conditions precedent to be satisfied before Access Period can commence</p> <p>(clause 6(c) General Conditions)</p>	<p>[insert any conditions precedent additional to those listed in clause 6(d) or insert not applicable]</p>
<p>Party responsible for carrying out Contestable Works</p> <p>(clause 8(b) General Conditions)</p>	<p>[insert "Contractor" or "USP", or insert not applicable]</p>
<p>Consents for USP Works which Contractor not required to obtain and maintain</p> <p>(clause 9.1(a) General Conditions)</p>	<p>[insert any Consents which are required for USP Works (if any) but which the Contractor is not responsible for obtaining/maintaining (if any) or insert not applicable]</p>

<p>Time for carrying out USP Works and date of USP Works Completion</p> <p>(clauses 9.1(d) and 9.7(a) General Conditions)</p>	<p>[insert a description of the timing for the date of USP Works Completion or period]</p>
<p>Whether clause 9.1(e) applies</p> <p>(clause 9.1(e) General Conditions)</p>	<p>Yes/No [delete one]</p>
<p>Whether clause 9.7 applies</p> <p>(clause 9.7 General Conditions)</p>	<p>Yes/No [delete one]</p>
<p>Number of days' notice of USP Works Completion</p> <p>(clause 9.7(b) General Conditions)</p>	<p>[insert number of days written notice which USP must give Contractor of date on which USP considers that USP Works Completion will be reached. If clause 9.7 does not apply, insert not applicable]</p>
<p>Number of days for Contractor to give USP Works Completion Certificate or reasons why not</p> <p>(clause 9.7(d) General Conditions)</p>	<p>[insert number of days. If clause 9.7 does not apply, insert not applicable]</p>
<p>Due dates for payment of USP Works Costs</p> <p>(clause 10.1 General Conditions)</p>	<p>[insert (if any) or insert not applicable]</p>
<p>Conditions precedent to commencement of construction work in relation to Contractor Works</p> <p>(clause 12.2(b) General Conditions)</p>	<p>[insert (if any) or insert not applicable]</p>

<p>Application of General Conditions to USP Requested Works</p> <p>(clause 13(a) General Conditions)</p>	<p>[insert details of any USP Requested Works which are intended to be subject to the General Conditions or insert not applicable]</p>
<p>Identity of Principal Contractor for purposes of the OHS Act</p> <p>(clauses 14, 27(b) General Conditions)</p>	<p>For Contractor Works: [insert name and details of Principal Contractor]</p> <p>For USP Works: [insert name and details of Principal Contractor]</p>
<p>Limitation - USP</p> <p>(clause 16.1 General Conditions)</p>	<p>[insert]</p>
<p>Limitation - Contractor</p> <p>(clause 16.2 General Conditions)</p>	<p>[insert]</p>
<p>Additional consents (if any) to be obtained and maintained by Contractor</p> <p>(clauses 1.1, 18(a) General Conditions)</p>	<p>[insert additional consents (if any) or insert not applicable]</p>
<p>Addresses for Notices</p> <p>(clauses 30(b), 30(d) General Conditions)</p>	<p>[insert, including the relevant Contractor and USP contact person]</p> <p><u>Contractor</u></p> <p>Name (Contractor Contact Person): [insert]</p> <p>Address: [insert]</p> <p>Email: [insert]</p> <p><u>USP</u></p> <p>Name (USP Contact Person): [insert]</p> <p>Address: [insert]</p> <p>Email: [insert]</p>

[insert Project name]

Template Services and Works Agreement Particulars

Commercial in Confidence

Signing page

Executed as a deed.

Executed by [insert Contractor] in accordance with section 127 of *the Corporations Act 2001* (Cth):

Signature of director

Signature of company secretary/director

Full name of director

Full name of company secretary/director

Date of signature

Date of signature

[insert Project name]

Template Services and Works Agreement Particulars

Commercial in Confidence

Executed by [insert USP] in accordance with section 127 of the *Corporations Act 2001* (Cth):

Signature of director

Signature of company secretary/director

Full name of director

Full name of company secretary/director

Date of signature

Date of signature

[insert Project name]

Template Services and Works Agreement Particulars

Commercial in Confidence

Attachment 1 – Condition Report

(Clauses 1.1 and 22.1(a) of General Conditions)

(to be attached, if any or insert not applicable)

[insert Project name]

Template Services and Works Agreement Particulars

Commercial in Confidence

Attachment 2 – Design Requirements

(Clauses 1.1 and 3(b) of General Conditions)

(to be attached, if any or insert not applicable)

[insert Project name]

Template Services and Works Agreement Particulars

Commercial in Confidence

Attachment 3 – Construction Requirements

(Clauses 1.1 and 4(b) of General Conditions)

(to be attached, if any or insert not applicable)

[Drafting note: The Construction Requirements should set out any restrictions to the Contractor's ability to subcontract the performance of the Contractor Works (or part thereof).]

[insert Project name]

Template Services and Works Agreement Particulars

Commercial in Confidence

Attachment 4 – Plan

(Clause 1.1 of General Conditions)

(to be attached, if any or insert not applicable)

[insert Project name]

Template Services and Works Agreement Particulars

Commercial in Confidence

Attachment 5 – USP Works

(Clauses 1.1 and 9 of the General Conditions)

[insert details for works (if any) that will be undertaken by USP as a result of or otherwise in connection with the Project Works, including relevant drawings, plans and specifications]

[insert Project name]

Template Services and Works Agreement Particulars

Commercial in Confidence

Attachment 6 – Contractor Works

(Clauses 1.1 and 12 of the General Conditions)

[specify all works associated with the installation, upgrade, or decommission of the Project Assets, including but not limited to excavation, construction, installation, maintenance, replacement, repairing, renewing, altering, upgrading or decommissioning the Project Assets, and list all documents describing the Project Works including drawings, plans and specifications]

Annexure C – Agreed Pricing Principles

[Insert details of pre-agreed rates provided by USP and accepted by Contractor for calculating:

(a) USP Works Costs, including any design work;

(b) fees or costs for review by USP of any design carried out by Contractor;

(c) fees for processing any applications which Contractor may be required to make under relevant USP Corporate Policies; and

(d) any other fees or costs agreed in the General Conditions to be payable in principle by the Contractor to the USP,

where USP Works Costs and USP Corporate Policies have the meanings given to those terms in the General Conditions.]

[The USP acknowledges and agrees that the Agreed Pricing Principles are inclusive of all overheads and profit.]

Annexure D – Relevant Contractor Area

(Clause 1.1)

[Drafting Note: To be attached prior to execution of this Standing Offer Deed.]

Annexure E – Expert Determination Agreement

(Clauses 1.1 and 5.4(g))

Expert Determination Agreement

[Insert]

(Contractor)

[Insert]

(USP)

[Insert]

(Expert)

Contents

- 1. Definitions.....27**
 - 1.1 Standing Offer Deed definitions.....27
 - 1.2 Definitions27
 - 1.3 Interpretation.....28
- 2. Relationship of parties29**
- 3. Appointment of Expert29**
- 4. Confidentiality30**
- 5. Costs and fees.....30**
- 6. Exclusion of liability and indemnity.....30**
- 7. Co-operation of the Parties.....30**
- 8. Governing Law and jurisdiction30**
- 9. Termination.....31**
- 10. Counterparts.....31**
- 11. Survival of terms31**
- Schedule 1 – The Matter33**
- Schedule 2 – Rules for Expert Determination Process34**
- Schedule 3 – Schedule of Fees and Disbursements37**

Expert Determination Agreement

Date

Parties [insert party name and address] (**Contractor**)

[insert party name and address] (**USP**)

[insert name and address of Expert agreed between the Parties or appointed pursuant to clause 5.4, 7.1(b) or 7.1(c) (as the case may be) of the Standing Offer Deed or the equivalent clause in each Relevant Agreement] (**Expert**)

Recitals

- A. The background to the Project is set out in the Standing Offer Deed.
- B. On [insert], the Parties agreed that the matter described in Schedule 1 be determined by an Expert appointed under clause [insert relevant clause reference] of the Relevant Agreement.
- C. In accordance with clause [insert relevant clause reference] of the Relevant Agreement, the Expert has been appointed to determine the Matter in accordance with the process set out in this Agreement.

Operative provisions

1. Definitions

1.1 Standing Offer Deed definitions

Unless otherwise expressly defined, expressions used in this Agreement have the meanings given to them in the Standing Offer Deed.

1.2 Definitions

In this Agreement, unless the context otherwise provides:

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

Code of Conduct means the code of conduct set out in section 2 of Schedule 2.

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

Entity has the meaning given in section 64A of the Corporations Act, but is also deemed to include a joint venture within the meaning of Australian Accounting Standard 131 (AASB 131).

Matter means a dispute under, arising out of, or in connection with the Relevant Agreement and referred to expert determination under clause [#insert relevant clause reference] of the Relevant Agreement, and as described in Schedule 1.

Party means [insert party names].

Project has the meaning given in the Standing Offer Deed.

Relevant Agreement means [insert the relevant document under which the Matter arose].

Rules means the "Rules for Expert Determination Process" set out in Schedule 2.

Schedule means a schedule to this Agreement.

Schedule of Fees and Disbursements is contained in Schedule 3.

Standing Offer Deed means the document titled "Standing Offer Deed" entered into by the USP and Contractor on [insert date].

1.3 Interpretation

In this Agreement:

- (a) **(headings)**: headings and subheadings are for convenience only and do not affect interpretation;
- (b) **(number 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 or Schedule is a reference to a party, clause or Schedule, of or to this Agreement; and
 - (ii) a section or part is a reference to a section or part of the Schedule in which they are located,

unless expressly provided otherwise;

- (d) **(document as amended)**: a reference to a deed, agreement, document or instrument means a reference to such 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 and, in the case of a trustee, includes a substituted or additional trustee;
- (f) **(person)**: a reference to a person includes an individual, the estate of an individual, a corporation, a body corporate, an Authority, an association or a joint venture (whether incorporated or unincorporated), a partnership, an Entity and a trust;
- (g) **(replacement person)**: a reference to a person appointed under this Agreement includes that person's replacement or delegate appointed in accordance with this Agreement (as applicable);
- (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")**: "include", "includes" and "including" 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) ("**Business Day**"): if the day on or by which anything is to be done under this Agreement is not a Business Day, that thing must be done no later than the next Business Day;
- (n) ("**time**"): a reference to time is a reference to time in Melbourne, Victoria, Australia;
- (o) ("**rights**"): a reference to a right includes any benefit, remedy, function, discretion, authority or power;
- (p) ("**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;
- (q) ("**no bias against drafter**"): each provision will be interpreted without disadvantage to the party who (or whose representative) drafted or proposed that provision; and
- (r) ("**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.

2. Relationship of parties

Unless otherwise expressly provided, nothing in this Agreement creates a partnership, joint venture, fiduciary, employment or agency relationship between the Parties.

3. Appointment of Expert

- (a) ("**Parties to appoint Expert**"): The Parties appoint the Expert to determine the Matter in the manner and within the times set out in this Agreement and the Expert accepts the appointment on the basis set out in this Agreement.
- (b) ("**Agreement of Conditions**"): The Parties agree that:
 - (i) the Expert will act as an expert and not as an arbitrator;
 - (ii) neither the determination of the Matter, nor the process required by this Agreement is an arbitration and any conference conducted during the determination is not a hearing conducted under any legislation or rules relating to any form of arbitration;
 - (iii) the rules of evidence do not apply to the determination; and
 - (iv) the Expert must conduct the determination of the Matter in accordance with the Rules including the Code of Conduct.
- (c) ("**Independence and bias**"): The Expert agrees to act honestly and independently in the performance of its obligations under this Agreement. If, at any time during the determination, the Expert becomes aware of circumstances that might reasonably be considered to adversely affect the Expert's capacity to act independently or impartially, the Expert must inform the Parties immediately and, unless the Parties agree otherwise, terminate this Agreement.

4. Confidentiality

- (a) **(Confidentiality):** All proceedings and submissions relating to the determination (including the fact that any step in the determination is occurring), and all documents prepared for the purposes of the determination (including the Expert's determination), must be kept confidential.
- (b) **(Disclosure of information):** No such proceedings, submissions or documents, nor any other information relating to or arising out of the determination, may be divulged to any person, except:
 - (i) with the prior written consent of both Parties;
 - (ii) as may be required by Law;
 - (iii) for the purpose of subsequent arbitration; or
 - (iv) to the extent necessary to give effect to or enforce the Expert's determination.

5. Costs and fees

- (a) **(Parties joint and severally liable):** As between the Parties and the Expert, the Parties are jointly and severally liable for the payment of the Expert's fees and disbursements, calculated in accordance with the Schedule of Fees and Disbursements.
- (b) **(Calculation of costs and fees):** The Parties agree, subject to the terms of the Relevant Agreement, as between themselves that:
 - (i) they will each pay one half of the Expert's fees and disbursements, calculated in accordance with the Schedule of Fees and Disbursements; and
 - (ii) they will each bear their own costs of and incidental to the preparation of this Agreement and their participation in the determination.

6. Exclusion of liability and indemnity

Except in the case of fraud, the Expert will not be liable to either Party for any act or omission by the Expert in the performance or purported performance of this Agreement. The Parties jointly and severally indemnify the Expert against all Claims or Liability in connection with any act or omission by the Expert (except fraud) in the performance or purported performance by the Expert of the terms of this Agreement.

7. Co-operation of the Parties

Each Party agrees to take part in the determination in good faith and to comply with the reasonable requests and directions of the Expert in relation to the conduct of the determination.

8. 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):** 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 Agreement.

9. Termination

- (a) **(Termination by Parties):** If the Parties agree, this Agreement may be terminated immediately on giving written notice to the Expert if:
- (i) the Expert is declared of unsound mind;
 - (ii) the Expert commits any proven act of fraud or dishonesty or, by wilful act or omission or by gross neglect, behaves in a manner clearly prejudicial to the interests of a Party;
 - (iii) the Expert fails to observe and fulfil any of the substantive terms of this Agreement;
 - (iv) the Expert fails to make his or her determination within the time required by section 6 of Schedule 2 of this Agreement; or
 - (v) the Matter is settled.
- (b) **(Termination by referral):** Notwithstanding clause 9(a), this Agreement will be immediately terminated if either party refers the Matter to arbitration in accordance with clause [insert relevant clause reference] of the Relevant Agreement. The Expert will be entitled to payment for the work done to the time of termination.

10. Counterparts

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

11. Survival of terms

- (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) confidentiality or privacy;
 - (ii) any indemnity, release or financial security given under this Agreement;
 - (iii) any limitation on Liability;
 - (iv) any obligation which this Agreement requires a party to undertake after the rescission, expiration or termination of this Agreement; or
 - (v) any right or obligation arising on termination, rescission or expiry of this Agreement.
- (b) **(Interpretation):** No provision of this Agreement which is expressed to survive the rescission, termination or expiration of this Agreement will prevent any other

provision of this Agreement, as a matter of interpretation, also surviving the rescission, termination or expiration of this Agreement.

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

Schedule 1 – The Matter

[Drafting Note: Description of matter to be inserted.]

Schedule 2 – Rules for Expert Determination Process

1. Commencement

The expert determination process begins when the Expert accepts an appointment to determine the Matter in accordance with these Rules including the Code of Conduct.

2. Code of Conduct

- (a) **(Expert's Function):** The function of the Expert is to make a determination of the Matter in accordance with the Relevant Agreement and the Expert Determination Agreement, including these Rules and the Code of Conduct.
 - (b) **(Submission and responses):** The Expert must receive the written submissions and responses of the Parties in accordance with the procedures specified in these Rules and may require further information or documentation from the Parties which is reasonably necessary to determine the Matter.
 - (c) **(Conference):** The Expert must decide whether a conference is necessary to receive further information. The Expert must inform the Parties of the subject matter of any conference and may hear representations only on those matters during any such conference.
 - (d) **(Disclosure of material):** The Expert must disclose to both Parties all information and documents received.
 - (e) **(Failure to make written submissions):** If a Party fails to make a written submission, the Expert may continue with the process.
 - (f) **(Contact with expert):** Subject to section 4 of these Rules in relation to conferences, meetings and discussions with the Expert must only take place in the presence of both Parties.
-

3. Written Submissions

- (a) **(Party who gave notice):** Within 5 Business Days after the date this expert determination process begins, the Party who gave notice under clause [insert clause] of the Relevant Agreement (**Party A**) must give the other Party and the Expert a written statement of the Matter referred for Expert determination, any agreed statement of facts and a written submission on the Matter in support of Party A's contentions.
- (b) **(Other party):** Within 5 Business Days after the statement in section 3(a) is served, the other Party must give Party A and the Expert a written response to Party A's submissions. If the Expert considers it appropriate, Party A may reply in writing to the other Party's response given in accordance with this section 3(b) within the time allowed by the Expert.
- (c) **(Further material):** If the Expert decides further information or documentation is required for the determination of the Matter, the Expert may direct one or more Parties to provide such further submissions, information or documents as the Expert may require.
- (d) **(Disclosure of material):** The Expert must disclose to both Parties all information and documents received.

- (e) **(Failure to make written submissions):** If a Party fails to make a written submission, the Expert may continue with the process.

4. Conference

- (a) **(Expert to call conference):** The Expert may, if he or she thinks appropriate, call a conference of the Parties. Unless the Parties agree otherwise, the conference will be held in Melbourne, Victoria, Australia.
- (b) **(Date, venue and agenda):** At least 5 Business Days before the conference, the Expert must notify the Parties of the date, venue and agenda for the conference.
- (c) **(Parties to appear):** The Parties must appear at the conference and may make submissions on the subject matter of the conference. If a Party fails to appear at a conference of which that Party had been notified under section 4(b), the Expert and the other Party may nevertheless proceed with the conference and the absence of that Party will not terminate or discontinue the expert determination process.
- (d) **(Requirements):** The Parties:
 - (i) may be accompanied at a conference by legal or other advisers; and
 - (ii) will be bound by any procedural directions given by the Expert in relation to the expert determination process.
- (e) **(Privacy):** The conference must be held in private.
- (f) **(Transcripts):** If required by any Party, transcripts of the conference proceedings must be taken and made available to the Expert and the Parties.

5. General

- (a) **(Governing agreements and Rules):** In making a determination or calling or holding a conference, the Expert must proceed in accordance with the Relevant Agreement, this Agreement and these Rules.
- (b) **(Contact with expert):** Subject to section 4(c), meetings and discussions with the Expert must only take place in the presence of both Parties.
- (c) **(Expert's Independence):** Without limiting clause 3(c) of this Agreement, the Expert must:
 - (i) inform the Parties of:
 - A. any relationship or interest with the Parties or their respective associates;
 - B. any interest the Expert has in the matters in dispute; and
 - C. any circumstance which might reasonably be considered to adversely affect the Expert's capacity to act independently or impartially,immediately upon becoming aware of any such circumstances; and
 - (ii) upon making any disclosure under this section 5(c), unless and until the Parties agree otherwise, terminate the proceedings.

6. The Determination

- (a) **(Timing):** As soon as possible after receipt of the submissions or after any conference and, in any event not later than 30 days after the Expert's acceptance of appointment, or such later date as agreed between the Parties, the Expert must:
 - (i) determine the Matter between the Parties; and
 - (ii) notify the Parties of that determination.
- (b) **(Content and form):** The determination of the Expert must:
 - (i) be in writing stating the Expert's determination and giving reasons;
 - (ii) be made on the basis of the submissions (if any) of the Parties, the conference (if any) and the Expert's own expertise; and
 - (iii) meet the requirements of the Relevant Agreement.
- (c) **(Final and binding):** To the extent permitted by Law, the Expert's determination will be final and binding on the Parties unless a notice of dissatisfaction is given in accordance with clause [insert relevant clause reference] of the Relevant Agreement.

7. Costs

Security for costs of the Expert must be deposited by both Parties at the commencement of the Expert determination process in accordance with any direction of the Expert.

8. Modification

These Rules may be modified only by agreement of the Parties and, if the Expert has been appointed, the Expert.

9. Proportionate Liability

Notwithstanding anything else, to the extent permissible by Law, the Expert 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 provision, have applied to any dispute referred to expert determination pursuant to clause [insert relevant clause reference] of the Relevant Agreement.

Schedule 3 – Schedule of Fees and Disbursements

[Drafting Note: Expert's fees and disbursements to be inserted.]

[Insert Project] - Standing Offer Deed

Executed as an agreement.

Contractor

[Drafting Note: Execution block to be inserted]

USP

[Drafting Note: Execution block to be inserted]

Expert

[Drafting Note: Execution block to be inserted]

Annexure F – Form of deed of novation

Deed of Novation

[insert]

(Continuing Party)

[insert]

(Resigning Party)

[insert]

(Substituting Party)

Deed of Novation

Date

Parties

[insert] ABN [insert] of [insert]
Resigning Party

[insert] ABN [insert] of [insert]
Continuing Party

[insert] ABN [insert] of [insert]
Substituting Party

Background

- A. The Resigning Party and the Continuing Party have entered into the Contract.
- B. The Resigning Party has agreed to novate the Contract to the Substituting Party in accordance with this deed.
- C. The Continuing Party has agreed to the novation of the Contract in accordance with this deed.
- D. That in consideration of, among other things, the mutual promises contained in this deed, the parties agree as set out in the operative part of this deed.

Operative provisions

1 Definitions and interpretation

1.1 Definitions

In this deed, capitalised terms have the meaning given to them in the Contract unless set out below or the context requires otherwise:

Claim means any claim, notice, demand, action, proceeding, litigation, investigation or judgment whether based on contract, tort (including negligence), statute or otherwise.

Continuing Party's Activities means all things or tasks which the Continuing Party is, or may be, required to do to comply with its obligations under the Contract and the Novated Contract including work carried out pursuant to the Contract prior to the date of this deed and work carried out pursuant to the Novated Contract.

Contract means the [insert contract details] between the Resigning Party and the Continuing Party in respect of the entering into Services and Works Agreements, or in respect of performance of the Project Works (as the case may be) entered into on or about [insert].

Dispute means any dispute, difference or disagreement arising between the parties relating to the interpretation of this deed or any matter arising out of, or in connection with this deed.

Dispute Notice has the meaning in clause 6.1(b) of this deed.

Negotiators has the meaning in clause 6.2 of this deed.

Novated Contract means the contract between the Substituting Party and the Continuing Party which results from the novation of the Contract on the Novation Date.

Novation Date means the date on which the conditions precedent set out in clause 2 of this deed are satisfied.

Prior Claims means:

- (a) any failure by the Resigning Party to fulfil any obligation (including as to payment) which it owed to the Continuing Party prior to the Novation Date;
- (b) any act, default or omission of the Resigning Party irrespective of the date of that act, default or omission; or
- (c) any Claim of the Continuing Party where the act, default, omission, circumstance (including in respect of work done) or event which gives rise to the Claim occurred prior to the Novation Date,

irrespective of whether or not the costs, losses or expenses in respect of that Claim accrued or were accruing prior to the Novation Date or whether or not the cause of action in respect of that Claim has arisen prior to the Novation Date.

1.2 Interpretation

The interpretation provisions of the Contract apply as if set out in full in this deed.

2 Condition precedent

The parties acknowledge and agree that this deed will become effective upon this deed being executed by all parties.

3 Continuing Party warranties

3.1 Warranties

The Continuing Party warrants to the Resigning Party that:

- (a) in carrying out the Continuing Party's Activities, the Continuing Party has fully complied (and will fully comply) with all of its obligations under the Contract;
- (b) on and from the Novation Date the Continuing Party will carry out the Continuing Party's Activities in accordance with the Novated Contract; and
- (c) the Continuing Party has the right, power and authority to enter into this deed and the Novated Contract and carry out its obligations under this deed and the Novated Contract.

3.2 Application of warranties and indemnities

The Continuing Party agrees that the warranties set out in this clause 3 extend to the acts, defaults and neglects of any of its own subcontractors, employees or agents as fully as if they were the acts, defaults or neglects of the Continuing Party.

4 Novation

4.1 Novation

On and from the Novation Date:

- (a) the Resigning Party and the Continuing Party mutually agree to terminate the Contract and, subject to clause 4.3, release each other from all obligations and liabilities under the Contract relating to the period after the Novation Date; and
- (b) the Substituting Party and the Continuing Party will be deemed to have entered into the Novated Contract on the same terms and conditions as the Contract, except that any reference in the Contract to the Resigning Party will be read as a reference to the Substituting Party.

4.2 Assumption of rights and obligations

From the Novation Date:

- (a) the Substituting Party:
 - (i) must comply with its obligations under the Novated Contract (to the extent that such obligations relate to the period on or after the Novation Date and have not been performed by the Resigning Party under the Contract as of the Novation Date); and
 - (ii) will enjoy the rights and benefits conferred on the Resigning Party under the Contract (to the extent that such obligations relate to the period on or after the Novation Date) as if the Substituting Party had originally been named in the Contract as a party instead of the Resigning Party; and
- (b) the Continuing Party must comply with its obligations under the Novated Contract notwithstanding any Claim that it may have against the Resigning Party arising out of or in connection with the Contract or the Continuing Party's Activities prior to the Novation Date.

4.3 Release by Continuing Party

The Continuing Party acknowledges and agrees that the Substituting Party is not, and cannot, become liable for any Claim arising out of or in connection with the Contract or the Continuing Party's Activities prior to the Novation Date including but not limited to any Prior Claims.

5 Substituting Party's immunity from liability

Notwithstanding any other provision of this deed or the Contract:

- (a) the Substituting Party will not become liable for, or in relation to, a Prior Claim;
- (b) the Continuing Party releases the Substituting Party from any claims or losses, in relation to, or in connection with, any Prior Claim; and

- (c) the Substituting Party may, at its absolute discretion, pay any amount claimed as due by the Continuing Party for work carried out prior to the Novation Date for and on behalf of the Resigning Party (and in discharge of the Resigning Party's obligations to pay the Continuing Party), and any amounts so paid will be a debt due from the Resigning Party to the Substituting Party in accordance with the Contract.

6 Dispute resolution

6.1 Dispute

- (a) If a Dispute arises between the parties, then the Dispute must be dealt with in accordance with this clause 6.
- (b) Where a Dispute arises, either party may give a notice to the other party:
 - (i) adequately identifying and providing details of the Dispute;
 - (ii) detailing particulars of the party's reason for being dissatisfied; and
 - (iii) detailing the position that the party believes is correct,**("Dispute Notice")**.
- (c) Unless a party has complied with the procedure to resolve a Dispute by negotiation of the Dispute under clause 6.3, that party may not commence the dispute resolution proceedings under clause 6.4.

6.2 Appointment of negotiators

If a Dispute Notice is issued under clause 6.1(b), each party will appoint two representatives with authority to resolve the Dispute ("**Negotiators**") and notify the other party of these appointments within 5 Business Days of the Dispute Notice being issued.

6.3 Negotiation

- (a) If a Dispute Notice is issued under clause 6.1(b), the Dispute will be referred to the Negotiators.
- (b) The Negotiators must, within:
 - (i) 10 Business Days of the receipt of the Dispute Notice under clause 6.1(b); or
 - (ii) such longer period of time as the Negotiators agree in writing,meet and undertake genuine and good faith negotiations with a view to resolving the Dispute within 15 Business Days of receipt of the Dispute Notice under clause 6.1(b) and, if they cannot resolve the Dispute, endeavour to agree upon a procedure to resolve the dispute or difference (such as mediation or expert determination) before proceeding to litigation.

6.4 Litigation

If the Dispute which has been referred to negotiation pursuant to clause 6.3 remains unresolved (in whole or in part) after the expiration of 25 Business Days of the receipt of the Dispute Notice under clause 6.1(b), then either party to the Dispute may commence legal proceedings to resolve any unresolved part of the Dispute.

6.5 Continuity

Despite the existence of a Dispute, the parties must continue to perform their obligations under this deed.

6.6 Injunctive or urgent relief

Nothing in this clause 6 prejudices either party's right to institute proceedings to seek injunctive or urgent declaratory relief in respect of a Dispute under this clause 6 or any other matter arising under this deed.

7 General

7.1 Governing Law

- (a) The Law governing the Deed and its interpretation is the Law of Victoria.
- (b) Each party irrevocably and unconditionally waives any objection to the venue of any legal process on the basis that the process has been brought in an inconvenient forum where that legal process has been brought in the courts of Victoria or the courts of appeal from them.

7.2 Amendments

This deed may only be varied by a document signed by or on behalf of each party.

7.3 Waiver

- (a) Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by Law or under 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 under this deed.
- (b) A waiver or consent given by a party under this deed is only effective and binding on that party if it is given or confirmed in writing by that party.
- (c) No waiver of a breach of a term of this deed operates as a waiver of any other breach of that term or of a breach of any other term of this deed.

7.4 Counterparts

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

7.5 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:

- (a) the legality, validity or enforceability in that jurisdiction of any other provision of this deed; or
- (b) the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this deed.

7.6 Further acts and documents

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

7.7 Assignment

A party cannot assign, novate or otherwise transfer any of its rights or obligations under this deed without the prior consent of each other party, other than by way of security.

7.8 Costs and expenses

Each party must pay its own legal costs and expenses in respect of the negotiation, preparation, completion and stamping of this deed.

7.9 Notices

Any notice or other communication in relation to this deed including any request, demand, consent, endorsement or approval, to or by a party to this deed:

- (a) must be in legible writing and in English and addressed as follows:

- (i) if to the Resigning Party:

Address: [insert]

Attention: [insert]

- (ii) if to the Continuing Party:

Address: [insert]

Attention: [insert]

- (iii) if to the Substituting Party:

Address: [insert]

Attention: [insert]

or a substitute address notified by a party to the other party in writing;

- (b) must be delivered by hand or posted by prepaid express post to the address of the addressee in accordance with clause 7.9(a); and

- (c) must be signed by an officer, under the common seal of the party or by any other person approved by the other parties.

7.10 When notices are taken to have been given and received

- (a) A notice will be deemed to be given or made:
 - (i) if posted by pre-paid express post from an address in Australia to an address in Australia, 2 Business Days after posting; or
 - (ii) if delivered by hand, on delivery,but if delivery or receipt is on a day which is not a Business Day or is after 5.00pm at the place of delivery or receipt, it is taken as given at 9:00am on the next Business Day.
- (b) A notice can be relied on by the addressee and the addressee is not liable to any other person for any consequences of that reliance if the addressee believes it to be genuine, correct and authorised by the sender.
- (c) In clauses 7.9 and 7.10, a reference to an addressee includes a reference to an addressee's agents or employees.
- (d) For the avoidance of doubt, a notice sent by email is not a valid notice for the purpose of this deed.
- (e) For the purposes of clauses 7.9 and 7.10, a notice includes those documents provided, given or submitted by the party where this deed requires the party to:
 - (i) provide, give or submit a notice or notify (or like expressions), whether or not in writing; or
 - (ii) provide, give or submit a Claim (or like expressions), whether or not in writing.

Signing page

Executed as a deed.

Substituting Party

Signed, sealed and delivered by **[insert]** in the presence of:

Director

Print name

Company Secretary / Director

Print name

Resigning Party

Signed, sealed and delivered by **[insert]** in the presence of:

Director

Print name

Company Secretary / Director

Print name

Continuing Party

Signed, sealed and delivered for **[insert]** in the presence of:

Director

Print name

Company Secretary / Director

Print name

Annexure B – Expert Determination Agreement

(Clauses 1.1 and 9.4(g))

[Insert]

(State)

[Insert]

(USP)

[Insert]

(Expert)

Contents

1. Definitions..... 27

 1.1 Utility Agreement definitions 27

 1.2 Definitions 27

 1.3 Interpretation..... 28

2. Relationship of parties 29

3. Appointment of Expert 29

4. Confidentiality 30

5. Costs and fees..... 30

6. Exclusion of liability and indemnity..... 30

7. Co-operation of the Parties..... 30

8. Governing Law and jurisdiction 31

9. Termination..... 31

10. Counterparts..... 31

11. Survival of terms 31

Schedule 1 – The Matter 33

Schedule 2 – Rules for Expert Determination Process 34

Schedule 3 – Schedule of Fees and Disbursements 37

Expert Determination Agreement

Date

Parties

[insert party name] [insert address] (State)

[insert party name] [insert address] (USP)

[insert name and address of Expert agreed between the Parties or appointed pursuant to clause 9.4 of the Utility Agreement or the equivalent clause in each Relevant Agreement] (Expert)

Background

- A. The background to the Project is set out in the Utility Agreement.
- B. On [insert], the Parties agreed that the Matter described in Schedule 1 be determined by an Expert appointed under clause [insert relevant clause reference] of the Relevant Agreement.
- C. In accordance with clause [insert relevant clause reference] of the Relevant Agreement, the Expert has been appointed to determine the Matter in accordance with the process set out in this Agreement.

Operative provisions

1. Definitions

1.1 Utility Agreement definitions

Unless otherwise expressly defined, expressions used in this Agreement have the meanings given to them in the Utility Agreement.

1.2 Definitions

In this Agreement, unless the context otherwise provides:

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

Code of Conduct means the code of conduct set out in section 2 of Schedule 2.

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

Entity has the meaning given in section 64A of the Corporations Act, but is also deemed to include a joint venture within the meaning of Australian Accounting Standard 131 (AASB 131).

Matter means a dispute under, arising out of, or in connection with the Relevant Agreement and referred to expert determination under clause [insert relevant clause reference] of the Relevant Agreement, as described in Schedule 1.

Party means [insert party names].

Project has the meaning given in the Utility Agreement.

Relevant Agreement means [insert the relevant document under which the Matter arose].

Rules means the "Rules for Expert Determination Process" set out in Schedule 2.

Schedule means a schedule to this Agreement.

Schedule of Fees and Disbursements is contained in Schedule 3.

Utility Agreement means the agreement titled Utility Agreement, entered into between the State and the USP on [insert date].

1.3 Interpretation

In this Agreement:

- (a) **(headings)**: headings and subheadings are for convenience only and do not affect interpretation;
- (b) **(number 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 or Schedule is a reference to a party, clause or Schedule, of or to this Agreement; and
 - (ii) a section or part is a reference to a section or part of the Schedule in which they are located,unless expressly provided otherwise;
- (d) **(document as amended)**: a reference to a deed, agreement, document or instrument means a reference to such 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 and, in the case of a trustee, includes a substituted or additional trustee;
- (f) **(person)**: a reference to a person includes an individual, the estate of an individual, a corporation, a body corporate, an Authority, an association or a joint venture (whether incorporated or unincorporated), a partnership, an Entity and a trust;
- (g) **(replacement person)**: a reference to a person appointed under this Agreement includes that person's replacement or delegate appointed in accordance with this Agreement (as applicable);
- (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")**: "include", "includes" and "including" 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) ("**Business Day**"): if the day on or by which anything is to be done under this Agreement is not a Business Day, that thing must be done no later than the next Business Day;
- (n) ("**time**"): a reference to time is a reference to time in Melbourne, Victoria, Australia;
- (o) ("**rights**"): a reference to a right includes any benefit, remedy, function, discretion, authority or power;
- (p) ("**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;
- (a) ("**no bias against drafter**"): each provision will be interpreted without disadvantage to the party who (or whose representative) drafted or proposed that provision; and
- (b) ("**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.

2. Relationship of parties

Unless otherwise expressly provided, nothing in this Agreement creates a partnership, joint venture, fiduciary, employment or agency relationship between the Parties.

3. Appointment of Expert

- (a) ("**Parties to appoint Expert**"): The Parties appoint the Expert to determine the Matter in the manner and within the times set out in this Agreement and the Expert accepts the appointment on the basis set out in this Agreement.
- (b) ("**Agreement of Conditions**"): The Parties agree that:
 - (i) the Expert will act as an expert and not as an arbitrator;
 - (ii) neither the determination of the Matter, nor the process required by this Agreement is an arbitration and any conference conducted during the determination is not a hearing conducted under any legislation or rules relating to any form of arbitration;
 - (iii) the rules of evidence do not apply to the determination; and
 - (iv) the Expert must conduct the determination of the Matter in accordance with the Rules including the Code of Conduct.
- (c) ("**Independence and bias**"): The Expert agrees to act honestly and independently in the performance of its obligations under this Agreement. If, at any time during the determination, the Expert becomes aware of circumstances that might reasonably

be considered to adversely affect the Expert's capacity to act independently or impartially, the Expert must inform the Parties immediately and, unless the Parties agree otherwise, terminate this Agreement.

4. Confidentiality

- (a) **(Confidentiality):** All proceedings and submissions relating to the determination (including the fact that any step in the determination is occurring), and all documents prepared for the purposes of the determination (including the Expert's determination), must be kept confidential.
- (b) **(Disclosure of information):** No such proceedings, submissions or documents, nor any other information relating to or arising out of the determination, may be divulged to any person, except:
 - (i) with the prior written consent of both Parties;
 - (ii) as may be required by Law;
 - (iii) for the purpose of subsequent arbitration; or
 - (iv) to the extent necessary to give effect to or enforce the Expert's determination.

5. Costs and fees

- (a) **(Parties joint and severally liable):** As between the Parties and the Expert, the Parties are jointly and severally liable for the payment of the Expert's fees and disbursements, calculated in accordance with the Schedule of Fees and Disbursements.
- (b) **(Calculation of costs and fees):** The Parties agree, subject to the terms of the Relevant Agreement, as between themselves that:
 - (i) they will each pay one half of the Expert's fees and disbursements, calculated in accordance with the Schedule of Fees and Disbursements; and
 - (ii) they will each bear their own costs of and incidental to the preparation of this Agreement and their participation in the determination.

6. Exclusion of liability and indemnity

Except in the case of fraud, the Expert will not be liable to either Party for any act or omission by the Expert in the performance or purported performance of this Agreement. The Parties jointly and severally indemnify the Expert against all Claims or Liability in connection with any act or omission by the Expert (except fraud) in the performance or purported performance by the Expert of the terms of this Agreement.

7. Co-operation of the Parties

Each Party agrees to take part in the determination in good faith and to comply with the reasonable requests and directions of the Expert in relation to the conduct of the determination.

8. 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):** 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 Agreement.

9. Termination

- (a) **(Termination by Parties):** If the Parties agree, this Agreement may be terminated immediately on giving written notice to the Expert if:
 - (i) the Expert is declared of unsound mind;
 - (ii) the Expert commits any proven act of fraud or dishonesty or, by wilful act or omission or by gross neglect, behaves in a manner clearly prejudicial to the interests of a Party;
 - (iii) the Expert fails to observe and fulfil any of the substantive terms of this Agreement;
 - (iv) the Expert fails to make his or her determination within the time required by section 6 of Schedule 2 of this Agreement; or
 - (v) the Matter is settled.
- (b) **(Termination by referral):** Notwithstanding clause 9(a), this Agreement will be immediately terminated if either party refers the Matter to arbitration in accordance with clause [insert relevant clause reference] of the Relevant Agreement. The Expert will be entitled to payment for the work done to the time of termination.

10. Counterparts

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

11. Survival of terms

- (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) confidentiality or privacy;
 - (ii) any indemnity, release or financial security given under this Agreement;
 - (iii) any limitation on Liability;
 - (iv) any obligation which this Agreement requires a party to undertake after the rescission, expiration or termination of this Agreement; or

- (v) any right or obligation arising on termination, rescission or expiry of this Agreement.
- (b) **(Interpretation):** No provision of this Agreement which is expressed to survive the rescission, termination or expiration of this Agreement will prevent any other provision of this Agreement, as a matter of interpretation, also surviving the rescission, termination or expiration of this Agreement.
- (c) **(Survival of rights and obligations):** No right or obligation of any party will merge on completion of any transaction under this Agreement. All rights and obligations under this Agreement survive the execution and delivery of any transfer or other document which implements any transaction under this Agreement.

Schedule 1 – The Matter

[Drafting Note: Description of matter to be inserted.]

Schedule 2 – Rules for Expert Determination Process

1. Commencement

The expert determination process begins when the Expert accepts an appointment to determine the Matter in accordance with these Rules including the Code of Conduct.

2. Code of Conduct

- (a) **(Expert's Function):** The function of the Expert is to make a determination of the Matter in accordance with the Relevant Agreement and the Expert Determination Agreement, including these Rules and the Code of Conduct.
 - (b) **(Submission and responses):** The Expert must receive the written submissions and responses of the Parties in accordance with the procedures specified in these Rules and may require further information or documentation from the Parties which is reasonably necessary to determine the Matter.
 - (c) **(Conference):** The Expert must decide whether a conference is necessary to receive further information. The Expert must inform the Parties of the subject matter of any conference and may hear representations only on those matters during any such conference.
 - (d) **(Disclosure of material):** The Expert must disclose to both Parties all information and documents received.
 - (e) **(Failure to make written submissions):** If a Party fails to make a written submission, the Expert may continue with the process.
 - (f) **(Contact with expert):** Subject to section 4 of these Rules in relation to conferences, meetings and discussions with the Expert must only take place in the presence of both Parties.
-

3. Written submissions

- (a) **(Party who gave notice):** Within 5 Business Days after the date this expert determination process begins, the Party who gave notice under clause [insert clause] of the Relevant Agreement (**Party A**) must give the other Party and the Expert a written statement of the Matter referred for Expert determination, any agreed statement of facts and a written submission on the Matter in support of Party A's contentions.
 - (b) **(Other party):** Within 5 Business Days after the statement in section 3(a) is served, the other Party must give Party A and the Expert a written response to Party A's submissions. If the Expert considers it appropriate, Party A may reply in writing to the other Party's response given in accordance with this section 3(b) within the time allowed by the Expert.
 - (c) **(Further material):** If the Expert decides further information or documentation is required for the determination of the Matter, the Expert may direct one or more Parties to provide such further submissions, information or documents as the Expert may require.
 - (d) **(Disclosure of material):** The Expert must disclose to both Parties all information and documents received.
 - (e) **(Failure to make written submissions):** If a Party fails to make a written submission, the Expert may continue with the process.
-

4. Conference

- (a) **(Expert to call conference):** The Expert may, if he or she thinks appropriate, call a conference of the Parties. Unless the Parties agree otherwise, the conference will be held in Melbourne, Victoria, Australia.
- (b) **(Date, venue and agenda):** At least 5 Business Days before the conference, the Expert must notify the Parties of the date, venue and agenda for the conference.
- (c) **(Parties to appear):** The Parties must appear at the conference and may make submissions on the subject matter of the conference. If a Party fails to appear at a conference of which that Party had been notified under section 4(b), the Expert and the other Party may nevertheless proceed with the conference and the absence of that Party will not terminate or discontinue the expert determination process.
- (d) **(Requirements):** The Parties:
 - (i) may be accompanied at a conference by legal or other advisers; and
 - (ii) will be bound by any procedural directions given by the Expert in relation to the expert determination process.
- (e) **(Privacy):** The conference must be held in private.
- (f) **(Transcripts):** If required by any Party, transcripts of the conference proceedings must be taken and made available to the Expert and the Parties.

5. General

- (a) **(Governing agreements and Rules):** In making a determination or calling or holding a conference, the Expert must proceed in accordance with the Relevant Agreement, this Agreement and these Rules.
- (b) **(Contact with expert):** Subject to section 4(c), meetings and discussions with the Expert must only take place in the presence of both Parties.
- (c) **(Expert's Independence):** Without limiting clause 3(c) of this Agreement, the Expert must:
 - (i) inform the Parties of:
 - (A) any relationship or interest with the Parties or their respective associates;
 - (B) any interest the Expert has in the matters in dispute; and
 - (C) any circumstance which might reasonably be considered to adversely affect the Expert's capacity to act independently or impartially,immediately upon becoming aware of any such circumstances; and
 - (ii) upon making any disclosure under this section 5(c), unless and until the Parties agree otherwise, terminate the proceedings.

6. The determination

- (a) **(Timing):** As soon as possible after receipt of the submissions or after any conference and, in any event not later than 30 days after the Expert's acceptance of appointment, or such later date as agreed between the Parties, the Expert must:
 - (i) determine the Matter between the Parties; and
 - (ii) notify the Parties of that determination.
- (b) **(Content and form):** The determination of the Expert must:
 - (i) be in writing stating the Expert's determination and giving reasons;
 - (ii) be made on the basis of the submissions (if any) of the Parties, the conference (if any) and the Expert's own expertise; and
 - (iii) meet the requirements of the Relevant Agreement.
- (c) **(Final and binding):** To the extent permitted by Law, the Expert's determination will be final and binding on the Parties unless a notice of dissatisfaction is given in accordance with clause [insert relevant clause reference] of the Relevant Agreement.

7. Costs

Security for costs of the Expert must be deposited by both Parties at the commencement of the Expert determination process in accordance with any direction of the Expert.

8. Modification

These Rules may be modified only by agreement of the Parties and, if the Expert has been appointed, the Expert.

9. Proportionate Liability

Notwithstanding anything else, to the extent permissible by Law, the Expert 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 provision, have applied to any dispute referred to expert determination pursuant to clause [insert relevant clause reference] of the Relevant Agreement.

Schedule 3 – Schedule of Fees and Disbursements

[Drafting Note: Expert's fees and disbursements to be inserted.]

Executed as an agreement.

State

[Drafting Note: Execution block to be inserted]

USP

[Drafting Note: Execution block to be inserted]

Expert

[Drafting Note: Execution block to be inserted]