

Independent Reviewer Deed of Appointment

Stage One - East West Link

[]

State

[]

Project Co

[]

Independent Reviewer

[State Note: The Independent Reviewer Deed of Appointment is subject to further consideration by the State to reflect the requirements of the Independent Reviewer Request for Tender and the proposed role of the Independent Reviewer both as a result of the roles proposed for the Independent Reviewer in Proposals and the role of the Independent Reviewer under the Tolling Services Contract.]

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Independent Reviewer Deed of Appointment made on

Parties [] (State)
[] (Project Co)
[] (Independent Reviewer)

Background

- A. The background to the Project is set out in the Project Agreement.
- B. The Independent Reviewer is experienced generally in construction and project management and, in particular, in:
 - (a) the review and checking of design documentation;
 - (b) design and construction in respect of roads and tunnels,and offers its expertise in those fields.
- C. The State Project Documents contemplate that the Independent Reviewer will discharge certain functions, including those set out in the Services Schedule.
- D. The Independent Reviewer will perform its obligations on the terms and conditions of this Deed.

Operative provisions

1. Definitions and interpretation

1.1 Project Agreement definitions

Unless otherwise expressly defined, expressions used in this Deed have the meanings given to them in or for the purposes of the Project Agreement.

1.2 Definitions

In this Deed, unless the context otherwise requires:

Agreed Amount has the meaning given in clause 15(b)(i).

Commencement Date has the meaning given in clause 2.1.

Contract Particulars means the particulars set out in Schedule 1.

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

Dispute has the meaning given in clause 16.2.

Disputing Parties has the meaning given in clause 16.2.

Downstream Independent Reviewer Contracts means:

- (a) [the D&C Subcontract];
- (b) [the O&M Subcontract]; and

- (c) the other contracts (if any) set out in the Contract Particulars.

[State Note: The nature of the downstream role of the Independent Reviewer to reflect Proposals and potentially the role of the Independent Reviewer under the Tolling Services Contract.]

Downstream Independent Reviewer Functions mean the functions, powers and obligations of the Independent Reviewer under the Downstream Independent Reviewer Contracts.

Downstream Parties means:

- (a) [the D&C Subcontractor];
(b) [the O&M Subcontractor]; and
(c) the other parties (if any) set out in the Contract Particulars.

Expiry Date means the date which is the earlier of:

- (a) the end of the Term; and
(b) termination of this Deed in accordance with clause 12 or otherwise at Law.

Fee means the sum of the Initial Fee and the Monthly Fees as adjusted from time to time in accordance with clause 10 and the Payment Schedule.

Hold Point has the meaning given in the PSR.

Independent Reviewer Side Deed means a document entitled "[#insert]" between Project Co and [#insert], dated on or about the date of this Deed.

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

Initial Fee means the lump sum amount payable to the Independent Reviewer for the performance of the Services during the Initial Period as set out in the Payment Schedule.

Initial Monitoring Plan means the document set out in Schedule 3.

Initial Period is the first 3 months of the Term commencing on the date of this Deed.

Key People means the people identified as such in the Contract Particulars.

Monitoring Plan means a monitoring plan provided by the Independent Reviewer in accordance with clause 3.4, as amended and updated in accordance with clause 3.4.

Monthly Fee means the amount payable to the Independent Reviewer for the performance of the Services in respect of a month after the Initial Period in accordance with the Payment Schedule.

Payment Schedule means Schedule 3.

Project Agreement means the document entitled "Project Agreement Stage One - East West Link" between the State and Project Co dated on or about the date of this Deed.

Project Parties means the State and Project Co.

Project Parties' Representatives means, in respect of each of the State and Project Co, the person named in the Contract Particulars or any other person appointed by the relevant Project Party from time to time to replace that person.

Construction Quality Management Plan has the meaning given in the PSR.

Cost has the meaning given in clause 15(g).

Quarter means:

- (a) the period from the end of the Initial Period until the first Quarterly Date during the Term;
- (b) each 3 month period commencing on a Quarterly Date; and
- (c) the period from the last Quarterly Date during the Term until the Expiry Date.

Quarterly Date means every 1 January, 1 April, 1 July and 1 October during the Term.

Quarterly Fee Estimate means the estimated Fees payable to the Independent Reviewer for the performance of the Services for the relevant Quarter as adjusted from time to time in accordance with clause 11.1(b) and the Payment Schedule.

Recipient has the meaning given in clause 15(b)(ii).

Resource Adjustment is an adjustment in the level of resources which are required from the Independent Reviewer to perform the Services.

Resource Adjustment Order is the document issued by the Project Parties in accordance with section 11.5 of the Payment Schedule.

Revenue has the meaning given in clause 15(f).

Schedule of Rates means the schedule of rates and prices set out in section 9 of the Payment Schedule as adjusted from time to time in accordance with clause 11.1 and the Payment Schedule.

Services means:

- (a) all of the functions conferred on the Independent Reviewer under this Deed, the State Project Documents or the Downstream Independent Reviewer Contracts, as varied in accordance with clause 11 or in accordance with terms of the Downstream Independent Reviewer Contracts;
- (b) all other things or tasks which the Independent Reviewer must do to comply with its obligations under this Deed, the State Project Documents or the Downstream Independent Reviewer Contracts; and
- (c) without limiting paragraph (b), all other things and tasks not described in this Deed, the State Project Documents or the Downstream Independent Reviewer Contracts if those things and tasks should have been reasonably anticipated by an experienced and expert professional provider of similar services as being necessary for the performance of those things or tasks or which are otherwise capable of inference from this Deed, the State Project Documents or the Downstream Independent Reviewer Contracts.

Services Schedule means Schedule 2.

Substitute Reviewer has the meaning given in clause 11.2(a).

Supplier has the meaning given in clause 15(b).

Term means the period from the Commencement Date to the date one month after the expiry of the D&C Phase or such later date as agreed by the parties.

Transition Out Period means the period of 24 months prior to the end of the Term.

Transition Out Plan means a plan prepared by the Independent Reviewer to meet its obligations in accordance with clause 13 which is in a form reasonably agreed to by the Project Parties.

Upstream Independent Reviewer Functions means the Services.

Wage Price Index has the meaning given in the Indexes Schedule.

1.3 Interpretation

In this Deed:

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

and unless the context otherwise requires:

- (b) **(count and gender)**: a word importing the singular includes the plural and vice versa, a word indicating a gender includes every other gender;
- (c) **(Deed 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 Deed; and
 - (ii) a section is a reference to a section of a Schedule;
- (d) **(deed as amended)**: a reference to this Deed or to any other deed, agreement, document or instrument includes a reference to this Deed or such other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (e) **(party)**: a reference to a party includes that party's legal representatives, trustees, executors, administrators, successors and permitted substitutes and assigns, including any persons taking part by way of novation;
- (f) **(person)**: a reference to a person includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (g) **(legislation)**: a reference to legislation includes its delegated legislation and a reference to such legislation or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (h) **(definitions)**: if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;

- (i) ("**includes**"): "includes" will be read as if followed by the phrase "(without limitation)";
- (j) ("**or**"): the meaning of "or" will be that of the inclusive, being one, some or all of a number of possibilities;
- (k) ("**information**"): a reference to information includes information, representations, statements, data, samples, calculations, assumptions, deductions, determinations, drawings, design specifications, models, plans and other documents in all forms including the electronic form in which it was generated;
- (l) ("**\$**"): a reference to "\$", AUD or dollar is to Australian currency;
- (m) ("**time**"): a reference to time is a reference to time in Melbourne, Australia;
- (n) ("**rights**"): a reference to a right includes any benefit, remedy, function, discretion, authority or power;
- (o) ("**obligations and liabilities**"): a reference to an obligation or a liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;
- (p) ("**may**"): the term "may", when used in the context of a power, right or remedy exercisable by the 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;
- (q) ("**construction**"): where there is a reference to an Authority, institute or association or other body referred to in this Deed which:
 - (i) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity, this Deed is deemed to refer to that other entity; or
 - (ii) ceases to exist, this Deed is deemed to refer to that new entity which serves substantially the same purpose or object as the former entity;
- (r) ("**remedy**"): the use of the word "remedy" or any form of it in this Deed means that the event to be remedied must be cured or its effects overcome; and
- (s) ("**contra proferentem rule not to apply**"): each provision will be interpreted without disadvantage to the party who (or whose representative) drafted or proffered that provision.

1.4 Business Day

If the day on or by which anything is to be done in accordance with this Deed is not a Business Day, that thing must be done no later than the next Business Day.

1.5 Joint and several Liability of Independent Reviewer

If the Independent Reviewer comprises more than one person:

- (a) ("**joint and several**"): the obligations of those persons are joint and several; and

- (b) **(proceedings)**: each Project Party may proceed against any or all of them for any failure of the Independent Reviewer to comply with any obligation in accordance with this Deed or otherwise.

1.6 Several Liability of the Project Parties

If a provision of this Deed binds the Project Parties, that provision binds each of the Project Parties severally and not jointly and severally.

1.7 Relationship of the parties

- (a) **(No partnership or joint venture)**: The relationship between and among the Project Parties to this Deed will not be that of partners or joint venturers and nothing therein contained will be deemed to constitute a partnership or joint venture among them and no party will have authority or power to act unilaterally as agent for the other.
- (b) **(Independent contractor)**: It is understood that the Independent Reviewer is acting as an independent contractor for the Project Parties and therefore the Independent Reviewer is not authorised to enter into any binding obligations on behalf of the Project Parties.
- (c) **(No relationship)**: Unless otherwise expressly provided, this Deed does not:
 - (i) create a partnership, joint venture or fiduciary relationship between the parties to this Deed; or
 - (ii) impose any duty of good faith on the State.

1.8 Approvals, directions and notices in writing

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

1.9 State's rights and obligations

- (a) **(Acknowledgement)**: The parties acknowledge the substance, operation and potential effect and consequences of clause 2.12 of the Project Agreement in relation to this Deed.
- (b) **(No Claim)**: Subject to clause 1.9(c), Project Co and the Independent Reviewer will not be entitled to make any Claim against the State for any Liability relating to any exercise or failure of the State to exercise its executive or statutory rights or duties.
- (c) **(Liability for breach)**: Clauses 1.9(a) and (b) do not limit any Liability which the State would have had to Project Co or the Independent Reviewer under any State Project Document as a result of a breach by the State of a term of any State Project Document but for these clauses.

2. Conditions precedent

2.1 Conditions precedent

The rights and obligations of the parties under this Deed will not commence until the later of:

- (a) the date of execution of this Deed by all parties to this Deed; and
- (b) the date of execution of the Project Agreement by all parties to the Project Agreement,

(Commencement Date).

2.2 Failure to achieve Financial Close

- (a) **(Failure to achieve Financial Close):** If the Project Parties do not achieve Financial Close by the Condition Precedent Deadline, then the Project Parties may, at their option, terminate this Deed by notice to the Independent Reviewer.
- (b) **(Independent Reviewer's rights on termination):** Where this Deed is terminated in accordance with this clause 2.2, then, notwithstanding clause 12.7:
 - (i) the Independent Reviewer will only be entitled to be paid:
 - A. the proportion of the Fee for the Services performed up to the date of termination in accordance with the Payment Schedule; and
 - B. such amount in respect of unavoidable Liabilities which have been approved by the Project Parties prior to the Independent Reviewer incurring such liabilities, except to the extent the Independent Reviewer fails to mitigate such Liabilities; and
 - (ii) the Independent Reviewer will not otherwise be entitled to bring any Claim against the Project Parties arising in connection with:
 - C. the termination of this Deed; or
 - D. the Project, the State Project Documents or the Downstream Independent Reviewer Contracts.

3. General obligations of the Independent Reviewer

3.1 Appointment

- (a) **(Appointment):** Each of the Project Parties appoint the Independent Reviewer under this Deed to perform the Services for the benefit of each of the Project Parties.
- (b) **(Acceptance of appointment):** The Independent Reviewer confirms its acceptance of the appointment.

3.2 Services

The Independent Reviewer must carry out the Services in accordance with this Deed for the Term.

3.3 Effect of Services Schedule

The Project Parties and the Independent Reviewer acknowledge that the Services Schedule:

- (a) is indicative only;
- (b) is not intended to be a complete description of the Services;
- (c) does not limit or otherwise affect the Services or the performance of the Services;
and
- (d) cannot be used as the aid to interpretation of the Services.

3.4 Monitoring Plan

- (a) **(Provision and amendment of Monitoring Plan):** The Independent Reviewer:
 - (i) must prepare and submit to the Project Parties within 25 Business Days of the date of this Deed, a Monitoring Plan which must, as a minimum, address those issues set out in the Initial Monitoring Plan and which addresses the requirements for the Monitoring Plan set out in Schedule 4;
 - (ii) subject to clause 3.4(e), throughout the performance of the Services, must develop, continually review and, if necessary, amend the Monitoring Plan:
 - A. as required by clause 3.4(c)(ii);
 - B. to reflect any Resource Adjustment;
 - C. to take into account events which will, or may reasonably be expected to, affect the manner in which the Independent Reviewer carries out the Services, including:
 - 1) Modifications under the State Project Documents;
 - 2) changes in Law;
 - 3) Approvals (including the conditions of Approvals);
 - 4) the commencement of new phases or stages of design, construction, operations or maintenance in accordance with the State Project Documents;
 - 5) to take into account the manner in which Project Co is undertaking the Works and the D&C Activities, including any Defects or non-compliances with the State Project Documents; and
 - 6) any breach or potential breach of the warranty in clause 3.4(b);
 - D. for the purposes of continuous improvement of the Monitoring Plan by continually improving the standards and quality of the Services carried out in accordance with the Monitoring Plan; and

- E. as otherwise agreed with the Project Parties;
- (iii) must promptly submit each amended Monitoring Plan to the Project Parties; and
- (iv) acknowledges that the Initial Monitoring Plan sets out certain minimum requirements in respect of the Monitoring Plan and no Monitoring Plan provided in accordance with this clause 3.4 can in any way limit or reduce the requirements or obligations of the Independent Reviewer set out in the Initial Monitoring Plan, except where it is necessary to do so to comply with the State Project Documents.
- (b) **(Warranty):** The Independent Reviewer warrants that the carrying out of the Services in accordance with the Monitoring Plan will enable the Independent Reviewer to comply with its obligations under this Deed.
- (c) **(Acknowledgements):** The Independent Reviewer acknowledges that the Monitoring Plan:
- (i) does not limit the Independent Reviewer's obligations under this Deed; and
- (ii) will require amendment resulting from a change to the Services in accordance with clause 11.
- (d) **(Review of updated plan):** Either Project Party may:
- (i) review each amended Monitoring Plan provided to the Project Parties in accordance with this clause 3.4; and
- (ii) if the amended Monitoring Plan does not comply with this Deed or the State Project Documents, notify the other Project Party and the Independent Reviewer of that non-compliance within 15 Business Days of the submission of the amended Monitoring Plan to the Project Parties.
- (e) **(Amended plan):** If the Independent Reviewer receives a notice in accordance with clause 3.4(d)(ii), the Independent Reviewer must promptly submit an amended Monitoring Plan to the Project Parties.
- (f) **(Compliance with Plan):** Except where otherwise provided in this Deed or the State Project Documents, the Independent Reviewer must not depart from the Monitoring Plan unless it is necessary to do so to ensure compliance with this Deed or the State Project Documents.
- (g) **(No duty to review):** The Project Parties owe no duty to the Independent Reviewer to review the Monitoring Plan or any amended Monitoring Plan for errors, omissions or compliance with this Deed or the State Project Documents. No comment on or approval, agreement or review of the Monitoring Plan by a Project Party will constitute a direction for the purposes of clause 5.6 or otherwise.

4. Various functions of the Independent Reviewer

[State Note: The State acknowledges that Short-Listed Respondents may propose that the entity appointed as the Independent Reviewer performs certain downstream functions including entry into an Independent Reviewer Side Deed or otherwise. The following clause has been drafted to reflect that the obligations of the Independent Reviewer under the

Independent Reviewer Deed of Appointment take precedence over all such other functions. It currently contemplates that the entity may also be required to enter into an Independent Reviewer Side Deed. The Independent Reviewer must not act for or enter into any agreement with the financiers in connection with the Finance Documents without the prior consent of the State and on such terms approved by the State. Depending on the State's assessment of Proposals in relation to the intended roles of the various parties and the role of the Independent Reviewer under the Tolling Services Contract, further amendments may be required to this clause 4 and other provisions of this Deed to address the State's requirements for such roles.]

- (c) **(Upstream Independent Reviewer Functions paramount):** The Project Parties and the Independent Reviewer acknowledge and agree that the Upstream Independent Reviewer Functions represent the paramount role of the Independent Reviewer, with the intent that:
- (i) if there is any ambiguity, conflict, discrepancy or inconsistency between any Upstream Independent Reviewer Functions and any Downstream Independent Reviewer Functions, the Upstream Independent Reviewer Functions will prevail as between the parties to this Deed;
 - (ii) neither the existence nor terms of a Downstream Independent Reviewer Function nor the exercise, failure to exercise or manner of exercise of a Downstream Independent Reviewer Function will be a precedent for, limit or otherwise affect the exercise of, or be construed in any way as an aid to interpretation of, an Upstream Independent Reviewer Function; and
 - (iii) neither:
 - A. the receipt by the Independent Reviewer of any notice, claim, plan, program, report, manual, model or any other document or information nor the giving of any notice, the making of any comment or any other act or omission by the Independent Reviewer arising in connection with a Downstream Independent Reviewer Function; nor
 - B. the existence or performance of any function by, any consultation with, or provision of any notice, report, certificate, comment or any other document or information to, the Independent Reviewer by any other reviewer, certifier, engineer, adviser or other consultant engaged by any party other than the State,will:
 - C. give rise to any obligation on the part of the Independent Reviewer to exercise (or exercise in a particular manner) any Upstream Independent Reviewer Function;
 - D. relieve Project Co from the giving of any notice, claim, plan, program, report, manual, model or any other document or information or the doing of any other thing in respect of an Upstream Independent Reviewer Function in order to give rise to any obligation on the part of the Independent Reviewer to exercise that Upstream Independent Reviewer Function; or

- E. be a precedent for, limit or otherwise affect the exercise of, or be construed in any way as an aid to interpretation of, an Upstream Independent Reviewer Function.
- (b) **(State approval and consent):** The Project Parties and the Independent Reviewer acknowledge and agree that:
- (i) the Independent Reviewer may not exercise any function or enter into any arrangement arising in connection with the Project other than in accordance with this Deed (including in accordance with clause 7.4) [or the Independent Reviewer Side Deed], unless approved by the State and on such terms approved by the State; and
 - (ii) no Downstream Independent Reviewer Function may be varied, altered or amended without the State's consent.
- (c) **(No Liability):** Subject to clause 4(d), to the extent permitted by Law, none of the State, its Associates or the Independent Reviewer will have any Liability, nor will Project Co or its Associates be entitled to make, continue or enforce any Claim against, or seek, pursue or obtain an indemnity against or contribution to Liability from the State, any of its Associates or the Independent Reviewer, and Project Co indemnifies the State, its Associates and the Independent Reviewer in respect of any such Claim or Liability arising connection with:
- (i) any ambiguity, conflict, discrepancy or inconsistency between any Upstream Independent Reviewer Functions and any Downstream Independent Reviewer Functions; or
 - (ii) subject to clause 9.8 and clause [#insert] **[State Note: Applicable clause to be inserted.]** of the Independent Reviewer Side Deed:
 - A. the exercise, failure to exercise or manner of exercise of any Downstream Independent Reviewer Function;
 - B. any act or omission of the Independent Reviewer arising in connection with the performance of any Downstream Independent Reviewer Function; or
 - C. the giving of any notice, claim, plan, program, report, manual, model or any other document or information, or any other act or omission in respect of any Downstream Independent Reviewer Function or any Downstream Independent Reviewer Contract.
- (d) **(No exclusion of Liability):** For the avoidance of doubt, clause 4(c) will not operate to exclude the Independent Reviewer's Liability with respect to:
- (i) a failure by the Independent Reviewer to comply with clause 4(f); or
 - (ii) any matter for which the Independent Reviewer has provided an indemnity in accordance with clause 9.8.
- (e) **(Duty of care to Project Parties):** The Independent Reviewer acknowledges that it owes a duty of care to the Project Parties when performing the Downstream Independent Reviewer Functions.

- (f) **(Obligations when performing downstream functions):** The Independent Reviewer warrants to the Project Parties that, in performing the Downstream Independent Reviewer Functions, it will:
- (i) comply with all Law, act honestly, diligently, reasonably and with the degree of professional care, knowledge, experience and skill which would be expected of an expert professional providing services similar to the Services for projects similar to the Project;
 - (ii) at all times, act within the time requirements for the performance of its obligations, both as:
 - A. Independent Reviewer in accordance with this Deed and the State Project Documents; and
 - B. Independent Reviewer when performing any Downstream Independent Reviewer Function which has an equivalent Upstream Independent Reviewer Function;
 - (iii) at all times act independently of the relevant Downstream Parties and all other parties to the Downstream Independent Reviewer Contracts;
 - (iv) ensure that the performance of any Downstream Independent Reviewer Function does not give rise to any (or the possibility of any) conflict of interest;
 - (v) ensure that it does not otherwise compromise its ability to perform the Upstream Independent Reviewer Functions in accordance with this Deed;
 - (vi) when performing the Downstream Independent Reviewer Functions, provide to the State copies of all written communications and details of all non-written communications with the Downstream Parties and consult with and provide all further information required by the State in connection with those communications;
 - (vii) otherwise comply with any reasonable requirements of the State for the purposes of this warranty; and
 - (viii) use and apply the same methodology that it uses and applies in performing the Upstream Independent Reviewer Functions.
- (g) **(Fee payable solely for Services):** The Project Parties and the Independent Reviewer acknowledge and agree that the Fee payable in accordance with this Deed will be payable solely for, and will relate solely to, performance of the Services. The Fee will not, for the avoidance of doubt, be payable for or relate to any Downstream Independent Reviewer Functions, which will be separately payable in accordance with the Independent Reviewer Side Deed.
- (h) **(Delegation of risks, liabilities, obligations and responsibilities):** Any express or implied delegation of risks, liabilities, obligations or responsibilities by Project Co and its respective Associates, whether in the [Independent Reviewer Side Deed], any Downstream Independent Reviewer Contract or otherwise, does not constitute approval of such delegation by the State or in any way limit or derogate from the scope of Project Co's obligations in accordance with the State Project Documents or this Deed or affect in any way the obligations of the Independent Reviewer in

accordance with the State Project Documents or this Deed. References to risks, liabilities, obligations or responsibilities assumed or accepted or acknowledgements given by any such entity or Associate in relation to any such delegation will be construed as assumed or accepted or given (as applicable) by Project Co in accordance with the State Project Documents.

- (i) **(No effect on Upstream Independent Reviewer Functions):** Reference in the Independent Reviewer Side Deed or any Downstream Independent Reviewer Contract to the performance of a function by the Independent Reviewer under any Downstream Independent Reviewer Contract, or the provision to or receipt by the Independent Reviewer of a document, certificate or notice from any Downstream Party (in its capacity as Independent Reviewer), does not in any way affect the functions of the Independent Reviewer under the State Project Documents or this Deed.

5. Performance by Independent Reviewer

5.1 Standard of care

The Independent Reviewer must exercise the standard of skill, care and diligence in the performance of the Services that would be expected of an expert professional provider of the Services experienced in providing services similar to the Services for projects similar to the Project.

5.2 Duty to act honestly, fairly and independently

The Independent Reviewer must, in performing the Services act honestly, professionally and independently of the Project Parties and the Downstream Parties and their respective contractors, suppliers and consultants.

5.3 Time requirements

The Independent Reviewer must perform the Services:

- (a) within the time limits specified in this Deed and the State Project Documents; and
- (b) where no time limit is specified, within a reasonable time.

5.4 Conflict of interest

- (a) **(Warranty):** The Independent Reviewer warrants that:
 - (i) as at the date of this Deed, no conflict of interest arises out of its engagement by the Project Parties under this Deed; and
 - (ii) if, during the term of this Deed, it becomes aware of the existence or possibility of a conflict of interest, it will:
 - A. immediately notify the Project Parties of that conflict of interest or possible conflict of interest; and
 - B. take such steps to avoid or mitigate the conflict of interest or possible conflict of interest as the Project Parties may reasonably require.

- (b) **(Prior approval):** The Independent Reviewer must not exercise any function nor enter into any arrangement arising out of in respect of or in connection with the Project other than in accordance with this Deed unless approved by the Project Parties and on such terms as are approved by the State.

5.5 Communications with Project Parties

The Independent Reviewer must ensure that a copy of each written communication between the Independent Reviewer and a Project Party which relates to the Project or this Deed is promptly given to the other Project Party.

5.6 No authority to give directions or waive requirements

The Independent Reviewer has no authority to:

- (a) **(directions):** give directions to the Project Parties [or the Downstream Parties], other than as may (if at all) be expressly set out in this Deed or the State Project Documents;
- (b) **(waive or vary):** waive or vary any requirements of the State Project Documents [or a Downstream Independent Reviewer Contract]; or
- (c) **(discharge or release):** discharge or release a party from any of its obligations under the State Project Documents.

5.7 Acknowledgement of reliance

The Independent Reviewer acknowledges that each Project Party [and each Downstream Party]:

- (a) **(reliance):** is entitled to, and will, rely on:
 - (i) the skill and expertise of the Independent Reviewer in the performance of the Services; and
 - (ii) any certificate signed or given by the Independent Reviewer under the State Project Documents; and
- (b) **(Liability):** may suffer Liability if the Independent Reviewer does not perform the Services in accordance with the requirements of this Deed.

5.8 Knowledge of Project Parties' requirements

The Independent Reviewer warrants that:

- (a) **(informed itself of State Project Documents relating to Services):** it has informed itself of the requirements of the State Project Documents and the Downstream Independent Reviewer Contracts in so far as they relate to the Services;
- (b) **(informed itself of other requirements):** without limiting clause 5.8(a), it has informed itself of all time limits and other requirements for any function which the Independent Reviewer must perform in accordance with the State Project Documents and the Downstream Independent Reviewer Contracts;
- (c) **(nature of work):** it has informed itself of the nature of the work necessary for the performance of the Services and (to the maximum extent possible) the means of

access to and facilities within the Site, including any restrictions on any such access; and

- (d) **(sufficiency of the Fee)**: it has satisfied itself as to the sufficiency of the Fee having regard to the costs which it will incur in complying with its obligations in accordance with this Deed.

5.9 Co-ordination and co-operation

The Independent Reviewer must, in performing the Services:

- (a) **(co-operation)**: co-operate with the Project Parties and the Downstream Parties and their respective contractors, suppliers and consultants;
- (a) **(co-ordinate)**: co-ordinate the Services with the work to be performed by the Project Parties and the Downstream Parties, and their respective contractors, suppliers and consultants; and
- (b) **(avoid unreasonable interference)**: avoid any unreasonable interference, disruption or delay to the work to be performed by the Project Parties and the Downstream Parties, and their respective contractors, suppliers and consultants.

5.10 Personnel

The Independent Reviewer must provide sufficient numbers of experienced and competent personnel to perform its obligations in accordance with this Deed within the timeframes specified in this Deed, in the State Project Documents and in the Downstream Independent Reviewer Contracts.

5.11 Key People

Without limiting its obligations in accordance with clause 5.10, the Independent Reviewer must:

- (a) **(Key People perform functions)**: ensure that the Key People perform the functions specified in the Contract Particulars and, unless reasonably directed otherwise by the Project Parties, ensure that they are committed and available to the Project as required to fulfil the requirements of this Deed and the State Project Documents;
- (b) **(removal of Key People)**: subject to clause 5.11(c), not remove the Key People without the prior consent of the Project Parties (which must not be unreasonably withheld or delayed);
- (c) **(best endeavours)**: use its best endeavours to ensure that none of the Key People resign or otherwise become unavailable to perform their functions as required by clause 5.11(a);
- (d) **(unavailability of Key People)**: without limiting clause 5.11(f) and in relation to any Key People who, in accordance with the Contract Particulars, are required to be committed to the Project, for at least 50% of their time, resign or otherwise become or may become unavailable to perform their functions as required by clause 5.11(a) (whether temporarily or permanently), notify the Project Parties accordingly including advising the Project Parties of the way in which the Independent Reviewer proposes to address the unavailability of any such Key People;

- (e) **(replacement of Key People)**: if any of the Key People are removed, die, become seriously ill or resign, subject to the approval of the Project Parties, replace them as soon as practicable with persons of at least equivalent skill and experience; and
- (f) **(availability of Key People)**: ensure that the Key People are available for consultation as any Project Party may reasonably require from time to time.

5.12 Independent Reviewer's Representative

The Independent Reviewer:

- (a) **(Independent Reviewer's Representative)**: has nominated the Independent Reviewer's Representative as the person to act as its representative for the Services;
- (b) **(nominate another person)**: may, from time to time nominate another person to act as the Independent Reviewer's Representative, subject to the Project Parties' approval (in their sole and absolute discretion and with no obligation to do so), in which case that person will be the relevant representative in lieu of the person named in the Contract Particulars; and
- (c) **(authority to bind Independent Reviewer)**: confirms that the Independent Reviewer's Representative has the power and authority to bind the Independent Reviewer.

5.13 Subcontracting

The Independent Reviewer:

- (a) **(no subcontracting)**: may not subcontract the performance of any of its Services without the prior consent of each Project Party; and
- (b) **(responsible for performance)**: remains responsible for the performance of the Services in accordance with this Deed, notwithstanding any such subcontracting.

6. Role of the Project Parties

6.1 No interference or influence

- (a) **(No interference or influence)**: A Project Party must not interfere with, or attempt to influence, the Independent Reviewer in the performance of any of the Services. A communication allowed by this Deed will not, however, of itself constitute a breach of this clause 6.1(a).
- (b) **(Project Parties may provide comments)**: Clause 6.1(a) will not prevent a Project Party from providing written comments to the Independent Reviewer in respect of any aspect of the Project Activities.

6.2 Provision of information

Project Co must, as soon as practicable, ensure that the Independent Reviewer is provided with all information, assistance, documentation, models and particulars as the Independent Reviewer reasonably requests:

- (a) **(services)**: relating to the Services;

- (b) **(Project Documents):** required under the State Project Documents and the Downstream Independent Reviewer Contracts; and
- (c) **(performance of Services):** to enable it to perform the Services effectively and otherwise in accordance with the State Project Documents, the Downstream Independent Reviewer Contracts and this Deed.

6.3 Access to records and systems

Without limiting the obligations of Project Co under the State Project Documents or clause 6.2, Project Co must provide the Independent Reviewer with such information and documentation (including all Design Documentation) and access to Project Co's books, records and systems as the Independent Reviewer may reasonably require to enable it to perform the Services effectively and otherwise in accordance with this Deed and the State Project Documents. Nothing in this clause 6.3 will be construed as a waiver of legal professional privilege.

6.4 Access to premises

Project Co must ensure that the Independent Reviewer is given such access to any place where any part of the Project Activities is being carried out (including transport within the Construction Site and access to the premises of their respective contractors, suppliers and consultants) and all necessary assistance as is required to enable the Independent Reviewer to perform the Services effectively and in accordance with the requirements of this Deed, the State Project Documents and the Downstream Independent Reviewer Contracts.

6.5 Right to enter, inspect and test

- (a) **(Right of entry):** Subject to clause 6.5(b), the Independent Reviewer (or any person authorised by the Independent Reviewer) may during Business Hours or upon giving reasonable notice to Project Co (except in the case of an emergency when no notice is required) enter the Site or the offices of Project Co to:
 - (i) inspect, observe or test any part of the Relevant Infrastructure or the Project Activities (whether or not such inspections, observations or tests are otherwise required in accordance with this Deed);
 - (ii) exercise any right or carry out any obligation which the Independent Reviewer has in accordance with any State Project Document; or
 - (iii) take such other action as the Independent Reviewer considers necessary to exercise its rights in accordance with this Deed and to discharge its duties, powers and obligations.
- (b) **(Conditions of access):** When entering the Site in accordance with clause 6.5(a), the Independent Reviewer must and must ensure any authorised person:
 - (i) complies with the Site Access and Interface Protocols;
 - (ii) does not unnecessarily interfere with the carrying out of the Project Activities; and
 - (iii) does not damage the Relevant Infrastructure or the Site.

- (c) **(Project Co to assist):** If requested by the Independent Reviewer, Project Co must assist the Independent Reviewer in connection with any inspection or testing in accordance with this clause 6.5, including:
 - (i) providing access to such part of the Relevant Infrastructure and all Project Co Materials as may be required by the Independent Reviewer;
 - (ii) preparing samples of materials used in connection with the Relevant Infrastructure as required by the Independent Reviewer; and
 - (iii) forwarding the samples prepared in accordance with clause 6.5(c)(ii) to the Independent Reviewer or such other place or person notified by the Independent Reviewer.

6.6 Meetings

The Project Parties must:

- (a) **(design meetings):** allow the Independent Reviewer to attend design meetings; and
- (b) **(other meetings):** attend such meetings with the Independent Reviewer as the Independent Reviewer may reasonably request to enable it to perform the Services effectively and otherwise in accordance with this Deed.

6.7 Co-operation

Project Co must and must ensure that each Downstream Party and Project Co's contractors, suppliers and consultants co-operate with the Independent Reviewer during the carrying out of the Services.

6.8 Project Parties not liable

On no account will a Project Party be liable to the other Project Party or its Associates for any act or omission by the Independent Reviewer whether or not in accordance with or purportedly in accordance with a provision of this Deed, the State Project Documents or otherwise.

7. Reporting and meetings

7.1 Progress reports

The Independent Reviewer must submit a written report to each Project Party:

- (a) **(before meeting of Project Control Group):** 2 Business Days before each meeting of the Project Control Group in accordance with clause 9.4 of the Project Agreement;
- (b) **(Project Parties requires):** in such form as the Project Parties may reasonably require; and
- (c) **(details):** containing details of:
 - (i) Project Co's compliance (and details of any non-compliances) with the State Project Documents;
 - (ii) the results of the review of Design Documentation in accordance with clause 16.2 of the Project Agreement;

- (iii) the results of the review of the D&C Program in accordance with clause 14 of the Project Agreement;
- (iv) the results of review of construction of the Works during the performance of the D&C Activities in accordance with clause 17.2 of the Project Agreement;
- (v) any Project Plans and Manuals, notices and other information and documentation and the results of any review of those documents or that information received from Project Co in accordance with the State Project Documents;
- (vi) the results of any review of the operation of the quality system developed and implemented by Project Co and any review and assessment of the quality of the Project Activities in accordance with the State Project Documents;
- (vii) any matters or departures notified in accordance with clause 22 of the Project Agreement;
- (viii) any notices given by a Project Party or the Proof Engineer to the Independent Reviewer and any notices issued by the Independent Reviewer;
- (ix) any certificates of completion for Completion or Close-Out or for Handback of any Returned Works issued or requested by Project Co or the State in relation to any of the Works;
- (x) progress of Project Co to Completion or Close-Out (as applicable) including the status of any Defects and the rectification of any Defects;
- (xi) the forecast cost of the Services (including for the current and following Quarter), taking into account current expenditure, resourcing and future forecasts;
- (xii) notification of reports requested by one Project Party in accordance with clause 7.4;
- (xiii) relevant details in relation to the performance of any Downstream Independent Reviewer Functions; and
- (xiv) such other matters in respect of the Services as the Project Parties (acting jointly) may reasonably request from time to time. *[State Note: List to be updated to reflect finalisation of the Project Agreement, the PSR and any other relevant documents.]*

7.2 Project Control Group

- (a) **(Establishment):** The Project Control Group will be established in accordance with clause 9.4 of the Project Agreement.
- (b) **(Independent Reviewer's obligations):** The Independent Reviewer must:
 - (i) attend each meeting of the Project Control Group, if requested by the State; and

- (ii) present and explain each progress report prepared in accordance with clause 7.1 at the relevant meeting.

7.3 Meetings with Project Parties

The Independent Reviewer must attend, and ensure that all relevant Key People attend, meetings with the Project Parties monthly during the Term or as otherwise agreed by the parties, to discuss the progress of the Services.

7.4 Reports requested by one Project Party

- (a) **(Request by one Project Party):** A Project Party may request the Independent Reviewer to prepare an additional report which is not otherwise required by the State Project Documents.
- (b) **(Independent Reviewer to prepare report):** The Independent Reviewer must prepare the additional report as requested in accordance with clause 7.4(a), except where the Independent Reviewer is:
 - (i) of the reasonable opinion that it would be inappropriate to prepare such a report in light of the performance and nature of the Services; or
 - (ii) not reasonably capable of preparing such a report.
- (c) **(Cost of reports):** The cost of additional reports prepared in accordance with this clause 7.4 will be paid to the Independent Reviewer in accordance with the Payment Schedule.

7.5 Questions relating to a report

- (a) **(Project Parties may submit questions):** Without limiting clauses 6.1(b) or 7.2(b)(ii), a Project Party may submit questions or queries to the Independent Reviewer in relation to a report issued in accordance with clause 7.1.
- (b) **(Independent Reviewer to respond):** Subject to clause 5.5, the Independent Reviewer must, within a reasonable period having regard to the nature of the question or query, respond in writing to questions and queries submitted by a Project Party in accordance with this clause 7.5.

8. Quality

8.1 Quality assurance system

The Independent Reviewer must:

- (a) **(plan and develop):** plan, develop and implement a quality assurance system which:
 - (i) meets the requirements of the relevant AS/NZS ISO Standards as and when they are published;
 - (ii) is consistent with the Monitoring Plan; and
 - (iii) is consistent with the requirements for the Construction Quality Management Plan as specified in section 3.1.4 of Part F of the PSR; and

- (b) **(provide Project Party Representatives)**: within 14 days of the date of this Deed, provide the Project Party Representatives with details of the quality assurance system which complies with clause 8.1(a)8.1(a) and which the Independent Reviewer proposes to adopt.

8.2 Audit

- (a) **(Independent Reviewer must allow audits)**: The Independent Reviewer must:
 - (i) allow any audit of its quality assurance system in accordance with this Deed by a Project Party or a third party appointed by the Project Parties, at the request of a Project Party and at the cost of that Project Party; and
 - (ii) fully co-operate with that third party in respect of the carrying out of the quality assurance audit.
- (b) **(Access to premises and information)**: Without limiting clause 6.3, 6.4, 6.5 or 8.2(a), the Independent Reviewer must, at all times:
 - (i) give to the Project Party or the third party appointed by the Project Parties (as the case may be) access to premises occupied by the Independent Reviewer where the Services are being undertaken; and
 - (ii) permit the Project Party or the third party appointed by the Project Parties to inspect applicable information relevant to the quality assurance audit.

8.3 Quality assurance not to relieve Independent Reviewer

The Independent Reviewer will not be relieved of any responsibilities or obligations in accordance with this Deed as a result of:

- (a) **(re-perform Services)**: compliance with the requirements of this clause 8; or
- (b) **(all such steps)**: any acts or omissions of the Project Parties with respect to the requirements of this clause 8, including:
 - (i) any review of, comments upon, or notice in respect of, the quality assurance system or any Monitoring Plan; and
 - (ii) any audit in accordance with clause 8.2.

8.4 Non-complying services

The Independent Reviewer must at its cost:

- (a) **(re-perform services)**: unless directed otherwise by the Project Parties, re-perform all Services which have not been performed in accordance with this Deed; and
- (b) **(all such steps)**: take all such steps as may be reasonably necessary to:
 - (i) mitigate the effect on the Project Parties of the failure to perform the Services in accordance with this Deed; and
 - (ii) put the Project Parties (as closely as possible) in the positions in which they would have been had the Independent Reviewer performed the

Services in accordance with this Deed, including all such steps as may be reasonably directed by the Project Parties.

9. Liability, insurance and indemnity

[State Note: The required insurance arrangements for the Independent Reviewer will be considered further in light of the role for the Independent Reviewer contemplated in Proposals, the role of the Independent Reviewer under the Tolling Services Contract, Proposals and the structure of the entity to perform the role of Independent Reviewer.]

9.1 Limitation of Liability

Subject to clause 9.2, the Independent Reviewer's total Liability under all Claims which the Project Parties and the Downstream Parties might have (whether jointly or severally) against the Independent Reviewer:

- (a) **(this Deed and Independent Reviewer Side Deed)**: arising in connection with this Deed and the Independent Reviewer Side Deed;
- (b) **(Services or Project)**: arising in connection with the Services or the Project; or
- (c) **(Law)**: otherwise at Law or in equity including:
 - (i) any statute (insofar as it is possible to exclude such Liability); or
 - (ii) in tort for negligence or otherwise, including negligent misrepresentation,

in respect of any fact, matter or thing under, arising in connection with the Services, the Project or any Project Document will be limited in aggregate to the greater of:

- (d) **(specified amount)**: the amount specified in the Contract Particulars; or
- (e) **(up to indemnity limit)**: to the extent that the Liability is the subject of an indemnity under any policy of insurance, the amount of any such indemnity limit.

9.2 Exclusions

The limitation of Liability in clause 9.1 does not apply to any Claims arising in connection with any of the following on the part of the Independent Reviewer or anyone for whom it is responsible:

- (a) **(fraud)**: fraud;
- (b) **(wilful misconduct)**: wilful misconduct, being any conduct, act or omission done or to be done by the Independent Reviewer or any officer, agent, adviser, consultant, contractor, subcontractor or employee of the Independent Reviewer which results from conscious, intentional or reckless disregard of any provision of this Deed or the rights or welfare of those who are or may be affected by that conduct, act or omission;
- (c) **(gross negligence)**: gross negligence, being any negligent act or omission which the Independent Reviewer knew, or ought reasonably to have been aware, would result in substantial losses being incurred by a Project Party or a Downstream Party; or

- (d) **(abandonment)**: abandonment of all or any material part of the Services.

9.3 Insurances

- (a) **(Insurances)**: The Independent Reviewer must hold and maintain from the Commencement Date:
- (i) **(public liability insurance)**: public liability insurance:
- A. endorsed to include the Project Parties as named insureds in respect of any Liability the Project Parties may incur arising in connection with the acts or omissions of the Independent Reviewer;
 - B. covering, without limitation, the Independent Reviewer's Liability in accordance with clause 9.8;
 - C. with a limit of indemnity of not less than the amount specified in the Contract Particulars; and
 - D. with a deductible of not more than the amount specified in the Contract Particulars; and
- (ii) **(professional indemnity insurance)**: project specific professional indemnity insurance which:
- A. has a limit of indemnity of not less than the amount specified in the Contract Particulars for any single claim in respect of legal Liability (including, without limitation, in connection with property damage, personal injury or death) arising in connection with a breach of clause 4 or any other breach of professional duty, whether owed in contract or otherwise, by reason of any negligent act, error or omission by the Independent Reviewer or its employees, agents or consultants;
 - B. has a deductible of not more than the amount specified in the Contract Particulars; and
 - C. has a retroactive date which is the Commencement Date,
- which complies with the requirements for insurances set out in clause 9.3(b) (as applicable); and
- (iii) **(workers' compensation insurance)**: workers' compensation insurance against any Liability, whether in accordance with statute or at common law, for the death of, or injury to, persons employed, by the Independent Reviewer, or if the Independent Reviewer is comprised of more than one party employed by each such party in carrying out the Services.

- (b) **(Requirements for insurances):**
- (i) The insurances referred to in clauses 9.3(a)(i) and 9.3(a)(ii) must be effected with Reputable Insurers and be on such terms as are approved by the State (such approval not to be unreasonably withheld).
 - (ii) If the Independent Reviewer comprises more than one person, the insurances referred to in clauses 9.3(a)(i) and 9.3(a)(ii) must (subject always to the overall limit of indemnity not being increased as a result):
 - A. insure each of those parties both jointly and severally; and
 - B. include a cross Liability clause whereby the insurer agrees:
 - 1) to waive all rights of subrogation or action that it may have or acquire against all or any of the persons comprising the insured; and
 - 2) that the term "insured" applies to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them.

9.4 Notice of matter affecting insurance

The Independent Reviewer must notify the Project Parties 30 days in advance of any event which could affect its insurance cover or if any policy is cancelled, avoided or allowed to lapse.

9.5 Provision of information

The Independent Reviewer must provide to the Project Parties:

- (a) **(certified copies):** certified copies of the insurance policies (where the Project Parties are included as named insureds); and
- (b) **(certificates of currency):** certificates of currency, with respect to the insurances effected and maintained by the Independent Reviewer for the purposes of this clause 9 at any time on request by any Project Party and upon the renewal of each policy.

9.6 Periods for insurance

The Independent Reviewer must keep:

- (a) **(professional indemnity insurance):** the professional indemnity insurance current for a period of 6 years after the cessation of the Services or the date of termination of this Deed, whichever is earlier;
- (b) **(workers compensation insurance):** the employers' Liability and workers compensation insurance current until it ceases to perform the Services;
- (c) **(public Liability insurance):** the public Liability insurance current until it ceases to perform the Services; and
- (d) **(other insurances):** any other insurances current for such time as may reasonably be required by the Project Parties.

9.7 Obligations unaffected by insurance

The requirement to effect and maintain insurance in this clause 9 does not limit the Liability or other obligations of the Independent Reviewer in accordance with this Deed.

9.8 Indemnity

- (a) **(Breach and negligent act or omission):** Subject to clause 9.1 the Independent Reviewer is liable for and must indemnify each Project Party against any Claim or loss brought against, suffered or incurred by a Project Party in respect of:
 - (i) any breach of this Deed by the Independent Reviewer; or
 - (ii) any negligent act or omission of the Independent Reviewer,

(including any Claim brought against a Project Party by another Project Party and any Claim or loss suffered or incurred by a project Party to another Project Party).
- (b) **(Reduction in Liability):** The Independent Reviewer's Liability under this clause 9.8 is reduced proportionally to the extent to which any action, proceeding, claim or demand arises out of any negligence or wrongful act or omission of the Project Parties or their employees or agents.
- (c) **(Survival):** All obligations to indemnify under this Deed survive termination of this Deed.
- (d) **(Consent):** The parties agree that the Project Parties do not require the consent of the Indemnified Persons to amend or waive any provision of any of this Deed.
- (e) **(Indemnity held on trust):** Each of the Project Parties and the Independent Reviewer each declares and acknowledges that each indemnity or promise referred to in this Deed in favour of the Indemnified Persons is held on trust by the Project Parties for the benefit of the Indemnified Persons from the date of this Deed.

9.9 Proportionate Liability

- (a) **(No reduction in insurance covers):** The Independent Reviewer must ensure that, all policies of insurance against liabilities, which it is required by this Deed to effect or maintain, do not reduce or exclude the insurance cover in respect of liabilities governed by Part IVAA of the *Wrongs Act 1958* (Vic) or any corresponding legislation of another Australian jurisdiction, by reason of the manner in which that legislation operates or does not operate, as the case may be, in light of any of the provisions of this Deed and the obligations undertaken by the Independent Reviewer in connection with it.
- (b) **(Reasonable endeavours):** To the extent that the Insurance is not specific to the Project, Project Co is only required to use its reasonable endeavours to procure insurance on the terms referred to in clause 9.9(a).

10. Payment

Subject to clause 7.4, the State (on behalf of the Project Parties) must pay to the Independent Reviewer the Fee subject to and in accordance with the Payment Schedule.

11. Change to or suspension of Services and appointment of Substitute Reviewer

11.1 Change to Services

- (a) **(Notice of change to Services):** The Project Parties may, by joint notice to the Independent Reviewer, instruct the Independent Reviewer to carry out a change to Services (including an addition or omission) which is within the general scope of this Deed. The Independent Reviewer must comply with any such instruction. For the avoidance of doubt, a Resource Adjustment is not of itself a change to the Services.
- (b) **(Adjustment to Quarterly Fee Estimate):** The relevant Quarterly Fee Estimate or Quarterly Fee Estimates applicable will be adjusted to reflect the change to the Services referred to in clause 11.1(a) in accordance with the Schedule of Rates. If the adjustment to the relevant Quarterly Fee Estimate or Quarterly Fee Estimates for the change to the Services cannot be determined by reference to the Schedule of Rates, the adjustment will be a reasonable amount determined by the State and Project Co.

11.2 Appointment of Substitute Reviewer

- (a) **(Appointment of Substitute Reviewer):** The Independent Reviewer acknowledges that the Project Parties may appoint another reviewer (**Substitute Reviewer**) to carry out those Services which are omitted as referred to in clause 11.1(a).
- (b) **(Rights and powers):** The Substitute Reviewer will have all of the rights and powers of the Independent Reviewer under the Project Documents in connection with those Services.
- (c) **(Decisions):** Any decision of a Substitute Reviewer so appointed will be treated (between the Project Parties but not as between the Project Parties and the Independent Reviewer) as if it is a decision of the Independent Reviewer.
- (d) **(No responsibility for performance):** Without prejudice to any Claim which any Project Party may have in respect of the performance of the Independent Reviewer, the Independent Reviewer is not responsible for the performance of the Substitute Reviewer.

11.3 Independent Reviewer must continue to perform

Notwithstanding a change to the Services or the appointment of a Substitute Reviewer, the Independent Reviewer must continue to perform its Services, as changed in accordance with clause 11.1, in accordance with this Deed.

11.4 Suspension of Services

- (a) **(Suspension of Services):** The Project Parties may, by joint notice to the Independent Reviewer, instruct the Independent Reviewer to suspend and, after a suspension has been instructed, to recommence, the performance of any or all of the Services.
- (b) **(Payment during suspension):** During the period which the Independent Reviewer's performance of the Services are suspended in accordance with clause

11.4(a), the State (on behalf of the Project Parties) will pay the Independent Reviewer subject to the provisions of this Deed:

- (i) subject to the provisions of this Deed, for the Services that are not suspended (if any); and
- (ii) subject to the Independent Reviewer using all reasonable endeavours to mitigate, minimise or avoid the effects and consequences of the costs associated with the suspension of any or all of the Services, such unavoidable costs incurred arising in connection with the suspension of the Services or costs incurred by the Independent Reviewer in anticipation of their Services not being suspended.

11.5 Meeting of all Project Parties

- (a) **(Project Party may call meeting):** If a Project Party is of the opinion that the Independent Reviewer is not performing its duties in accordance with this Deed, that Project Party may call a meeting of the Project Parties' Representatives who must attend within 2 Business Days (or such other period as requested by that Project Party) to decide an appropriate action to resolve the issue.
- (b) **(Resolutions to be considered):** Without limiting the scope of the Project Parties' decision, the Project Parties will consider at such a meeting whether to resolve the issue referred to in clause 11.5(a) by:
 - (i) requesting that the Independent Reviewer comply with this Deed;
 - (ii) changing the Services of the Independent Reviewer in accordance with clause 11.1 and appointing a Substitute Reviewer in accordance with clause 11.2 in connection with the Services which the Independent Reviewer is not performing in accordance with this Deed;
 - (iii) suspending the Services of the Independent Reviewer in accordance with clause 11.4; or
 - (iv) terminating the appointment of the Independent Reviewer in accordance with clause 12.

12. Termination

12.1 Notice of default

If the Independent Reviewer is in breach of this Deed and the breach is, in the reasonable opinion of the Project Parties, able to be remedied then the Project Parties may jointly give notice to the Independent Reviewer:

- (a) specifying the breach; and
- (a) requiring that the breach be remedied within 7 days, or such later date as agreed by the State and Project Co.

12.2 Termination for breach

If:

- (a) **(unable to remedy breach)**: the Independent Reviewer is in breach of this Deed and the breach is not, in the reasonable opinion of the Project Parties, able to be remedied; or
- (a) **(breach not remedied)**: the Project Parties give a notice in accordance with clause 12.1 and the breach is not remedied within the period of time notified to the Independent Reviewer in accordance with clause 12.1(a),

then, subject to clause 12.6, the Project Parties may immediately terminate the appointment of the Independent Reviewer by joint notice to the Independent Reviewer.

12.3 Termination for insolvency

If an Insolvency Event occurs in respect of the Independent Reviewer then, subject to clause 12.6, the Project Parties may immediately terminate the appointment of the Independent Reviewer by joint notice to the Independent Reviewer, whether or not the Independent Reviewer is then in breach of this Deed.

12.4 Termination for convenience

Subject to clause 12.6, the Project Parties may at any time for their convenience terminate the appointment of the Independent Reviewer upon 21 days joint notice to the Independent Reviewer, and appoint another person to act as the Independent Reviewer.

12.5 No automatic termination upon termination of any State Project Document

The appointment of the Independent Reviewer does not automatically terminate upon the termination of any of the State Project Documents.

12.6 Prior agreement on replacement

Prior to serving a notice in accordance with clause 0, 12.3 or 12.4, the Project Parties must have agreed upon or failing agreement the State has determined, acting reasonably, another person to act as the Independent Reviewer.

12.7 Independent Reviewer's rights upon termination for convenience

Where the appointment of the Independent Reviewer is terminated in accordance with clause 12.4:

- (a) **(payment in accordance with Payment Schedule)**: the Independent Reviewer is only entitled to be paid by the State and Project Co in accordance with the Payment Schedule:
 - (i) the proportion of the Fee for Services performed up to the date of the termination; and
 - (ii) a reasonable amount in respect of any unavoidable liabilities incurred by the Independent Reviewer as a consequence of the termination, except to the extent the Independent Reviewer fails to mitigate such liabilities; and

- (b) **(no entitlement to Claim):** the Independent Reviewer will not otherwise be entitled to bring any Claim against the State or Project Co arising in connection with:
 - (i) the termination of this Deed; or
 - (ii) the Project or the State Project Documents.

12.8 Termination without prejudice

Termination of the appointment of the Independent Reviewer will be without prejudice to any other rights which the Project Parties may have in respect of any breach of the terms of this Deed which occurred prior to the date of termination.

13. Transition out

13.1 Transition Out Period

- (a) **(Obligations):** During the Transition Out Period, the Independent Reviewer must:
 - (i) provide the Services required in accordance with, and otherwise comply with, the Transition Out Plan; and
 - (ii) without being limited by clause 13.1(a)(i), cooperate and consult with the Project Parties and do all such tasks and things as may be reasonably necessary to ensure:
 - A. the smooth transition to the Project Parties of the Independent Reviewer's responsibilities for the monitoring of Project Co's carrying out of the Project Activities; and
 - B. the final completion of all the Services and the full discharge of all of the Independent Reviewer's responsibilities in accordance with this Deed.
- (b) **(Transition Out Plan):** For the purposes of clause 13.1(a), the Independent Reviewer must:
 - (i) prepare a draft of the Transition Out Plan and provide it to the Project Parties by no later than 60 Business Days before the commencement of the Transition Out Period which:
 - A. is based on the draft Transition Out Plan submitted by the Independent Reviewer with its tender for the Services; and
 - B. takes into account all relevant considerations which have arisen during the Term;
 - (ii) provide all drafts of the Transition Out Plan to the Project Parties for review and consult with the Project Parties as required in relation to such drafts;
 - (iii) review and, if necessary, update the Transition Out Plan and make such amendments as may be reasonably required by the Project Parties to any draft of the Transition Out Plan; and

- (iv) finalise, to the reasonable satisfaction of the Project Parties, the Transition Out Plan by no later than 20 Business Days before the commencement of the Transition Out Period.
- (c) **(Review Transition Out Plan every 6 months):** The Independent Reviewer must review the Transition Out Plan at least once every 6 months during the Transition Out Period. The Independent Reviewer must consult with the Project Parties as required in relation to any necessary amendments to the Transition Out Plan. The Project Parties may require the Independent Reviewer, by notice, to make reasonable amendments to the Transition Out Plan during the Transition Out Period, if reasonably necessary to achieve the objectives specified in clause 13.1(a)(ii).

13.2 Delivery of documents

Upon completion of the Services, or upon the termination of the appointment of the Independent Reviewer, the Independent Reviewer:

- (a) **(books, records and documentation):** must deliver up to the Project Parties or to such other person as the Project Parties may direct, all books, records, drawings, specifications and other documentation in the possession, custody or control of the Independent Reviewer relating to the Services; and
- (b) **(right to use documentation):** acknowledges that the Project Parties have the right to use all such books, records, drawings, specifications and other documents for the purposes of the Project.

13.3 Reasonable assistance

Prior to completion of the Services, or upon the termination of the appointment of the Independent Reviewer, the Independent Reviewer must provide full assistance to the Project Parties, the Downstream Parties and any successor to the Independent Reviewer appointed in order to enable such successor to be in a position to perform the Services with effect from the appointment of such successor.

14. Intellectual property

The Independent Reviewer:

- (a) **(grant):** grants to the State;
- (b) **(all things necessary):** must do all things necessary to give effect to the grant to the State of,

a world-wide, perpetual, irrevocable, non-exclusive, transferable, royalty-free licence (including the right to sub-license) to use, reproduce, modify, adapt, develop, communicate to the public or otherwise exploit the Independent Reviewer Material, for the purposes of:

- (c) **(Project):** the Project (including, where this Deed is terminated for any reason other than for convenience under clause 12.4, to complete any Services which have not been:
 - (i) carried out; or
 - (ii) carried out in accordance with the applicable State Project Documents, as at the date of termination);

- (d) **(Project Documents)**: the exercise of the rights of the State or its Associates in accordance with the Project Documents (including its step-in rights in accordance with clause 36 of the Project Agreement); and
- (e) **(further procurement)**: the procurement, design, supply, construction, installation, production, commissioning, completion, operation, maintenance, repair and alteration, during and after the Term, of any part of the Project, the Relevant Infrastructure project relating to aspects of the East West Link.

15. GST

- (a) **(Amount payable)**: Notwithstanding any other provision of this Deed, any amount payable for a supply made under or in connection with this Deed which is calculated by reference to a cost, expense or other amount paid or incurred by a party will be reduced by an amount equal to any input tax credits which that party is entitled to in connection with that cost, expense or other amount.
- (b) **(GST payable by Supplier)**: If GST becomes payable on any Taxable Supply made by a party (**Supplier**) under or in connection with this Deed:
 - (i) any amount payable or consideration to be provided in accordance with any other provision of this Deed for that supply (**Agreed Amount**) is exclusive of GST;
 - (ii) an additional amount will be payable by the party which is the recipient of the Taxable Supply (**Recipient**), equal to the amount of GST payable on that Taxable Supply as calculated by the Supplier in accordance with the GST Law, which will be payable at the same time and in the same manner as for the Agreed Amount; and
 - (iii) the Supplier will provide a Tax Invoice to the Recipient in connection with that supply, either at the time expressly set out in any other provision of this Deed or no later than the time at which the Agreed Amount for that Taxable Supply is to be provided in accordance with this Deed. The Recipient is not obliged to pay any amount in accordance with this clause 15(b) unless and until a Tax Invoice is received by the Recipient in connection with the Taxable Supply except where the Recipient is required to issue the Tax Invoice.
- (c) **(Variation in GST payable)**: If for any reason, the GST payable by the Supplier in connection with a supply it makes under or in connection with this Deed (incorporating any increasing adjustments or decreasing adjustments relating to that supply) varies from the additional amount it received from the Recipient under clause 15(b) in connection with that supply, the Supplier will provide a refund or credit to, or will be entitled to receive from, the Recipient (as appropriate) the amount of this variation. Where an adjustment event occurs in relation to a supply and except where the Recipient is required to issue the Adjustment Note:
 - (i) the Supplier will issue an Adjustment Note to the Recipient in connection with that supply within 14 days after becoming aware of that adjustment event occurring; and
 - (ii) no additional amount will be payable by the Recipient unless and until an Adjustment Note is received by the Recipient.

- (d) **(GST ceasing to be payable):** No amount is payable by a party in accordance with clauses 15(b) or 15(c) to the extent that the GST to which the amount relates has ceased to be payable by or refundable to the Supplier by the Commissioner of Taxation under the GST Law.
- (e) **(Expert Determination):** If the Recipient is dissatisfied with any calculation to be made by the Supplier in accordance with this clause 15, the Recipient may, at its own expense and after notifying the Supplier accordingly, refer the matter to an independent expert nominated by the President of the Institute of Chartered Accountants for expert determination, which will be final and binding on all parties (except in the case of manifest error on the face of the expert determination). The expert will act as an expert and not as an arbitrator and must take into account the terms of this Deed, the matters required to be taken into account by the Supplier in accordance with this clause 15 and any other matter considered by the expert to be relevant to the determination. The parties release the expert from any Liability in acting as an expert, except in the case of fraud on the part of the expert.
- (f) **(Revenue net of GST):** Any reference in this Deed or any Project Document to price, value, sales, revenue, profit or a similar amount (**Revenue**), is a reference to the GST exclusive component of that Revenue, unless the contrary intention is expressed.
- (g) **(Cost net of GST):** Any reference in this Deed or any Project Document to cost, expense, Liability or other similar amount (**Cost**) of a party, is a reference to that Cost reduced by the Input Tax Credits to which the party is entitled in respect of such Cost, unless the contrary intention is expressed.
- (h) **(General obligation):** Each party agrees to do all things, including providing Tax Invoices and other documentation, that may be necessary or desirable to enable or assist the other party in determining its GST payable on any supply made by that other party in connection with this Deed, or any input tax credits, adjustments or refunds in relation to any amount of GST paid or payable in connection with any supply made in connection with this Deed.
- (i) **(GST Groups):** For the purposes of this Deed, a reference to GST payable on a Taxable Supply made by a party includes any corresponding GST payable on a Taxable Supply made by the representative member of any GST group of which that party is a member and a reference to an input tax credit entitlement of a party includes any corresponding input tax credit entitlement of the representative member of any GST group of which that party is a member.
- (j) **(Project Agreement to prevail):** If, but for this clause 15(j), a GST clause in another Project Document would apply in connection with a Taxable Supply to which this clause 15 also applies, then clause 53 of the Project Agreement will apply in connection with that supply and the GST clause in the other Project Document will not apply.
- (k) **(Definitions):** In this clause 15 unless otherwise defined in this Deed, terms used have the meanings given to them in the GST Law.

16. Dispute Resolution

16.1 Disputes to be resolved in accordance with the Project Agreement

Any dispute between the Project Parties arising in connection with this Deed must be resolved in accordance with the procedures set out in clauses 41 to 42 of the Project Agreement.

16.2 Notice of dispute

If any dispute (other than a dispute which is to be referred for resolution in accordance with clauses 41 to 42 of the Project Agreement under clause 16.1) arises between one or both of the Project Parties (on the one hand) and the Independent Reviewer (on the other hand) (**Disputing Parties**) in respect of any fact, matter or thing arising out of or in connection with the Services or this Deed (**Dispute**), any of the Disputing Parties may give notice to each of the other parties specifying:

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

16.3 Executive negotiation

The Dispute identified in the notice given under clause 16.2 is to be referred to the persons described in the Contract Particulars who must:

- (a) (**good faith negotiations**): meet and undertake genuine and good faith negotiations with a view to resolving the Dispute; and
- (b) (**procedure for resolution**): if they cannot resolve the Dispute, endeavour to agree upon a procedure to resolve the Dispute.

16.4 Mediation

If the persons described in the Contract Particulars cannot resolve, or agree upon a procedure to resolve, the Dispute within 10 Business Days after the date the notice is given under clause 16.2, or within such longer period of time as these persons may agree, the Dispute is to be submitted to mediation in accordance with clauses 16.5 to 16.8.

16.5 Mediation

Within 5 Business Days of the expiration of the period referred to in clause 16.4, the Dispute will be referred for mediation to:

- (a) the person set out in the Contract Particulars;
- (b) if:
 - (i) no such person is specified; or
 - (ii) the mediator specified in the Contract Particulars or the person appointed in accordance with this clause 16.5(b):
 - A. is unavailable;
 - B. declines to act; or
 - C. does not respond within 5 Business Days of a request for advice as to whether they are able to conduct the mediation,

a person appointed by the President (or acting President, as the case may be) of the Institute of Arbitrators and Mediators, Australia.

16.6 Place of mediation

The place of mediation will be Melbourne.

16.7 Evidence not admissible

Evidence of anything said, documents presented to, admissions made or matters raised in the course of any mediation will be confidential to the Disputing Parties and the mediator and will not be admissible in any subsequent proceedings.

16.8 Costs

Failing any agreement to the contrary between the Disputing Parties, the costs of the mediation (including any fees charged by the mediator) will be shared equally between the Disputing Parties.

16.9 Reference to litigation

If after 15 Business Days of the Mediator nominated in accordance with clause 16.5 having accepted his or her appointment, the Dispute has not been resolved, then the Dispute may be referred to litigation.

16.10 Condition precedent to litigation

The Project Parties and the Independent Reviewer must comply with the provisions of clauses 16.2 to 16.8 as a condition precedent to commencing court proceedings in respect of any Dispute to which clause 16.2 applies (other than proceedings for urgent or injunctive relief).

16.11 Services to continue

The Independent Reviewer must continue to perform the Services in accordance with this Deed notwithstanding the existence of a Dispute referred to in this clause 16.2.

17. Notices

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

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

The State

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

Project Co

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

Independent Reviewer

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

- (c) **(signed)**: must be signed by the party making the communication or by the solicitor for, or any attorney, director, secretary or authorised agent of, that party on its behalf;
- (d) **(form of delivery)**: must be delivered by hand or posted by prepaid post to the address, sent by fax to the number or emailed (in the form agreed by both parties) to the email address of the addressee set out in clause 17(b); and
- (e) **(taken to be received)**: are taken to be received by the addressee at the address set out in clause 17(b):
 - (i) in the case of delivery by hand, on delivery at the address of the addressee, unless that delivery is outside Business Hours, in which case that communication is taken to be received at 9.00 am on the next Business Day;
 - (ii) in the case of prepaid post, on the third Business Day after the date of posting to an address within Australia and on the fifth Business Day after the date of posting by airmail to an address outside Australia; and
 - (iii) in the case of email, the first to occur of:
 - A. receipt by the sender of any email acknowledgement from the addressee's information system showing that the communication has been delivered to the email address of that addressee;
 - B. the time that the communication enters an information system which is under the control of the addressee; or
 - C. the time that the communication is first opened or read by the addressee,

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

18. Miscellaneous

18.1 Governing law and jurisdiction

- (a) **(Governing Law)**: This Deed is governed by, and must be construed according to, the Laws of Victoria, Australia.
- (b) **(Jurisdiction)**: Without limiting clause 16, each party irrevocably submits to the non-exclusive jurisdiction of the courts of Victoria, and the courts competent to

determine appeals from those aforementioned courts, with respect to any proceedings which may be brought in connection with this Deed.

18.2 Entire agreement

To the extent permitted by Law and in relation to their subject matter, this Deed and the other State Project Documents:

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

18.3 Further acts and documents

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

18.4 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) the Project Party's rights to set-off and recover money;
 - (ii) confidentiality or privacy;
 - (iii) any obligation to make any records available to the State;
 - (iv) any indemnity or financial security given in accordance with this Deed; or
 - (v) 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.

18.5 Waiver

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

or enforcement, of that or any other right provided by Law or in accordance with this Deed.

- (c) **(No waiver of another breach):** No waiver of a breach of a term of this Deed operates as a waiver of another breach of that term or of a breach of any other term of this Deed.

18.6 Consents, approvals and directions

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

18.7 Amendments

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

18.8 Expenses

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

18.9 Severance

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

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

18.10 Counterparts

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

18.11 Moratorium legislation

Unless application is mandatory by Law, any Law will not apply to any State Project Documents so as to abrogate or otherwise prejudicially affect any rights given or accruing to the State.

18.12 Proportionate liability

- (a) **(Excluded operation of Wrongs Act):** The operation of Part IVAA of the *Wrongs Act 1958* (Vic) is excluded in relation to all and any rights, obligations or liabilities

of either party under this 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 18.12(a), the rights, obligations and liabilities of the parties (including those relating to proportionate liability) are as specified in this Deed and not otherwise, whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.

18.13 Confidentiality

The Independent Reviewer must keep confidential details of this Deed and all information and documents provided to, or by, the Independent Reviewer relating to the Services and not disclose or use the information or documents except:

- (a) to the Project Parties;
- (b) for the purposes of performing the Services;
- (c) where required by Law or to obtain legal advice on this Deed; or
- (d) with the prior consent of the Project Parties.

This obligation will survive completion of the Services or the termination of this Deed.

18.14 Assignment and security

- (a) **(No assignment):** Subject to clause 18.14(b), no party to this Deed may assign, novate, transfer, mortgage, charge, encumber or otherwise deal with any of its rights or obligations under this Deed without the prior consent of each other party to this Deed.
- (b) **(Mortgage, charge or encumber):** Project Co may mortgage, charge or encumber its rights under this Deed in accordance with the Project Agreement and the Finance Documents.

18.15 No representation or reliance

- (a) **(No representation):** Each party acknowledges that no party (nor any person acting on a party's behalf) has made any representation or other inducement to it to enter into this Deed, except for representations or inducements expressly set out in this Deed.
- (b) **(No reliance):** Each party acknowledges and confirms that it does not enter into this Deed in reliance on any representation or other inducement by or on behalf of any other party, except for representations or inducements expressly set out in this Deed

18.16 Indemnities

- (a) **(Continuing Liability):** Each indemnity in this Deed is a continuing obligation, separate and independent from the other obligations of the parties.
- (b) **(Expense not necessary):** It is not necessary for a party to incur expense or to make any payment before enforcing a right of indemnity conferred by this Deed.

Executed as a deed.

[State Note: Execution blocks to be inserted.]

Schedule 1 Contract Particulars

[State Note: To be based on the Preferred Respondent's Proposal and proposals received from the successful entity tendering for the role of the Independent Reviewer.]

1. Other Downstream Independent Reviewer Contracts

[#insert]

2. Other Downstream Parties

[#insert]

3. Independent Reviewer's Representative

[#insert]

4. Project Parties' Representatives

State: [#insert]

Project Co: [#insert]

5. Key People

Name	Role
[#insert]	[#insert]

6. Limitation on Independent Reviewer's Liability

Limit: *[State Note: To be inserted following further consideration by the State of the proposed role of the Independent Reviewer.]*

7. Project specific professional indemnity insurance

Minimum limit of indemnity: **\$50,000,000** for any one claim and in the aggregate

Maximum deductible: **\$1,000,000**

8. Public Liability insurance

Minimum limit of indemnity: **\$50,000,000** for any single occurrence and unlimited in the aggregate as to the number of occurrences for any one period of insurance

Maximum deductible: **\$250,000**

9. Dispute resolution

State's Executive Negotiator: [*#insert*]

Project Co's Executive Negotiator: [*#insert*]

Independent Reviewer's Executive Negotiator: [*#insert*]

Mediator: [*#insert*]

Schedule 2 Services

1. General

The Independent Reviewer must:

- (a) **(become familiar with the role)**: become familiar with the role (express or implied) under the State Project Documents and the Downstream Independent Reviewer Contracts of the "Independent Reviewer" and review information made available to the Independent Reviewer by the parties in order to become fully acquainted with the Project;
- (b) **(discharge functions under the Project Documents)**: discharge the functions which the State Project Documents and the Downstream Independent Reviewer Contracts contemplate will be discharged by the Independent Reviewer;
- (c) **(attend meetings and report)**: attend meetings and report as required from time to time by the parties;
- (d) **(minimum surveillance)**: undertake, as a minimum, the surveillance of the Project set out or described in the Monitoring Plan;
- (e) **(Hold Points and witness points)**: attend, as a minimum, the Hold Points and witness points set out or described in the Monitoring Plan;
- (f) **(certificates)**: issues certificates in accordance with and in the form set out in the Schedule of Certificates and Notices; and
- (g) **(general)**: otherwise discharge the functions of the Independent Reviewer under the Project Documents, including the PSR, and the Downstream Independent Reviewer Contracts.

2. Project Agreement (including the PSR)

The Independent Reviewer's functions under the Project Agreement include, but are not necessarily limited to:

[State Note: The table below is to be amended and updated to reflect the final version of the State Project Documents and the downstream Independent Reviewer agreements.]

Clause No.	Independent Reviewer Role
[#insert]	[#insert]

The Independent Reviewer's functions under the PSR include, but are not necessarily limited to, functions under the following sections:

[#insert]

Schedule 3 Payment Schedule

1. Payment of the Fee for Services

- (a) **(State responsible):** Subject to sections 1(b) and 1(c), and without limiting any provision of the Project Agreement, the State will be solely and exclusively liable for making any payments due to the Independent Reviewer under this Deed.
- (b) **(Payment for special reports):** Without limiting any provision of the Project Agreement, the relevant Project Party requesting the preparation of an additional report under clause 7.4 will be solely responsible for payment to the Independent Reviewer for the costs associated with the preparation of such additional report.
- (c) **(Payment for Downstream Independent Reviewer Functions):** For the avoidance of doubt, if Project Co requires the Independent Reviewer to exercise its functions under the [Independent Reviewer Side Deed], Project Co will assume sole Liability in respect of the applicable fees (in addition to any fees otherwise payable in accordance with this section 1).

2. Payment claim

- (a) **(Independent Reviewer to prepare and submit):** Subject to section 5, the Independent Reviewer must submit to the State (with a copy to Project Co) a claim for payment on account of the Monthly Fee (not including an additional report required under clause 7.4):
 - (i) for the Services performed in accordance with this Deed during a month, at the end of the month; and
 - (ii) calculated in and otherwise in accordance with this Payment Schedule.
- (b) **(Content):** Each payment claim prepared in accordance with section 2(a) must set out:
 - (i) a breakdown of the Services, including details of personnel days worked for each resource (in a form and including such information and supporting documentation) as the Project Parties may require from time to time) actually carried out during the relevant month;
 - (ii) details of approved disbursements actually incurred during the relevant month (including such information and supporting documentation as the Project Parties may require from time to time);
 - (iii) the part of the Fee then payable;
 - (iv) if the Independent Reviewer considers, for the purposes of clause 9.6(d) of the Project Agreement, that the Project Parties (as a result of their respective conduct) have a proportionate responsibility for the costs and expenses of the Independent Reviewer which differs from the proportions stated in clause 9.6(c) of the Project Agreement, the Independent Reviewer's assessment of the relevant proportions; and
 - (v) the amounts previously claimed by the Independent Reviewer in relation to the Quarter and the amount of the Quarterly Fee Estimate,

and otherwise be in a form and substance agreed with the Project Parties.

- (c) **(Payment Claims for special reports):** Where an additional report has been requested by a Project Party under clause 7.4, the Independent Reviewer must submit a separate payment claim to the Project Party who made the request in respect of the preparation of the report.

3. Payment

- (a) **(Payment of Fee):** Subject to sections 3(b), 4(b) and 5, within 20 Business Days of receipt of a payment claim in accordance with section 2(a), the State must pay the Independent Reviewer the part of the Fee which the State believes represents the value of the Services performed by the Independent Reviewer during the period for which the payment claim is submitted.
- (b) **(Payment for special reports):** Within 20 Business Days of receipt of a payment claim under section 2(c), the relevant Project Party must pay the Independent Reviewer the amount which it believes represents the value of the Services performed by the Independent Reviewer relating to the preparation of the additional report during the period for which the payment claim is submitted.

4. Payment of wages by Independent Reviewer

- (a) **(Signed statement required):** Before a payment is made to the Independent Reviewer under section 3, the relevant Project Party may require the Independent Reviewer to give Project Co a statement signed by the Independent Reviewer stating that no wages or payments to any sub-contractors of the Independent Reviewer are due and owing by the Independent Reviewer in respect of the Services at the time of payment.
- (b) **(Possible to withhold money):** If, within 2 Business Days after the request, the Independent Reviewer fails to provide the statement, then the party responsible for the payment of the relevant payment claim may withhold payment of moneys due to the Independent Reviewer until the statement is received.

5. Insurance

Before a payment claim can be made by the Independent Reviewer under section 2(a), the Independent Reviewer must have effected the insurance required by clause 9.3 on the basis set out in section 10 and provided evidence of this to the Project Parties. If a payment claim is purported to be submitted by the Independent Reviewer prior to effecting such insurance and providing such evidence, neither of the Project Parties will be liable to make any payment in respect of such claim.

6. Books of account

The Independent Reviewer must, for the purposes of this Deed:

- (a) institute and maintain all proper books of account and operating records necessary to afford a correct and complete record and explanation of all payment claims (including relevant supporting documentation) made by the Independent Reviewer under this Deed; and
- (a) permit the Project Parties' representatives (and any persons authorised by either of them) access at all reasonable times to all relevant books of account and operating

records necessary to establish that all payment claims made by the Independent Reviewer and all moneys paid to the Independent Reviewer under the terms of this Deed are or have been properly accounted for.

7. Notification of disputed amounts

If the State or Project Co disputes any amount which the Independent Reviewer has claimed then the State or Project Co (as applicable) must notify the Independent Reviewer of its reasons for disputing that amount within 20 Business Days after receipt of the relevant payment claim.

8. The Fee

[State Note: This section is to be based on the Independent Reviewer's fee proposal.]

(a) The Initial Fee payable for the Initial Period will be broken down as follows:

Description	Amount
[#insert]	[#insert]

(b) After the Initial Period, the Quarterly Fee Estimate will be as follows:

Description	Amount
[#insert]	[#insert]

(c) Except as otherwise provided, the Initial Fee and the Quarterly Fee Estimate are inclusive of labour, material, disbursements and expenses, overhead, supervision, management of subcontracts and profit.

9. Schedule of Rates

[State Note: This section is to include both rates and prices and is to be based on the Independent Reviewer's fee proposal.]

Position/Discipline	Name	Rate \$/day
[#insert]	[#insert]	[#insert]

Key People	Position	Daily Rate
[#insert]	[#insert]	[#insert]

Except as otherwise provided, the rates and prices set out in the Schedule of Rates are inclusive of overhead, supervision, management of subcontracts and profit.

10. Disbursements

The Independent Reviewer will:

- (a) only be entitled to reimbursement of disbursements for which the Independent Reviewer is to be paid on a schedule of rates basis under this Deed if those disbursements:
 - (i) have been reasonably and properly incurred for the sole purpose of performing Services;
 - (ii) where they exceed or are likely to exceed \$2,000, have the prior approval of the State and Project Co;
 - (iii) to the extent applicable, are in accordance with the Schedule of Rates; and
 - (iv) are supported by documentation provided to the State and Project Co which is satisfactory to the State and Project Co; and
- (b) not be entitled to make any Claim against the State and Project Co arising in connection with disbursements or other costs incurred in connection with the performance of the Services other than in accordance with section 10(a).

11. Payments

11.1 Initial Period

Subject to section 12:

- (a) during the Initial Period, where the Independent Reviewer makes a payment claim under section 2, the monthly amount of the Fee then payable will be equal to the relevant monthly instalment of the Initial Fee as set out in section 8; and
- (a) the Initial Fee is a fixed amount and is not subject to adjustment.

11.2 After Initial Period

Subject to sections 11.4 and 12, where the Independent Reviewer makes a payment claim under section 2(a) after the Initial Period, the Monthly Fee then payable will be equal to the costs of the Independent Reviewer incurred in providing the Services based on the Schedule of Rates, the personnel days and approved disbursements incurred during the relevant month.

11.3 Adjustment of Quarterly Fee Estimates and Schedule of Rates

The amounts with respect to:

- (a) the Quarterly Fee Estimates, and
- (b) the Schedule of Rates,

are to be Indexed in accordance with the Wage Price Index.

11.4 Quarterly Fee Estimate

The total Monthly Fees payable to the Independent Reviewer in respect of any Quarter under section 11.2 must not be greater than 10% more than the Quarterly Fee Estimate in respect of that Quarter unless otherwise agreed by the Project Parties.

11.5 Resource Adjustment Order

The Project Parties may direct the Independent Reviewer to carry out a Resource Adjustment by issuing a document entitled 'Resource Adjustment Order' in accordance with this section.

11.6 Notice of resource evaluation

No fewer than 20 Business Days before the start of every Quarter, the Independent Reviewer must provide the Project Parties with a notice setting out:

- (a) its evaluation of the resource levels (in a form set out in Schedule 5 or as otherwise agreed by the Project Parties) required for the Quarter having regard to the actual nature and extent of the Services to be carried out by the Independent Reviewer during the relevant Quarter (having regard to the minimum resourcing estimates contained in the Initial Monitoring Plan); and
- (a) its estimate of the costs for performing the Services having regard to its evaluation of the resource levels and the rates and prices set out in the Schedule of Rates and the amount by which the Quarterly Fee Estimate should be adjusted as a result of the Resource Adjustment (if any) which the Independent Reviewer should effect in the relevant Quarter.

11.7 Quarterly meeting

No fewer than 10 Business Days before the start of every Quarter, the Independent Reviewer must meet with the Project Parties to:

- (a) evaluate the resource levels required for the Quarter having regard to the actual nature and extent of the Services to be carried out by the Independent Reviewer in that Quarter; and
- (b) discuss:
 - (i) the possibility of effecting a Resource Adjustment in that Quarter; and
 - (ii) the Independent Reviewer's estimate of the amount by which the Quarterly Fee Estimate should be adjusted as a result of any such Resource Adjustment.

11.8 Resource adjustment and its approval

If the Project Parties' and the Independent Reviewer agree on a Resource Adjustment and the adjustment in the Quarterly Fee Estimate before the start of the relevant Quarter (and such adjustment is equal to or greater than 10% higher or lower than the Quarterly Fee Estimate in respect of the relevant Quarter), then:

- (a) the Project Parties will issue a Resource Adjustment Order;
- (a) the Quarterly Fee Estimate will be adjusted by the agreed adjustment in the Quarterly Fee Estimate; and

(b) the Independent Reviewer must promptly effect the Resource Adjustment.

12. GST

All lump sums, rates and amounts in this Payment Schedule do not include GST.

Schedule 3 Initial Monitoring Plan

[State Note: This schedule is to be based on the Independent Reviewer's Monitoring Plan provided by the successful tenderer for the role of the Independent Reviewer.]

Schedule 4 Requirements for Monitoring Plan

[State Note: To be advised upon release of the Independent Reviewer Request for Tender.]

