

Model Utility Agreement Guidelines

Prepared by the Minister for Transport Infrastructure as Project Minister for the North East Link Project 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 the North East Link Project (**Project**) for the purposes of section 231 of the *Major Transport Projects Facilitation Act 2009* (Vic) (the **Act**) 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 North East Link Project.
3. It is envisaged that a separate utility agreement (**Master Utility Agreement**) will be entered into between the project authority of the North East Link Project, being the Secretary of the Department of Transport (**Project Authority**), and each individual utility (**Utility**) whose infrastructure is expected to be impacted by the Project.
4. Under the Master Utility Agreement, upon request by the Project Authority, the Utility must enter into a further agreement in the form of a specified standing offer template and attachments (**Utilities Standing Offer Deed**) with an entity engaged, or proposed to be engaged, for the delivery of any part of the Project (which may include, where the State requires, the State or 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 any agreement with the USP) (**Contractor**).
5. Under the Utilities Standing Offer Deed, upon issue by the Contractor of an order for a specific package of work forming part of the Project in the form of a specified template (**Site Works Order**), the Utility will enter into an agreement with the Contractor for that package of work (**Site Works Agreement**). The Utilities Standing Offer Deed contains the pre-agreed terms and conditions which will govern each Site Works Agreement (**General Conditions**).
6. It is intended that the template Master Utility Agreement, the template Utilities Standing Offer Deed, the template General Conditions and the template Site Works Order together form the draft agreement required by section 231(2) of the Act (**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 Act. Paragraphs 10 to 19 of these guidelines set out the arrangements addressed in the Draft Agreement.
8. Unless the context requires otherwise, words used in these guidelines that have a specific meaning in the Act or the attached Draft Agreement, have the same meaning in these guidelines.

Draft Agreement

9. The Draft Agreement sets out the proposed arrangements in respect of the carrying out of works in respect of utility infrastructure which will be affected by the carrying out of the North East Link Project (**Utility Infrastructure Works**).
10. Under the Draft Agreement, the State may, at any time, issue a written request to the Utility requiring the Utility to enter into a Utilities Standing Offer Deed with a named Contractor within a specified timeframe (**USO Request**). The USP must then negotiate in good faith with the relevant Contractor and use its best endeavours to enter into a Utilities 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) Utilities Standing Offer Deed;
 - (b) General Conditions; and

(c) Site Works Order,

attached to the Master 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 that the Contractor does not agree to any of the terms of any template document, the Draft Agreement also sets out certain obligations on the Utility to continue to negotiate in good faith with the Contractor and use its best endeavours to enter into a negotiated standing offer deed.

11. A relevant Contractor may issue the Utility with a Site Works Order, 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).
12. The Contractor must complete the information in the Site Works Order 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 Site Works Order; or
 - (b) request further information, if necessary.
13. If the Utility does not accept the Site Works Order within the specified period, the parties must negotiate in good faith to make any adjustments to the Site Works Order acceptable to both parties, after which the Contractor may submit a revised Site Works Order.
14. If the Utility has not accepted a revised Site Works Order within a specified period of the Contractor providing the original Site Works Order to the Utility, either party may refer to the matter for dispute resolution under a procedure specified in the Utilities Standing Offer Deed for the resolution of site works agreement formation disputes (**Site Works Agreement Formation Dispute Procedure**). The Site Works Agreement Formation Dispute Procedure is intended to provide a contractual replication (with necessary amendments) of the procedure under Part 7 of the Act.
15. 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

16. If the Utility will be undertaking any Utility Infrastructure Works, the Utility will be entitled to be paid as set out in:
 - (a) any relevant Law; or
 - (b) the relevant Site Works Agreement.

Safety

17. The Site 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.
18. During the access period, the Contractor must comply with all Law relating to the safety of persons on or about the Site, and the carrying out of the Project Works or the Contractor's use of the Site, including without limitation the relevant OHS legislation.

Insurance

19. The party responsible for effecting and maintaining each of the public liability insurance and professional indemnity insurance will be as stated in the Site Works Agreement. The Draft Agreement includes options addressing insurances being effected and maintained by or on behalf of the USP or the Contractor.

Master Utility Agreement

North East Link Project

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

[Insert name]
USP

Contents

1.	Definitions and Interpretation	2
1.1	Definitions	2
1.2	Interpretation	4
2.	Operation and documents forming deed.....	4
2.1	Term.....	4
2.2	Documents forming this Deed	4
3.	Utilities Standing Offer Deeds.....	5
3.1	Form of Utilities Standing Offer Deed	5
3.2	Notice to USP to enter into Utilities Standing Offer Deed.....	5
3.3	Acknowledgement of Relevant Contractor's Discretion	6
3.4	Failure to enter into Utilities Standing Offer Deed.....	6
3.5	State to appoint expert	6
4.	Subsequent Relevant Utility Infrastructure and Unnotified Utility Infrastructure	6
4.1	USP to notify of Subsequent Relevant Utility Infrastructure	6
4.2	Unnotified Utility Infrastructure	7
4.3	Unnotified Subsequent Relevant Utility Infrastructure	7
5.	Confidentiality	8
5.1	Confidentiality	8
6.	Disputes	8
6.1	Procedure for resolving disputes	8
6.2	Negotiation.....	9
6.3	Alternative 1 - Expert determination	9
6.4	Selection of expert	9
6.5	Rules of expert determination	10
6.6	Expert finding.....	10
6.7	Liability of expert.....	10
6.8	Costs	11
7.	Arbitration.....	11
7.1	Alternative 2 - Reference to Arbitration	11
7.2	Arbitration.....	11
7.3	Appointment of arbitrator	11
7.4	General Principles for conduct of arbitration	11
7.5	Proportional liability.....	12
7.6	Extension of ambit of arbitration proceedings	12
7.7	Award final and binding	13
7.8	Continue to perform	13
7.9	Governing law of arbitration agreement	13
7.10	Interlocutory relief	13
8.	Termination	13
8.1	Termination of Deed	13

8.2	Termination of a Utilities Standing Offer Deed.....	13
9.	Notices	14
9.1	Notices	14
9.2	Governing Law.....	14
9.3	Jurisdiction	14
9.4	Counterparts	14
9.5	Entire agreement	15
9.6	Amendments.....	15
9.7	Survival of certain provisions.....	15
9.8	Waiver	15
9.9	Consents, approvals and directions	16
9.10	Expenses	16
9.11	Severance.....	16
9.12	Moratorium legislation.....	16
9.13	Proportionate liability	16
	Schedule 1 - Key Details for Master Utility Agreement	18
	Annexure A - Template Utilities Standing Offer Deed	19
	Annexure B - Expert Determination Agreement.....	134

Master Utility Agreement

This Deed is dated

Parties

State:

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

Address: C/o North East Link Project, Level 13, 121 Exhibition Street Melbourne
VIC 3000

USP:

Name **[insert name]** ABN [insert]

Address: [insert]

Background

- A The Secretary to the Department of Transport is the project authority for the North East Link Project which was declared to be a declared project under section 10 of the *Major Transport Projects Facilitation Act 2009* (Vic) ("**Act**"), the declaration of which was published in the Government Gazette on 19 June 2018 ("**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 State will contract with various entities using various delivery models to deliver the Project.
- D The State wishes, and the USP agrees, that the USP will enter into Utility Standing Offer Deeds with Relevant Contractors for the purposes of enabling Relevant Contractors to access, relocate, remove or protect Relevant Utility Infrastructure during the course of the Project ("**Utilities Standing Offer Deeds**").
- E The parties have agreed to enter into this Master Utility Agreement ("**Deed**") in order to:
 - (a) govern the terms on which the USP will enter into Utilities Standing Offer Deeds; and
 - (b) set out the terms which are required to be included in the Utilities Standing Offer Deeds to govern each Site Works Agreement.

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:

Act has the meaning in paragraph A of the Background.

Alternative Standing Offer Deed has the meaning in clause 3.2(c).

Approval means:

- (a) each State approval required for the purpose of the Project; and
- (b) any other 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.

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.

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.

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.

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

Representative has the meaning in clause 6.2(a).

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

Site Works Agreement means any "Site Works Agreement" formed under a Utilities Standing Offer Deed.

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

Template Site Works Order means the site works order attached as Annexure B to the Template Utilities Standing Offer Deed.

Template Utilities Standing Offer Deed means the document at **Annexure A**.

Term means the period identified in clause 2.1.

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

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

Utilities Standing Offer Deed has the meaning in clause 3.1, and also includes a deemed Utilities Standing Offer Deed as contemplated by clause 3.2(e).

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, 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. Operation and documents forming deed

2.1 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.

2.2 Documents forming this Deed

This Deed consists of the following documents:

- (a) this **document**;

- (b) the Schedule 1 to this document; and
- (c) the Template Utilities Standing Offer Deed at **Annexure A**.

3. Utilities Standing Offer Deeds

3.1 Form of Utilities Standing Offer Deed

Subject to clause 3.2, a Utilities Standing Offer Deed will consist of the following:

- (a) a Utilities Standing Offer Deed in the form of the Template Utilities Standing Offer Deed, executed by the USP and a Relevant Contractor;
- (b) Template General Conditions in the form at Annexure A to the Template Utilities Standing Offer Deed; and
- (c) a Template Site Works Order in the form at Annexure B to the Template Utilities Standing Offer Deed.

3.2 Notice to USP to enter into Utilities Standing Offer Deed

- (a) The State may at any time, issue a written notice to the USP ("**USO Notice**") requesting the USP to enter into a Utilities 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 Utilities Standing Offer Deed within the Required Timeframe. For clarity, to the extent that the Relevant Contractor agrees to the terms of the:
 - (i) Template Utilities Standing Offer Deed;
 - (ii) Template General Conditions; or
 - (iii) Template Site Works Order,(together, "**Template Documents**"), 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 that the Contractor does not agree to any term of the Template Documents, the USP must continue to negotiate in good faith with the Relevant Contractor and use its best endeavours to enter into a Utilities Standing Offer Deed with fewest amendments that it can reasonably negotiate with the Contractor within the Required Timeframe ("**Alternative Standing Offer Deed**").
- (d) For clarity, in 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 or any relevant term in any of the Template Documents, without the express agreement of the Relevant Contractor.
- (e) Upon execution of an Alternative Standing Offer Deed, it will be deemed to be a Utilities Standing Offer Deed.
- (f) Upon execution of the Utilities Standing Offer Deed or Alternative Standing Offer Deed by the USP and the Relevant Contractor, the USP must notify the State in writing within 5 Business Days of execution that the relevant Utilities Standing Offer

Deed has been entered into, and must as soon as reasonably practicable provide the State with a copy of the executed Utilities Standing Offer Deed in both in hard copy and in searchable electronic format.

3.3 Acknowledgement of Relevant Contractor's Discretion

The USP acknowledges that, notwithstanding the USP's obligations under this Deed, the Relevant Contractors are under no obligation to enter into any agreement with the USP in the form of the Template Utilities Standing Offer Deed, and the 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 Utilities Standing Offer Deed

If, by the expiry of the Required Timeframe, the USP and the Relevant Contractor have not entered into a Utilities Standing Offer Deed or an Alternative 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 Utilities Standing Offer Deed or an Alternative Standing Offer Deed.

3.5 State to appoint expert

The State acknowledges and agrees that:

- (a) under clause 8.1(b) and (c) of the Template Utilities 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 a Utilities Standing Offer Deed substantially in the form of the Template Utilities Standing Offer Deed, the State accepts those obligations and undertakes to the USP to perform those obligations as if the State were a party to any Utilities Standing Offer Deed executed by the USP.

4. Subsequent Relevant Utility Infrastructure and Unnotified Utility Infrastructure

4.1 USP to notify of Subsequent Relevant Utility Infrastructure

- (a) If, at any time during the Term, 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,

("Subsequent Relevant Utility Infrastructure"),

the USP must promptly, and in any event before commencing any work to construct, modify, decommission or change the use of the Subsequent Relevant Utility Infrastructure, notify the State in writing, which notice must:

 - (iii) include a description of the nature of the Subsequent Relevant Utility Infrastructure and its location; and
 - (iv) attach to the notice a plan that shows:
 - (A) the location of the Subsequent Relevant Utility Infrastructure within an area of 3 square metres or less; or

- (B) at least 2 locations of the Subsequent Relevant Utility Infrastructure in a way that will enable the State to determine the precise location of the Subsequent Relevant Utility Infrastructure.
 - (b) The USP must not commence any work in respect of any Subsequent Relevant Utility Infrastructure until the USP has:
 - (i) complied with clause 4.1(a); and
 - (ii) entered into good faith negotiations with the State to try to agree a mutually satisfactory arrangement whereby:
 - (A) any delay or disruption to:
 - (1) the Project; or
 - (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) cost to either the State (and its Relevant Contractors) or the USP,
- will be minimised to the extent possible.

4.2 Unnotified Utility Infrastructure

If either party becomes aware of any Relevant Utility Infrastructure which is or appears to be Unnotified Utility Infrastructure, the parties acknowledge and agree that for the purposes of this Agreement:

- (a) to the extent that it is established that that Unnotified Utility Infrastructure is infrastructure which is owned, operated or controlled by the USP and the project authority gives a notice to the USP under subsection 232(3) of the Act, the reference to "5 business days" in subsection 232(4)(c)(ii) of the Act will be read as if it were "10 business days", and subsection 232(4)(c)(B) will be read as if the words "produce a plan acceptable to the State specifying the time period within which and the method by which the utility will" were inserted at the beginning of that section; and
- (b) except to the extent specifically set out in this clause 4.2, the State does not agree to waive or limit any rights it may have under the Act.

4.3 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 4.1, the parties acknowledge and agree that:

- (a) to the extent that it is established that that Subsequent Relevant Utility Infrastructure is infrastructure which is owned, operated or controlled by the USP,

the USP must, at its election, within 10 Business Days of receiving a written notice from the State, either:

- (i) agree to the State or a Relevant Contractor nominated by the State carrying out 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) to the extent that the USP elects to act in accordance with clause 4.3(a)(ii), the USP must comply fully with that plan.

5. Confidentiality

5.1 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 Utility Standing Offer Deed or any Site 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.

6. Disputes

6.1 Procedure for resolving disputes

- (a) Any dispute between the parties arising under this Deed must be resolved in accordance with this clause 6.
- (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 6.2;
 - (ii) secondly, if the dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 6.2(c)(i) the parties may agree one of the following alternatives:
 - (A) **Alternative 1:** that the dispute be referred to an expert for determination in accordance with clauses 6.4 to 6.8 (inclusive); or

- (B) **Alternative 2:** that the dispute be referred to arbitration in accordance with clause 7; or
- (C) **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

either party may commence proceedings.

6.2 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 Chief Executive Officers (or equivalent) of both parties (**Representatives**).
- (b) A notice under clause 6.2(a) must:
 - (i) state that it is a notice under this clause 6; 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 6.2(a), then:
 - (i) the Representatives must, within 10 Business Days of the date on which the notice under clause 6.2(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 Representatives will be reduced to writing, signed by or on behalf of each party and will be contractually binding on the parties.

6.3 Alternative 1 - Expert determination

If:

- (a) a dispute which has been referred to the Representatives for negotiation in accordance with to clause 6.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 6.2(c)(i); and
- (b) the parties agree within 20 Business Days after the expiration of the period for negotiation referred to in clause 6.2(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 6.4 to 6.8. For the avoidance of doubt, a dispute may only be referred to an expert for determination by agreement of the parties.

6.4 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 6.3, the parties must exchange lists of 3 persons (in order of preference) who, if appointed, would satisfy the requirements of clause 6.4(d), from whom the expert is to be chosen.

- (b) Any person that appears on both lists under clause 6.4(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 6.2(a) will be appointed.
- (c) If no person appears on both lists, the party which gave the notice under clause 6.2(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 6.4(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 6.4(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 6.4 on the basis that the expert does not satisfy the requirements of clause 6.4(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.

6.5 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.

6.6 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 7.
- (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.

6.7 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.

6.8 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.

7. Arbitration

7.1 Alternative 2 - Reference to Arbitration

If the parties choose Alternative 2 of clause 6.1(b)(ii)(B), then this clause 7 will apply.

7.2 Arbitration

- (a) Arbitration in accordance with this clause 7 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 7.
- (b) The seat of the arbitration will be Melbourne, Victoria.
- (c) The language of the arbitration will be English.

7.3 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 6.1(b)(ii)(B), the arbitrator or arbitrators will be appointed by the Australian Centre for International Commercial Arbitration.

7.4 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 7 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 7.4(a)(i) and 7.4(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 7.4(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 7.4(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.

7.5 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 7.5, have applied to any dispute referred to arbitration in accordance with this clause 7.

7.6 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 7 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 7.6(a) on such terms and conditions (if any) as the arbitrator thinks fit.

7.7 Award final and binding

(a) Subject to clause 7.7(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 7.

7.8 Continue to perform

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

7.9 Governing law of arbitration agreement

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

7.10 Interlocutory relief

This clause 7 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.

8. Termination

8.1 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 Utilities Standing

Offer Deeds formed in accordance with clause 3 of this Deed and any Site Works Agreements will not be affected and must be fulfilled in accordance with the terms of the relevant Utilities Standing Offer Deeds and Site Works Agreements, unless the parties otherwise agree in writing.

8.2 Termination of a Utilities Standing Offer Deed

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

9. Notices

9.1 Notices

- (a) A notice shall 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 the Deed or last communicated in writing by that person to the person giving the notice, whichever is the earlier.
- (b) A notice under this Deed shall 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 9.1(b) takes effect when taken to be received (or at such later time specified in the notice). Subject to clause 9.1(d), a notice is taken to be received:
 - (i) if delivered by hand, on the date it is delivered to the addressee;
 - (i) if sent by pre-paid express post, on the sixth Business Day after the date of posting;
 - (ii) 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 6 or clause 7, such notice shall 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 9.1(c).
- (e) Without limiting the generality of 'notice', it includes a document.

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 6 and 7, 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 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.

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 State 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 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.

9.9 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.

9.10 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.

9.11 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.

9.12 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.

9.13 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 9.13(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.

Signing page

Executed as a deed

Executed by the **Secretary to the Department of Transport** in accordance with the *Transport Integration Act 2010* (Vic) in the presence of:

Signature of witness



Secretary to the Department of Transport



Name of witness (print)

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

Signature of director

Full name of director

Signature of company secretary/director

Full name of company secretary/director

Schedule 1- Key Details for Master Utility Agreement

1.	Commencement Date (Clause 1.1)	Upon execution by both parties
2.	Expiry Date (Clause 1.1)	31 December 2027
3.	Details for Notices - the State (Clauses 3.4 and 9.1)	Contact Person and Role: Address: Email address: Phone number:
4.	Details for Notices - the USP (Clauses 3.4 and 9.1)	Contact Person and Role: Address: Email address: Phone number:

Annexure A to Master Utility Agreement - Template Utilities Standing Offer Deed

(Clause 3.1(a))

Utilities Standing Offer Deed

North East Link Project

[insert USP]

USP

[Insert name]

Contractor

CONTENTS

1.	Definitions and Interpretation	22
2.	Operation and documents forming deed.....	24
3.	Site Works Agreements	25
4.	Subsequent Relevant Utility Infrastructure and Unnotified Utility Infrastructure	27
5.	Confidentiality	28
6.	Disputes	28
7.	Arbitration.....	31
8.	Site Works Agreement Formation Disputes.....	33
9.	Termination	37
10.	Notices	37
	Schedule 1 - Key Details for Template Utilities Standing Offer Deed.....	41
	Annexure A – General Conditions	43
	Annexure B – Template Site Works Order	97
	Annexure C – Agreed USP Rates	106
	Annexure D – Relevant Contractor Area	107
	Annexure E - Expert Determination Agreement.....	108
	Annexure F - Form of deed of novation	124

This Deed is dated [insert]

Parties

Contractor:

Name: [insert name] ABN [insert]

Address: [insert]

USP:

Name [insert name] ABN [insert]

Address: [insert]

Background

- A. The Secretary, Department of Transport, is the project authority for the North East Link Project which was declared to be a declared project under section 10 of the *Major Transport Projects Facilitation Act 2009* (Vic) ("**MTPFA**"), the declaration of which was published in the Government Gazette on 19 June 2018 ("**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 State ("**Master Utility Agreement**") under which the USP has agreed that when required to do so by the State, the USP will enter into standing offer deeds in the form set out in clause 3.1 with Relevant Contractors for the purposes of enabling Relevant Contractors to access, relocate, remove or protect Relevant Utility Infrastructure during the course of the Project ("**Utilities Standing Offer Deeds**").
- E. The parties have agreed to enter into this Utilities Standing Offer Deed ("**Deed**") in order to:
 - (a) govern the terms on which the Contractor and the USP will enter into a Site Works Agreement; and
 - (b) set out the terms which are required to be included in the Site Works Agreements.

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 below:

Agreed USP Rates means the rates set out at Annexure C to this Deed, which must include any amounts in respect of overheads and profit.

Approval means:

- (a) each State approval required for the purpose of the Project; and
- (b) any other 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).

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 in Schedule 1.

Dispute means any dispute between the parties arising under this Deed other than a Site 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 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:

- (d) legislation and delegated legislation;
 - (e) all ordinances, by-laws, regulations of and other statutory instruments (however described) issued under the legislation or delegated legislation; and
 - (f) consolidations, amendments, re-enactments and replacements of legislation or delegated legislation,
- but excludes Approvals.

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

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

MTPFA has the meaning in paragraph A of the Background.

Personnel means employees, agents, contractors and nominated representatives.

Project has the meaning in paragraph A of the Background.

Relevant Contractor has the meaning given in the Master 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 has the meaning given in the Master Utility Agreement.

Renewed Term means the period referred to in the Schedule, commencing on the Expiry Date or the Renewed Term Expiry Date, as the case may be. **Representative** has the meaning in clause 6.2(a).

Secretary means the Secretary, Department of Transport, Victoria.

Site Works Agreement means an agreement either agreed under clause 3.2 or approved under clause 8.7.

Site Works Order means a document in the form of the Template Site Works Order, as completed and issued by the Contractor to the USP.

Site Works Agreement Formation Dispute has the meaning in clause 8.

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

Subsequent Relevant Utility Infrastructure has the meaning given in clause 4.

Template Site Works Order means the document attached at Annexure B.

Term means the period identified in clause 2.1(a).

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

USP Works Costs has the meaning in clause 3.2.

Utilities Standing Offer Deed 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. Operation and documents forming deed

2.1 Term

- (a) This Deed commences on the Commencement Date and expires on latest of the Expiry Date, the Renewed Term Expiry Date (if any) or the Final Expiry Date (if any), unless it is terminated earlier in accordance with this Deed, in which case this Deed will expire on the date of such earlier termination.
- (b) If the Contractor:
 - (i) wishes to renew this Deed for a Renewed Term to commence immediately after the Expiry Date; and

- (ii) gives notice to the Utility not less than 1 month before the Expiry Date,

this Deed will be extended for the Renewed Term on the same terms, until the date which is 2 years after the commencement of the Renewed Term ("**Renewed Term Expiry Date**").

- (c) If the Contractor:

- (i) wishes to renew this Deed for a further Renewed Term to commence immediately after the Renewed Term Expiry Date; and

- (ii) gives notice to the Utility not less than 1 month before the Renewed Term Expiry Date,

this Deed will be extended for a further Renewed Term ("**Second Renewed Term**") on the same terms, until the date which is 2 years after the commencement of the Second Renewed Term ("**Final Expiry Date**").

2.2 Documents forming this Deed

This Deed consists of the following documents:

- (a) this document;
- (b) the General Conditions; and
- (c) the Template Site Works Order.

3. Site Works Agreements

3.1 General

Access to Sites in accordance with this Deed will be governed by the relevant Site Works Agreement in respect of each Site. Each Site Works Agreement will comprise:

- (a) a signed Site Works Order as contemplated by clause 3.2(g); and
- (b) the General Conditions.

3.2 Process for creating Site Works Agreements

The process for agreeing any new Site Works Agreement during the Term is as follows:

- (a) the Contractor may (but is not obliged to), at any time during the Term, provide to the USP a Site Works Order in the form of the Template Site Works Order completed to include all information referred to in the Template Site Works Order, to the extent the Contractor is able to provide such information;
- (b) the USP acknowledges and agrees that all Agreed USP Rates are inclusive of all overheads and profit;
- (c) within 5 Business Days of receiving a Site Works Order under clause 3.2(a), the USP must:
 - (i) to the extent that the Site Works Order includes USP Works, calculate and supply to the Contractor a reasonable amount for the proposed USP Works Costs which must be based on:

- (A) the Agreed USP Rates 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 shall include a reasonable amount for profit and overheads;
- (ii) review and consider the Site Works Order and provide comments and any further information which the USP is to provide (including any additional information as requested by the Contractor);
- (iii) complete any details in the Site Works Order as reasonably requested by the Contractor; and
- (iv) either:
 - (A) request further information if necessary, in respect of the Site Works Order including reasons why it does not yet accept the Site Works Order; or
 - (B) accept the Site Works Order by providing written notice to the Contractor of such acceptance and by signing the Site Works Order;
- (d) if the USP has not accepted the Site Works Order under clause 3.2(c)(iv)(B), the parties must negotiate in good faith to make any adjustments to the Site Works Order acceptable to both parties, after which (without limiting clause 3.2(a)) the Contractor may submit a revised Site Works Order ("**Alternative Site Works Order**") under clause 3.2(a);
- (e) if the USP has not accepted an Alternative Site Works Order within 15 Business Days of the Contractor providing the original Site Works Order to the USP in accordance with clause 3.2(a), either party may refer the matter for dispute resolution under clause 8;
- (f) if the parties have not entered into a Site Works Agreement within the period specified in clause 3.2(e), each party must give written notice to the North East Link Project, using the contact details set out below:

Contact position:

Address:

Email address:

Phone number:
- (g) the parties agree that on and from the date that both parties sign a Site Works Order under clause 3.2(c)(iv)(B), a Site Works Agreement is deemed to be formed; and
- (h) 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 Site Works Orders at all, and the USP shall have no Claim against the Contractor in relation to the number of or lack of Site Works Orders 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 Site 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. Subsequent Relevant Utility Infrastructure and Unnotified Utility Infrastructure

4.1 Subsequent Relevant Utility Infrastructure

- (a) If, at any time during the Term, the USP intends to:
 - (i) construct any New Relevant Utility Infrastructure, or
 - (ii) modify or relocate any existing Relevant Utility Infrastructure,in the Relevant Contractor Area ("**Subsequent Relevant Utility Infrastructure**"), the USP must promptly, and in any event before commencing any work to construct or modify the Subsequent Relevant Utility Infrastructure, notify the Contractor in writing, which notice must:
 - (iii) include a description of the nature of the Subsequent Relevant Utility Infrastructure and its location; and
 - (iv) attach to the notice a plan that shows:
 - (A) the location of the Subsequent Relevant Utility Infrastructure within an area of 3 square metres or less; or
 - (B) at least 2 locations of the Subsequent Relevant Utility Infrastructure in a way that will enable the Contractor to determine the precise location of the Subsequent Relevant Utility Infrastructure.
- (b) The USP must not commence any work in respect of any Subsequent Relevant Utility Infrastructure until the USP has:
 - (i) complied with clause 4.1(a); and
 - (ii) entered into good faith negotiations with the Contractor to try to agree a mutually satisfactory arrangement whereby:
 - (A) any delay or disruption to:
 - (1) the Project; or
 - (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) cost to either the Contractor or the USP,

will be minimised to the extent possible.

4.2 Unnotified Utility Infrastructure

If either party becomes aware of any Relevant Utility Infrastructure which is or appears to be Unnotified Utility Infrastructure, the parties acknowledge and agree that:

- (a) to the extent that it is established that that Unnotified Utility Infrastructure is infrastructure which is owned, operated or controlled by the USP, the USP must, at its election, within 10 Business Days of receiving a written notice from the Contractor, either:
 - (i) agree to the Contractor carrying out works to remove, relocate or protect the infrastructure; or
 - (ii) produce a plan acceptable to the Contractor, acting reasonably, specifying the time period within which and the method by which the USP will carry out the works itself to remove, relocate or protect the infrastructure.
- (b) to the extent that the USP elects to act in accordance with clause 4.2(a)(ii), the USP must comply fully with that plan.

5. Confidentiality

5.1 Confidentiality

- (a) Each party must not, and must ensure its Personnel do not, 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 Site 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.

6. Disputes

6.1 Procedure for resolving Disputes

- (a) Any Dispute must be resolved in accordance with this clause 6.

- (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 6.2;
 - (ii) secondly, if the Dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 6.2(c)(i) the parties may agree one of the following alternatives:
 - (A) **Alternative 1:** that the Dispute be referred to an expert for determination in accordance with clauses 6.4 to 6.8 (inclusive); or
 - (B) **Alternative 2:** that the dispute be referred to arbitration in accordance with clause 7; or
 - (C) **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
- either party may commence proceedings.

6.2 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 Chief Executive Officers (or equivalent) of both parties (**Representatives**).
- (b) A notice under clause 6.2(a) must:
 - (i) state that it is a notice under this clause 6; 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 6.2(a), then:
 - (i) the Representatives must meet and attempt in good faith to resolve the Dispute (in whole or in part) within 10 Business Days of the date on which the notice under clause 6.2(a) is received (or such later date as the parties may agree); and
 - (ii) any agreement reached between the Representatives will be reduced to writing, signed by or on behalf of each party and will be contractually binding on the parties.

6.3 Alternative 1 - Expert determination

If:

- (a) a Dispute which has been referred to the Representatives for negotiation in accordance with to clause 6.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 6.2(c)(i); and

- (b) the parties agree within 20 Business Days after the expiration of the period for negotiation referred to in clause 6.2(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 6.4 to 6.8. For the avoidance of doubt, a Dispute may only be referred to an expert for determination by agreement of the parties.

6.4 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 6.3, the parties must exchange lists of 3 persons (in order of preference) who, if appointed, would satisfy the requirements of clause 6.4(d), from whom the expert is to be chosen.
- (b) Any person that appears on both lists under clause 6.4(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 6.2(a) will be appointed.
- (c) If no person appears on both lists, the party which gave the notice under clause 6.2(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 6.4(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 6.4(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 6.4 on the basis that the expert does not satisfy the requirements of clause 6.4(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.

6.5 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.

6.6 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.

6.7 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.

6.8 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.

7. Arbitration

7.1 Alternative 2 - Reference to Arbitration

If the parties choose Alternative 2 of clause 6.1(b)(ii)(B), then this clause 7 will apply.

7.2 Arbitration

- (a) Arbitration in accordance with this clause 7 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 7.
- (b) The seat of the arbitration will be Melbourne, Victoria.
- (c) The language of the arbitration will be English.

7.3 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 6.1(b)(ii)(B), the arbitrator or arbitrators will be appointed by the Australian Centre for International Commercial Arbitration.

7.4 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 7 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 7.4(a)(i) and 7.4(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 7.4(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 7.4(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.

7.5 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 7.5, have applied to any Dispute referred to arbitration in accordance with this clause 7.

7.6 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 7 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 7.6(a) on such terms and conditions (if any) as the arbitrator thinks fit.

7.7 Award final and binding

- (a) Subject to clause 7.7(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 7.

7.8 Continue to perform

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

7.9 Governing law of arbitration agreement

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

7.10 Interlocutory relief

This clause 7 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.

8. Site Works Agreement Formation Disputes

8.1 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 8, then:
 - (i) that party must give written notice to the other party that a dispute exists to which this clause 8 applies;
 - (ii) the parties must use all reasonable endeavours to agree on a person to be appointed by the Secretary under clause 8.1(b); and
 - (iii) if, within 5 Business Days after the giving of a notice under clause 8.1(a)(i):
 - (A) the parties have agreed on a person to be appointed by the Secretary under clause 8.1(b), the parties must notify, in writing, the Secretary of that outcome and the name of the person; or
 - (B) the parties have not agreed on a person to be appointed by the Secretary under clause 8.1(b) the parties must notify, in writing, the Secretary of that outcome.
- (b) On receipt of a notice under clause 8.1(a)(iii):
 - (i) the Secretary must appoint the person named in that notice as the expert; and
 - (ii) the Secretary must:
 - (A) make the appointment within 5 business days after receipt of a notice under clause 8.1(a)(iii); and
 - (B) notify, in writing, the parties of the appointment.
- (c) On receipt of a notice under clause 8.1(a)(iii)(B), the Secretary must appoint a person as the expert in accordance with this clause 8.1(c):
 - (i) the person appointed under clause 8.1(c)(i) 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 Site Works Agreement Formation Dispute must be resolved.
- (ii) The Secretary must:
 - (A) make an appointment within 5 business days after receipt of a notice under clause 8.1(a)(iii)(B); and
 - (B) notify, in writing, the parties of the appointment.

8.2 Fees of, and costs incurred by, expert

An expert appointed under clause 8.1(b) or 8.1(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 8.7.

8.3 Immunity for expert

- (a) The expert is not personally liable for anything done or omitted to be done in good faith:
 - (i) in the exercise of a power or the discharge of a duty under this Deed; or
 - (ii) 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.
- (b) Any liability resulting from an act or omission that would, but for 8.3(a), attach to the expert, attaches instead to the Crown.

8.4 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 8 for the resolution of the dispute by giving written notice of that commencement to the parties.

8.5 Determination of procedure by expert

- (a) The expert, within 5 business days after giving written notice under clause 8.4, must:
 - (i) subject to clause 8, determine the procedure he or she will apply for the resolution of the dispute; and
 - (ii) notify, in writing, the parties of that procedure.
- (b) Unless otherwise directed in writing by the expert:
 - (i) submissions by the parties to the expert must be in writing; and

- (ii) the parties must provide a draft Site Works Agreement (whether as part of a written submission or otherwise) that identifies the matters in relation to which the parties do not agree.

8.6 Parties may make submissions

A party may make a submission in relation to the dispute to the expert, in accordance with the procedure determined by the expert, within 30 business days after being notified of the procedure under clause 8.5(a)(ii).

8.7 Determination of expert resolving dispute

- (a) The expert must make a determination to resolve the dispute with 15 Business Days after the receipt of all of the submissions of the parties.
- (b) A determination under clause 8.7(a) must:
 - (i) set out the reasons of the expert;
 - (ii) determine the terms and conditions for a Site Works Agreement; and
 - (iii) be given to the parties.
- (c) In determining the terms and conditions for a Site Works Agreement, the expert must have regard to the Model Utility Agreement Guidelines.
- (d) An approved Site Works Agreement is taken to arise between the parties in accordance with the expert's determination.

8.8 Termination of approved Site Works Agreement

An approved Site Works Agreement taken to have arisen under clause 8.7(d) may not be terminated or revoked unless agreed by both parties or as expressly provided for in the Site Works Agreement.

8.9 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 8.7.

8.10 Parties are liable to the Secretary for expert's costs paid by the Secretary

- (a) The parties are liable to the Secretary for the expert's costs as provided in a determination under this clause 8.10(a) and the Secretary 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 8.10(a).
- (c) A determination under clause 8.10(b) must be fair and reasonable.
- (d) In determining what is fair and reasonable for the purpose of clause 8.10(c), the expert may have regard to:
 - (i) whether a party used all reasonable endeavours to negotiate a Site 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 8.10(d) does not limit what may be had regard to in determining what is fair and reasonable for the purpose of clause 8.10(c).
- (f) A determination under clause 8.10(b) must:
 - (i) set out the reasons of the expert; and
 - (ii) be given to the Secretary and the parties.
- (g) In this clause 8.10:

expert's costs means the fees, allowances and costs referred to in clause 8.2.

8.11 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 8.7.
- (b) An appeal must be commenced:
 - (i) within 10 business days after a determination of the expert under clause 8.7; and
 - (ii) in accordance with the rules of the Supreme Court.

9. Termination

9.1 Termination where Master Utility Agreement terminated

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

9.2 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 Master Utility Agreement and any separate Site 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 Site Works Agreements, unless the parties otherwise agree in writing.

10. 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 10(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 10(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.

10.2 Governing Law

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

10.3 Jurisdiction

Without limiting clauses 6 and 7, 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.

10.4 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.

10.5 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.

10.6 Amendments

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

10.7 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.

10.8 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.

10.9 Consents, approvals and directions

- (a) **(Contractor):** A consent or approval required in accordance with this Deed from the Contractor may be given or withheld, or may be given subject to any conditions, as the Contractor 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.

10.10 Amendments

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

10.11 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.

10.12 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.

10.13 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.

10.14 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 10.8(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 Template Utilities Standing Offer Deed

1.	Commencement Date: (Clause 1.1)	Upon execution by both parties
2.	Expiry Date (Clause 1.1)	31 December 2027
3.	Renewed Term (if any) (Clause 1.1)	2 years

Signing page

Executed as a deed

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

Signature of director

Full name of director

Signature of company secretary/director

Full name of company secretary/director

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

Signature of director

Full name of director

Signature of company secretary/director

Full name of company secretary/director

Annexure A to Template Utilities Standing Offer Deed – General Conditions

NELP UTILITIES STANDING OFFER GENERAL CONDITIONS

Contents

1.	Definitions and Interpretation	47
1.1	Definitions	47
1.2	Interpretation	52
2.	Site Works Agreements and Variations	52
2.1	Application	52
2.2	Variations to Project Works	52
2.3	Contractor not to commence work	53
3.	Design	53
4.	Construction	54
5.	Intellectual Property	55
5.1	Warranties.....	55
5.2	Licence.....	55
5.3	Moral Rights.....	56
6.	Conditions for access	56
7.	Access Licence	56
7.1	Grant of licence.....	56
7.2	Third party access	56
7.3	Defect rectification	57
8.	Contestable and Non-Contestable Works	57
9.	USP Works and Right of Access	57
9.1	USP Works	57
9.2	Subcontracting.....	58
9.3	Access to the Site	58
9.4	Access to land other than the Site.....	58
9.5	USP to comply with directions	58
9.6	Interference.....	58
9.7	Completion of USP Works.....	59
9.8	General Completion Obligation	59
10.	USP Works Costs	59
10.1	Payment of the USP Works Costs	59
10.2	Payment due dates.....	59
11.	GST.....	59
12.	Contractor Works	60
12.1	Standards.....	60
12.2	Conditions for Commencement of Construction Work.....	61
12.3	Subcontracting	61

12.4	Cost of Project Works	61
13.	USP Requested Works	61
14.	Safety & OHS – Compliance and Principal Contractor	61
15.	Insurance	62
15.1	Public liability insurance	62
15.2	Professional indemnity insurance.....	62
15.3	Additional Requirements	63
16.	Indemnity	63
17.	Contractor's General Obligations	64
18.	Damage to operating USP Assets	64
19.	Compliance with Laws	64
20.	Notification of incidents.....	64
21.	Site Conditions and Contamination	65
22.	Assignment and novation	66
22.1	Assignment by Contractor	66
22.2	Novation	66
23.	Reinstatement of the Site and Assets	67
23.1	Reinstatement obligation	67
24.	Ownership of Assets	67
24.1	Contractor retains ownership.....	67
24.2	Condition of Retained USP Assets.....	67
25.	Practical Completion	68
25.1	Contractor to notify of Practical Completion.....	68
25.2	Inspection of USP Assets at Practical Completion	68
25.3	Provision of Handover Information	69
25.4	Defects Correction Period	69
26.	Further Agreements	69
27.	Further access	69
28.	Emergency.....	69
29.	Termination	70
29.1	Effect of termination on Site Works Agreements	70
29.2	Termination for convenience	70
30.	Disputes	70
30.1	Procedure for resolving disputes	70
30.2	Negotiation.....	71
30.3	Expert determination.....	71
30.4	Selection of expert	72
30.5	Rules of expert determination	72
30.6	Expert finding	73

30.7	Liability of expert.....	73
30.8	Costs	73
31.	Arbitration.....	73
31.1	Reference to Arbitration.....	73
31.2	Arbitration.....	74
31.3	Appointment of arbitrator	74
31.4	General Principles for conduct of arbitration	74
31.5	Proportional liability.....	75
31.6	Extension of ambit of arbitration proceedings	75
31.7	Award final and binding	76
31.8	Continue to perform	76
31.9	Governing law of arbitration agreement	76
31.10	Interlocutory relief	76
32.	Notices	76
33.	General.....	77
33.1	Amendments.....	77
33.2	Waiver	77
33.3	Survival of certain provisions.....	77
33.4	No further rights	78
33.5	Parties to bear their own costs	78
33.6	Governing Law and jurisdiction	78
33.7	Proportionate liability	78
33.8	Relationship of parties	79
33.9	Severance	79
33.10	Counterparts	79
Annexure A - Conditions for Commencement of Construction Work		80
Annexure B - Expert Determination Agreement.....		81

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 (or would be likely to) result in any other Loss or Damage to USP.

Access Period means the period starting on the later of the date stated in the relevant Site 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 Site Works Agreement.

Approval means:

- (a) each State approval required for the purpose of the Project; and
- (b) any other 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.

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 Project Works and the USP Works 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;
- (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 Project Works and 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).

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 Site 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 Site 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.

Condition Report means the condition report (if any) attached to the relevant Site 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 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) that the Contractor is required to obtain in 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(c).

Contractor has the meaning given in the relevant Site Works Agreement.

Contractor Contact Person has the meaning given in the relevant Site Works Agreement.

Contractor Works means those parts of the Project Works described in the relevant Site 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 Works.

Defects Correction Period has the meaning given in the relevant Site Works Agreement.

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, 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 Site Works Agreement.

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.

General Conditions means this document.

Handover Information has the meaning given in the relevant Site Works Agreement.

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 Site Works Agreement.

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 Site Works Agreement or arising at Law in connection with a Site Works Agreement.

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 25.2(b)(i).

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 Site Works Agreement, in respect of which title reverts to the USP in accordance with clause 25.

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

OHS Act means the *Occupational Health and Safety Act 2004* (Vic) and the *Occupational Health and Safety Regulations 2007* (Vic).

parties has the meaning given in the relevant Site Works Agreement.

Personnel means employees, agents, contractors and nominated representatives.

Plan means the plan identified as such in the relevant Site 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 given in clause 25.2(b).

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

Principal Contractor has the meaning given in clause 14(a).

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

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

Proposed Variation has the meaning given in clause 2.2.

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.

Retained USP Assets means the USP Assets other than any New USP Asset which has reached Practical Completion in accordance with clause 25.2.

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

Site Works Agreement means an agreement either agreed under clause 3.2 of the Utilities Standing Offer Deed or approved under clause 8.7 of the Utilities Standing Offer Deed.

Term has the meaning given in the Utilities Standing Offer Deed.

USP has the meaning given in the relevant Site 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; and
- (b) a New USP Asset after Practical Completion in accordance with clause 25.2.

USP Contact Person has the meaning given in the Site Works Agreement.

USP Policies and Requirements means any corporate policies, application processes or guidelines of the USP which, at the date of the Utilities Standing Offer Deed are either published or notified in writing to the Contractor, in each case prior to the issue of the relevant Site Works Order, but does not include any standard form of contract drafted by or on behalf of a USP, whether published or unpublished.

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 Site Works Agreement to be carried out by or on behalf of the USP (if any), other than any USP Requested 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 Site 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 Site Works Agreement, knew or ought to have known was necessary,

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

USP Works Costs has the meaning given in clause 3.2 of the Utilities Standing Offer Deed, and are as specified in or calculated in accordance with the relevant Site Works Agreement.

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

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 Master 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.
- (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. Site Works Agreements and Variations

2.1 Application

These General Conditions apply to each Site 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 Site Works Agreement.

2.2 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 Site 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; or

- (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 under clause 30; or
- (b) acting reasonably, reject the Proposed Variation, in which case the Proposed Variation:
 - (i) if the Access Period has not commenced, does not constitute part of the Project Works; or
 - (ii) if the Access Period has already commenced, does not constitute part of the Project Works being the subject of the licence granted under clause 7,

and this clause 2.2 applies anew.

2.3 Contractor not to commence work

- (a) Subject to clause 2.3(b), the Contractor must not commence any work in relation to any Proposed Variation:
 - (i) unless and to the extent that the USP approves the Proposed Variation in accordance with clause 2.2; or
 - (ii) where the matter has been referred to dispute in accordance with the processes under either or both of clauses 30 and 31, except in accordance with the outcome of those processes.
- (b) To the extent that work referred to in clause 2.3(a) is design work, the Contractor may commence work despite neither of the conditions in clauses 2.3(a)(i) and 2.3(a)(ii) being fulfilled, but to the extent the Contractor commences and carries out any such design work, it does so at its own cost and risk.

3. Design

- (a) The party responsible for carrying out design for, respectively:
 - (i) the Contractor Works or a specified part of the Contractor Works, and
 - (ii) any USP Works or a specified part of the USP Works,

are as set out in the relevant Site Works Agreement ("**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 works;
- (iii) process for certification of completion of design (to the extent they are additional to or more onerous than those contained in clause 9.7);
- (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; or
- (viii) the relevant Site Works Agreement, including Attachment 2 to the relevant Site Works Order,

("together, **"Design Requirements"**).

4. Construction

- (a) The party responsible for carrying out construction for any Project Works will be as set out in the relevant Site Works Agreement ("**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 (to the extent they are additional to or more onerous than those contained in clause 25);
 - (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; or

- (ix) the relevant Site Works Agreement, including Attachment 3 to the relevant Site Works Order;

(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;
 - (ii) by the use or enjoyment of the Project Assets or 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 Site 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 Site 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 Site 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 Site 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 Site 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 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), during or after the Term, 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 North East Link 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 Site 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 Site Works Agreement and the day after all of the following have been satisfied:

- (a) the Contractor has obtained all Consents in accordance with clause 19;
- (b) the Contractor has provided the USP with evidence that the Contractor has complied with its obligations in clause 15;
- (c) the USP has completed any USP Works stated in the Site Works Agreement to be completed before the Access Period may commence; and
- (d) any other conditions specified in the Site Works Agreement,

unless otherwise specified in the relevant Site Works Agreement.

7. Access Licence

7.1 Grant of licence

During the Access Period, the USP grants to the Contractor and the Contractor's Representatives a non-exclusive licence to access the Existing USP Assets to carry out the Contractor Works subject to the terms and conditions of the relevant Site Works Agreement.

7.2 Third party access

Notwithstanding that the licence granted under clause 7.1 is non-exclusive, and subject to its emergency rights under clause 28, if the USP proposes to grant any third party access to the Existing USP Assets during the Access Period, it must:

- (a) give the Contractor 10 Business Days prior written notice of the proposed access; and
- (b) ensure the terms of access require the third party to comply with directions of the Contractor and the Principal Contractor.

7.3 Defect rectification

- (a) Subject to and without limiting clause 27, during the Defects Correction Period, the Contractor may:
 - (i) continue to access the USP Assets, which access will be on the terms and conditions of the relevant Site Works Agreement as a licence from month to month; and
 - (ii) rectify defects in the Contractor Works in the Site.
- (b) The parties acknowledge and agree that during the Defects Correction Period, if rectification of defects in the Contractor Works will impact on an USP Asset, any such rectification must be carried out in accordance with clause 27.

8. Contestable and Non-Contestable Works

- (a) This clause 8 will only apply to a particular Site Works Agreement where it is stated in the Relevant Site Works Agreement to apply.
- (b) To the extent that any Law or any USP Policies and Requirements require that any Project Works must be carried out by or on behalf of the USP ("**Non-Contestable Works**"), those Works will be USP Works. **[Drafting Note: Utility to advise if there are any particular assets that are non-contestable.]**
- (c) To the extent that clause 8(b) does not apply, at the Contractor's election ("**Contestable Works**"), those Project Works will be carried out by either the Contractor or the USP, as stated in the relevant Site Works Agreement.

9. USP Works and Right of Access

9.1 USP Works

- (a) The USP must obtain and maintain all Consents required for the USP Works (if any).
- (b) The USP must carry out the USP Works (if any):
 - (i) within the timeframes (if any) set out in the Site Works Agreement, and if none, within a reasonable time from the date of the relevant Site 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; and
 - (iv) in accordance with all Design Requirements and Construction Requirements (as the case may be).
- (c) If the relevant Site Works Agreement states that this clause 9.1(c) 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.

9.2 Subcontracting

The USP may subcontract the performance of all or part of any USP Works at its sole discretion.

9.3 Access to the Site

The Contractor acknowledges and agrees that, subject to clause 9.4, the USP will at any time after giving reasonable notice to the Contractor, have access to the Site for any reason, including 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 Site Works Agreement.

9.4 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 Site Works Agreement.

9.5 USP to comply with directions

If the USP accesses the Site during the Access Period, the USP must comply with all directions issued by the Principal Contractor in its capacity as Principal Contractor.

9.6 Interference

- (a) The Contractor must not unreasonably delay or interfere with performance of any USP Works or the USP's access to the Site in accordance with clause 9.3, and must (except during the Access Period, in which case clause 9.5 applies) comply

and ensure the Contractor's Representatives comply with all reasonable health, safety and related directions given by the USP or the USP's Representatives.

- (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 Site Works Agreement.

9.7 Completion of USP Works

Where stated in the Site 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 Site Works Agreement;
- (b) the USP must give the Contractor at least the number of days' written notice stated in the relevant Site 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 shall 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 Site 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 Site 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 Site Works Agreement in the manner specified by the USP from time to time.

10.2 Payment due dates

If a Site Works Agreement does not specify a due date in relation to a payment by the Contractor under the Site Works Agreement (as applicable), 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 Site 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 Master Agreement or a Site 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 Master Agreement or a Site 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 Master Agreement or a Site 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 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 Law 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 the Contractor has complied fully with all relevant conditions precedent set out at or referred to in:

- (a) Annexure A; and
- (b) the Site Works Agreement.

12.3 Subcontracting

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.

12.4 Cost of Project Works

The Contractor undertakes the Project Works at its cost (including the costs required to be incurred to obtain Consents in accordance with clause 19).

13. USP Requested Works

- (a) Except to the extent expressly set out in any Site Works Agreement and subject to clause 13(c), these General Conditions will not apply to any USP Requested Works.
- (b) Subject to clause 13(c), the Contractor is not obliged to negotiate with the USP in relation to, nor to carry out, any USP Requested Works.
- (c) The USP acknowledges and agrees that to the extent that any USP Requested Works fall within the definition of Subsequent Relevant Utility Infrastructure as that term is defined in the Utility Standing Offer Deed, that clause 4 of the Utility Standing Offer Deed will apply to the relevant USP Requested Works.

14. Safety & OHS – Compliance and Principal Contractor

- (a) To the extent that the relevant Site Works Agreement specifies that a party other than the USP has been appointed as principal contractor (as defined in the OHS Act) in respect of the Contractor Works or the USP Works (**Principal Contractor**):
 - (i) the USP acknowledges and agrees that the USP does not, during the Access Period, 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 during the Access Period 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 Site 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) During the Access Period, the Contractor must comply with all Laws relating to the safety of persons on or about the Site, and the carrying out of the Project Works or the Contractor's use of the Site, including the OHS Act.

15. Insurance

15.1 Public liability insurance

The parties acknowledge and agree that of the following alternatives, the alternative applying to a Site Works Agreement will be the one specified in the relevant Site Works Agreement:

Alternative 1: Contractor to insure

The parties acknowledge that the Contractor has arranged for public liability insurance to be effected and maintained in relation to the Project Works with a level of cover not less than \$20million per occurrence such insurance to be maintained until the expiry of the Term.

Alternative 2: USP to insure

The USP must arrange for public liability insurance to be effected and maintained in relation to the Project Works with a level of cover of not less than \$20million per occurrence such insurance to be maintained until the expiry of the Term.

15.2 Professional indemnity insurance

Alternative 1: Contractor to insure

- (a) The parties acknowledge that the Contractor has arranged for professional indemnity insurance to be effected and maintained in relation to the Project Works with a level of cover not less than \$10million per occurrence.

Alternative: USP to insure

- (b) The USP must before commencing any USP Works, effect and maintain professional indemnity insurance with a level of cover not less than \$10million per occurrence.
- (c) In respect of any insurance taken out under this clause 15.2:

- (i) the insurance must be maintained until 7 years after Practical Completion;
- (ii) the party taking out the insurance must ensure that every consultant and design subcontractor, if engaged in services in relation to any Project Works, effects and maintains professional indemnity insurance with levels of cover not less than stated in this clause 15.2; and
- (iii) each such consultant's and design subcontractor's professional indemnity insurance must be maintained until the expiry of the Term.

15.3 Additional Requirements

- (a) If requested by the other party, the party who is obliged to take out the insurance must provide the other party with a certificate of currency for each of the insurance policies required under this clause 15.
- (b) Any insurance referred to in this clause 15 must:
 - (i) name the other party as co-insured;
 - (ii) be obtained from insurers, and be on terms, that are reasonably acceptable to the other party;
 - (iii) contain a provision that the insurer waives all rights of subrogation against the party taking out the insurance, its related bodies corporate or any of their respective contractors or employees, in relation to the relevant Site Works Agreement.
- (c) The party who is obliged to take out the insurance must immediately notify the other party of any cancellation, non-renewal or material alteration to any of the insurances it is required to effect and maintain.
- (d) If the party who is obliged to take out the insurance fails to effect or maintain insurance in accordance with this clause 15 (whether due to cancellation, non-renewal or otherwise) the other party may, 5 Business Days after giving notice to the party who is obliged to take out the insurance of its intention to do so, effect and maintain the insurance at the cost of the party who is obliged to take out the insurance.

16. 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 Asset, whether during or after the Term, in respect of any negligent acts or omissions of, or breach of the relevant Site 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 the Contractor or the Contractor's Representatives.

- (c) The Contractor's liability under clause 16(a) and clause 16(b) is reduced proportionately to the extent that the claim by the third party is caused by the wilful misconduct of, a negligent act or omission of, or a breach of the relevant Site Works Agreement by, the USP.
- (d) Notwithstanding clauses 16(a), 16(b) and 16(c), to the extent that, and for so long as both parties to the relevant Site Works Agreement are Public Sector Bodies as defined in the *Public Administration Act 2004* (Vic):
 - (i) clauses 16(a) and 16(b) will not apply; and
 - (ii) if a dispute arises out of the relevant Site Works Agreement, the parties agree to settle the dispute in accordance with the Guidelines for Dispute Resolution between Public Sector Bodies in Victoria.

17. Contractor's General Obligations

The Contractor must at all times during the Access Period and Defects Correction Period:

- (a) provide the USP with all information reasonably required by the USP in respect of the Contractor Works from time to time;
- (b) only access the USP Assets to carry out the Contractor Works (including defect rectification) and for no other purpose without the prior written consent of the USP;
- (c) comply with all EHS Laws, and any reasonable directions of the USP relating to safety (except during the Access Period, in which case clause 13 applies); and
- (d) manage and address all complaints arising from or in relation to the Contractor's use of the Site in accordance with the requirements of the USP.

18. 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.

19. 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 Site Works Agreement as being the responsibility of the Contractor to obtain and maintain;
 - (ii) comply with all relevant Laws, including in connection with the Contractor's use of the Site in accordance with the relevant Site 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) On request by the USP, the Contractor must provide the USP with evidence of compliance with any relevant Laws or Approvals or the existence and/or currency of its Approvals.

20. Notification of incidents

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

- (a) any damage to any of the Existing USP Assets or any of the New USP Assets;
- (b) any interference with any of the Existing USP Assets or New USP Assets; or
- (c) any hazard affecting or threatening the Site, Existing USP Assets or 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.
[Drafting note: Utility to advise of any specific reporting requirements of the Utility under any law or otherwise.]

21. Site Conditions and Contamination

- (a) This clause 21 does not apply to the extent that the USP is not the owner of the Site.
- (b) 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 21(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.
- (c) 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.

- (d) The Contractor must:
 - (i) ensure that no hazardous materials emanate from or spill into the Site or from the Site; and
 - (ii) 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 acknowledges that the USP is not liable for any such Contamination.
- (e) 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, pollutant, 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).
- (f) 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.

22. Assignment and novation

22.1 Assignment by Contractor

- (a) The Contractor may only assign or transfer its rights under the relevant Site Works Agreement:
 - (i) with the prior written consent of the USP (not to be unreasonably withheld); and
 - (ii) if the proposed assignee and the Contractor have entered into a deed with the USP in the form reasonably required by the USP to the effect that the proposed assignee will perform and observe the obligations of the Contractor under the relevant Site Works Agreement.

- (b) The USP may assign its rights or obligations under the relevant Site Works Agreement without obtaining the prior written consent of the Contractor, and the Contractor must promptly execute any documents reasonably required by the USP to give effect to that assignment.

22.2 Novation

Neither party may novate any Site Works Agreement without the consent of the other party, to be given or withheld in that party's sole discretion.

23. Reinstatement of the Site and Assets

23.1 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) remove the Contractor's Property from the Site (excluding the Project Assets);
 - (ii) make good any damage to the Existing USP Assets, New USP Assets or Site caused by or arising out of or in connection with the Contractor Works to the satisfaction of the USP acting reasonably;
 - (iii) remove all Contaminants brought on to the Site by the Contractor or any person claiming through the Contractor; and
 - (iv) 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 23.1(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.

24. Ownership of Assets

24.1 Contractor retains ownership

The parties agree that:

- (a) any New USP Assets will, until Practical Completion in accordance with clause 25.2; and
- (b) each Project Asset will at all times (including beyond the Term),

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).

24.2 Condition of Retained USP Assets

The Contractor is solely responsible to ensure that it keeps 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 due to any act or omission of the

USP. The Contractor must carry out inspections as often as may be required, and undertake repairs and maintenance, and any other work required to ensure that the Retained USP Assets are kept in the Acceptable Condition.

25. Practical Completion

25.1 Contractor to notify of Practical Completion

The Contractor must give 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 Practical Completion inspection.

25.2 Inspection of USP Assets at Practical Completion

After receiving the Contractor's written notice under clause 25.1, 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 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;
 - (D) confirming that the USP Assets have been handed over to the USP; and
 - (E) 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 25.1 applies anew.

Notwithstanding anything in this clause 25.2, prior to Practical Completion of a USP Asset, the Contractor must provide to the USP the Practical Completion Information to the USP's satisfaction, acting reasonably.

25.3 Provision of Handover Information

Within three (3) calendar months of receiving a notice under clause 25.2(b)(i), the Contractor must, rectify all Minor Defects (if any) listed in clause 25.2(b)(i) and provide to the USP the Handover Information to the USP's satisfaction, acting reasonably.

25.4 Defects Correction Period

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

26. 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 Site Works Agreement and the transactions contemplated by the relevant Site Works Agreement (including any agreement necessary for the Project Assets to remain on the Site (if required)).

27. 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 works. Any approval granted by the USP does not affect the obligations of the Contractor under the Master Agreement or the relevant Site 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 27(c).

28. 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 28:
 - (i) the USP must take reasonable care not to damage any Project Asset;
 - (ii) if during the Access Period, 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 28 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.

29. Termination

29.1 Effect of termination on Site Works Agreements

The Contractor and the USP agree that if the Utilities Standing Offer Deed is terminated, discharged (including through expiry of the Term) or becomes frustrated, the separate Site 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 Site Works Agreements, unless the parties otherwise agree in writing.

29.2 Termination for convenience

The Contractor may, at any time for its sole convenience by written notice to the USP terminate a Site Works Agreement from the date stated in the notice. The termination of a Site Works Agreement pursuant to this clause 29.2 shall be without prejudice to the rights of either party to recover damages in respect of any prior breach of contract by the other party. If the Contractor terminates a Site Works Agreement under this clause 29.2, the USP will be entitled to payment of such reasonable costs as it would have been entitled to under the provisions of the relevant Site Works Agreement, but only to the extent that such costs have been actually and properly incurred as at the date of the notice.

30. Disputes

30.1 Procedure for resolving disputes

- (a) **(Disputes to be resolved):** Any dispute between the parties arising under a Site Works Agreement must be resolved in accordance with this clause 30.
- (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 30.2;
 - (ii) secondly, if the dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 30.2(c)(i) the

parties may agree that the dispute must be referred to an expert for determination in accordance with clauses 30.4 to 30.8 (inclusive) or to arbitration in accordance with clause 31; 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 30.2(c)(i) and irrespective of whether the parties failed to meet as required by that clause or whether having so met the parties fail to agree whether the dispute should be referred to an expert or to arbitration within 20 Business Days after the expiration of the period for negotiation referred to in clause 30.2(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 30.6(a),

then the dispute must be referred to arbitration in accordance with clause 31.

30.2 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 Chief Executive Officers (or equivalent) of both parties (Representatives).
- (b) **(Contents of Notice):** A notice under clause 30.2(a) must:
 - (i) state that it is a notice under this clause 30; 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 30.2(a), then:
 - (i) the Representatives must meet and attempt in good faith to resolve the dispute (in whole or in part) within 10 Business Days of the date on which the notice under clause 30.2(a) is received (or such later date as the parties may agree); and
 - (ii) any agreement reached between the Representatives will be reduced to writing, signed by or on behalf of each party and will be contractually binding on the parties.

30.3 Expert determination

If:

- (a) **(dispute unresolved by Representatives):** a dispute which has been referred to the Representatives for negotiation in accordance with to clause 30.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 30.2(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 30.2(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 30.4 to 30.8. For the avoidance of doubt, a dispute may only be referred to an expert for determination by agreement of the parties.

30.4 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 30.3, the parties must exchange lists of 3 persons (in order of preference) who, if appointed, would satisfy the requirements of clause 30.4(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 30.4(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 30.2(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 30.2(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 30.4(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 30.4(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 30.4 on the basis that the expert does not satisfy the requirements of clause 30.4(d).
- (f) **(Not an arbitration agreement):** 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) **(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.

30.5 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.

30.6 Expert finding

- (a) **(Notification):** The determination of the expert must be in writing and will be final and binding on the parties unless, within 10 Business Days of receipt of the determination, a party gives notice to the other party of its dissatisfaction and intention to refer the matter to arbitration under clause 31.
- (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.

30.7 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.

30.8 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.

31. Arbitration

31.1 Reference to Arbitration

- (a) **(Dispute):** If:

- (i) a dispute:
 - (A) which has been referred to the parties' Representatives for negotiation in accordance with clause 30.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 30.2(c)(i); and
 - (B) the parties do not agree to refer the dispute to an expert for determination; or
- (ii) in the case of a dispute which the parties agree to refer to expert determination under clause 30.3:
 - (A) a determination is not made within 30 days of the expert's acceptance of the appointment; or
 - (B) a notice of dissatisfaction is given in accordance with clause 30.6,

then either Party may notify the other that it requires the dispute to be referred to arbitration.

- (b) **(Referral):** Upon receipt by the other party of a notice under clause 31.1(a)(ii)(B), the dispute will be referred to arbitration.

31.2 Arbitration

- (a) **(ACICA Rules):** Arbitration in accordance with this clause 31 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 31.
- (b) **(Seat):** The seat of the arbitration will be Melbourne, Victoria.
- (c) **(Language):** The language of the arbitration will be English.

31.3 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 31.1(b), the arbitrator or arbitrators will be appointed by the Australian Centre for International Commercial Arbitration.

31.4 General Principles for conduct of arbitration

- (a) **(Conduct of arbitration):** The parties agree that:
 - (i) they have chosen arbitration for the purposes of achieving a just, quick and cost-effective resolution of any Dispute;
 - (ii) any arbitration conducted in accordance with this clause 31 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 31.4(a)(i) and 31.4(a)(ii).
- (b) **(Evidence in writing):** All evidence in chief must be in writing unless otherwise ordered by the arbitrator.
- (c) **(Evidence and discovery):** The rules for evidence and discovery will be the IBA Rules on the Taking of Evidence in International Arbitration current at the date of arbitration.
- (d) **(Oral hearing):** The oral hearing must be conducted as follows:
 - (i) any oral hearing must take place in Melbourne, Victoria and all outstanding issues must be addressed at the oral hearing;
 - (ii) the date and duration of the oral hearing must be fixed by the arbitrator at the first preliminary conference. The arbitrator must have regard to the principles set out in clause 31.4(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 31.4(d)(ii);
 - (vii) a party will not be bound to accept the written evidence of a witness submitted on behalf of the opposing party which is not challenged in cross examination; and
 - (viii) each party is expected to put its case on significant issues in cross examination of a relevant witness called by the opposing party or, where it seeks to challenge the evidence of a witness not called for cross-examination by reference to other evidence, to identify that evidence in its written opening submissions so that the opposing party may know the nature of and basis for the challenge to the witness' written evidence.
- (e) **(Experts):** Unless otherwise ordered each party may only rely upon one expert witness in connection with any recognised area of specialisation.

31.5 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 31.5, have applied to any dispute referred to arbitration in accordance with this clause 31.

31.6 Extension of ambit of arbitration proceedings

- (a) **(Extending Disputes):** Where:
- (i) a dispute between the parties to this Deed is referred to arbitration in accordance with this clause 31 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) **(Arbitrator's order):** An arbitrator may make an order in accordance with clause 31.6(a) on such terms and conditions (if any) as the arbitrator thinks fit.

31.7 Award final and binding

- (a) **(Final and binding):** Subject to clause 31.7(b), any award will be final and binding on the parties.
- (b) **(Appeal):** Each party consents to any appeal to a court where that appeal is made under the Commercial Arbitration Act 2011 (Vic) on a question of law arising in connection with an arbitral award made in accordance with this clause 31.

31.8 Continue to perform

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

31.9 Governing law of arbitration agreement

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

31.10 Interlocutory relief

This clause 31 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.

32. Notices

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

- (a) **(in writing):** must be in writing;
- (b) **(addressed):** must be addressed as specified in the Site 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 10(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 10(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.

33. General

33.1 Amendments

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

33.2 Waiver

- (a) Other than where the waiver is already given expressly in the terms of the relevant Site Works Agreement, a waiver that may be given by a party under the relevant Site 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 Site 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 Site Works Agreement.
- (c) No waiver of a breach of a term of the relevant Site Works Agreement operates as a waiver of another breach of that term or of a breach of any other term of the relevant Site Works Agreement.

33.3 Survival of certain provisions

- (a) All provisions of the relevant Site Works Agreement which, expressly or by implication from their nature, are intended to survive the rescission, termination or expiration of the relevant Site Works Agreement will survive the rescission, termination or expiration of the relevant Site 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 Site Works Agreement;
 - (vi) any limitation on Liability;
 - (vii) any obligation which the relevant Site Works Agreement requires a party to undertake after the rescission, expiration or termination of the relevant Site Works Agreement; or
 - (viii) any right or obligation arising on termination, rescission or expiry of the relevant Site Works Agreement.
- (b) No provision of [the relevant Site Works Agreement] which is expressed to survive the rescission, termination or expiration of [the relevant Site Works Agreement] will prevent any other provision of [the relevant Site Works Agreement], as a matter of interpretation, also surviving the rescission, termination or expiration of [the relevant Site Works Agreement].
- (c) No right or obligation of any party will merge on completion of any transaction under [the relevant Site Works Agreement]. All rights and obligations under [the relevant Site Works Agreement] survive the execution and delivery of any transfer or other document which implements any transaction under [the relevant Site Works Agreement].

33.4 No further rights

The rights conferred on the Contractor by the relevant Site Works Agreement are contractual only and nothing in the relevant Site 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 Site Works Agreement), easements or rights of way of any kind).

33.5 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 Site Works Agreement, including all costs and expenses in connection with negotiating, preparing, and executing the relevant Site Works Agreement.

33.6 Governing Law and jurisdiction

- (a) The relevant Site 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 Site Works Agreement.

33.7 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 Site Works Agreement whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.
- (b) Without limiting clause 33.7(a), the rights, obligations and liabilities of the parties (including those relating to proportionate liability) are as specified in the relevant Site Works Agreement and not otherwise, whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.

33.8 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 Site 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 Site 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 Site Works Agreement and that entering into the Site Works Agreement is for the benefit of all the beneficiaries of the trust.

33.9 Severance

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

33.10 Counterparts

The relevant Site Works Agreement may be executed in any number of counterparts and by the parties in separate counterparts. Each counterpart constitutes the relevant Site 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 Site Works Agreement.

Annexure A to General Conditions - 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;
 - (a) 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 paragraphs 1(a) and 1(b) of this Annexure A.

Annexure B to General Conditions - Expert Determination Agreement

(Clause 30.5)

Expert Determination Agreement

[]

([Project Co / Secondary Package Contractor])

[]

(USP)

[]

(Expert)

Contents

1.	Definitions	83
1.1	NELP Utilities Standing Offer General Conditions definitions	83
1.2	Definitions	83
1.3	Interpretation.....	84
2.	Relationship of parties	85
3.	Appointment of Expert.....	85
4.	Confidentiality	86
5.	Costs and fees	86
6.	Exclusion of liability and indemnity	86
7.	Co-operation of the Parties	86
8.	Governing Law and jurisdiction	87
9.	Termination	87
10.	Counterparts	87
11.	Survival of terms.....	87
	Schedule 1 - The Matter.....	89
	Schedule 2 - Rules for Expert Determination Process	90
	Schedule 3 - Schedule of Fees and Disbursements	93

Expert Determination Agreement

Date

Parties *[#insert party name and address] (#insert party name) ([Project Co / Secondary Package Contractor])*

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

[#insert party name and address] (#insert party name) [#insert name and address of Expert agreed between the Parties or appointed pursuant to clause 30.4 of the NELP Utilities Standing Offer General Conditions or the equivalent clause in each Relevant Agreement] (Expert)

Recitals

- A. The background to the Project is set out in the Utilities 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 NELP Utilities Standing Offer General Conditions definitions

Unless otherwise expressly defined, expressions used in this Agreement have the meanings given to them in the NELP Utilities Standing Offer General Conditions.

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).

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

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.

Party means *[#insert party names]*.

Project has the meaning given in the Utilities 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.

NELP Utilities Standing Offer General Conditions means Annexure A to the Utilities Standing Offer Deed.

Utilities Standing Offer Deed means the document titled Utilities Standing Offer Deed entered into between [Project Co/Secondary Package Contractor] 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;
- (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) Intellectual Property Rights;
 - (iii) any indemnity, release or financial security given under this Agreement;
 - (iv) any limitation on Liability;

- (v) any obligation which this Agreement requires a party to undertake after the rescission, expiration or termination of this Agreement; or
 - (vi) 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 to Expert Determination Agreement - The Matter

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

Schedule 2 to Expert Determination Agreement - 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 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, 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 to Expert Determination Agreement - Schedule of Fees and Disbursements

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

Signed as an agreement.

[Project Co / Secondary Package Contractor]

[Note: Execution block to be inserted]

USP

[Note: Execution block to be inserted]

Expert

[Note: Execution block to be inserted]

Annexure B to Template Utilities Standing Offer Deed – Template Site Works Order

[Drafting Note: Template Site Works Order to be attached prior to execution of this Utilities Standing Offer Deed.]

Parties: [insert] (USP)

[insert] (Contractor)

Site Works Order– [insert site name]

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 Agreement entered into by the parties in respect of the North East Link Project, will form a binding agreement.

Existing USP Assets (cl. 1.1)	The Project Works are expected to impact on the following assets: [insert details of the existing USP assets that will be impacted upon by the interface works being conducted by the Contractor.]
New USP Assets (cl. 1.1)	The Project Assets include the following assets in respect of which, when constructed, title will revert to the USP: [insert details of the new assets that will be handed over to the USP on completion]
Plan (cl. 1.1)	See plan entitled [insert title of plan] attached to this Site Works Order [Insert if applicable – see definition of "Site" in the Site Works Order]
Practical Completion Information (cl. 1.1)	[insert details of all information required by USP for Practical Completion, including any requirements for as-built drawings and specifications.]
Project Assets (cl. 1.1)	[insert details of the assets to be constructed, installed, upgraded or decommissioned at the Site, including any alterations to Existing USP Assets]
Site (cl. 1.1)	[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
USP Works Completion Test (cl. 1.1)	[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]
Access Period (cl. 1.1, 6)	Start date: [insert] End date: [insert]
USP Works	Refer to Attachment D.

(cl. 1.1, 9)	
USP Works Costs (cl. 1.1, 10)	\$(insert) or agreed method of calculation.
Contractor Works (cl. 1.1, 12)	Refer to Attachment E.
Condition Report (cl. 1.1, 23.1)	See report entitled [insert title of condition report] attached to this Site Works Order. [Insert if applicable]
Handover Information (cl. 1.1, 25.3)	[insert details of all information required by USP to be provided at the time stated in clause 25.3, including any requirements for as-built drawings and specifications.]
Defects Correction Period (cl. 1.1, 25.4)	Start date: [the day after expiry of the Access Period?] End date: [insert]
Changes to General Conditions (cl. 2.1)	[insert any changes to terms specific to these Works (including, for example specific issues in relation to land/site, Approvals)]
Responsibility for Design (cl. 3)	Party responsible for carrying out design of Project Works: [insert] Party responsible for carrying out design of USP Works (if any): [insert]
Responsibility for Construction (cl. 4)	Party responsible for carrying out construction of Project Works: [insert] Party responsible for carrying out construction of USP Works (if any): [insert]
USP Works to be completed before Access Period can commence (cl. 6)	[insert details of USP Works which must be completed before Access Period can commence (if any)]
Whether cl. 8 applies (cl. 8)	Yes/No [delete one]
Where cl. 8 applies, description of Project Works to be carried out as Contestable or Non-Contestable Works, and who to carry out (cl. 8)	Contestable Works - [insert description] Non-contestable Works - [insert description]
Time for carrying out USP Works (cl. 9.1) Whether USP to provide a programme for the USP	[insert a description of the timing for the works, including specifying timing for any USP Works which must be completed prior to the Access Period commencing]

Works and obtain approval of programme prior to commencing USP Works (clause 9.1)	Yes/No [delete one]
Whether clause 9.7 applies (cl. 9.7)	Yes/No [delete one]
Date for USP Works Completion (cl. 9.7(a))	[insert]
Number of days' notice of USP Works Completion (cl. 9.7(b))	[insert number of days written notice which USP must give Contractor of date on which USP considers that USP Works Completion will be reached]
Number of days for Contractor to give USP Works Completion Certificate or reasons why not (cl. 9.7(d))	[insert number of days]
Dates for payment of USP Works Costs (cl. 10.1)	[insert]
Conditions precedent to commencement of construction work in relation to Contractor Works (cl. 12.2)	[insert]
Identity of Principal Contractor for OHS purposes (cl. 14)	For Project Works: [insert name and details of Principal Contractor] For USP Works: [insert name and details of Principal Contractor]
Public Liability Insurance (cl. 15.1)	Alternative applying: [insert alternative applying] Level of cover applying: [insert level of cover applying]
Professional Indemnity Insurance (cl. 15.2)	Alternative applying: [insert alternative applying] Level of cover applying: [insert level of cover applying]
Additional Consents (if any) to be obtained by Contractor (cl. 19)	[insert]
Addresses for Notices	[insert, including relevant contact person for each party]

(cl. 32)	
----------	--

Signing page

Executed as a deed

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

Signature of director

Full name of director

Date of signature

Signature of company secretary/director

Full name of company secretary/director

Date of signature

\

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

Signature of director

Full name of director

Date of signature

Signature of company secretary/director

Full name of company secretary/director

Date of signature

Attachment A to Template Site Works Order

Condition Report

(Clauses 1.1 and 19.1 of General Conditions)

(to be attached, if any)

Attachment B to Template Site Works Order

Design Requirements

(Clause 3(b) of General Conditions)

(to be attached, if any)

Attachment C to Template Site Works Order

Construction Requirements

(Clause 4(b) of General Conditions)

(to be attached, if any)

Attachment D to Template Site Works Order

USP Works

(Clauses 1.1, 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]

Attachment E to Template Site Works Order

Contractor Works

(Clauses 1.1, 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 to Template Utilities Standing Offer Deed – Agreed USP Rates

[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.]

Annexure D to Template Utilities Standing Offer Deed – Relevant Contractor Area

(Clause 1.1)

[to be attached]

Annexure E to Template Utilities Standing Offer Deed - Expert Determination Agreement

(Clause 6.4(g))

Expert Determination Agreement

[]

([Project Co / Secondary Package Contractor])

[]

(USP)

[]

(Expert)

Contents

1.	Definitions	110
1.1	Utilities Standing Offer Deed definitions	110
1.2	Definitions	110
1.3	Interpretation.....	111
2.	Relationship of parties	112
3.	Appointment of Expert.....	113
4.	Confidentiality	113
5.	Costs and fees	113
6.	Exclusion of liability and indemnity	114
7.	Co-operation of the Parties	114
8.	Governing Law and jurisdiction	114
9.	Termination	114
10.	Counterparts	115
11.	Survival of terms.....	115
	Schedule 1 - The Matter.....	116
	Schedule 2 - Rules for Expert Determination Process	117
	Schedule 3 - Schedule of Fees and Disbursements	120

Expert Determination Agreement

Date

Parties *[#insert party name and address] (#insert party name) ([Project Co / Secondary Package Contractor])*

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

[#insert party name and address] (#insert party name) [#insert name and address of Expert agreed between the Parties or appointed pursuant to clause 6.4 of the Utilities Standing Offer Deed or the equivalent clause in each Relevant Agreement] (Expert)

Recitals

- A. The background to the Project is set out in the Utilities 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

10. Definitions

10.1 Utilities Standing Offer Deed definitions

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

10.2 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).

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:

- (b) 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;

- (c) 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;
- (d) registered and unregistered trademarks and service marks, including goodwill in the business concerned in the relevant goods and/or services;
- (e) trade, business or company names;
- (f) internet domain names; and
- (g) proprietary rights under the *Circuit Layouts Act 1989* (Cth),

whether created or in existence before or after the date of the Utilities Standing Offer Deed.

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.

Party means [*#insert party names*].

Project has the meaning given in the Utilities 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.

Utilities Standing Offer Deed means the document titled "Utilities Standing Offer Deed" entered into by the USP and [Project Co/Secondary Package Contractor] on [*insert date*].

10.3 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.

11. Relationship of parties

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

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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
 - (i) the Matter is settled.
- (b) **(Termination by referral):** Notwithstanding clause 18(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.

19. 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.

20. 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:
 - (ii) confidentiality or privacy;
 - (iii) Intellectual Property Rights;
 - (iv) any indemnity, release or financial security given under this Agreement;
 - (v) any limitation on Liability;
 - (vi) any obligation which this Agreement requires a party to undertake after the rescission, expiration or termination of this Agreement; or
 - (vii) 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 to Expert Determination Agreement - The Matter

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

Schedule 2 to Expert Determination Agreement - 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 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, 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 to Expert Determination Agreement - Schedule of Fees and Disbursements

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

Signed as an agreement.

[Project Co / Secondary Package Contractor]

[Note: Execution block to be inserted]

USP

[Note: Execution block to be inserted]

Expert

[Note: Execution block to be inserted]

Annexure F to Template Utilities Standing Offer Deed - Form of deed of novation

**Deed
North East Link Project
Deed of Novation**

[insert]

(Continuing Party)

[insert]

(Resigning Party)

[insert]

(Substituting Party)

The agreement

Deed of Novation

Date ►

(b) Between the parties

(c) Resigning Party [insert]
ABN [insert]
of [insert]

(d) Continuing Party [insert]
ABN [insert]
of [insert]

(e) Substituting Party [insert]
ABN [insert]
of [insert]

(f) Recitals

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.

(g) This deed witnesses 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 part

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 Site 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.

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 shall 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 shall be read as a reference to the Substituting Party.

4.2 Assumption of rights and obligations

From the Novation Date:

- (a) the Substituting Party shall:
 - (i) 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) 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 shall 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 State'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 shall 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 shall 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 shall 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 shall 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);
- (c) where the sender is the **[insert reference to the other parties to this deed excluding the State]** (under this deed), must be signed by an officer, under the common seal of the **[insert reference to the other parties to this deed excluding the State]** or by any other person approved by the **[insert reference to State]**; and
- (d) where the sender is the **[insert reference to State]**, must be signed by an officer or authorised signatory, or under the common seal of the **[insert reference to State]**.

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 for
[insert]

sign here ► _____
Director

print name _____

sign here ► _____
Company Secretary/Director

print name _____

Signed by
[State]
by

sign here
► _____
Authorised Signatory

print
name

in the presence of
sign here
► _____
Witness

print
name

Continuing Party

Signed sealed and delivered for
[insert]

sign here ►

Director

print name

sign here ►

Company Secretary/Director

print name _____

Annexure B to Master Utility Agreement - Expert Determination Agreement

(Clause 6.4(g))

Expert Determination Agreement

[]

(State)

[]

([Project Co / Secondary Package Contractor])

[]

(Expert)

Contents

1.	Definitions	136
1.1	Master Utility Agreement definitions.....	136
1.2	Definitions	136
1.3	Interpretation.....	137
2.	Relationship of parties	138
3.	Appointment of Expert.....	138
4.	Confidentiality	139
5.	Costs and fees	139
6.	Exclusion of liability and indemnity	139
7.	Co-operation of the Parties	140
8.	Governing Law and jurisdiction	140
9.	Termination	140
10.	Counterparts	140
11.	Survival of terms.....	140
	Schedule 1 - The Matter.....	142
	Schedule 2 - Rules for Expert Determination Process	143
	Schedule 3 - Schedule of Fees and Disbursements	146

Expert Determination Agreement

Date

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

[insert party name and address] (insert party name) ([Project Co/Secondary Package Contractor])

[insert party name and address] (insert party name) [insert name and address of Expert agreed between the Parties or appointed pursuant to clause 6.4 of the Master Utility Agreement or the equivalent clause in each Relevant Agreement] (Expert)

Recitals

- A. The background to the Project is set out in the Master 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 Master Utility Agreement definitions

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

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

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.

Party means [*#insert party names*].

Project has the meaning given in the Master 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.

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) **(absolute discretion)**: the State can exercise any power, right or remedy in its absolute and unfettered discretion and has no obligation to do so;
- (r) **("may")**: without limiting clause 1.3(q), the term "may", when used in the context of a power, right or remedy exercisable by the State, means that the State can exercise that power, right or remedy in its absolute and unfettered discretion and the State has no obligation to do so;
- (s) **(no bias against drafter)**: each provision will be interpreted without disadvantage to the party who (or whose representative) drafted or proposed that provision; and
- (t) **(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) the State'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 the State;
 - (v) any indemnity, release or financial security given under this Agreement;
 - (vi) any limitation on Liability;
 - (vii) any obligation which this Agreement requires a party to undertake after the rescission, expiration or termination of this Agreement; or
 - (viii) 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 to Expert Determination Agreement - The Matter

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

Schedule 2 to Expert Determination Agreement - 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 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, 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 to Expert Determination Agreement - Schedule of Fees and Disbursements

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

Signed as an agreement.

State

[Note: Execution block to be inserted]

Project Co / Secondary Package Contractor

[Note: Execution block to be inserted]

Expert

[Note: Execution block to be inserted]