



WestConnex M5 Project Deed

Roads and Maritime Services

ABN 76 236 371 088

and

WCX M5 PT Pty Ltd

(ACN 608 798 465) in its personal capacity and in its capacity as trustee of the WCX M5 Project Trust (ABN 73 899 615 977)

and

WCX M5 AT Pty Ltd

(ACN 608 798 081) in its personal capacity and in its capacity as trustee of the WCX M5 Asset Trust (ABN 23 365 031 283)

2015

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- Exhibit H Scope of Works and Technical Criteria
- Exhibit I Plan for Roads Act section 52 declaration and section 63 direction

THIS DEED is made on

2015

BETWEEN:

- (1) **Roads and Maritime Services** ABN 76 236 371 088 of Level 9, 101 Miller Street, North Sydney, New South Wales, 2060 (**RMS**);
- (2) **WCX M5 PT Pty Ltd** (ACN 608 798 465) in its personal capacity and in its capacity as trustee of the WCX M5 Project Trust (ABN 73 899 615 977) of Level 18, 10 Miller Street, North Sydney, New South Wales, 2060 (the **Project Trustee**); and
- (3) **WCX M5 AT Pty Ltd** (ACN 608 798 081) in its personal capacity and in its capacity as trustee of the WCX M5 Asset Trust (ABN 23 265 031 283) of Level 18, 10 Miller Street, North Sydney, New South Wales, 2060 (the **Asset Trustee**).

RECITALS:

- (A) RMS is a statutory body representing the Crown in the right of the State of New South Wales.
- (B) RMS, the Project Trustee and the Asset Trustee now enter into this deed in relation to the Project to set out the terms on which:
 - (1) the Asset Trustee carries out:
 - (i) the investigation, financing, funding, planning, design and construction, and commissioning of the Project Works, the Temporary Works and the Asset Renewal; and
 - (ii) the integration, interface and co-ordination of the Asset Trustee's Activities with the other elements of the WestConnex Program of Works;
 - (2) the Project Trustee carries out:
 - (i) the operation, maintenance and repair of the Motorway (other than the Asset Renewal);
 - (ii) the handover of the Motorway to RMS at the end of the Term; and
 - (iii) the levying and collection of tolls.
- (C) The overall strategic objectives of the NSW Government and RMS for the Project are:
 - (1) to provide a high standard access controlled motorway that integrates with the regional transport network;
 - (2) to minimise adverse social and environmental impacts in the local area during construction and operation;
 - (3) to ensure the Motorway is safe and reliable for road users;
 - (4) that the Project will demonstrate excellence in design and environmental sustainability; and
 - (5) that the Project will be economically justified and affordable to government and that Opening Completion and Completion of the Project Works will be achieved on time and on budget.

OPERATIVE PROVISIONS:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

The following definitions apply in this deed:

Account Bank means National Australia Bank.

Account Bank Deed Poll means the deed poll entitled "WCX M5 Account Bank Deed Poll (RMS Security)" signed by the Account Bank in favour of RMS on or about the date of this deed.

Accreting Instrument means any form of financial instrument (including, without limitation, bond, note or other instrument in the domestic or international capital markets or bank loan) issued by the Project Trustee, the Asset Trustee or the Borrower or otherwise under which the Project Trustee, the Asset Trustee or the Borrower is the debtor whereby the principal amount outstanding under the instrument accretes over time until the maturity date of the instrument by reference to a mechanism specified in the instrument itself. It includes a zero coupon bond or CPI indexed bond but does not include any instruments or loans issued between any of the Borrower, the Project Trustee and the Asset Trustee.

Act of Prevention means:

- (a) a breach of this deed by RMS; and
- (b) an act or omission by RMS or any of its Related Parties, not being an act or omission:
 - (i) expressly permitted or allowed by this deed, including any Direction given by RMS or RMS's Representative;
 - (ii) which is carried out within the timeframe expressly permitted or allowed by this deed;
 - (iii) to the extent the act or omission is caused or contributed to by a breach by the Trustees of this deed, or any negligent or unlawful act or omission of the Trustees or any of their Related Parties; or
 - (iv) being the exercise by RMS of any of its functions and powers pursuant to any Law.

Actual Revenue means, for the purposes of a Smart Motorways Event, in respect of any period, all Revenue which the Project Trustee has been entitled to receive and collect over that period pursuant to clause 21.

Agreed Amount has the meaning given to that term in clause 24.2(b)(i).

Airport Parties has the meaning given to that term in clause 6.3(a)(v).

Alexandria Landfill Site has the meaning given in Appendix B.30 of Part A of the SWTC.

Amendment has the meaning given to that term in clause 36.2(a).

Approval means any licence, permit, consent, approval, determination, certificate or permission from any Authority or under any Law, or any requirement made under any Law which must be obtained or satisfied (as the case may be):

- (a) to perform the Trustee's Activities;
- (b) in connection with the Project, the Construction Site, any Extra Land, the Motorway, the Motorway Stratum and the Maintenance Site;
- (c) for the use and occupation of the Project Works after Opening Completion and/or Completion; or
- (d) otherwise to comply with Law,

including:

- (e) the Planning Approval and the EPBC Act Approval;
- (f) any Environment Protection Licence issued in relation to the Trustee's Activities; and
- (g) the Landfill EPL and the Trade Waste Agreement,

but not including:

- (h) any Direction given by RMS or RMS's Representative pursuant to this deed;
- (i) the exercise by RMS of its rights under this deed; or
- (j) any requirement by a person carrying out Existing Operations.

Approved Financing Transaction means Financial Indebtedness that is constituted by:

- (a) any Intercompany Loans;
- (b) any trade credit, hire purchase or leasing arrangement in the ordinary course of trading;
- (c) any unsecured indebtedness (other than that referred to in paragraphs (a) and (b) above) where the total outstanding does not exceed \$ [REDACTED] in aggregate; or
- (d) Financial Indebtedness otherwise approved in writing by RMS which it may give or withhold in its absolute discretion.

Approved Insurer means:

- (a) an Australian registered insurance company which is approved by the Australian Prudential Regulatory Authority (APRA) to conduct general insurance business in Australia with a rating specified in paragraph (e) of this definition;
- (b) Lloyds Underwriters;
- (c) a Treasury Managed Fund insurance scheme with the NSW State Government;
- (d) the Comcover insurance scheme for the Australian Federal Government; or
- (e) an insurer with a rating of not less than A by Standard and Poor's (Australia) Pty Limited or A2 by Moody's Investors Service, Inc or such other rating approved by RMS (which approval shall not be unreasonably withheld or delayed).

Approved O&M Work Traffic Management Plans has the meaning given to that term in clause 9.6A(a)(vi).

Approved Project Works Traffic Management Plans has the meaning given to that term in clause 9.6(a)(vi).

Artefacts means any and all:

- (a) valuable minerals, fossils or coins;
- (b) articles or objects of value or antiquity; or
- (c) objects or things of scientific, geological, historical, heritage, aesthetic, social, spiritual, cultural, archaeological, anthropological or other special interest.

Asset Hold Trust means the trust called "WCX M5 Asset Hold Trust" established by the Asset Hold Trust Deed (ABN 91 309 289 753).

Asset Hold Trust Deed means the trust deed establishing Asset Hold Trust executed by Asset Hold Trustee dated on or about 16 October 2015.

Asset Hold Trustee means WCX M5 AHT Pty Ltd (ACN 608 763 524) in its capacity of the Asset Hold Trust.

Asset Renewal means the replacement and refurbishment of an asset item on the Motorway as agreed between the Project Trustee and the Asset Trustee from time to time and notified by the Asset Trustee to RMS in writing.

Asset Trust means the trust called "WCX M5 Asset Trust" established by the Asset Trust Deed (ABN 23 365 031 283).

Asset Trust Deed means the trust deed establishing the Asset Trust executed by the Asset Trustee dated on or about 19 October 2015.

Asset Trustee's Activities means all things and tasks which the Asset Trustee does, is, or may be, required to carry out or do to comply with its obligations under the RMS Project Documents with respect to the Project Works, the Temporary Works, the Asset Renewal and the New M5 Main Works D&C Phase Maintenance, including, but not limited to, the activities set out in clause 9.1(a).

Associate has the meaning given in sections 12 and 15 of the Corporations Act, provided that no persons will be deemed to be Associates merely because they are parties to, or become parties to, any Project Documents.

Authority means:

- (a) any governmental or semi-governmental or local government authority, administrative or judicial body or tribunal, department, commission, public authority, agency, Minister, statutory corporation or instrumentality;
- (b) any other person having a right to impose a requirement, or whose consent is required, under Law with respect to any part of the Trustee's Activities; or
- (c) any other person having jurisdiction over, or ownership of, Utility Services, the Utility Service Works, the Local Areas or the Local Area Works,

and includes the Clean Energy Regulator.

Bank Bill means a bill of exchange (as defined in the *Bills of Exchange Act 1909* (Cth)) that has been accepted by a bank authorised under a Law of the Commonwealth or any state to carry on banking business.

Base Case Financial Model means the financial model and assumptions prepared by or for the Trustees and accepted by RMS pursuant to paragraph 5 of Schedule 1, as updated from time to time in accordance with this deed.

Base Revenue means, for the purposes of a Smart Motorways Event, in respect of any period, all Revenue specified for that period in the Base Case Financial Model as at Financial Close.

Baseline Conditions means the indicative conditions of Planning Approval and EPBC Act Approval in respect of the New M5 Main Works, set out in Schedule 31.

BBSY, for a period, means the rate expressed as a yield per cent per annum (rounded up (if necessary) to 4 decimal places) that is quoted as the average bid rate on the Reuters monitor system page "BBSY" (or any page that replaces that page) at about 10.10am (Sydney time) on the first day of the relevant period for which the rate is sought, for Bank Bills that have a tenor in months which is closest to the period, provided that if there is a manifest error in the calculation of that average bid rate or if no average bid rate is so published for Bank Bills of that tenor by 10.30am then the BBSY will be the bid rate specified by the non-defaulting party reasonably, acting in good faith, having regard to the rates otherwise bid for Bank Bills having a tenor as described above at or around that time.

Borrower means WCX M5 FINCO Pty Ltd (ABN 65 606 993 462).

Builder has the meaning given to that term in section 35(8) of the FWBI Act.

Building Code means the Building Code 2013 (Cth).

Building Work has the meaning given to that term in section 5 of the FWBI Act.

Business Day means any day other than a Saturday, Sunday or public holiday in Sydney, or 27, 28, 29, 30 and 31 December.

CASA means the Civil Aviation Safety Authority, a Commonwealth government authority established under section 8 of the *Civil Aviation Act 1988* (Cth).

Cash Flow Available for Debt Service or **CFADS** means, for a relevant period:

- (a) Revenue; less
- (b) Operating Costs,

in each case for that period.

Carriageway has the meaning given in Appendix B.2 of Part A of the SWTC.

Cash Manager means the company to be established by the Project Trustee and the M4 Project Company in accordance with the Manager Shareholders' Agreement to manage the distribution of Toll Amounts (as defined in the Manager Shareholders' Agreement) from the joint clearing house bank account in accordance with the Toll Calculation Schedule and the Manager Shareholders' Agreement.

Change means any change or variation to the Project Works, the Temporary Works, the New M5 Main Works D&C Phase Maintenance, the Asset Renewal, the O&M Work or the Trustee's Activities and includes additions, increases, decreases, omissions, deletions, demolition or removal to or from any of these.

Change Costs means, to the extent a Change:

- (a) increases the cost of the Project Works, the Temporary Works, the Trustee's Activities, the Asset Renewal, the New M5 Main Works D&C Phase Maintenance, or the O&M Work; or
- (b) is deemed to be directed by RMS pursuant to either clause 4A.3(i)(ii) or clause 4B.3(i)(ii) and requires the Trustees to carry out works,

the following amounts:

- (c) the direct costs and associated on-site overheads reasonably arising out of or in connection with the Change including any increased construction costs, operating costs, maintenance costs and financing costs (to the extent that those financing costs are reasonable and incurred on an arm's length basis);
- (d) a reasonable amount on account of the off-site overheads and profit margin of (as applicable):
 - (i) the Contractor (which, if the Change Order in respect of the Change is issued prior to the Date of Completion, will be no greater than the D&C Margin); and/or
 - (ii) the Operator (which will be no greater than the O&M Margin); and/or
 - (iii) any applicable contractor in respect of the O&M Work or the Asset Renewal (which will be a reasonable margin taking into consideration the type of works undertaken by the applicable contractor),

not including an amount on account of the off-site overheads and profit margin of the Trustees; and

- (e) in the case of:
 - (i) a Change directed by RMS pursuant to clause 14.1(a) or 14.2(e), if the proposed Change will delay the Date of Completion beyond the Date for Completion or the Date of Opening Completion beyond the Date for Opening Completion, an amount calculated to ensure the return to the Equity Investors equals the Projected Equity Return calculated upon their contributed amount of Equity for the period of that delay beyond the Date for Completion or the Date for Opening Completion, if any; and
 - (ii) a Change the subject of a Change Order otherwise deemed to have been given to the Trustees by RMS in accordance with this deed, if the Change will result in the delay notified by the Trustees under section 1.2(d) of Schedule 37 (subject to section 1.7 of Schedule 37) to the Date of Completion beyond the Date for Completion or the Date of Opening Completion beyond the Date for Opening Completion (as applicable), an amount calculated to ensure the return to the Equity Investors equals the Projected Equity Return calculated upon their contributed amount of Equity for the period of that delay beyond the Date for Completion or the Date for Opening Completion (as applicable), if any,

after deducting Change Savings arising from the Change.

Change in Codes and Standards means a change in Codes and Standards which takes effect after the date of this deed and prior to the Date of Opening Completion other than a change in Codes and Standards that, on or before the date of this deed:

- (a) has been published or publicly notified; or
- (b) a contractor experienced and competent in the financing, design, construction, operation and maintenance of works and services similar to the Project Works or the Temporary Works would have foreseen or anticipated.

Change in Federal Environmental Law means:

- (a) a change in a Federal Environmental Law existing at the date of this deed;
- (b) the enactment or making of a new Federal Environmental Law after the date of this deed; or
- (c) a change in the way a Federal Environmental Law is applied, or in the interpretation of a Federal Environmental Law, after the date of this deed,

which requires a Change to the Project Works.

Change Notice has the meaning given to that term in Schedule 37.

Change of Control means:

- (a) in relation to a Project Entity, if the Project Entity comes under the Control of a person (acting alone or together with its Associates) who did not Control the Project Entity as at the date of this deed or the date on which RMS grants consent under clause 37;
- (b) in relation to a Project Entity, if a person (acting alone or together with its Associates) who was in Control of the Project Entity as at the date of this deed or the date on which RMS grants consent under clause 37 ceases to have Control of the Project Entity;
- (c) in relation to the Asset Trustee, a change in the unitholdings of the Asset Trust such that upon the change occurring, an entity that did not previously have the ability, has the ability to determine the outcome of decisions of the Asset Trustee in relation to the financial and operating policies of the Asset Trustee as trustee of the Asset Trust; or
- (d) in relation to the Project Trustee, a change in the unitholdings of the Project Trust such that upon the change occurring, an entity that did not previously have the ability, has the ability to determine the outcome of decisions of the Project Trustee in relation to the financial and operating policies of the Project Trustee as trustee of the Project Trust,

other than as a result of a Permitted Dealing.

Change Order means a notice given by RMS under section 1.4(b), section 1.7(b), section 1.7(d), section 1.7(e) or section 1.9 of the Change Procedure.

Change Procedure means the procedure in Schedule 37.

Change Proposal means a notice given by RMS under section 1.1(a) of the Change Procedure.

Change Savings means:

- (a) the cost savings arising out of or in connection with the Change (including any savings in relation to construction costs and associated on-site overheads, operating costs, maintenance costs or financing costs); and

- (b) a reasonable amount on account of off-site overheads and profit margin of (as applicable):
 - (i) the Contractor (which, if the Change Order in respect of the Change is issued prior to the Date of Completion, will be no greater than the D&C Margin); and/or
 - (ii) the Operator (which will be no greater than the O&M Margin);not including an amount on account of the off-site overheads and profit margin of the Trustees.

CIMIC Group means CIMIC Group Limited (ABN 57 004 482 982).

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

- (a) under, arising out of, or in any way in connection with, this deed;
- (b) arising out of, or in any way in connection with, any task, fact, matter, thing or relationship connected with, the Project, the Trustee's Activities or any party's conduct prior to:
 - (i) in respect of the New M5 Project, the date of this deed;
 - (ii) in respect of the M5 East Project, the M5E Transfer Date; or
 - (iii) in respect of the M5 West Project, the M5W Transfer Date; or
- (c) otherwise at Law including:
 - (i) under or for breach of any statute;
 - (ii) in tort for negligence or otherwise, including negligent misrepresentation; or
 - (iii) for restitution including restitution based on unjust enrichment.

Clean Energy Regulator means the "Clean Energy Regulator" established under the *Clean Energy Regulator Act 2011* (Cth).

Code Monitoring Group has the meaning given to that term in the Building Code.

Codes and Standards means all codes, standards, specifications and guidelines referred to in Part A of the SWTC.

Commercially Sensitive Information means:

- (a) any information relating to any financing arrangement under any Equity Document or Debt Financing Document;
- (b) any information relating to the Group's cost structure or profit margins;
- (c) any information relating to any of a Trustee's Intellectual Property Rights; or
- (d) any information which is commercially sensitive in that it provides a competitive advantage or has a unique characteristic to the Trustees or the unitholders, financiers or Subcontractors of a Trustee,

which, in respect of the information contained in the Project Documents, is the information described in Schedule 3.

Commonwealth means the Commonwealth of Australia.

Commonwealth Subordinated Loan Agreement means the agreement between the Commonwealth and the Borrower dated on or about the date of this deed.

Community Involvement Plan has the meaning given to that term in Appendix D.2 of Part A of the SWTC.

Compensation Event means the occurrence of any of the following events prior to the Date of Opening Completion or the Date of Completion (as the case may be) (other than the event referred to in paragraph (h)), which may be at any time during the Term):

- (a) an Act of Prevention;
- (b) a Legal Challenge occurs and, as a consequence of that Legal Challenge, a Trustee receives an order by a court or direction by RMS's Representative pursuant to clause 7.5(a) or clause 7.5(d) which requires that a Trustee suspend or cease to perform any or all of its obligations under this deed, other than due to:
 - (i) a Trustee's failure to comply with its obligations under a Project Document;
 - (ii) a breach of a Trustee's warranties under clause 7.3(b);
 - (iii) a wrongful act or omission of a Trustee or any of its Related Parties; or
 - (iv) a failure by the a Trustee or any of its Related Parties to comply with the EP&A Act or the EPBC Act or any other applicable legislation;
- (c) a Native Title Claim is made and, as a consequence of that Native Title Claim, a Trustee receives an order by a court or a direction by RMS's Representative pursuant to clause 11.9(a) or clause 11.9(b), or is required at Law, to suspend or cease to perform any or all of its obligations under this deed;
- (d) RMS has not issued the PPA Notice by the Planning Approval Longstop Date;
- (e) RMS has not issued its EPBCA Notice within 30 Business Days of the date on which the Primary Planning Approval is granted, but only to the extent of the period that:
 - (i) starts on the later of:
 - (A) the date which is 30 Business Days after the date on which the Primary Planning Approval is granted; and
 - (B) the EPBC Act Approval Target Date; and
 - (ii) ends on the earlier of the issue of the EPBCA Notice and termination of this deed under clause 6.9;
- (f) unless clause 11.12(e) applies, the SPI Managing Contractor Works are not complete (except for minor defects) by the SPI Managing Contractor Works Completion Date (as evidenced by the certificate provided by the Independent Certifier under clause 11.12(c));
- (g) the discovery of an Artefact to the extent that the discovery of that Artefact results in the Trustees being directed, ordered to or required by RMS's Representative, an Authority, a court or tribunal or by Law to suspend or cease to perform any or all of the Trustees Activities for more than 20 Business Days in aggregate (for each discovery of an Artefact); or

- (h) the occurrence of a catastrophic structural failing of a structural component of the M5 East Motorway or the M5 West Motorway that has a design life as set out in Schedule 64 which expires on or after the Final Expiry Date.

Completion means the stage in the execution of a Asset Trustee's Activities when the Asset Trustee has satisfied all the conditions precedent to completion set out in Schedule 40.

Concept Design means the concept design prepared by the Asset Trustee and included in Appendix E.3 of Part A of the SWTC.

Conditions Precedent means the conditions precedent set out in Schedule 1.

Consent Refinancing means any Refinancing other than a No Consent Refinancing or a Rescue Refinancing.

Consequential Loss means any:

- (a) loss of income, loss of revenue, loss of profit, loss of financial opportunity, loss of investment return, loss of business or loss of business opportunity, loss of contract, loss of goodwill, loss of use, loss of production or failure to realise anticipated savings (whether the loss is direct or indirect);
- (b) increase in direct or indirect financing costs; or
- (c) any loss, damage, cost, expense or Liability that is:
 - (i) not a loss, damage, cost, expense or Liability that may fairly and reasonably be considered to arise naturally (being according to the usual course of things) from the breach or relevant matter; or
 - (ii) not fairly and reasonably contemplated by both RMS and the Trustees at the date of this deed as the probable result of the breach or relevant matter,

whether present or future, fixed or unascertained, actual or contingent.

Construction Compliance Unit or CCU means the unit of that name forming part of NSW Industrial Relations, a division of the NSW Government Department of Finance and Services.

Construction Plan has the meaning given to that term in Appendix C.1 of Part A of the SWTC.

Construction Plant means plant, equipment (including hand-held tools), machinery, apparatus, vehicles, appliances and things used in the carrying out of the Asset Trustee's Activities but not forming part of the Project Works.

Construction Site means the New M5 Main Works Site, the Local Areas identified in the Site Access Schedule and the Temporary Areas.

Consumer Price Index or CPI has the meaning given in Schedule 45.

Contamination means the presence in, on or under land or any other aspect of the Environment of a substance, gas, chemical, liquid or other matter (whether occurring naturally or otherwise) which is:

- (a) at a concentration above the concentration at which the substance, gas, chemical, liquid or other matter (whether occurring naturally or otherwise) is normally present in, on or under land or any other aspect of the Environment in the same

locality, being a presence that presents a risk of harm to human health or any other aspect of the Environment; or

- (b) toxic, flammable or otherwise capable of causing harm to humans or damage to the Environment including asbestos, toluene, polychlorine biphenyls, lead based paints, glues, solvents, cleaning agents, paints and water treatment chemicals,

and for the purposes of clause 11.10(e) only applies to contamination to the extent it is:

- (c) caused by the Trustees; or
- (d) within the Construction Site or any Extra Land and:
 - (i) is physically encountered in carrying out the Asset Trustee's Activities;
 - (ii) is ground water ingressing at the face of the Project Works or within the area of the tunnel excavation; or
 - (iii) must be remediated for the Project Works or the Motorway to comply with this deed.

Contamination Baseline Tests has the meaning given in clause 11.10(h).

Contamination Notice means a notice or direction given, or purporting to have been given, under any Law which requires the person to whom it is issued to take action to investigate, remediate or manage Contamination and includes a site investigation notice, remediation notice and requirement to prepare a site management plan.

Contract Documentation and Deliverables has the meaning given to that term in clause 29.1(a).

Contractor means the Leighton Dragados Samsung Joint Venture being an unincorporated joint venture comprising Leighton Contractors, Dragados Australia and Samsung.

Contractor Guarantor means, in respect of the Contractor, CIMIC Group, Dragados S.A (CIF: A-15139314), or both as the context requires.

Contractor's Side Deed means the deed so titled dated on or about the date of this deed between the Asset Trustee, the Project Trustee, the Contractor, the Contractor Guarantor, the D&C Independent Certifier and RMS substantially in the form set out in Schedule 9.

Control has the meaning given in section 50AA of the Corporations Act.

Core SPI Site has the meaning given in Appendix B.30 of Part A of the SWTC.

Corporate WHS Management System has the meaning given in the Work Health and Safety Management Systems and Auditing Guidelines (5th edition) (September 2013) or any document issued from time to time which amends or replaces that document.

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

Cost Budget has the meaning given to that term in clause 4A.4(d)(i).

Crown Building Work has the meaning given to that term in section 109R of the EP&A Act.

D&C Financier Consent Deed means the deed entitled "D&C Financier Consent Deed" entered into between the Asset Trustee, the Borrower, the Security Trustee, the Contractor and the Contractor Guarantor on or about the date of this deed.

D&C Guarantee means each of the deeds of guarantee and indemnity dated on or about the date of this deed given by the Contractor Guarantors to the Asset Trustee in respect of the obligations of the Contractor under the D&C Documents (as defined in the New M5 Main Works D&C Deed) substantially in the form set out in Schedule 6 of the New M5 Main Works D&C Deed, or all of them as the context requires.

D&C Independent Certifier means Arcadis Australia Pacific Pty Ltd (ACN) 104 485 289) or such other person(s) as may be engaged by the Asset Trustee and the Contractor.

D&C Independent Certifier Deed means the deed entitled "D&C Independent Certifier Deed" entered into between the Asset Trustee, the Contractor and the D&C Independent Certifier on or about the date of this deed, substantially in the form set out in Schedule 10 of the New M5 Main Works D&C Deed.

D&C Margin means the amount identified as the D&C Margin in the Model Output Schedule as at Financial Close.

Data for the purposes of the definition of "Emissions and Energy Data" and Schedule 18, includes data, information, records and reports.

Date for Completion means 31 March 2020, as may be extended in accordance with the terms of this deed.

Date for Opening Completion means in respect of the New M5 Main Works, 20 December 2019, as may be extended in accordance with the terms of this deed.

Date for SPI Interface Works Completion means 1 July 2018, as may be extended in accordance with the terms of this deed.

Date of Completion means the date notified in a Notice of Completion as the date Completion was achieved.

Date of Final Handover means the date notified in accordance with clause 34.3(p)(i) as the date Final Handover was achieved.

Date of Opening Completion means the date (if any) notified in accordance with clause 16.11 as the date on which the New M5 Main Works are to be opened to the public for the safe, efficient and continuous passage of vehicles.

Date of SPI Interface Works Completion means the date notified in a Notice of SPI Interface Works Completion as the date SPI Interface Works Completion was achieved.

Day 1 Clauses means clauses 1, 4, 5, 6, 7.1, 7.2, 7.3, 7.4, 10, 11.7, 14, 26.5, 27, 29.5, 30, 32, 35, 36, 36A, 37, 39, 42 and 43 and any other clauses or schedules required to have commenced in order to give effect to those clauses.

Debt Financiers means the providers of any facilities, financial arrangements or accommodation provided from time to time under the Debt Financing Documents to the Borrower, the Asset Trustee or the Project Trustee for the purposes of carrying out the Project and may, where the context permits, include any agent of or trustee for such Debt Financiers.

Debt Financing Documents means:

- (a) Senior Syndicated Facility Agreement;

- (b) Security Trust Deed;
- (c) General Security Deed;
- (d) from the date of execution of each Leasehold Mortgage, that Leasehold Mortgage;
- (e) Swap Agreements;
- (f) Account Bank Deed Poll;
- (g) Establishment Fee Letter;
- (h) Senior Facility Agent Fee Letter;
- (i) Security Trustee Fee Letter;
- (j) Commonwealth Subordinated Loan Agreement;
- (k) Intercreditor Deed;
- (l) Financiers Tripartite Deed;
- (m) D&C Financier Consent Deed;
- (n) from the date of execution of the O&M Financier Consent Deed, the O&M Financier Consent Deed;
- (o) from the date of execution of the Payment Certifier Deed, the Payment Certifier Deed;
- (p) Senior Common Terms Deed;
- (q) any document entered into in relation to any Refinancing in accordance with clause 36A or clause 5.3(b) of the Financiers Tripartite Deed; and
- (r) any other document that the parties agree in writing is a Debt Financing Document for the purposes of this deed.

Debt Profile means the principal amount of Project Debt forecast to be outstanding at the end of each period until the expiry of the Term as set out in the Model Outputs Schedule.

Debt Service means, for the relevant period, the aggregate amount of:

- (a) Principal Repayment (excluding any repayment of Project Debt to the extent that amount is replaced as a result of a Refinancing); and
- (b) Interest Expense,

to be paid in that period.

Debt Service Coverage Ratio or **DSCR** means each ratio of:

- (a) Cash Flow Available for Debt Service,
- to:
- (b) Debt Service,

as forecast in the Refinancing Model for each period of 12 months ending on each Ratio Calculation Date.

The "relevant period" for each Ratio Calculation Date is the 12 month period ending on the Ratio Calculation Date.

Deed of Appointment of Environmental Representative means the deed so entitled to be entered into between RMS, the Asset Trustee, the Contractor and the Environmental Representative at the request of the Asset Trustee substantially in the form set out in Schedule 30.

Deeds of Disclaimer means:

- (a) the content of clauses 2, 3, 8.1(e) and 8.1(h) of the process deed poll executed by each entity comprising the Contractor dated:
 - (i) in the case of Samsung, 12 September 2014;
 - (ii) in the case of Leighton Contractors, 9 September 2014; and
 - (iii) in the case of Dragados Australia, 10 September 2014; and
- (b) the deed of disclaimer signed by the Contractor on or about the date of this deed in favour of the Asset Trustee, RMS and the State of NSW substantially in the form of Schedule 12.

Defect means:

- (a) any defect, deficiency, fault, error or omission in the Project Works, the Temporary Works or the O&M Work; or
- (b) any:
 - (i) cracking, shrinkage, movement or subsidence in the Project Works or the Temporary Works; or
 - (ii) other aspect of the Asset Trustee's Activities, the Project Works, the Temporary Works or the O&M Work,

which is not in accordance with the requirements of this deed.

Defects Correction Period means a period referred to in clauses 17.3, 17.4 or 17.5.

Deliverable means:

- (a) the Project Works and any other deliverable required to be delivered or goods and services required to be provided by or for the Asset Trustee to RMS under this deed (or any part of them); and
- (b) after the Date of Completion, any modification, variation, update or replacement from time to time of any deliverables set out in paragraph (a) above by or on behalf of the Trustees in connection with the performance of their obligations under this deed or the operation, maintenance or upgrade of any of the Project Works.

Design Documentation means all:

- (a) design documentation (including design standards, concrete mix designs, design reports, durability reports, specifications, models (including any MX GENIO models prepared in relation to the Project Works, the Temporary Works or the Asset

Trustee's Activities), samples, prototypes, calculations, drawings, shop drawings, digital records and all other relevant data) in electronic, computer readable and written forms, or stored by any other means, which are required for the performance of the Asset Trustee's Activities or which the Asset Trustee or any other person creates in performing the Asset Trustee's Activities (including the design of the Temporary Works); and

- (b) computer software (including both source code and object code versions) where the computer software has been specifically created or specifically modified for the purposes of the Asset Trustee's Activities.

Design Plan has the meaning given to that term in Appendix C.1 of Part A of the SWTC.

Direction means any certificate, decision, demand, determination, direction, instruction, order, rejection, request or requirement.

Discriminatory Change in State Law means:

- (a) the amendment, repeal or change after the date of this deed, of a State Law (not including any amendment or change in an Approval resulting from any direct action of the Trustees in accordance with this deed, including any Change requested by a Trustee) existing at the date of this deed;
- (b) the enactment after the date of this deed, of a new State Law; or
- (c) a change after the date of this deed in the interpretation or application of an existing State Law, brought about by:
 - (i) the amendment, repeal or change of another State Law; or
 - (ii) the enactment of a new State Law,

which directly affects the interpretation or application of the first mentioned existing State Law,

and which specifically and only:

- (d) affects the Project; or
- (e) has a direct effect upon the Project together with other privately owned and operated tollroads, or tollroads that are owned and operated by SMC, in the State of New South Wales.

A Discriminatory Change in State Law will be deemed to have occurred if:

- (f) after the date of this deed, the NSW Government introduces (or after its introduction, changes) a tax on tolls payable for use of the Motorway; or
- (g) as a result of a change in any State Law relating to the identification of motor vehicles, the Trustee's electronic tolling system is not able (after all reasonable efforts and adjustments have been made by the Trustees and their Subcontractors) to identify vehicles in the manner contemplated by this deed).

Dispute has the meaning given to that term in clause 32.

Dispute Resolution Procedure means the procedure for resolving Disputes set out in Schedule 4.

Distribution means, whether in cash or in kind:

- (a) any distribution by the Group (directly or indirectly) to its investors (or in each case, their Related Bodies Corporate), of amounts available for distribution, whether by way of dividend, return of capital, redemption, purchase, buy back, cancellation, payment, repayment, loan, contractual arrangement, transfer of assets or rights or otherwise in respect of the equity capital of the Group, units in a trust or any subordinated debt or other debt or equity instrument issued by the Group. It does not include any liabilities or payments made by the Group under any tax sharing agreement or tax funding agreement to which it is a party;
- (b) any payment by the Group to a Related Body Corporate of the Group or a Sister Entity other than pursuant to a Project Document or to fund payments by a Related Body Corporate of the Group or a Sister Entity under a Project Document; or
- (c) the release by the Group in favour of a Related Body Corporate of the Group of any contingent funding liabilities of such Related Body Corporate, the amount of such release being deemed to be a gain for the purpose of any calculation of Refinancing Gain.

Dragados Australia means Dragados Australia Pty Ltd (ABN 98 000 893 667).

Early Planning Works means that part of the Early Works carried out in connection with the Primary Planning Approval and the EPBC Act Approval for the New M5 Main Works, including:

- (a) the work identified as "Early Planning Works" in Schedule 28;
- (b) the work carried out under clauses 6.1(d); and
- (c) negotiating any potential condition or requirement of the Primary Planning Approval and/or the EPBC Act Approval for the New M5 Main Works.

Early Termination Amount:

- (a) means on any date, the total of:
 - (i) the Project Debt on that date;
 - (ii) the amounts which the Group must, subject to clause 9.2(e), pay as a consequence of the termination, including to its Subcontractors but excluding any amount payable to the Subcontractors which relates to any amount payable by a Subcontractor to any "related entity" (as defined in the Corporations Act) of a Subcontractor other than where the related entity is engaged on an arm's length basis and on commercial terms; and
 - (iii) an amount (which is not less than zero) equal to either:
 - (A) on any date on or prior to the Date of Completion, an amount sufficient to give the Group the ability to give the Equity Investors the Projected Equity Return on the Equity Contributions to the date of termination:
 - (aa) taking into account all Distributions by the Trustees to the Equity Investors; and
 - (bb) less any amounts owing to the Trustees or the Borrower and any credit balances standing in accounts held by or for the benefit of the Trustees or the Borrower; or

- (B) on any date after the Date of Completion, the amount set out in the Model Outputs Schedule (as updated from time to time) for the Quarter in which termination occurs (such amount being recalculated and updated in accordance with the formula in the Model Outputs Schedule for the date of termination), being an amount sufficient to give the Group the ability to give the Equity Investors the Projected Equity Return on the Equity Contributions to the date of termination; and
- (b) does not include any interest on the Project Debt to the extent that it is calculated at a rate which would constitute a penalty.

Early Works means those parts of the Project Works, the Temporary Works, the Asset Trustee's Activities and the Project Trustee's Activities described in Schedule 28.

Easements means the easements, restrictions on use, covenants, agreements, arrangements or other similar arrangements together with any leases, sub-leases, licences and rights and privileges in each case as contemplated pursuant to Schedule 21 to benefit or burden the Motorway Stratum or any Additional Land (as defined in Schedule 22) and which may be created pursuant to clause 18.2 of this deed.

Emergency means an abnormal event which requires an urgent response to:

- (a) protect or repair the M5 East Motorway, the M5 West Motorway, the Project Works, other property or the public;
- (b) provide access to emergency services or traffic control; or
- (c) prevent any occurrence which may cause damage to the M5 East Motorway, the M5 West Motorway, the Project Works or other property or compromise the safety of any person.

Emissions and Energy Data means:

- (a) any Data of the type that a registered corporation or any other person is required by the NGER Legislation to keep or to provide to the Clean Energy Regulator concerning greenhouse gas emissions, energy production or energy consumption;
- (b) any Data of the type that a registered corporation or any other person is entitled to provide to the Clean Energy Regulator under the NGER Legislation concerning reduction of greenhouse gas emissions, removal of greenhouse gases or offsets of greenhouse gas emissions from any greenhouse gas project; and
- (c) any other Data concerning environmental emissions or energy production, use, consumption or efficiency of the type that any person is required by any other Law to keep or to provide to any Authority.

Entity means a natural person, body corporate, partnership or trust and includes, in the case of a trust, a reference to the trustee of the trust.

Environment means components of the earth, including:

- (a) land, air and water;
- (b) any layer of the atmosphere;
- (c) any organic or inorganic matter and any living organism;
- (d) human-made or modified structures and areas; and

- (e) interacting natural ecosystems that include components referred to in paragraphs (a) to (c) of this definition.

Environment Protection Licence means an environment protection licence granted under the *Protection of the Environment Operations Act 1997* (NSW).

Environmental Documents means the Planning Approval and Appendix D.1 of Part A of the SWTC.

Environmental Impact Statement means the WestConnex New M5 Main Works environmental impact statement and associated technical documents prepared for assessment and placed on exhibition in accordance with NSW planning assessment requirements.

Environmental Management System means the system referred to in section 3.8.1 of Part A of the SWTC.

Environmental Manager means the individual referred to in section 3.8.2 of Part A of the SWTC.

Environmental Notice means any notice (including any notice of an intention to issue an order under the EP&A Act), order or request for information issued by an Authority in respect of a matter concerning the Environment.

Environmental Representative or **ER** means the person to be appointed under the Deed of Appointment of Environmental Representative or any person appointed by RMS, the Asset Trustee and the Contractor as a replacement from time to time.

EP&A Act means the *Environmental Planning and Assessment Act 1979* (NSW).

EPBCA Notice has the meaning given to that term in clause 6.2(c)(ii).

EPBC Act means the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

EPBC Act Approval means:

- (a) the approval granted by the Minister for the Environment under the EPBC Act, including all conditions to such approval and documents incorporated by reference;
- (b) any modification to the approval referred to in paragraph (a) of this definition; and
- (c) any other consent, concurrence or approval, or determination of satisfaction with any matter, which is made, given or issued under the approval referred to in paragraph (a) of this definition from time to time and all conditions to any of them, and includes all documents incorporated by reference, as that consent, concurrence or approval may be modified from time to time.

EPBC Act Approval Change means:

- (a) the EPBC Act Approval as modified under the EPBC Act;
- (b) the Minister for the Environment issues a new Approval in respect of the New M5 Main Works in substitution for, or replacement of, the EPBC Act Approval; or
- (c) any new Approval referred to in paragraph (b) of this definition is modified under the EPBC Act; or

- (d) an Approval for the M5 East Motorway (existing as at the date of this deed) or Approval for the M5 West Motorway (existing as at the date of this deed) is modified under the EPBC Act.

EPBC Act Approval Change Event means the occurrence of a EPBC Act Approval Change not arising as a consequence of:

- (a) a Trustee's failure to comply with its obligations under a Project Document;
- (b) a breach by the Asset Trustee of its warranties under clause 7.3(b);
- (c) a wrongful act or omission of the Trustees or their Related Parties; or
- (d) a failure by the Trustees or any of its Related Parties to comply with the EP&A Act or the EPBC Act or any other applicable legislation.

EPBC Act Approval Longstop Date means 30 September 2016.

EPBC Act Approval Target Date means 3 June 2016.

EPBC Approval Application means the application for approval under section 133 of the EPBC Act in respect of the Project Works (other than the Early Works to be submitted by RMS to the Minister for the Environment in accordance with clause 6.2).

Equity means all equity capital in, or the subordinated debt which is, in substance, equivalent to ordinary equity of, the Asset Trust and the Project Trustee, as set out in the Base Case Financial Model (but for the avoidance of doubt excludes all amounts under the Commonwealth Subordinated Loan Agreement).

Equity Contributions means the aggregate of the capital subscribed to the Asset Trust and the Project Trust as at the date of Financial Close.

Equity Documents means:

- (a) the constitution of the Asset Trustee;
- (b) the constitution of the Project Trustee;
- (c) the constitution of Asset Hold Trustee;
- (d) the constitution of Project Hold Trustee;
- (e) the constitution of the Borrower;
- (f) the Asset Trust Deed;
- (g) the Project Trust Deed;
- (h) the Asset Hold Trust Deed;
- (i) the Project Hold Trust Deed;
- (j) the Unit Subscription Agreement (Project Hold Trust);
- (k) the Unit Subscription Agreement (Asset Hold Trust);
- (l) the Unit Subscription Agreement (Project Trust);
- (m) the Unit Subscription Agreement (Asset Trust);

- (n) the Unitholder Loan Subordination Deed; and
- (o) the SMC Unitholder Loan Agreement.

Equity Investor means each person who has been issued shares in the Holding Trustees or units in the Holding Trusts in the Group.

Equity Return means a nominal after tax internal rate of return on the Equity Contribution (which, for the avoidance of doubt, excludes any tax paid or payable by the Equity Investors).

Establishment Fee Letter means the document so entitled addressed to the Debt Financiers and from and signed by the Borrower on or about the date of this deed.

Event of Default means any event specified in clause 31.1.

Excluded Site Condition means to the extent it affects the New M5 Main Works D&C Phase Maintenance or the Project Works, any major defects in any man-made physical element of the existing:

- (a) viaducts;
- (b) drainage lines; or
- (c) structures,

listed in Schedule 63 (**Existing Structures**) (other than pavement) existing on, above or adjacent to, or under the surface of the Construction Site, prior to the date of this deed where those Existing Structures do not form part of the Project Works, but which may connect or interface with the Project Works.

Existing M5 East Documents means any documents related to the operation, repairs and maintenance of the M5 East Motorway.

Existing M5 East Operator means Ventia Pty Ltd (ABN 51 603 146 676).

Existing M5 West Documents means any documents related to the operation, repairs and maintenance of the M5 West Motorway.

Existing Operations means:

- (a) all infrastructure (including the existing infrastructure and Utility Services) which is owned, operated or under the control of an Existing Operator; and
 - (b) the businesses and operations undertaken by an Existing Operator,
- on or in the vicinity of the Construction Site.

Existing Operator means:

- (a) RailCorp;
- (b) Sydney Trains ABN 38 284 779 682;
- (c) Transport for NSW ABN 18 804 239 602;
- (d) Australian Rail Track Corporation Ltd ABN 75 081 455 754;
- (e) Ausgrid ABN 67 505 337 385;

- (f) Endeavour Energy ABN 59 253 130 878;
- (g) Telstra Corporation Limited ABN 33 051 775 556;
- (h) Sydney Water Corporation ABN 49 776 225 038;
- (i) Jemena Gas Networks (NSW) Ltd ABN 87 003 004 322;
- (j) Sydney Desalination Plant Pty Limited ABN 50 125 935 177;
- (k) Airport Link Company Pty Ltd ABN 88 058 436 801; and
- (l) any person notified by RMS to the Trustees after the date of this deed who owns, operates or controls any infrastructure (including existing infrastructure and Utility Services) or undertakes any business or operation on or in the vicinity of the Construction Site,

and any of their Related Bodies Corporate.

Existing Structure has the meaning given to it in the definition of Excluded Site Conditions in this clause 1.1.

Exotic Swap means any hedging or swap arrangement that does not satisfy all of the following criteria:

- (a) either:
 - (i) a fixed to floating (and vice versa) interest rate swap; or
 - (ii) a cross-currency swap which swaps payments in respect of the relevant currency of any underlying Financial Indebtedness that is not denominated in Australian dollars to Australian dollar payments and has a tenor of no longer than 5 years (or such longer period as agreed by RMS in writing);
- (b) does not have any element of accretion or indexation of the notional principal;
- (c) has a tenor of no longer than the tenor of the underlying principal of the Project Debt and may include forward start swaps provided the termination date of such swaps is no later than the term of the underlying principal of the Project Debt; and
- (d) together with all other hedging or swap arrangements of any of the Project Trustee, the Asset Trustee and the Borrower, has a notional amount that is no more than the underlying principal of the Project Debt.

Expiry Date has the meaning given to that term in clause 2.1(b).

Extra Land means the land referred to in clauses 11.4(a)(ii) and 11.4(b)(i).

Fair Work Building Industry Inspectorate has the meaning given to that term in the Building Code.

Federal Environmental Law means a Law of the Commonwealth which expressly requires or necessitates the installation, modification or enhancement of air filtration or Contamination control measures for the purposes of the Project.

Final Design Documentation Stage is the design stage described in section 3 of Appendix C.2 of Part A of the SWTC.

Final Determination means a decision of a court:

- (a) from which no appeal can be taken and in respect of which no application for special leave to appeal can be made; or
- (b) in respect of which the relevant appeal or special leave application period has expired without an appeal being taken or an application for special leave to appeal being made,

which prevents the Trustees from undertaking the Project in accordance with this deed.

Final Expiry Date means 31 December 2060, or such later date determined in accordance with this deed.

Final Handover means the stage when the Trustees have done everything which this deed requires the Trustees to do as a condition precedent to Final Handover.

Financial Close means the date on which the Conditions Precedent have been satisfied or waived in accordance with clause 5.2.

Financial Indebtedness means any indebtedness, present or future, actual or contingent, in respect of moneys borrowed or raised, or any financial accommodation whatsoever, including under the Debt Financing Documents or under or in respect of any bill, acceptance, guarantee, discounting arrangement, redeemable share or stock, hedging/swap arrangements, finance or capital lease, hire purchase agreement, the deferred purchase cost of any asset or service, or any obligation to deliver goods or provide services paid for in advance by any financier or in respect of any financing transaction. It does not include any liability or indebtedness under a tax funding agreement and/or tax sharing agreement to which the Trustee is a party.

Financiers Tripartite Deed means the deed entitled "Financiers Tripartite Deed" entered into between RMS, the Asset Trustee, the Project Trustee, the Security Trustee and the Borrower on or about the date of this deed.

Financing Delay Costs means:

- (a) any financing costs, swap break and restructure costs and additional finance charges that are payable or which accrue under the Debt Financing Documents as a direct consequence of the delay and which:
 - (i) would not have otherwise been incurred; or
 - (ii) are payable or accrue during a period when the Project Trustee is expected to, but did not due to the delay, earn Revenue; and
- (b) any other financing costs to the extent those financing costs are reasonable, incurred on an arm's length basis and are a direct consequence of the delay.

First Trustee Change of Control means the first sale, transfer assignment or any other disposal or dealing with shares, units or other form of equity which results in either:

- (a) SMC ceasing to have Control of a Project Entity; or
- (b) the Initial Shareholders ceasing to have Control of SMC.

Force Majeure means:

- (a) prior to the Date of Opening Completion:
 - (i) earthquake, cyclone, fire, explosion, flood;

- (ii) malicious damage, sabotage, act of a public enemy, terrorism or civil unrest taking place in Australia or any Key Plant and Equipment Place of Manufacture;
 - (iii) war, invasion, hostility between nations, civil insurrection, military coup or act of a foreign enemy taking place in Australia;
 - (iv) ionising radiation or radioactive contamination from nuclear waste or the combustion of nuclear fuel taking place in Australia; or
 - (v) confiscation, nationalisation, requisition or property damage under the order of any government taking place in Australia; or
- (b) on or after the Date of Opening Completion:
- (i) the events referred to in paragraphs (a)(i) to (v) of this definition; or
 - (ii) the occurrence of any other event other than:
 - (A) a breach of a Project Document by the Trustees or any other event arising directly as a consequence of a breach of a Project Document by the Trustees; or
 - (B) an event the risk of which is not otherwise specifically allocated under a Project Document,

which is beyond the reasonable control of the parties and their Related Parties and which is an event which, or an event the effects of which both:

- (c) prevents or delays the Trustees from performing an obligation under the Project Documents; and
- (d) could not have been wholly Mitigated, prevented, avoided, remedied or overcome by the relevant Trustee or its Related Parties taking those steps which a prudent, experienced and competent concessionaire, designer, constructor or operator would have taken.

FWBI Act means the *Fair Work (Building Industry) Act 2012* (Cth).

General Security Deed means the deed so titled entered into by, among others, the Borrower, the Project Trustee, the Asset Trustee and the Security Trustee on or about the date of this deed.

GIPA Act means the *Government Information (Public Access) Act 2009* (NSW).

Good Industry Practice means that degree of skill, care, prudence, foresight and practice which would reasonably and ordinarily be expected from time to time of a skilled and experienced person, engaged in the same or similar type of undertaking as that of the Trustees or their Related Parties, as the case may be, under the same or similar circumstances as the performance of the Trustee's Activities.

Group means the Asset Trustee, the Project Trustee, the Asset Trust, the Project Trust, the Holding Trustees, the Holding Trusts and the Borrower and any wholly owned subsidiary of any of them, and **Group Member** means any of them.

GST, GST law and other terms used in clause 24.2 and the Toll Calculation Schedule have the meanings used in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (as amended from time to time) or any replacement or other relevant legislation and regulations, except GST law also includes any applicable Australian Tax Office rulings

and any reference to GST payable by the Supplier (as defined in clause 24.2) includes GST payable by the representative member of any GST group of which the Supplier is a member.

Hazardous Substance means any substance which would or might reasonably be expected to cause damage or injury to human beings, any property or the Environment.

Hold Point means a point beyond which a work process must not proceed without the authorisation or release of a designated authority.

Holding Company means, in relation to a body corporate, a body corporate of which the first body corporate is a Subsidiary.

Holding Trust Deeds means the Asset Hold Trust Deed and the Project Hold Trust Deed.

Holding Trustees means Asset Hold Trustee and the Project Hold Trustee.

Holding Trusts means each of the Project Hold Trust and the Asset Hold Trust.

Holding Vehicle means SMC.

Incident means any of the following incidents or events arising out of or in connection with either Trustee's Activities:

- (a) any work health and safety, environmental or security incident including:
 - (i) a fatality or injury to any person including any incident which must be reported to the New South Wales WorkCover Authority;
 - (ii) loss of containment, escape of or migration of Contamination off-site and into the Environment;
 - (iii) any fire or dangerous event on the Construction Site, Extra Land, Motorway, Motorway Stratum or Maintenance Site;
 - (iv) a security breach;
 - (v) any unauthorised removal of trees;
 - (vi) any incident involving the community;
 - (vii) any accidents involving damage to persons or property occurring upon or in the vicinity of the Construction Site, Extra Land, Motorway, Motorway Stratum or Maintenance Site;
 - (viii) a non-compliance with an Approval; or
 - (ix) any public complaint; or
- (b) any unplanned and/or undesired event which results in or has the potential to result in injury, ill-health, damage to or loss of property, interruption to operations or environmental impairment,

and includes:

- (c) a near miss, breach of procedure, quality failure and/or injuries to contractors and members of the public; and
- (d) "occurrences" and "notifiable occurrences" under the WHS Legislation.

Indemnified Party has the meaning given to it in clause 27.1.

Independent Certifier means Arcadis Australia Pacific Pty Ltd (ACN) 104 485 289) or such other person(s) as may be engaged by RMS, the Asset Trustee and the Project Trustee in accordance with the Independent Certifier Deed.

Independent Certifier Deed means the deed titled "Independent Certifier Deed" entered into between RMS, the Asset Trustee, the Project Trustee and the Independent Certifier on or about the date of this deed.

Independent Commission Against Corruption means the corporation of that name constituted by the *Independent Commission Against Corruption Act 1988* (NSW).

Indexed means indexed in accordance with increases in CPI.

Information Document means any information, data, document or material (in any format or medium including any electronic form and whether oral or written) which is:

- (a) referred to in Schedule 61;
- (b) issued or made available by, or on behalf of RMS or the NSW Government, to the Trustees in connection with the Project, the Project Works or the Asset Trustee's Activities or the Project Trustee's Activities (including anything issued or made available through RMS's website), regardless of whether it was expressly classified or stated to be an "Information Document"; or
- (c) referred to, or incorporated by reference, in an Information Document unless such information, data, document or material is otherwise expressly stated to form part of this deed,

whether issued or made available on, before or after the date of execution of this deed.

Initial Shareholders means the initial shareholders of SMC, being:

- (a) the Minister for Roads, Maritime and Freight of the State of New South Wales (or such other name given to the governmental minister responsible for the roads portfolio), as may be appointed from time to time; and
- (b) the Treasurer of New South Wales, as may be appointed from time to time.

Insolvency Event means:

- (a) a controller (as defined in section 9 of the Corporations Act), administrator or similar officer is appointed in respect of a person or any asset of a person;
- (b) a liquidator or provisional liquidator is appointed in respect of a person;
- (c) any application (not withdrawn or dismissed within 7 days) is made to a court for an order, an order is made, a meeting is convened or a resolution is passed, for the purpose of:
 - (i) appointing a person referred to in paragraph (a) or (b) of this definition;
 - (ii) winding up or deregistering a person; or
 - (iii) proposing or implementing a scheme of arrangement, other than with the prior approval of RMS under a solvent scheme of arrangement pursuant to Part 5.1 of the Corporations Act;

- (d) any application (not withdrawn or dismissed within 7 days) is made to a court for an order, a meeting is convened, a resolution is passed or any negotiations are commenced, for the purpose of implementing or agreeing:
 - (i) a moratorium of any debts of a person;
 - (ii) any other assignment, composition or arrangement (formal or informal) with a person's creditors; or
 - (iii) any similar proceeding or arrangement by which the assets of a person are subjected conditionally or unconditionally to the control of that person's creditors or a trustee,
 or any agreement or other arrangement of the type referred to in this paragraph (d) is ordered, declared or agreed to;
- (e) as a result of the operation of section 459F(1) of the Corporations Act, a person is taken to have failed to comply with a statutory demand (as defined in the Corporations Act);
- (f) any writ of execution, garnishee order, mareva injunction or similar order, attachment or other process is made, levied or issued against or in relation to any asset of a person;
- (g) in relation to the Asset Trust or the Project Trust, an application or order as sought or made (and is not stayed or dismissed within 10 Business Days after being sought or made) in any court for the property of the Asset Trust or the Project Trust (as applicable) to be brought into court or administered by the court or brought under its control;
- (h) in relation to the Asset Trust or the Project Trust, the assets of the Asset Trust or the Project Trust (as applicable) are not sufficient to satisfy the Asset Trustee's debts or the Project Trustee's debts (as applicable) as and when they become due and payable in respect of which the Project Trustee or the Asset Trustee (as applicable) has a right to be indemnified out of the assets of the Asset Trust or the Project Trust (as applicable);
- (i) anything analogous to anything referred to in paragraphs (a) to (h) (inclusive) of this definition, or which has a substantially similar effect, occurs with respect to a person under any law; or
- (j) a person is, or admits in writing that it is, or is declared to be, or is taken under any applicable law to be (for any purpose), insolvent or unable to pay its debts.

Insured Liability has the meaning given to that term in clause 26.3(b).

Intellectual Property Right means any statutory and other proprietary right in respect of inventions, innovations, patents, utility models, registered and registrable designs, circuit layouts, mask rights, copyright (including future copyright), confidential information, trade secrets, technical data and know-how, trade marks and any other right in respect of intellectual property as defined in Article 2 of the Convention establishing the World Intellectual Property Organisation of July 1967.

Intercompany Loan means any Financial Indebtedness incurred by the Asset Trustee or the Project Trustee to any of:

- (a) the Borrower;
- (b) the Holding Trusts;

- (c) Asset Trust; or
- (d) Project Trust,

pursuant to any loan agreement or debt or hybrid instrument issued by either of the Trustees to any such person referred to in paragraphs (a) to (d) above to fund either Trustees' obligations pursuant to a Project Document to which a Trustee is a party to or to fund payments by a Related Body Corporate of the Trustees or a Sister Entity under a Project Document.

Intercreditor Agent means National Australia Bank or any other replacement entity appointed as intercreditor agent in accordance with the Debt Financing Documents.

Intercreditor Deed means the deed entitled "Intercreditor Deed" between, among others, the Borrower, the Commonwealth and the Security Trustee dated on or about the date of this deed.

Interest Cover Ratio or **ICR** means the ratio of:

- (a) actual Cash Flow Available for Debt Service for the 12 month period that occurs immediately prior to the Proposed Refinancing Date,

to:

- (b) Interest Expense forecast in the Refinancing Model to be incurred in the 12 month period that occurs following the Proposed Refinancing Date.

Interest Expense means, in relation to any period, the sum of the interest, margin, guarantee fees, letter of credit fees, line fees and commitment fees paid or payable under any Debt Financing Document (which includes any capitalised interest) for the relevant period and adjusted for the net effect of interest rate or currency hedging transactions in respect of Project Debt. Interest Expense does not include upfront fees in respect of any debt facilities (including in respect of a Refinancing).

Interlink means Interlink Roads Pty Limited (ABN 53 003 845 430).

Interlink Interface Agreement means the agreement entered into between the Minister for Roads, Maritime and Freight, RMS, WDA and Interlink titled "WestConnex M5: M5 Southwest Motorway Interface Agreement" on or about 16 July 2015.

Key Plant and Equipment means the items generally of the type described in Schedule 49.

Key Plant and Equipment Place of Manufacture means any country where the Contractor is undertaking or procuring the manufacturing of the Key Plant and Equipment as set out in Schedule 49.

Key Relevant Entity means:

- (a) the Operator;
- (b) if the Tolling Contractor (Back Office) is not RMS, the Tolling Contractor (Back Office); and
- (c) any Relevant Entity engaged by the Asset Trustee, the Project Trustee or the Operator under a contract or contracts with an aggregate contract value of equal to or greater than \$██████████.

KGI Construction Deed means the deed titled "Construction Deed – WestConnex Stage 2: King Georges Road Interchange Upgrade" entered into between WDA and the KGI Contractor on or about 11 May 2015.

KGI Contractor means Fulton Hogan Construction Pty Ltd (ABN 46 010 240 758), or such other contractor as may be engaged to carry out the KGI Contractor's Activities.

KGI Side Deed Poll means the deed poll titled "Side Deed Poll – WestConnex Stage 2: King Georges Road Interchange Upgrade" from the KGI Contractor in favour of WDA, RMS and any other beneficiaries dated 11 May 2015.

KGI Warranties means:

- (a) any warranty provided by a Subcontractor (as defined in the KGI Construction Deed) to the KGI Contractor pursuant to clause 17.14 of the KGI Construction Deed; and
- (b) clauses 16.2(a), 16.2(b) and 16.3 of the KGI Construction Deed.

KGI Warrantor means a person that has provided a KGI Warranty.

Known Core SPI Site Contamination means Contamination in, on or under the Core SPI Site which is disclosed in the Information Documents or Part A of the SWTC.

Landfill Closure Works has the meaning given in Appendix B.30 of Part A of the SWTC.

Landfill Closure Works Deed Poll means a deed poll substantially in the form of Schedule 14 provided by the Contractor for the benefit of the Asset Trustee, RMS and the nominee of RMS in relation to the Landfill Closure Works.

Landfill EPL has the meaning given in Appendix B.30 of Part A of the SWTC.

Lane Occupancy Fees means lane occupancy fees payable by the Asset Trustee to RMS or Interlink, as calculated in accordance with Schedule 58 or Annexure 1 of the Interlink Interface Agreement.

Law means:

- (a) Commonwealth, New South Wales or local government legislation including regulations, by-laws and other subordinate legislation;
- (b) principles of law or equity established by decisions of courts; and
- (c) Approvals (including any condition or requirement under them).

Leasehold Mortgages means any leasehold mortgage deed entered into between the Security Trustee and the Asset Trust or the Project Trust in respect of the M5 Leases.

Legal Challenge has the meaning given to that term in clause 7.5(a).

Leighton Contractors means Leighton Contractors Pty Ltd (ABN 98 000 893 667).

Liability includes any liability of any kind whether for debt, cost (including legal costs, deductibles or increased premiums), expense, loss, damage, compensation or charge and whether:

- (a) liquidated or not;

- (b) arising from or in connection with any obligation (whether as a principal obligation, a surety or an indemnity);
- (c) legal or equitable, and whether arising under or for breach of contract, in tort (including negligence), restitution or at Law;
- (d) present, prospective or contingent; or
- (e) owed, incurred or imposed by or to or on account of or for the account of any person alone or severally or jointly with another or others.

Licensed Maintenance Areas means the areas described in section 2D(a) of Schedule 22, as varied in accordance with section 2D(b).

Licensed Software has the meaning given to the term "Supplier Licensed Software" in the New M5 Main Works D&C Deed.

Local Area Works means the modification, reinstatement and improvement of Local Areas which the Asset Trustee must design, construct and hand over to RMS or the relevant Authority in accordance with this deed and Part A of the SWTC including Appendices B.2, B.6, C.4, C.5 and C.6 of Part A of the SWTC (and including, to the extent relevant to such works, Changes directed in accordance with this deed).

Local Areas means all public spaces, parks, pedestrian ways, pedal cycle paths, local roads, state highways, regional roads and main roads, including their associated road reserves and areas acquired or made available for the purposes of Local Area Works (and designated in the Site Access Schedule as Local Areas), which:

- (a) are adjacent to;
- (b) connect to;
- (c) intersect;
- (d) cross; or
- (e) are in any way affected by,

the Project Works or the Temporary Works, including those sections of public spaces, parks, pedestrian ways, pedal cycle paths, local roads, state highways, regional roads and main roads, including any associated road reserves, that are made redundant or become service roads as part of the road network.

Long Service Corporation means the corporation of that name constituted by the *Long Service Corporation Act 2010* (NSW).

Loss means:

- (a) any cost, expense, fee, loss, damage, Liability or other amount; and
- (b) without being limited by paragraph (a) of this definition and only to the extent not prohibited by Law, any fine or penalty,

whether direct, indirect, consequential, present, future, fixed, unascertained, actual or contingent, which for the avoidance of doubt includes Consequential Loss.

M4 Project Company means WCX M4 Pty Limited (ABN 92 602 963 806).

M5 East Asset means an asset described in the M5 East Motorway Agreed Condition Specification, other than an asset which forms part of or is located on the New M5 Motorway, including the surface roads referred to in section 2A.1(d) of Schedule 22.

M5 East Asset Works has the meaning given to that term in clause 4A.3(a).

M5 East Consultant means one or more independent condition consultants engaged in accordance with clause 4A.2(a).

M5 East Motorway means road, tunnel and other physical works, facilities, systems and Utility Services on the motorway known as the M5 East Motorway located between General Holmes Drive (at the eastern end) and King Georges Road (at the western end), including all plant, machinery, equipment, fixtures, furniture, fittings, landscaping, spare parts and other improvements on or in the M5 East Motorway or the M5 East Motorway Stratum (including the "Works" (as defined in the KGI Contract) carried out on the M5 East Motorway) but to avoid doubt, excludes:

- (a) any systems, plant, equipment, furniture, machinery and spare parts relating to the Tolling Services Agreement; and
- (b) the New M5 Motorway, including the surface roads referred to in section 2A.1(d) of Schedule 22.

M5 East Motorway Agreed Condition Specification means the condition specification for the M5 East Motorway set out in Exhibit F.

M5 East Motorway Planning Approval means:

- (a) the approval granted by the Minister for Urban Affairs and Planning on 9 December 1997 under the EP&A Act in relation to the M5 East Motorway Proposal, including all conditions to such approval and documents incorporated by reference;
- (b) any modification to the Primary M5 East Motorway Planning Approval; and
- (c) any other consent, concurrence or approval, or determination of satisfaction with any matter, which is made, given or issued under the Primary M5 East Motorway Planning Approval from time to time and all conditions to any of them, and includes all documents incorporated by reference, as that consent, concurrence or approval may be modified from time to time.

M5 East Motorway Proposal means the proposal contained in the environmental impact statement "Proposed M5 East Motorway", dated June 1994 prepared for the Roads and Traffic Authority by Manidis Roberts Consultants and the "Supplement to the M5 East Motorway Environmental Impact Statement", dated December 1996 prepared for the Roads and Traffic Authority by Manidis Roberts Consultants, subject to modifications to the proposal as described in Part 6 of the "Representations Report" prepared by the Roads and Traffic Authority dated August 1997, the Roads and Traffic Authority's "M5 East Property Value Guarantee Procedure" dated 1 December 1997, and in Appendix B of the "Proposed M5 East Motorway- Fairford Road, Padstow to General Holmes Drive, Kyeemagh: Director-General's Report".

M5 East Motorway Stratum means the stratum of real property to be the subject of the M5 East New Lease as agreed or determined in accordance with Schedule 22.

M5 East New Lease means the lease granted in respect of the M5 East Motorway Stratum in accordance with the terms of this deed.

M5 East O&M Work means all things or tasks which the Project Trustee is, or may be, required to do in discharging its operation, maintenance and repair obligations under this deed with respect to the M5 East Motorway.

M5 East Planned Projects means each of the projects described in Schedule 65.

M5 East Planned Project Completion means, in relation to a M5 East Planned Project, the stage at which all of the works identified in the M5 East Planned Project Scope of Works for that M5 East Planned Project are complete.

M5 East Planned Project Scope of Works has the meaning given to that term in clause 4A.4(c).

M5 East Project means:

- (a) the operation, maintenance and repair of the M5 East Motorway (which will form part of the Motorway);
- (b) the handover of the M5 East Motorway (which will form part of the Motorway to RMS at the end of the Term); and
- (c) the levying and collection of tolls.

M5 Leases means the M5 East New Lease, the M5 West New Lease and the New M5 Main Works Lease granted in accordance with the terms of this deed.

M5 Subleases means the subleases to be entered into between the Project Trustee and the Asset Trustee as referred to in section 4 of Schedule 22.

M5 West Asset means an asset described in the M5 West Motorway Agreed Condition Specification.

M5 West Asset Works has the meaning given to that term in clause 4B.3(a).

M5 West Consultant means one or more independent condition consultants engaged in accordance with clause 4B.2(a).

M5 West Motorway means the roads, bridges and other physical works, facilities, systems and Utility Services on the motorway known as the M5 South West Motorway located between King Georges Road (at the eastern end) and the Hume Motorway (at the western end), including all plant, machinery, equipment, fixtures, furniture, fittings, landscaping, spare parts and other improvements on or in the M5 West Motorway or the M5 West Motorway Stratum but to avoid doubt, excludes any systems, plant, equipment, furniture, machinery and spare parts relating to the Tolling Services Agreement.

M5 West Motorway Agreed Condition Specification means the condition specification for the M5 West Motorway set out in Exhibit G.

M5 West Motorway Planning Approval means:

- (a) the approval granted by the Minister for Planning and Infrastructure on 9 November 2011 under the EP&A Act in relation to the M5 West Motorway Proposal, including all conditions to such approval and documents incorporated by reference;
- (b) any modification to the Primary M5 West Motorway Planning Approval;
- (c) any other consent, concurrence or approval, or determination of satisfaction with any matter, which is made, given or issued under the Primary M5 West Motorway Planning Approval from time to time and all conditions to any of them, and includes

all documents incorporated by reference, as that consent, concurrence or approval may be modified from time to time; and

- (d) any other consent, concurrence or approval, or determination of satisfaction with any matter, which has been made, given or issued from time to time in accordance with the EP&A Act in respect of any part of the M5 West Motorway.

M5 West Motorway Proposal means the proposal contained in "Major Projects Application 10_0052", "M5 West Widening – Environmental Assessment" (Volumes 1, 2 and 3) prepared by Manidis Roberts and dated September 2010, and "M5 West Widening – Submissions and Preferred Project Report" (Volumes 1 and 2) prepared by the NSW Roads & Traffic Authority and dated May 2011 including the revised Statement of Commitments contained therein.

M5 West Motorway Stratum means the stratum of real property to be the subject of the M5 West New Lease as agreed or determined in accordance with Schedule 22.

M5 West New Lease means the lease granted in respect of the M5 West Motorway Stratum in accordance with the terms of this deed.

M5 West O&M Work means all things or tasks which the Project Trustee is, or may be, required to do in discharging its operation, maintenance and repair obligations under this deed with respect to the M5 West Motorway.

M5 West Project means:

- (a) the operation, maintenance and repair of the M5 West Motorway (which will form part of the Motorway);
- (b) the handover of the M5 West Motorway (which will form part of the Motorway to RMS at the end of the Term); and
- (c) the levying and collection of tolls.

M5 West Project Documents means:

- (a) the deed entitled "F-5 Tollroad Project Deed" between RMS, the State of New South Wales and Interlink dated 21 February 1991; and
- (b) the deed entitled "M5 Western Link Project deed" between RMS, the State of New South Wales and Interlink dated 29 June 1993.

M5 West Subcontract means a Subcontract for works or services in respect of the M5 West Motorway that has been entered into by a Trustee prior to RMS issuing an Option Exercise Notice.

M5E Transfer Date means the Date of Opening Completion.

M5W Option Indemnified Party has the meaning given in clause 4C.7.

M5W Transfer Date means 11 December 2026.

Maintenance Site means all areas affected by the O&M Work and the Asset Renewal, or on which the O&M Work or the Asset Renewal is carried out, including:

- (a) the Motorway Stratum;
- (b) the Licensed Maintenance Areas; and

- (c) for a period of 12 months commencing on the date on which the Defects Correction Period begins for the Local Area Works, the landscaped areas of the Local Area Works.

Major Australian Bank means Australia and New Zealand Banking Group Limited, Westpac Banking Corporation, National Australia Bank and Commonwealth Bank of Australia.

Management Services Agreement means the document titled "Management Services Agreement" between SMC and the Project Trustee dated on or about the date of this deed.

Manager Shareholders' Agreement means the agreement entitled "Manager Shareholders' Agreement" to be entered into between the M4 Project Company, the Project Trustee and the Cash Manager on terms approved by RMS (acting reasonably).

Master Access Deed or MAD means the master access deed in respect of rail corridor works between RailCorp and RMS dated 5 March 2012.

Material Adverse Effect means an adverse effect that is a Qualifying Adverse Effect on the ability of:

- (a) the Borrower, the Project Trustee or the Asset Trustee to pay the Debt Financiers the interest, amortisation and any net interest rate management agreement payments that are or would have owing under, and substantially in accordance with, the Debt Financing Documents on the dates that they are (or would have been) owing under the Debt Financing Documents, were it not for the occurrence of the relevant event, omission or circumstance; or
- (b) the Group to give to the Equity Investors the Projected Equity Return.

Materials means any equipment, plant, materials, fixtures, fittings, furniture, machinery, goods parts and other items incorporated or to be incorporated into the Project Works, the Temporary Works, the Asset Renewal and the New M5 Main Works D&C Phase Maintenance.

Maximum Upfront Costs Cap means the nominal dollar amount of all fees, costs and expenses forecast to be payable by the Trustees or the Borrower (or a Related Body Corporate of the Trustees) to external financiers, advisors or consultants or to RMS under clause 36A.9 in connection with all Refinancings over the period from the date of Financial Close to the end of the Term, which are shown to be capitalised in the Model Outputs Schedule as at the date of Financial Close.

Minister means any minister responsible for administering Part 5 (Classification of Roads) of the Roads Act.

Mitigate means, in respect of any event, taking all reasonable steps to preclude the cause of the event and avoiding or minimising the consequences of the event, including by expending reasonable sums of money and taking reasonable steps to accommodate the event or the effect of the event on the Asset Trustee's Activities or the Project Trustee's Activities (including by changing the sequencing or timing of, or the construction methodologies used by the relevant Trustee in carrying out, the Asset Trustee's Activities or the Project Trustee's Activities).

Model Outputs Schedule means the schedule identified as such in the Base Case Financial Model, being Exhibit A, as updated from time to time in accordance with this deed.

Modification Application Documents has the meaning given to that term in clause 7.3(a).

Monthly Operational Management Report means a report which satisfies the requirements of Schedule 35A.

Moral Rights means any rights of integrity of authorship, rights of attribution of authorship, rights not to have authorship falsely attributed and rights of a similar nature conferred by statute that exist, or may come to exist, anywhere in the world.

Moral Rights Consent means a consent by the owner of Moral Rights substantially in the form of Schedule 5.

Motorway means:

- (a) **(New M5 Motorway)** on and from the Date of Opening Completion, the New M5 Motorway;
- (b) **(M5 East Motorway)** on and from the M5E Transfer Date, the M5 East Motorway; and
- (c) **(M5 West Motorway)** on and from the M5W Transfer Date, the M5 West Motorway,

and to be called "**WestConnex M5**" or such other name as may be determined by RMS.

Motorway Control Centre or **MCC** means the building, facilities, equipment and systems described in section 5.6.1 of Part A of the SWTC.

Motorway Stratum means the stratum of real property to be the subject of the M5 Leases.

National Australia Bank means National Australia Bank Limited (ABN 12 004 044 937).

Native Title Claim means any claim or application relating to native title under the *Native Title Act 1993* (Cth) or any other Law concerning native title.

New Connection Project means any new road which, after the date of this deed, connects to:

- (a) the New M5 Motorway, the M5 East Motorway or the M5 West Motorway (and includes Stage 3, the Gateway and Southern Connector as described in the WestConnex Program of Works as at the date of this deed); or
- (b) on and from the date of opening of Stage 3, Stage 3 (as described in the WestConnex Program of Works as at the date of this deed).

New M5 Main Works means the road, tunnel and other physical works, facilities, systems and Utility Services described in section 3.4.1 of Part A of the SWTC including all plant, machinery, equipment, fixtures, furniture, fittings, landscaping, spare parts and other improvements provided by the Asset Trustee as part of the Project Works under this deed and to be called the "New M5" or such other name as may be determined by RMS.

New M5 Main Works D&C Date for Completion has the meaning given to the term "Date for Completion" in the New M5 Main Works D&C Deed.

New M5 Main Works D&C Date for Opening Completion has the meaning given to the term "Date for Opening Completion" in the New M5 Main Works D&C Deed.

New M5 Main Works D&C Date for SPI Interface Works Completion has the meaning given to the term "Date for SPI Interface Works Completion" in the New M5 Main Works D&C Deed.

New M5 Main Works D&C Deed means the agreement so entitled to be entered into on or about the date of this deed between the Asset Trustee and the Contractor.

New M5 Main Works D&C Phase Maintenance means the services described in clause 19.1A.

New M5 Main Works Lease means the lease granted in respect of the New M5 Motorway Stratum in accordance with the terms of this deed.

New M5 Main Works Site means:

- (a) the land described as the New M5 Main Works Site in the Site Access Schedule; and
- (b) the tunnel substratum shown in the Site Access Schedule.

New M5 Motorway means:

- (a) **(roads within the Construction Site and New M5 Main Works Site)**: on and from the date of this deed until the Date of Opening Completion of the New M5 Main Works under this deed, the roads, tunnels and other physical works, facilities, systems and Utility Services, including all plant machinery, equipment, fixtures, furniture, fittings, landscaping, spare parts and other improvements, on or in the Construction Site or New M5 Main Works Site; and
- (b) **(completed New M5 Motorway)**: on and from the Date of Opening Completion of the New M5 Main Works, the roads, tunnels and other physical works, facilities, systems and Utility Services, including all plant, machinery, equipment, fixtures, furniture, fittings, landscaping, spare parts and other improvements on or in the New M5 Motorway or the New M5 Motorway Stratum but to avoid doubt, excludes any systems, plant, equipment, fixtures, fittings, furniture, machinery and spare parts relating to the Tolling Services Agreement.

New M5 Motorway Agreed Condition Specification means the condition specification for the New M5 Motorway set out in Exhibit E.

New M5 Motorway Stratum means the stratum of real property to be the subject of the New M5 Main Works Lease as agreed or determined in accordance with Schedule 22.

New M5 O&M Work means all things or tasks which the Project Trustee is, or may be, required to do in discharging its operation, maintenance and repair obligations under this deed with respect to the New M5 Motorway.

New M5 Project means:

- (a) the investigation, financing, funding, planning, design, construction and commissioning of the New M5 Main Works and the Temporary Works;
- (b) the operation, maintenance and repair of the New M5 Motorway (which will form part of the Motorway);
- (c) the handover of the New M5 Motorway (which will form part of the Motorway to RMS at the end of the Term); and
- (d) the levying and collection of tolls.

NGER Legislation means the *National Greenhouse and Energy Reporting Act 2007* (Cth) and the regulations and any other legislative instruments under that Act.

No Consent Refinancing means any Refinancing which:

- (a) satisfies the criteria in clause 36A.5; and
- (b) RMS has confirmed in writing under clause 36A.4 is a No Consent Refinancing or which RMS is deemed to have so confirmed under that clause.

Nominated Authority means the Independent Certifier unless otherwise directed by RMS's Representative (notwithstanding any other requirements in the RMS Specifications).

Non-RMS Parcel means a parcel of land and property of which RMS is not the registered proprietor and in relation to which, or upon which, Property Works are to be undertaken.

Non-toll Business has the meaning given to that term in clause 21.3.

Notice has the meaning given to that term in clause 42.1.

Notice of Completion means a notice in the form of Schedule 42 issued by the Independent Certifier pursuant to clause 16.11(f)(i).

Notice of Opening Completion means a notice in the form of Schedule 42 issued by the Independent Certifier pursuant to clause 16.11(f)(i).

Notice of SPI Interface Works Completion means a notice in the form of Schedule 42 issued by the Independent Certifier pursuant to clause 16.11(f)(i).

Notifiable Claim has the meaning given to that term in clause 26.7(a).

NSW Code means the NSW Government Code of Practice for Procurement (January 2005) or any substitute for, or update to, such code as contemplated in the NSW Guidelines.

NSW Government means the Government of the State of New South Wales.

NSW Government Policies means the NSW Code, NSW Guidelines, NSW Government Aboriginal Participation in Construction Guidelines (January 2007), Environmental Management Systems Guidelines (3rd edition) (August 2013), Work Health and Safety Management Systems and Auditing Guidelines (5th edition) (September 2013), Training Management Guidelines (February 2009), Waste Reduction and Purchasing Policy (WRAPP) (2011-2014) and any other NSW Government guidelines and requirements specified or required by this deed.

NSW Guidelines means the Implementation Guidelines to the New South Wales Code of Practice for Procurement: Building and Construction (July 2013) (as published by NSW Treasury on 7 June 2013).

O&M Best Practices means operating, maintenance and repair practices performed with the due skill, care and diligence which may reasonably be expected of a skilled professional suitably qualified in the performance of obligations similar to the Operator's obligations under the O&M Deed so as to achieve a result consistent with Law, reliability, safety, protection of the Environment and the requirements of this deed, including everything reasonably necessary to ensure that:

- (a) the Motorway is operated, maintained and repaired in a manner safe to all people and the Environment;

- (b) the Motorway is functioning as designed;
- (c) the Motorway is available pursuant to the requirements of the SWTC;
- (d) operation, maintenance and repairs are performed to ensure availability of the Motorway and reliable long-term and safe operation and are performed by trained and experienced personnel utilising proper equipment, tools and procedures;
- (e) sufficient operation and maintenance personnel are available and are adequately experienced and trained;
- (f) adequate materials, resources and supplies are available to ensure compliance with the requirements of this deed under normal conditions and reasonably anticipated abnormal conditions;
- (g) the principle of continuous improvement is adhered to, that is, a commitment to continually improving the standards and quality of the operation and maintenance of the Motorway and the manner in which it is carried out so as to ensure that the operation and maintenance of the Motorway is carried out in a manner which at all times remains consistent with the overall road network systems and standards; and
- (h) advancements in technology and updates to Codes and Standards which are required to comply with the principle in paragraph (g) of this definition are promptly responded to and incorporated into the operation and maintenance of the Motorway.

O&M Deed means the agreement so entitled to be entered into after the date of this deed between the Project Trustee and the Operator on terms approved by RMS (acting reasonably) and substantially in accordance with Exhibit B.

O&M Financier Consent Deed means the deed entitled "WCX M5 WestConnex New M5 Main Works O&M Financier Consent Deed" entered into between the Asset Trustee, the Borrower, the Security Trustee, the Operator and the Operator Guarantor on or about the date of this deed.

O&M Guarantee means the deed of guarantee to be given by the Operator Guarantor to the Project Trustee in respect of the obligations of the Operator under the O&M Deed on terms approved by RMS (such approval not to be unreasonably withheld or delayed).

O&M Manuals means the manuals developed in accordance with clause 19.4, including the Project Plans incorporated into them as required by clause 9.5(e) and clause 9.5A(e), which describe the policy, practices and procedures for the operation, maintenance and repair (including Asset Renewal) of the Motorway.

O&M Margin means the amount identified as the O&M Margin in the Model Output Schedule as at Financial Close.

O&M Plan has the meaning given to that term in Appendix C.1 of Part A of the SWTC.

O&M Work means all things or tasks which the Project Trustee is, or may be, required to do in discharging its operation, maintenance and repair obligations under this deed including:

- (a) the M5 East O&M Work;
- (b) the M5 West O&M Work; and
- (c) the New M5 O&M Work,

but, for the avoidance of doubt, does not include Asset Renewal.

O&M Work Traffic Management Plan has the meaning given to that term in clause 9.6A(a)(ii)(A). **Opening Completion** means the stage when:

- (a) the Project Works are complete in accordance with this deed except for:
 - (i) minor Defects which:
 - (A) do not prevent the Project Works from being reasonably capable of being used for their intended purpose;
 - (B) can be corrected without prejudicing the convenient or intended use of the Project Works; and
 - (C) the Asset Trustee has reasonable grounds for not promptly rectifying; and
 - (ii) the elements of the Project Works described in Part B of Schedule 40 titled "Conditions Precedent to Completion";
- (b) without limiting paragraph (a), the Project Works are capable of being opened to the public for the safe, efficient and continuous passage of vehicles;
- (c) the Asset Trustee has carried out and passed all tests which must necessarily be carried out and passed before the Project Works are opened to the public for the safe, efficient and continuous passage of vehicles except for the Operational Acceptance Tests;
- (d) the Operational Readiness Evaluation has been completed to the satisfaction of the Independent Certifier, having regard to the opinions of relevant representatives of RMS, Transport for NSW Transport Management Centre, Fire and Rescue NSW and NSW Police Force; and
- (e) without limiting paragraph (b), the Asset Trustee has satisfied each of the conditions precedent to Opening Completion set out in Part A of Schedule 40.

Operating Costs means the amounts actually paid or forecast in the Refinancing Model to be paid by the Project Trustee in operating and maintaining the Motorway including:

- (a) total amounts paid to the Operator under the O&M Deed and others to operate and maintain the Motorway;
- (b) operating expenses (including general, administrative and insurance costs, trustee fees and agency fees but excluding payments made under any Intercompany Loan);
- (c) all costs and expenses (including salary, wages, superannuation, payroll costs, the hire, purchase or lease of office equipment, administration, office supply and other costs) incurred in connection with any person or persons employed to manage that business;
- (d) statutory, registration and filing fees;
- (e) consultants costs (including engineers, consultants, auditors, accountants and legal or financial advisers);
- (f) costs incurred to develop and improve assets, including the costs of materials, services, labour, overheads, computer software and hardware;

- (g) maintenance expenditure; and
- (h) Taxes paid in respect of the Project (including income tax, duties and other statutory charges and goods and services tax) and without double counting, any liabilities or payments made under any tax funding agreement and/or a tax sharing agreement to which any Trustee is a party.

Operational Acceptance Tests means the tests of the same name applicable to the Roadside Tolling Equipment described in Part A of the SWTC, Appendix B.10 (Toll Collection System) Attachment B.10-1, section 5.3.4.

Operational Readiness Evaluation or **ORE** means the series of tests required by Part A of the SWTC to ensure that all of the:

- (a) New M5 Main Works physical assets;
- (b) personnel that will be involved in carrying out the O&M Work which the Asset Trustee is required to train as set out under the SWTC; and
- (c) processes documented in the O&M Manuals and all other documents related to the O&M Work that the Asset Trustee is required to prepare under the SWTC,

function seamlessly and correctly to facilitate safe traffic operations.

Operations Insurance means the insurances the Project Trustee is obliged to obtain under clause 26 as set out in Part 2 of Schedule 46.

Operations Management and Control System or **OMCS** has the meaning given to that term in the SWTC.

Operator means the operator to be engaged by the Project Trustee under the O&M Deed, or such other person approved by RMS.

Operator Guarantor means the guarantor of the Operator, or such other person approved by RMS.

Operator's Side Deed means the deed so entitled to be entered into between the Project Trustee, the Operator, the Operator Guarantor and RMS on terms substantially in accordance with Exhibit B.

Option Acceptance Notice means notice provided by Asset Trustee pursuant to clause 4C.5.

Option Exercise Notice means notice provided by RMS pursuant to clause 4C.4.

Option Exercise Period means the period commencing on 1 January 2026 and ending on 30 June 2026.

Option Exercise Price means, on any date, the greater of:

- (a) ██████████; and
- (b) ██████████.

Outsourced TBO Services has the meaning given to that term in clause 1.11.

Outstanding Project Debt means, at any time, the aggregate amount of Project Debt outstanding.

Overall D&C Program means the overall program for design and construction activities which is contained in Schedule 44, as updated in accordance with clause 16.3(c).

PAFA Act means the *Public Authorities (Financial Arrangements) Act 1987* (NSW).

PAFA Act Guarantee means the guarantee made on or prior to the date of this deed pursuant to section 22B of the PAFA Act in respect of RMS's financial obligations under the Project Documents.

Payment Certifier Deed means the deed entitled "M5 Project Payment Certifier Deed" to be entered into between the Borrower, the Payment Certifier (as defined in the Debt Financing Documents) and the Security Trustee.

PDCS means:

- (a) the Trustees' web based project data and collaboration system, or such other electronic project data and collaboration system to be used by the Trustees' under clause 8.7; or
- (b) any other communication system agreed between the parties from time to time.

Permitted Dealing means:

- (a) a restructure of a Holding Company or Holding Trust (other than an Ultimate Unitholder) of a Project Entity;
- (b) a transfer or issue of any Securities in an Ultimate Unitholder listed on any recognised stock or securities exchange;
- (c) the listing of any Securities in any Holding Company or Holding Trust (other than the Ultimate Unitholders) of a Project Entity on any recognised stock or securities exchange; or
- (d) permitted in accordance with clause 37.4.

Permitted RMS Activity has the meaning given to that term in clause 22.3.

Permitted Security Interest means:

- (a) any Security Interest permitted under the Debt Financing Documents; and
- (b) the RMS Security.

Permitted Working Hours means the permitted working hours specified in the Planning Approval.

Personal Information has the meaning given to that term in the *Privacy Act 1988* (Cth).

Planned Lane Closure has the meaning given in Schedule 58.

Planning Application Documents has the meaning given to that term in clause 6.1(b).

Planning Approval means:

- (a) the approval granted by the Minister for Planning under the EP&A Act in relation to the Planning Approval Application, including all conditions to such approval and documents incorporated by reference;
- (b) any modification to the Primary Planning Approval; and

- (c) any other consent, concurrence or approval, or determination of satisfaction with any matter, which is made, given or issued under the Primary Planning Approval from time to time and all conditions to any of them, and includes all documents incorporated by reference, as that consent, concurrence or approval may be modified from time to time.

Planning Approval Application means the application for approval under Part 5.1 of the EP&A Act in respect of the Concept Design submitted by RMS to the Minister for Planning in accordance with clause 6.2.

Planning Approval Change means:

- (a) the Planning Approval is modified under the EP&A Act; or
- (b) the Minister for Planning issues a new Approval in respect of the New M5 Main Works in substitution for, or replacement of, the Planning Approval;
- (c) any new Approval referred to in paragraph (b) of this definition is modified under the EP&A Act; or
- (d) an Approval for the M5 East Motorway (existing as at the date of this deed) or an Approval for the M5 West Motorway (existing as at the date of this deed) is modified under the EP&A Act other than as contemplated under the Primary Planning Approval.

Planning Approval Change Event means the occurrence of a Planning Approval Change not arising as a consequence of:

- (a) a Trustee's failure to comply with its obligations under a Project Document;
- (b) a breach by the Asset Trustee of its warranties under clause 7.3(b);
- (c) a wrongful act or omission of a Trustee or its Related Parties; or
- (d) a failure by a Trustee or any of its Related Parties to comply with the EP&A Act or the EPBC Act or any other applicable legislation.

Planning Approval Longstop Date means 30 September 2016.

Planning Approval Target Date means 21 April 2016.

Planning Termination Sum means:

- (a) the Planning Termination Sum (D&C), as may be increased in accordance with clause 6.11(f);
- (b) the Project Debt on that date;
- (c) the amounts which the Trustees must, subject to clause 9.2(e), pay as a consequence of the termination (other than Planning Termination Sum (D&C), including to its Subcontractors (other than the Contractor) but excluding any amount payable to the Subcontractors which relates to any amount payable by a Subcontractor to any "related entity" (as defined in the Corporations Act) of a Subcontractor other than where the related entity is engaged on an arm's length basis and on commercial terms; and

- (d) the amount (which may not be less than zero) of the Equity Contributions at the time of termination, less:
 - (i) all Distributions by the Trustees to the Holding Trusts; and
 - (ii) any amounts owing to the Trustees or the Borrower and any credit balances standing in accounts held by or for the benefit of the Trustees or the Borrower.

Planning Termination Sum (D&C) means the Planning Termination Sum payable by the Asset Trustee to the New M5 Main Works D&C Contractor in accordance with clause 6.9 of the New M5 Main Works D&C Deed.

Potential MAE Trigger means:

- (a) a Planning Approval Change Event or a EPBC Approval Change Event occurs;
- (b) an event or circumstance referred to in clause 23A.2(b)(ii) or 23A.2(b)(iv) occurs;
- (c) a Qualifying Change in Law occurs;
- (d) an Uninsurable Force Majeure event occurs;
- (e) the offence of failing or refusing to pay the toll for the use of the Motorway is not enforced or recovery procedures are not pursued to the standard required by this deed; or
- (f) a Smart Motorways Event occurs.

PPA Notice has the meaning given to that term in clause 6.2(c)(i).

PPS Act means the *Personal Property Securities Act 2009* (Cth) and regulations made under that Act.

Pre-Agreed Change means any of the Changes described in Schedule 38.

Primary Planning Approval means the approval referred to in paragraph (a) of the definition of Planning Approval.

Primary M5 East Motorway Planning Approval means the approval referred to in paragraph (a) of the definition of M5 East Motorway Planning Approval.

Primary M5 West Motorway Planning Approval means the approval referred to in paragraph (a) of the definition of M5 West Motorway Planning Approval.

Principal Contractor has the meaning given to the term "principal contractor" in the WHS Legislation.

Principal Contractor Deed means the deed entitled "Deed of Engagement of Principal Contractor" entered into between RMS, the Asset Trustee and the Contractor on or about the date of this deed substantially in the form of Schedule 11.

Principal Repayment means, in respect of a period and any Project Debt, all repayments of outstanding principal required to be made under that Project Debt during the period as set out in any amortisation schedule or repayment for that Project Debt.

Privacy Laws means:

- (a) the *Privacy Act 1988* (Cth);

- (b) the *Privacy and Personal Information Protection Act 1998* (NSW); and
- (c) any other current or future legislation, mandatory codes and policies (where such codes and policies have been notified by an affected party to the other parties) relating to the handling of Personal Information which may apply from time to time to a party or to any other recipient of Personal Information permitted under this deed.

Procured Third Party Software has the meaning given to it in the New M5 Main Works D&C Deed.

Project means:

- (a) the New M5 Project;
- (b) the M5 East Project; and
- (c) the M5 West Project.

Project Aboriginal Participation Plan means a plan that satisfies the requirements of the NSW Government Aboriginal Participation in Construction Guidelines (January 2007) for an "Aboriginal Participation Plan".

Project Approval Long Stop Date means 30 September 2017.

Project Debt means:

- (a) the Financial Indebtedness of the Borrower, the Asset Trustee or the Project Trustee under the Debt Financing Documents; and
- (b) the net amount of any money payable or receivable by the Borrower, the Asset Trustee or the Project Trustee on the termination of any interest rate or currency risk management agreement entered into by the Borrower, the Asset Trustee or the Project Trustee to limit or otherwise manage its exposure to interest rate fluctuations in respect of the facilities referred to in paragraph (a), provided that the method of calculating the termination amount and the actual calculation of the termination amount are furnished to RMS and:
 - (i) if the Borrower, the Asset Trustee or the Project Trustee is a net receiver of such moneys, the amount is a negative number; and
 - (ii) if the Borrower, the Asset Trustee or the Project Trustee is a net payer of such moneys, the amount is a positive number,

but excludes any advances in the nature of unitholder contributions.

Project Documentation Schedule means Appendix C.2 of Part A of the SWTC.

Project Documents means:

- (a) this deed;
- (b) the New M5 Main Works D&C Deed;
- (c) the D&C Guarantees;
- (d) the Contractor's Side Deed;
- (e) from the date of execution of the O&M Deed, the Operator's Side Deed;

- (f) the RMS Security;
- (g) from the date of execution of the O&M Deed, the O&M Deed;
- (h) from the execution of the O&M Deed, the O&M Guarantee;
- (i) the Equity Documents;
- (j) the Debt Financing Documents;
- (k) the Tolling Services Agreement;
- (l) the Independent Certifier Deed;
- (m) the D&C Independent Certifier Deed;
- (n) the Interlink Interface Agreement;
- (o) from the execution of the Deed of Appointment of Environmental Representative, the Deed of Appointment of Environmental Representative;
- (p) the PAFA Act Guarantee;
- (q) from the date of execution of each M5 Lease, that M5 Lease;
- (r) from the date of execution of each M5 Sublease, that M5 Sublease;
- (s) the Principal Contractor Deed;
- (t) the Landfill Closure Works Deed Poll;
- (u) from the date of execution of the Manager Shareholder's Agreement, the Manager Shareholders' Agreement;
- (v) the Road Operators Coordination Agreement;
- (w) the Management Services Agreement;
- (x) from the execution any deed entered into by RMS and the Asset Trustee pursuant to clause 19.12(b)(v)(B), any deed entered into by RMS and the Asset Trustee pursuant to clause 19.12(b)(v)(B); and
- (y) any other document the parties agree is a Project Document.

Project Entity has the meaning given in clause 37.2(a).

Project Hold Trust means the trust called " WCX M5 Project Hold Trust" established by the Project Hold Trust Deed (ABN 71 617 094 248).

Project Hold Trust Deed means the trust deed establishing Project Hold Trust executed by Project Hold Trustee dated on or about 16 October 2015.

Project Hold Trustee means WCX M5 PHT Pty Ltd (ACN 608 763 088) in its capacity as trustee of the Project Hold Trust.

Project Insurance means a policy or policies of insurance which the Trustees are obliged to obtain under clause 26 as set out in Schedule 46.

Project IRR means the expected Project prefinancing and pre-tax internal rate of return as set out in the Model Outputs Schedule.

Project Plan means any plan of the kind referred to in clause 9.5(a) or clause 9.5A(a), as that plan may be updated, amended and further developed under clause 9.5 or clause 9.5A and Schedule 35.

Project Site means:

- (a) the New M5 Main Works Site; and
- (b) the Local Areas identified in the Site Access Schedule.

Project Training Management Plan has the meaning given to that term in Appendix C.1 of Part A of the SWTC.

Project Trust means the trust called "WCX M5 Project Trust" established by the Project Trust Deed (ABN 73 899 615 977).

Project Trust Deed means the trust deed establishing the Project Trust executed by the Project Trustee dated on or about 19 October 2015.

Project Trustee's Activities means all things and tasks which the Project Trustee does, is, or may be, required to carry out or do to comply with its obligations under the RMS Project Documents with respect to the O&M Work including, but not limited to the activities set out in clause 9.1(b).

Project WHS Management Plan has the meaning given to that term in Appendix C.1 of Part A of the SWTC.

Project Works means the physical works which Asset Trustee must design, construct and complete under this deed (including, to the extent relevant to such works, Changes directed in accordance with this deed) including:

- (a) the New M5 Main Works (including the SPI Interface Works, the Landfill Closure Works and the Tolling Equipment Works);
- (b) the Utility Service Works;
- (c) the Local Area Works; and
- (d) the Property Works,

but excluding the Temporary Works, the Asset Renewal, the O&M Work and the works referred to in Pre-Agreed Change 1 (unless Pre-Agreed Change 1 is directed by RMS in accordance with clause 14.2).

Project Works Insurances means a policy or policies of insurance which the Asset Trustee is obliged to obtain under clause 26 as set out in Part 1 of Schedule 46.

Project Works Traffic Management Plan has the meaning given to that term in clause 9.6(a)(ii)(A).

Projected Equity Return means:

- (a) where the Trustees and SMC are all wholly owned by the State, the nominal internal rate of return on the Equity Contributions (which, for the avoidance of doubt, excludes any tax paid or payable by the Equity Investors) described as such in the Model Outputs Schedule; and
- (b) where the Trustees or SMC are not wholly owned by the State, the nominal after tax internal rate of return on the Equity Contributions (which, for the avoidance of

doubt, excludes any tax paid or payable by the Equity Investors) described as such in the Model Outputs Schedule, updated only for the direct consequences of any change in shareholding of any or all of the Trustees or SMC.

Property Works means all works required to existing buildings and infrastructure or to and within properties arising out of the Asset Trustee's Activities as described or specified in Part A of the SWTC, including in section 3.4.2 of Part A of the SWTC (and including, to the extent relevant to such works, Changes directed in accordance with this deed).

Proposed Refinancing Date means, in respect of a Refinancing, the date contained in the Refinancing Model upon which the Refinancing is expected to occur (or such earlier date as the parties may agree).

Pure Economic Loss means Consequential Loss other than Consequential Loss arising from:

- (a) any injury to, or disease or death of, persons;
- (b) the loss of (whether total or partial), or destruction of or damage to, any real or personal property; or
- (c) loss of use or access to any real or personal property, where such loss of use or access is caused by a Trustee's or a Trustee Related Party's wrongful act or omission or breach of this deed.

Qualifying Adverse Effect means an adverse effect on the cashflows projected to be generated from the Project from the date of the occurrence of the relevant event, omission or circumstance until the end of the Term, the net present value of which exceeds the Qualifying Adverse Effect Threshold. In calculating the net present value for the purposes of this definition:

- (a) the nominal adverse effect on the Project cashflows will be calculated by comparing:
 - (i) the cashflows projected by the Base Case Financial Model (at Financial Close) to be generated from the Project from the date of the occurrence of the relevant event, omission or circumstance until the end of the Term as if the relevant event, omission or circumstance had not occurred, with:
 - (ii) the cashflows projected to be generated from the Project from the date of the occurrence of the relevant event, omission or circumstance until the end of the Term taking into account the impact of the relevant event, omission or circumstance;
- (b) a discount rate equal to the Project IRR will be applied; and
- (c) in respect of any New Connection Project, the net present value of any adverse effect on the cashflows projected to be generated from the Project as a result of any other New Connection Project that has been undertaken and opened to the public for the safe, efficient and continuous passage of vehicles prior to the date of the occurrence of the relevant event will be included.

Qualifying Adverse Effect Threshold means:

- (a) in respect of a New Connection Project:
 - (i) \$ [REDACTED] for the first New Connection Project undertaken and opened by RMS to the public for the safe, efficient and continuous passage of vehicles; and

- (ii) \$ [REDACTED] for each New Connection Project undertaken and opened thereafter by RMS to the public for the safe, efficient and continuous passage of vehicles; and
- (b) in respect of any other Possible MAE Event, \$ [REDACTED].

Qualifying Change in Law means:

- (a) a Discriminatory Change in State Law;
- (b) a Change in Federal Environmental Law; or
- (c) prior to the Date of Completion, a Law or change in governmental policy which requires the Asset Trustee or the Project Trustee to comply with NSW Government Policy on Aboriginal Participation in Construction (February 2015).

Quality Management System means a corporate system that details the organisational structure, policies, procedures, practices, recourses and responsibilities for quality management.

Quality Manager means the person specified as such in Schedule 36.

Quality Plan has the meaning given to that term in Appendix C.1 of Part A of the SWTC.

Quarter means:

- (a) in the case of the first Quarter, the period commencing on the first day of the Term and expiring on the day immediately prior to the first Quarterly Date occurring during the Term;
- (b) each 3 month period commencing on a Quarterly Date thereafter; and
- (c) in the case of the last Quarter, the period commencing on the last Quarterly Date occurring during the Term and ending on the expiry of the Term.

Quarterly Date means 1 January, 1 April, 1 July and 1 October in any year during the Term.

Rail Agreement means the Master Access Deed together with the document issued by RailCorp with respect to the Project Works, Temporary Works and Asset Trustee's Activities and referred to in clause 23.3(a) as an 'Access Authority Instrument'.

Rail Corridor Works means that part of the Works, as that term is used in the Master Access Deed, that is within the scope of, or forms part of, the Project Works, Temporary Works or Asset Trustee's Activities under this deed, and includes the principal items of infrastructure identified in Schedule 34.

RailCorp means Rail Corporation New South Wales (ABN 59 325 778 353).

RailCorp Maintenance Plan means a Maintenance Plan within the meaning of the Master Access Deed (including, where relevant, a draft of such a Maintenance Plan) and as contemplated under each of clauses 4.6, 4.7, 15.2(a)(i) and 20 of the Master Access Deed.

RailCorp's Technical Conditions means the design, technical and engineering conditions and other requirements of RailCorp in respect of the Rail Corridor Works identified and listed in Schedule 34, as those conditions and other requirements may be varied by RailCorp from time to time.

Ratio Calculation Date means the last Business Day of each Quarter.

Recipient has the meaning given to that term in clause 24.2(b)(ii).

Refinancing means any of the following:

- (a) the entry into any new Debt Financing Document, or any amendment or variation to, or restatement, novation, supplement or replacement of, any Debt Financing Document;
- (b) the exercise of any right (including the giving of a waiver or consent) under any Debt Financing Document to which RMS is not a party; or
- (c) any other step or arrangement or new contractual or financing arrangement that has a substantially similar effect to that described in paragraph (a) or (b),

that changes or is reasonably likely to change the type, amount, pricing, tenor, terms for payment or repayment or hedging of the financial accommodation to the Asset Trustee, the Project Trustee or the Borrower but does not include:

- (d) the syndication or subscription or assignment, novation or transfer of any Project Debt under the Debt Financing Documents following a Refinancing, that is permitted by the Debt Financing Documents at the date of that Refinancing;
- (e) the change in control or sell down or assignment or transfer of any bonds in an arm's length transaction at market value; or
- (f) the entry into of any derivative transaction at any time provided it is not an Exotic Swap.

Refinancing Gain has the meaning given to that term in clause 36A.8.

Refinancing Model has the meaning given to that term in clause 36A.4.

Refinancing Model Outputs Schedule means the schedule identified as such in a Refinancing Model prepared in accordance with clause 36A.11.

Related Body Corporate has the same meaning as in the Corporations Act.

Related Parties means:

- (a) in respect of RMS (and subject to clause 1.10), RMS's Representative and any of the respective employees, agents, contractors or officers of RMS and RMS's Representative, but excludes:
 - (i) the Independent Certifier;
 - (ii) the Environmental Representative;
 - (iii) the Trustees and their Subcontractors; and
 - (iv) employees, agents, consultants and officers of the persons listed in paragraphs (a)(i) to (iii) of this definition; and
- (b) in respect of each Trustee (and subject to clause 1.10), each Trustee's Representative and any of the respective employees, agents, contractors (in their capacity as contractors for the Project) or officers of the Trustees and the relevant Trustee's Representative, but excludes:

- (i) the Independent Certifier;
- (ii) the D&C Independent Certifier;
- (iii) the Environmental Representative; and
- (iv) employees, agents, consultants, contractors (of any tier) and officers of the persons listed in paragraphs (b)(i) to (iv) of this definition.

Relevant Entity means the Operator and any other Subcontractor or other entity that carries out operation, maintenance, refurbishment and/or repair works or services (including Asset Renewal) in respect of the Motorway.

Relevant Insurer means an insurance company having a financial performance rating of at least A- by Standard and Poor's (Australia) Pty Limited (or equivalent rating).

Relevant Proportionate Liability Legislation has the meaning given to that term in Schedule 4.

Remedy means to remedy or cure the Event of Default or, if the Event of Default is not capable of being remedied or cured, to overcome the consequences of the Event of Default.

Remedy Notice has the meaning given to that term in clause 31.2(c).

Remedy Plan has the meaning given to that term in clause 31.2(c)(ii)(A).

Representative means, in respect of a Debt Financier, a Senior Facility Agent, a Security Trustee, an Intercreditor Agent or other trustee (including a note trustee) acting on behalf of that Debt Financier.

Required Rating means a credit rating of at least A+ by Standard and Poor's (Australia) Pty Limited or Aa2 by Moody's Investors Service, Inc.

Rescue Refinancing means a Refinancing which is permitted by clause 5.3(b) of the Financiers Tripartite Deed.

Revenue means, for a period, all the following amounts received by the Project Trustee from or in relation to the Project during that period:

- (a) toll and other revenue from use of the Motorway, including all tolls, fees and charges that the Project Trustee is entitled to charge in accordance with the Toll Calculation Schedule;
- (b) any liquidated damages or compensation payable under or in respect of the New M5 Main Works D&C Deed;
- (c) any proceeds from business interruption insurance policies which will be applied in accordance with this deed; and
- (d) non-toll revenue (including interest) and receipts otherwise arising or derived from or paid or payable in respect of the Project,

and any moneys held in the joint bank account managed by the Cash Manager or held on trust for either of the Trustees by any other party to the Manager Shareholder's Agreement in accordance with the Manager Shareholders' Agreement which are due to be paid to the Project Trustee, but excluding:

- (e) insurance proceeds (other than those referred to in paragraph (c) above);

- (f) proceeds of any Project Debt or Equity;
- (g) any prepaid money which is held in a segregated account on trust for the persons providing it, until toll revenue has been earned from it; and
- (h) any moneys held in the joint bank account managed by the Cash Manager which are due to be paid to a person other than the Project Trustee or the Asset Trustee.

RMS M5 West Option means the option for RMS to exclude the M5 West Motorway from the Project.

RMS Project Documents means those Project Documents to which RMS is a party.

RMS Refinancing Share has the meaning given in clause 36A.8(e).

RMS Security means the Security Interest granted by the Trustees and the Borrower in favour of RMS to secure performance of each of the Trustee's obligations under this deed and each of the Trustee's obligations and the Borrower's obligations under the other Project Documents.

RMS SM Works means any works carried out or procured by RMS in connection with the implementation or operation of Smart Motorways or any upgrades to Smart Motorways or any Smart Motorways Software, which may include additions, increases, decreases, omissions, deletions, demolition or removal to or from any of the Project Works, the Temporary Works, the Motorway, the Traffic Management Assets or the Smart Motorways Software.

RMS's Representative means:

- (a) the person appointed by RMS under clause 8.1(a)(i); or
- (b) any other person appointed from time to time by RMS under clause 8.1(a)(ii),

and includes any appointee under clauses 8.1(b) or 8.1(d).

Road Occupancy Licence or **ROL** has the meaning given to that term in clause 9.6(a)(ii)(B).

Road Operators Coordination Agreement means the deed entitled "Road Operators Coordination Agreement" between M4 Project Company, Project Trustee, Asset Trustee and SMC dated on or about the date of this deed.

Roads Act means the *Roads Act 1993* (NSW).

Samsung means Samsung C&T Corporation, a duly organised company under the laws of the Republic of Korea (Registration Number 110111-0015762).

Securities means shares, units, interests in a partnership and any other interests which would constitute "securities" as defined in the Corporations Act.

Security Bond means an unconditional undertaking provided pursuant to clause 10.

Security Interest means any mortgage, pledge, lien or charge or any security or preferential interest or arrangement of any kind and includes:

- (a) a "security interest" as defined in section 12 of the PPS Act;
- (b) anything which gives a creditor priority to other creditors with respect to any asset; and

- (c) retention of title (other than in the ordinary course of day-to-day trading) and a deposit of money by way of security.

Security Trust Deed means the deed entitled "WCX M5 Security Trust Deed" entered into between the Borrower, the Project Trustee, the Asset Trustee, the Project Hold Trustee, the Asset Hold Trustee, the Debt Financiers, the Commonwealth, the Security Trustee and the Intercreditor Agent entered into on or about the date of this deed.

Security Trustee means National Australia Bank or any other person appointed as security trustee for the Debt Financiers in accordance with the Debt Financing Documents.

Security Trustee Fee Letter means the document entitled "Security Trustee Fee Letter" addressed to the Security Trustee from and signed by the Borrower on or about the date of this deed.

Senior Common Terms Deed means the document entitled "WestConnex M5 Senior Commons Terms Deed" entered into by, among others, the Borrower, the Project Trustee, the Asset Trustee, the Asset Hold Trust, the Project Hold Trust, the Debt Financiers, the Senior Facility Agent, the Intercreditor Agent, the Account Bank and the Security Trustee on or about the date of this deed.

Senior Facility Agent means National Australia Bank or any other replacement entity appointed as senior facility agent in accordance with the Debt Financing Documents.

Senior Facility Agent Fee Letter means the document entitled "Agent Fee Letter" addressed to the Senior Facility Agent and from and signed by the Borrower on or about the date of this deed.

Senior Project Group means the group referred to in clause 8.5.

Senior Syndicated Facility Agreement means the deed entitled "WestConnex M5 Senior Facility Agreement" entered into between, among others, the Borrower, the Project Trustee, the Asset Trustee, the Debt Financiers, the Security Trustee, the Senior Facility Agent and the Intercreditor Agent on or about the date of this deed.

Sister Entity means a company or trust, the shares or units in which are wholly owned (directly or indirectly) by the Ultimate Unitholder and which is involved in the Project.

Site Access Schedule means Schedule 26.

Site Conditions means any physical conditions and characteristics of, upon, above, below or over the surface, or in the vicinity of, the Construction Site and any Extra Land or their surroundings including:

- (a) Artefacts and any other natural and artificial conditions;
- (b) physical and structural conditions, including old footings, underground structures, buildings, improvements, partially completed structures and in-ground works;
- (c) all improvements, including any artificial things, foundations, retaining walls and other structures installed by or on behalf of RMS or others;
- (d) surface water, ground water, ground water hydrology and the effects of any dewatering;
- (e) any Contamination, Hazardous Substance or other spoil or waste;

- (f) topography of the Construction Site and Extra Land, ground surface conditions and geology, including rock and sub-surface conditions or other materials encountered at the Construction Site or Extra Land;
- (g) geological, geotechnical and subsurface conditions or characteristics;
- (h) any underground strata;
- (i) all Utility Services, systems and facilities, above or below ground level and all facilities with which such Utility Services and systems are connected;
- (j) the Environment, water and weather or climatic conditions, or the effects of the Environment, water and weather or climatic conditions, including rain, surface water runoff and drainage, floods, water seepage, wind blown dust and sand, seasons and physical conditions that are a consequence of weather or climatic conditions; and
- (k) any latent conditions.

Smart Motorways means any system implemented by RMS to enable RMS to use, control and use data generated by, the Traffic Management Assets to:

- (a) control, improve or manage the flow of traffic and congestion; and
- (b) support the Project Trustee's response to incidents,

on the Motorway or the surrounding road network.

Smart Motorways Change means any change or variation to the Project Works, the Temporary Works, the Asset Renewal, the New M5 Main Works D&C Phase Maintenance, the O&M Work, the Asset Trustee's Activities or the Project Trustee's Activities, the Motorway or the Traffic Management Assets, including any addition, increase, decrease, omission, deletion, demolition or removal to or from any of these, which:

- (a) arises from any RMS SM Works; or
- (b) RMS requires the Trustees to carry out in connection with the implementation or operation of Smart Motorways or any upgrades to Smart Motorways or any Smart Motorways Software.

Smart Motorways Event means any reduction in the Actual Revenue where the Actual Revenue received by the Project Trustee in any Quarter is the lesser of:

- (a) the Actual Revenue the Project Trustee would have otherwise received in that Quarter; and
- (b) the Base Revenue for that Quarter,

which the Project Trustee demonstrates, pursuant to clause 18A, is directly the result of the implementation or operation of Smart Motorways, or upgrade of Smart Motorways or Smart Motorways Software.

Smart Motorways Software means any software which is used by RMS to implement or operate Smart Motorways.

SMC means Sydney Motorway Corporation Pty Limited (ABN 47 601 507 591) a non guaranteed company owned by the NSW Treasurer and the Minister for Roads, Maritime and Freight.

SMC Unitholder Loan Agreement means the document titled "WestConnex M5 Project SMC Unitholder Loan Agreement" between Asset Hold Trustee and SMC and dated on or about the date of this deed.

Source Code means the complete high level language computer programs which, when compiled, generate the object and executable program that constitutes the useable software product. Source Code includes the make files, flow charts, programming notes and other necessary instructions to the compiler and linker.

SPI Contribution means \$ [REDACTED] (excluding GST).

SPI Interface Works means the works described in section 2 of Appendix B.30 of Part A of the SWTC.

SPI Interface Works Completion means the stage when:

- (a) the SPI Interface Works are complete in accordance with this deed except for minor Defects which:
 - (i) do not prevent the SPI Interface Works from being reasonably capable of being used for their intended purpose;
 - (ii) can be corrected without prejudicing the convenient or intended use of the SPI Interface Works; and
 - (iii) the Asset Trustee has reasonable grounds for not promptly rectifying;
- (b) without limiting paragraph (a), the SPI Interface Works are capable of being used for their intended purpose;
- (c) the Asset Trustee has carried out and passed all tests which must necessarily be carried out and passed before the SPI Interface Works may be used for their intended purpose; and
- (d) without limiting paragraph (b), the Asset Trustee has satisfied each of the conditions precedent to SPI Interface Works Completion set out in Part AA of Schedule 40.

SPI Lease Area has the meaning given in Schedule 22.

SPI Managing Contractor means Ward Civil and Environmental Engineering Pty Ltd (ABN 65 098 942 459) or such other contractor (as agreed between the parties in writing) engaged to carry out the SPI Managing Contractor Works.

SPI Managing Contractor Works means the works described in the SPI Managing Contractor Works SWTC which are to be carried out and completed by the SPI Managing Contractor and any other works of a similar nature that RMS proposes to undertake in relation to the preparation of the Core SPI Site for the purposes of the Project as agreed between the parties in writing.

SPI Managing Contractor Works Completion Date means 1 July 2016.

SPI Managing Contractor Works SWTC means Schedule 62.

Stage 3 Contractor means the contractor engaged to carry out works in relation to the "Stage 3" component of the WestConnex Program of Works which will physically connect to the completed New M5 Main Works.

Stakeholders has the meaning given to that term in clause 9.16(b).

Stapled Entity means each of the Project Trust and the Asset Trust.

State Law means legislation of the State of New South Wales including regulations and subordinate legislation (but which excludes any Approval).

Subcontract means a contract between a Trustee and a Subcontractor and includes the New M5 Main Works D&C Deed, the O&M Deed and an agreement for supply of goods or services (including professional services and Construction Plant hire) or both.

Subcontractor means a subcontractor a sub-sub contractor and so on right down the contracting chain of a Trustee in performing the Asset Trustee's Activities or the Project Trustee's Activities, and includes the Contractor, the Operator and a supplier of goods or services (including professional services and Construction Plant hire) or both, and only includes RMS in its capacity as the Tolling Contractor (Back Office) to the extent required by clause 1.10.

Subcontractor Break Costs means all break costs payable by the Trustees to their Subcontractors under the M5 West Subcontracts as a direct consequence of the termination of the M5 West Subcontracts.

Subordinated Debt Facility means the debt facility provided by the Commonwealth in accordance with the Commonwealth Subordinated Loan Agreement.

Subsidiary has the meaning given to that term in the Corporations Act, but an entity will also be taken to be a Subsidiary of an entity if that entity Controls it and without limitation:

- (a) a trust may be a Subsidiary, for the purposes of which a unit or other beneficial interest will be regarded as a share;
- (b) an entity may be a Subsidiary of a trust if it would have been a Subsidiary if that trust were a corporation; and
- (c) if there are one or more interposed entities between it and the entity that Controls it.

Subsidiary D&C Program means a subsidiary program for design and construction activities of the kind referred to in clause 16.3(a) as updated under clause 16.3(c).

Supplier has the meaning given to that term in clause 24.2(b).

Surviving Clauses has the meaning given to that term in clause 43.15(a).

Swap Agreements means each agreement (including any master agreement and any confirmation or transaction under it) entered into or to be entered into between the Borrower and any Debt Financier.

SWTC or **Scope of Works and Technical Criteria** means Exhibit H which includes:

- (a) Part A – New M5 Main Works SWTC;
- (b) Part B – M5 East Motorway SWTC; and
- (c) Part C – M5 West Motorway SWTC.

Sydney Trains means Sydney Trains (ABN 38 248 779 682).

Target Financial Close Date means the date which is 10 Business Days after the date of this deed.

Taxes means income, stamp, indirect or other taxes (including payroll tax, goods and services tax and land tax), levies, imposts, deductions, charges (including any superannuation guarantee charge), duties (including import duty), workers compensation insurance premiums, compulsory loans and withholdings (including financial institutions duty, debits tax or other taxes whether incurred by, payable by return or passed on to another person) together with interest thereon or penalties, if any, and charges, fees or other amounts made on, or in respect thereof.

Temporary Areas means the land described as the Temporary Areas in the Site Access Schedule.

Temporary Works means any temporary physical works required for the purpose of the carrying out of the Asset Trustee's Activities, but which does not form part of the Project Works including any such works specified in section 3.5 of Part A of the SWTC and including, to the extent relevant to such works, Changes directed in accordance with this deed.

Term means the period calculated in accordance with clause 2.1(b).

Third Party Agreements means:

- (a) the agreements or template agreements referred to in Schedule 23 entered into by RMS or WDA or proposed to be entered into by RMS with the parties referred to in Schedule 23. Copies of the Third Party Agreements, as at the date of this deed, are contained in Schedule 24; and
- (b) any agreement to which clause 9.18(b) applies.

Third Party Claim has the meaning given to that term in clause 26.11(a).

Third Party Confidential Information means information provided to RMS by any third party (including Interlink or the Existing M5 East Operator) and which RMS has given the Trustees prior written notice is confidential.

Third Party Works means the Local Area Works, Property Works and Utility Service Works.

Toll Calculation Schedule means Schedule 44A.

Toll Collection System means the system proposed to be used or used (as the case may be) for imposing and collecting tolls in relation to the use of the Motorway, as described in Appendix B.10 of Part A of the SWTC.

Tollable Section has the meaning given to that term in the Toll Calculation Schedule.

Tolling Contractor (Back Office) means the contractor engaged by the Project Trustee to carry out the Tolling Services Work.

Tolling Equipment means any roadside tolling equipment specified in Part A of the SWTC, including the gantries and associated equipment.

Tolling Equipment Works means the works to be undertaken by the Project Trustee in respect of the Toll Collection System for the New M5 Project as set out in section 5.7 of Part A of the SWTC which form part of the New M5 Main Works.

Tolling Equipment Works Contractor means the subcontractor engaged by the Contractor to perform the Tolling Equipment Works. At the date of this deed, the Tolling Equipment Works Contractor is Kapsch TrafficCom Australia Pty Ltd of 636 St Kilda Road, Melbourne Victoria 3000.

Tolling Equipment Works Subcontract means the agreement so entitled dated on or about the date of this deed between the Contractor and the Tolling Equipment Works Contractor.

Tolling Services means the collection of tolls, charges and fees, including the management of customer accounts, transaction processing and billing.

Tolling Services Agreement means the deed entitled "Tolling Services Agreement" between the Project Trustee and the Tolling Contractor (Back Office) in relation to the Project dated on or about the date of this deed.

Tolling Services Work means the back office tolling work to be carried out by the Tolling Contractor (Back Office) under the Tolling Services Agreement.

Trade Waste Agreement or **TWA** has the meaning given in Appendix B.30 to Part A of the SWTC.

Traffic Data means the traffic figures set out in:

- (a) Appendix B.2 (Geometric and Road Design Requirements), Table B.2-2 and Attachment B.2-3 of Part A of the SWTC;
- (b) Appendix B.3 (Tunnels and Long Underpasses), Table B.3-1, Table B.3-2, and Tables B.3-2A to B.3-2E of Part A of the SWTC; and
- (c) Appendix B.6 (Pavements), Tables B.6-2A, B.6-2B, B.6-3 and B.6-4 of Part A of the SWTC.

Traffic Management Assets means in relation to Smart Motorways:

- (a) the on ramps forming part of the Motorway;
- (b) roadside equipment, including variable message and speed limit signs, ramp signals, dynamic lane and speed management systems, network monitoring systems, CCTV systems, fibre optic cables, vehicle detectors, vehicle height detectors and roadside cabinets; and
- (c) the Operations Management and Control System and any other systems implemented on the Motorway to control, improve or manage traffic on the Motorway or the surrounding road network.

Training Management Guidelines means the document entitled "Training Management Guidelines" prepared by the NSW Government Department of Premier and Cabinet and dated February 2009, as updated from time to time.

Trust Assets means:

- (a) in relation to the Asset Trust, all present and after acquired property, interests, rights and proceeds held by the Asset Trustee from time to time as trustee of the Asset Trust; and
- (b) in relation to the Project Trust, all present and after acquired property, interests, rights and proceeds held by the Project Trustee from time to time as trustee of the Project Trust.

Trustee means each of the Asset Trustee and the Project Trustee (or either of them if the context so requires) and "Trustees" means each of them severally for their respective obligations under the Project Documents.

Trustee Change Notice has the meaning given to that term in section 1.2 of Schedule 37.

Trustee's Activities means the Asset Trustee's Activities or the Project Trustee's Activities or both as the context requires.

Trustee's Controlling Corporation means SMC in its capacity as a "controlling corporation" within the meaning of the NGER Legislation.

Trustee's Delay Costs means:

- (a) in relation to a Compensation Event (under clause 6.8 or the events set out in clause 6.11), the extra costs reasonably incurred and payable or to be paid by the Trustees, including costs that are payable to:
 - (i) the Contractor under the New M5 Main Works D&C Deed;
 - (ii) the Operator under the O&M Deed; or
 - (iii) the Tolling Contractor (Back Office) under the Tolling Services Agreement; and
- (b) in respect of clause 6.8 or the events set out in clause 6.11 only, Financing Delay Costs,

excluding:

- (c) any related Change Costs; and
- (d) any amounts payable by any of those Subcontractors to a member of the Group, a Related Party of any Trustee, a Related Body Corporate of a Group Member or a Related Body Corporate of that Subcontractor, to the extent that the Related Party, member of the Group or Related Body Corporate is not engaged by the Trustees on an arm's length basis and on commercial terms.

Trustee's Emissions and Energy Data means any Emissions and Energy Data relating to any aspect of the Asset Trustee's Activities or the Project Trustee's Activities, or the activities of any Subcontractors engaged by the Trustees, in connection with the Asset Trustee's Activities or the Project Trustee's Activities under this deed, including any such Emissions and Energy Data that:

- (a) the Trustees are required at any time to keep or to provide to RMS or to any Authority (or both) pursuant to an obligation under this deed;
- (b) the Trustees or the Trustee's Controlling Corporation are required at any time to keep or to provide to RMS or to any Authority (or both) pursuant to an obligation at Law (including an obligation under the NGER Legislation); or
- (c) the Trustees or the Trustee's Controlling Corporation is entitled at any time to provide to the Clean Energy Regulator under the NGER Legislation concerning any greenhouse gas project.

Trustee's Revenue Loss means, in relation to a Compensation Event:

- (a) the toll revenue that the Project Trustee expected to earn for the Delay Period, as calculated in accordance with the Base Case Financial Model,

less,

- (b) the Project Trustee's expected operation and maintenance costs for the Delay Period (as calculated in accordance with the Base Case Financial Model), to the extent these will not be incurred as a result of the delay.

For these purposes, the **Delay Period** is the period that the Date of Opening Completion is delayed due to the relevant Compensation Event (as calculated in accordance with Schedule 39).

Ultimate Unitholder means SMC or any entity ultimately owned, directly or indirectly, or managed by SMC or any of its Associates.

In this definition an entity is considered to be "ultimately owned" by a person if that person owns (directly or indirectly, as applicable) greater than 50% of the capital in that entity.

Unforeseeable EPBC Requirement means requirements or conditions of the EPBC Act Approval as described in clause 6.3(a)(ii).

Unforeseeable PA Requirement means requirements or conditions of the Primary Planning Approval as described in clause 6.3(a)(i).

Uninsurable means, in relation to a risk, either that:

- (a) insurance is not available with any Relevant Insurer; or
- (b) the insurance premium payable for the insurance is at such a level or the terms and conditions are such that a reputable insurance broker acceptable to the parties certifies that in its reasonable opinion the risk is not generally being insured against with Relevant Insurers by prudent, competent and experienced concessionaires, designers, contractors and/or operators (as applicable) of motorways or tollroads,

at the time that the insurance is sought to be obtained or renewed.

Uninsurable FM Termination Amount means:

- (a) on any date, the total of:
 - (i) the Project Debt on that date;
 - (ii) the amounts which a Trustee must, subject to clause 9.2(e), pay as a consequence of the termination, including to its Subcontractors but excluding any amount payable to the Subcontractors which relates to any amount payable by a Subcontractor to any "related entity" (as defined in the Corporations Act) of a Subcontractor other than where the related entity is engaged on an arm's length basis and on commercial terms; and
 - (iii) an amount (which is not less than zero) equal to either:
 - (A) on any date on or prior to the Date of Opening Completion, an amount sufficient to give the Group the ability to give the Equity Investors half of the Projected Equity Return on the Equity Contributions to the date of termination:
 - (aa) taking into account all Distributions by the Trustees to the Holding Trusts; and

- (bb) less any amounts owing to the Trustees or the Borrower and any credit balances standing in accounts held by or for the benefit of the Trustees or the Borrower; or
- (B) on any date after the Date of Opening Completion, the amount set out in the Model Outputs Schedule for the Quarter in which termination occurs (such amount being recalculated and updated in accordance with the formula in the Model Output Schedule for the date of termination), being an amount sufficient to give the Group the ability to give the Equity Investors a return equal to half the Projected Equity Return on the Equity Contributions to the date of termination; and
- (b) does not include any interest on the Project Debt to the extent that it is calculated at a rate which would constitute a penalty.

Uninsurable Force Majeure Event means, at any time:

- (a) a Force Majeure event referred to in paragraphs (a)(iii), (a)(iv) or (a)(v) of the definition of "Force Majeure" or sabotage, act of public enemy or terrorism (to the extent not covered by the *Terrorism Insurance Act 2003* (Cth)); or
- (b) a Force Majeure event which:
 - (i) causes physical loss or damage to the Project Works, the Temporary Works or the Motorway; or
 - (ii) prevents the Motorway being open to the public for the safe, continuous and efficient passage of vehicles,

in respect of which the Trustees are not insured and which is Uninsurable.

Unitholder Loan Subordination Deed means the document titled "WestConnex M5 Subordination Deed" between the Asset Hold Trustee, the Security Trustee and SMC and dated on or about the date of this deed.

Unit Subscription Agreement (Asset Hold Trust) means the document between SMC and Asset Hold Trustee in its capacity as trustee of Asset Hold Trust dated on or about the date of this deed.

Unit Subscription Agreement (Asset Trust) means the document between Asset Hold Trustee in its capacity as trustee of the Asset Hold Trust and the Asset Trustee dated on or about the date of this deed.

Unit Subscription Agreement (Project Hold Trust) means the document between SMC and Project Hold Trustee in its capacity as trustee of Project Hold Trust dated on or about the date of this deed.

Unit Subscription Agreement (Project Trust) means the document between Project Hold Trustee in its capacity as trustee of Project Hold Trust and the Project Trustee dated on or about the date of this deed.

Unplanned Lane Closure has the meaning given in Schedule 58.

Unstapled means any amendment to the Holding Trust Deeds including to clause 9.8 of the Holding Trust Deeds so that the Units (as defined in the Asset Hold Trust Deed) and Units (as defined in the Project Hold Trust Deed) are no longer stapled.

Upfront Costs means all fees, costs and expenses payable by the Borrower, the Asset Trustee or the Project Trustee or a Related Body Corporate of the Asset Trustee or the Project Trustee to external third party financiers, advisers or consultants or to RMS under clause 36A.9 in connection with a Refinancing at the time of financial close of that Refinancing.

Utility Service means any service, facility or item of infrastructure, including water, electricity, gas, ethane, fuel, telephone, drainage, sewerage, railway, industrial waste disposal and electronic communications service.

Utility Service Works means the construction, modification or relocation of Utility Services all of which are to be designed and constructed by the Asset Trustee and handed over to RMS, an Authority or any other person in accordance with this deed including any such works specified in the SWTC, including in section 6.3 (and including, to the extent relevant to such works, Changes directed in accordance with this deed).

WDA means WestConnex Delivery Authority a body corporate constituted under section 51B of the *Transport Administration (General) Regulation 2013* (NSW).

WestConnex Program of Works means the 33-km motorway that will link Sydney's west with the airport and Port Botany precinct, and will include the M4 extension and duplication of the M5 East to King Georges Road as described at www.westconnex.com.au/index.html and as augmented from time to time.

WHS Accreditation Scheme means the Australian Government Building and Construction WHS Accreditation Scheme established by the *Fair Work (Building Industry) Act 2012* (Cth).

WHS Legislation means:

- (a) the *Work Health and Safety Act 2011* (NSW) and the Work Health and Safety Regulation 2011 (NSW); and
- (b) any legislation in other States and Territories of Australia addressing work health and safety which applies to the Asset Trustee's Activities or the Project Trustee's Activities, the Project Works or the Temporary Works.

Wilful Misconduct means an act or failure to act by the relevant party or its Related Parties that was intended to cause, or was in deliberate disregard of or deliberate indifference to, harmful consequences, excluding any innocent act, omission, mistake or error of judgement.

1.2 Interpretation

In this deed:

- (a) headings are for convenience only and do not affect the interpretation of this deed;
and unless the context indicates a contrary intention:
- (b) person includes an individual, the estate of an individual, a body politic, a corporation, a statutory or other authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (c) a reference to a party includes that party's executors, administrators, successors, and permitted substitutes and assigns, including persons taking by way of novation and, in the case of a trustee, includes a substituted or an additional trustee;
- (d) includes in any form is not a word of limitation;

- (e) a reference to any Authority, institute, association or body is:
 - (i) if that Authority, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that Authority, institute, association or body are transferred to another organisation, deemed to refer to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as the case may be; and
 - (ii) if that Authority, institute, association or body ceases to exist, deemed to refer to the organisation which serves substantially the same purposes or object as that Authority, institute, association or body;
- (f) a reference to a document (including this deed and any other deed, agreement, instrument, guideline, code of practice or code and standard) is to that document as amended, varied, novated, ratified, supplemented or replaced from time to time;
- (g) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or any section or provision of either of these includes:
 - (i) all ordinances, by-laws, regulations of and other statutory instruments (however described) issued under the statute or delegated legislation; and
 - (ii) any consolidations, amendments, re-enactments and replacements;
- (h) a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause, schedule, exhibit, attachment or annexure to or of this deed;
- (i) a reference to:
 - (i) this deed includes all schedules, exhibits, attachments and annexures to it, including the SWTC; and
 - (ii) the SWTC includes all Appendices to the SWTC;
- (j) a word importing the singular includes the plural (and vice versa) and a word indicating a gender includes every other gender;
- (k) if a word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- (l) for the purposes of clause 16.2(b):
 - (i) any extension of time stated in days; or
 - (ii) any reference to "day",
 will exclude days which are public holidays in Sydney;
- (m) for all purposes other than as set out in clause 1.2(l), "day" means calendar day;
- (n) a reference to a court or tribunal is to an Australian court or tribunal;
- (o) a reference to a group of persons is a reference to all of them collectively, to any two or more of them collectively and to each of them individually;
- (p) a reference to a "month" is a reference to a calendar month;

- (q) a reference to "\$" or "dollar" is to Australian currency;
- (r) the Environmental Representative will perform the functions of the Environmental Representative or the ER under the Planning Approval and this deed;
- (s) any reference to:
 - (i) the Project Works (including the Third Party Works);
 - (ii) the Temporary Works;
 - (iii) the Motorway;
 - (iv) the New M5 Main Works D&C Phase Maintenance;
 - (v) the Asset Renewal;
 - (vi) the O&M Work;
 - (vii) the Project Plans;
 - (viii) the SWTC;
 - (ix) the Design Documentation; or
 - (x) any other document or thing,
 or any part of any of them:
 - (xi) being fit for its purpose or for its intended purpose; or
 - (xii) as having an intended use,
 (or any similar reference) will be read as referring to the purpose, intended purpose or intended use stated in, contemplated by or ascertainable from:
 - (xiii) the Project Documents; or
 - (xiv) (to the extent relevant for determining the purpose, intended purpose or intended use in connection with a Change), the Change Order and the documents referred to in the Change Order;
- (t) any reference to "information" will be read as including information, representations, statements, data, samples, bore logs, calculations, assumptions, deductions, determinations, drawings, design, specifications, models, plans and other documents in all forms including the electronic form in which it was generated;
- (u) any obligation of the Trustees under this deed with respect to a Project Plan, will be read as an obligation with respect to the version of the relevant Project Plan last submitted by the relevant Trustee to RMS's Representative under clause 9.5 in respect of which RMS's Representative has not given a notice under section 2.2(a)(ii) of Schedule 35; and
- (v) references to defined terms in the SWTC will be read in accordance with the relevant interpretation section in the SWTC.

1.3 **Contra proferentem**

In the interpretation of this deed, no rule of construction applies to the disadvantage of one party on the basis that the party (or its representative) put forward or drafted this deed or any provision in it.

1.4 **Business Day**

If the day on or by which any thing is to be done under this deed is not a Business Day, that thing must be done:

- (a) if it involves a payment other than a payment which is due on demand, on the preceding Business Day; and
- (b) in all other cases, no later than the next Business Day.

1.5 **Certification**

For the purposes of this deed, a copy of a document will be regarded as duly certified by a Trustee if it is certified as a true copy by a director, secretary or general manager of the Trustee, as the case may be.

1.6 **Ambiguous terms**

- (a) If RMS's Representative considers, or if a Trustee notifies RMS's Representative in writing that it considers, that there is an omission, ambiguity, discrepancy, inadequacy or inconsistency in, or between, the documents comprising this deed (including in any schedules, annexures or exhibits), RMS's Representative must, subject to clause 1.7, direct the interpretation of this deed which the Trustees must follow.
- (b) RMS's Representative, in giving a direction in accordance with clause 1.6(a), is not required to determine whether or not there is an omission, ambiguity, discrepancy, inadequacy or inconsistency in, or between, the documents comprising this deed.
- (c) Any direction which RMS's Representative gives in accordance with clause 1.6(a):
 - (i) will not relieve the Trustees from or alter their liabilities or obligations under this deed or otherwise according to Law;
 - (ii) will not entitle the Trustees to make (nor will it make RMS liable upon) any Claim arising out of or in any way in connection with the direction;
 - (iii) will not limit or otherwise affect RMS's rights against the Trustees, whether under this deed or otherwise according to Law; and
 - (iv) must, in respect of a notice given by a Trustee under clause 1.6(a), be given within 20 Business Days of receipt of that notice.

1.7 **Order of precedence**

The following order of precedence applies in the event of any ambiguity, discrepancy or inconsistency in, or between, the documents comprising this deed:

- (a) if the ambiguity, discrepancy or inconsistency is in or between the documents comprising this deed, the documents will be given precedence in accordance with the following:
 - (i) this deed excluding the schedules and exhibits; and

- (ii) the schedules and exhibits;
- (b) to the extent that clause 1.7(a) does not apply or resolve the ambiguity, discrepancy or inconsistency and the ambiguity, discrepancy or inconsistency is in or between different codes, standards, specifications or guidelines with which the Trustees must comply, the order of precedence set out in section 2.3 of Part A of the SWTC will apply; and
- (c) to the extent that clauses 1.7(a) and 1.7(b) do not apply or resolve the ambiguity, discrepancy or inconsistency, that part of the deed, SWTC or Environmental Documents which prescribes or requires the highest standard of compliance, the highest quality or standard or the more onerous obligation will take precedence (unless directed otherwise by RMS's Representative).

The documents comprising this deed (including the SWTC and the Environmental Documents) are to be regarded as mutually explanatory and anything contained in one but not the others will be equally binding as if contained in all of them.

1.8 **Severability**

If at any time any provision of this deed is or becomes void, illegal, invalid or unenforceable in any respect under the Law of any jurisdiction, then:

- (a) that will not affect or impair:
 - (i) the legality, validity or enforceability in that jurisdiction of any other provision of this deed; or
 - (ii) the legality, validity or enforceability under the Law of any other jurisdiction of that or any other provision of this deed; and
- (b) the provision will be construed in a manner which:
 - (i) avoids the provision being void, illegal, invalid or unenforceable; and
 - (ii) subject to clause 1.8(b)(i), preserves to the maximum possible extent:
 - (A) the enforceability of the provision and the provisions of this deed; and
 - (B) the original effect and intent of this deed.

1.9 **Electronic Files**

Where this deed (including the SWTC) refers to an electronic file on a separate disc which forms part of this deed, that disc forms part of this deed.

1.10 **Tolling Contractor (Back Office)**

A reference to a Related Party or a Subcontractor of the Trustees includes RMS or any Related Party of RMS where RMS or any Related Party of RMS is engaged as the Tolling Contractor (Back Office), except in the definitions of "Act of Prevention", Change Costs, "Compensation Event", "Early Termination Amount", "Planning Termination Sum", "Trustee's Delay Costs" and "Uninsurable FM Termination Amount" and clauses 9.2(b), 23A.5(a), 23A.7(b), 27.2, 31.8(d), 31.11(a)(iii) and 31.11(a)(iv).

1.11 **Tolling Back Office**

- (a) The parties acknowledge and agree that the Project Trustee may (subject to RMS's approval not to be unreasonably withheld) procure tolling back office services during the Term on an outsourced service provider basis (**Outsourced TBO Services**).
- (b) If the Project Trustee procures the Outsourced TBO Services, RMS acknowledges and agrees that:
 - (i) the Project Trustee's obligations under this deed to provide RMS with rights or interests in respect of tolling back office infrastructure (including the Project Trustee's obligation to achieve Final Handover), will be reduced to the extent that the Project Trustee does not itself have the relevant rights or interests in the tolling back office infrastructure; and
 - (ii) for any period in which the service provider of the Outsourced TBO Services is RMS (or any subsidiary or related body corporate of RMS), the Project Trustee's obligations under this deed to provide RMS with rights or interests in respect of tolling back office infrastructure (including the Project Trustee's obligation to achieve Final Handover) are deemed to be satisfied.

1.12 **Trustee**

If, and to the extent that this deed is silent on, does not clearly allocate or contains any ambiguity in relation to either of:

- (a) whether an obligation under this deed is an obligation of the Asset Trustee or the Project Trustee; or
- (b) liability for a particular risk under this deed, then as between the Asset Trustee and the Project Trustee,

that obligation or liability will be borne by the Project Trustee.

1.13 **Not used**

1.14 **Cross guarantees and indemnities**

- (a) The Asset Trustee severally unconditionally and irrevocably guarantees to RMS the performance by the Project Trustee of its obligations under the RMS Project Documents.
- (b) As a covenant separate and distinct from that contained in clause 1.14(a), the Asset Trustee irrevocably and unconditionally agrees to indemnify RMS and at all times to keep RMS indemnified against loss or damage suffered by RMS arising out of or in connection with any failure by the Project Trustee to perform its obligations under the RMS Project Documents.
- (c) The Project Trustee severally unconditionally and irrevocably guarantees to RMS the performance by the Asset Trustee of its obligations under the RMS Project Documents.
- (d) As a covenant separate and distinct from that contained in clause 1.14(c), the Project Trustee irrevocably and unconditionally agrees to indemnify RMS and at all times to keep RMS indemnified against any loss or damage suffered by RMS arising

out of or in connection with any failure by the Asset Trustee to perform its obligations under the RMS Project Documents.

- (e) The several guarantees on the part of the Asset Trustee and the Project Trustee in this clause may not be revoked or released until all obligations on the part of the Asset Trustee and the Project Trustee respectively have been performed in full.
- (f) Neither the RMS Project Documents nor the obligations of the Asset Trustee or the Project Trustee under the RMS Project Documents will be affected by anything which but for this clause might operate to release, prejudicially affect or discharge them or in any way relieve them from any obligation imposed on either of them under the RMS Project Documents.
- (g) The several guarantees on the part of the Asset Trustee and the Project Trustee in this clause will not be taken to be wholly or partially discharged by any matter or thing and remain in full force until each of the Asset Trustee and the Project Trustee respectively have completely performed their obligations under the RMS Project Documents.

2. **GRANT OF CONCESSION**

2.1 **Terms of concession**

- (a) In consideration for the Trustees agreeing to perform their respective obligations under this deed, RMS:
 - (i) grants the Trustees a right to carry out the Project;
 - (ii) leases the operation of the Motorway to the Project Trustee; and
 - (iii) grants the M5 Leases to the Asset Trustee,subject to, and in accordance with, this deed.
- (b) The Term will commence on the Date of Opening Completion and end on the date which is the earlier of:
 - (i) the date on which this deed is terminated under clause 31; and
 - (ii) the Final Expiry Date,(such date being the **Expiry Date**).

3. **NOT USED**

4. **PROJECT RISKS**

4.1 **Project risks**

The Trustees:

- (a) subject to the express provisions of this deed, accept all risks associated with the Project;
- (b) subject to the express provisions of this deed and the allocation of the Trustees' obligations and liabilities under this deed between the Asset Trustee and the Project Trustee, without limiting the generality of clause 4.1(a), accept all risks associated with:

- (i) the cost of the Project, including the cost of all Subcontractors and increases in the cost of Materials, Construction Plant, Utility Services and labour required for the performance of the Asset Trustee's Activities and the Project Trustee's Activities;
- (ii) the performance of Subcontractors;
- (iii) obtaining access to all areas other than the Construction Site;
- (iv) the occupation and use of the Construction Site, the Maintenance Site and the Motorway by the Trustees (including the risk of any Lane Occupancy Fees that may be payable in connection with such occupation or use);
- (v) the Site Conditions encountered (other than to the extent relief is available to the Asset Trustee as contemplated by paragraph (g) of the definition of "Compensation Event" and clause 11.10);
- (vi) all information provided or not provided by RMS about the Project Works, the Temporary Works, the Motorway, the Construction Site, the Asset Renewal, the New M5 Main Works D&C Phase Maintenance and the O&M Work;
- (vii) Contamination of any land upon or within which the Project is undertaken;
- (viii) traffic conditions on approach roads to the Construction Site and any other difficulties with obtaining access to and from the Construction Site;
- (ix) complying with all Laws, Approvals and requirements of Authorities;
- (x) the existence, location, condition and availability of Utility Services in respect of the Asset Trustee's Activities and the Project Trustee's Activities;
- (xi) reliance upon or the use of the Concept Design;
- (xii) providing all Materials, Construction Plant, Utility Services and labour necessary for the Asset Trustee's Activities and the Project Trustee's Activities;
- (xiii) industrial relations issues;
- (xiv) foreign exchange movements in any currencies adverse to the Trustees;
- (xv) damage to the Asset Trustee's Activities and the Project Trustee's Activities, Project Works, Temporary Works, the O&M Work, the Asset Renewal, the New M5 Main Works D&C Phase Maintenance, the Construction Site, Extra Land or Motorway;
- (xvi) the time taken to achieve SPI Interface Works Completion, Opening Completion and Completion;
- (xvii) third party claims;
- (xviii) revenue from the Project and traffic volumes, including the risk that revenue from the Project or traffic volumes may be less than expected by the Group or its advisers; and
- (xix) Liability for Taxes, including the risk that Liability for Taxes is greater than estimated by the Group or its advisers; and

- (c) subject to the express provisions of this deed, acknowledge that RMS has not made any representation or given any warranty in respect of the traffic usage of the Motorway or any other road.

4A **M5 EAST**

4A.1 **M5 East Transfer**

- (a) Subject to the express provisions of this deed, on and from the M5E Transfer Date:
 - (i) the Asset Trustee accepts all risks associated with the M5 East Motorway, including the risk of loss or damage to the M5 East Motorway until the end of the Term; and
 - (ii) RMS will:
 - (A) grant a lease to the Asset Trustee of the M5 East Motorway pursuant to clause 18; and
 - (B) to the extent to which RMS is entitled to do so, transfer to the Project Trustee ownership of RMS's rights, title and interests in all relevant operational assets, plant and equipment and any Intellectual Property Rights that are:
 - (aa) identified to RMS by the Project Trustee in writing prior to the M5E Transfer Date; and
 - (bb) required for the operations, maintenance and repair of the M5 East Motorway.
- (b) Except to the extent set out in this clause 4A, RMS is not obliged to replace or repair any element of the M5 East Motorway.

4A.2 **M5 East Consultant**

- (a) The Asset Trustee and RMS must, within 6 months after the date of this deed, jointly engage one or more independent condition consultants (**M5 East Consultant**) to make determinations on the matters that this clause 4A expressly requires be determined by a M5 East Consultant.
- (b) The cost of engaging the M5 East Consultants will be shared equally between the Asset Trustee and RMS.
- (c) The parties acknowledge and agree that:
 - (i) without limiting the effect which the determinations of a M5 East Consultant will have upon the rights and obligations of the parties under this clause 4A, a M5 East Consultant will not have any power to give any Directions to any of the parties; and
 - (ii) each M5 East Consultant will be obliged to act independently of RMS, the Trustees and their respective Related Parties, and will not be an employee, agent or consultant of RMS or the Trustees.
- (d) The parties must provide the M5 East Consultants and each other with all information and documents, and allow the M5 East Consultants and each other to access the M5 East Motorway, as may be necessary or reasonably required by the M5 East Consultant to allow each M5 East Consultant to perform its obligations under this clause 4A.

4A.3 **M5 East Asset Works**

- (a) RMS must undertake such works (if any), or procure that such works (if any) are undertaken, as may be necessary to ensure that:
- (i) the M5 East Assets are in the condition required by the M5 East Motorway Agreed Condition Specification;
 - (ii) the M5 East Motorway is otherwise fit for the purpose for which the M5 East Motorway was designed; and
 - (iii) the M5 East Motorway is capable of being operated by an experienced and competent operator using Good Industry Practice so as to comply with the M5 East Motorway Planning Approval,
- on the M5E Transfer Date (**M5 East Asset Works**).
- (b) RMS may engage any entity to perform any of the M5 East Asset Works prior to the M5E Transfer Date, provided that any such engagement will not relieve RMS of its obligations under clause 4A.3(a).
- (c) A M5 East Consultant must inspect the M5 East Motorway and determine whether the M5 East Assets are in the condition required by the M5 East Motorway Agreed Condition Specification (**M5 East Condition Assessment**) as soon as reasonably practicable after:
- (i) the engagement of the relevant M5 East Consultant;
 - (ii) the second anniversary of the date of this deed or such other time agreed between the Asset Trustee and RMS; and
 - (iii) the M5E Transfer Date.
- (d) RMS and the Asset Trustee may attend any inspection of the M5 East Motorway referred to in clause 4A.3(c).
- (e) Within 20 Business Days after completion of an M5 East Condition Assessment referred to in clauses 4A.3(c)(i) or 4A.3(c)(ii), the relevant M5 East Consultant must give the Asset Trustee and RMS a report (**M5 East Condition Report**) which either:
- (i) confirms that the M5 East Assets are in the condition required by the M5 East Motorway Agreed Condition Specification; or
 - (ii) contains details of any M5 East Assets that the M5 East Consultant believes are not in the condition required by the M5 East Motorway Agreed Condition Specification.
- (f) Within 20 Business Days after completion of an M5 East Condition Assessment referred to in clause 4A.3(c)(iii), the relevant M5 East Consultant must give the Asset Trustee and RMS an M5 East Condition Report which either:
- (i) confirms that the M5 East Assets are in the condition required by the M5 East Motorway Agreed Condition Specification; or
 - (ii) contains details of any M5 East Assets that the M5 East Consultant believes are not in the condition required by the M5 East Motorway Agreed Condition Specification on the M5E Transfer Date.

- (g) The parties agree that the M5 East Consultant's determinations set out in an M5 East Condition Report issued by the M5 East Consultant under clause 4A.3(f) will be final and binding on the parties, except in the case of manifest error.
- (h) Subject to clause 4A.3(g), if a M5 East Consultant gives the Asset Trustee and RMS an M5 East Condition Report pursuant to clause 4A.3(f)(i) which confirms that the M5 East Assets are in the condition required by the M5 East Motorway Agreed Condition Specification, the parties agree that RMS will have satisfied its obligations under clause 4A.3(a).
- (i) Subject to clause 4A.3(g), if the M5 East Consultant gives the Asset Trustee and RMS an M5 East Condition Report pursuant to clause 4A.3(f)(ii) which contains details of any M5 East Assets that the M5 East Consultant believes are not in the condition required by the M5 East Motorway Agreed Condition Specification:
 - (i) RMS and the Asset Trustee must meet within 20 Business Days after receipt of that M5 East Condition Report to discuss that M5 East Condition Report and to agree:
 - (A) whether any further inspection or testing is required to confirm the findings in that M5 East Condition Report; and
 - (B) the M5 East Asset Works to be carried out by the Trustees in respect of the M5 East Assets identified in that M5 East Condition Report;
 - (ii) clause 14.1 will apply as if RMS had issued a Change Proposal requiring the Asset Trustee to carry out the M5 East Asset Works agreed between the parties pursuant to clause 4A.3(i)(i)(B), and the Asset Trustee must:
 - (A) use reasonable endeavours to carry out those M5 East Asset Works during scheduled maintenance periods; and
 - (B) Mitigate the cost of carrying out those M5 East Asset Works; and
 - (iii) if, despite using its reasonable endeavours to do so, the Asset Trustee cannot carry out any of those M5 East Asset Works during a scheduled maintenance period and must obtain a ROL pursuant to clause 9.6 in order to carry out those M5 East Asset Works, RMS must pay the Project Trustee an amount equal to the toll revenue that the Project Trustee demonstrates to RMS's satisfaction (acting reasonably) that the Project Trustee expected to earn from the aggregate tolls levied on the M5 East Motorway and the New M5 Motorway during the period in which traffic on the M5 East Motorway was restricted, closed, interfered with or obstructed in accordance with the ROL (**M5 East Asset Works Closure**), which must exclude:
 - (A) any the toll revenue earned by the Project Trustee from the tolls levied on the M5 East Motorway during the period of the M5 East Asset Works Closure;
 - (B) any toll revenue earned by the Project Trustee from traffic on the New M5 Motorway; and
 - (C) the Project Trustee's expected operation and maintenance costs and the Asset Trustee's expected Asset Renewal costs for the period of the M5 East Asset Works Closure (calculated in accordance with the Base Case Financial Model), to the extent that these have not been incurred as a result of the M5 East Asset Works Closure.

- (j) The parties agree that:
 - (i) RMS is only liable to pay the Project Trustee the amounts referred to in clause 4A.3(i)(iii) to the extent that those amounts are not included in the calculation of the Change Costs payable in respect of the Change referred to in clause 4A.3(i)(ii); and
 - (ii) the Trustees will have no entitlement to be paid any amount under this clause 4A.3 to the extent that those amounts were incurred as a consequence of the wrongful act or omission, negligence, Wilful Misconduct or breach of a Trustee or a Related Party of a Trustee.
- (k) Subject to clause 4D, the Trustees' entitlement to be paid any amount under this clause 4A.3 will be the sole remedy for the recovery of any Loss which a Trustee or its Related Party suffers or incurs arising out of or in any way in connection with the M5 East Asset Works or the condition of the M5 East Motorway (including a breach of this deed by RMS).

4A.4 **M5 East Planned Projects**

- (a) Subject to clause 4A.4(d) and without limiting RMS's obligations under clause 4A.3(a), RMS must carry out the M5 East Planned Projects prior to the M5E Transfer Date.
- (b) RMS may engage any entity to perform the M5 East Planned Projects prior to the M5E Transfer Date, provided that such engagement will not relieve RMS of its obligations under clause 4A.4(a).
- (c) RMS will develop a detailed scope of work (**M5 East Planned Project Scope of Work**) for each M5 East Planned Project that will be based on the description of that M5 East Planned Project set out in Schedule 64 and provide each M5 East Planned Project Scope of Works to the Asset Trustee for review and comment.
- (d) The parties agree that, notwithstanding any other provision of this deed:
 - (i) RMS's total aggregate liability in connection with the M5 East Planned Projects will be limited to \$██████████ in aggregate (**Cost Budget**); and
 - (ii) the M5 East Planned Project Scope of Work for each of the M5 East Planned Projects will be developed so as to minimise the likelihood that costs incurred by RMS in connection with all of the M5 East Planned Projects exceed the Cost Budget.
- (e) If RMS forms the view that the aggregate cost of the M5 East Planned Projects will exceed the Cost Budget, RMS will consult with the Trustees to consider any amendments to the M5 East Planned Project Scope of Works for those M5 East Planned Projects and the order in which those M5 East Planned Projects will be undertaken.
- (f) RMS will notify the Asset Trustee and the M5 East Consultant upon commencement of the M5 East Planned Projects and must, upon request by the relevant M5 East Consultant or the Asset Trustee, provide the M5 East Consultant or the Asset Trustee (as applicable) with access to the M5 East Motorway to inspect the progress of the M5 East Planned Projects.
- (g) The relevant M5 East Consultant must inspect the M5 East Planned Projects prior to M5 East Planned Project Completion at a frequency to be agreed between RMS and the Asset Trustee.

- (h) RMS may give written notice to the relevant M5 East Consultant and the Asset Trustee if RMS believes that an M5 East Planned Project has achieved M5 East Planned Project Completion.
- (i) The relevant M5 East Consultant must inspect the M5 East Motorway as soon as reasonably practicable, but not more than 20 Business Days after, receipt of a notice issued by RMS under clause 4A.4(h) to determine whether RMS has achieved M5 East Planned Project Completion in respect of an M5 East Planned Project or M5 East Planned Projects the subject of that notice.
- (j) RMS and the Asset Trustee may attend any inspection of the M5 East Motorway referred to in clause 4A.4(i).
- (k) Within 4 Business Days after RMS notifies the Asset Trustee and the relevant M5 East Consultant that M5 East Planned Project Completion has been achieved in respect of an M5 East Planned Project, the M5 East Consultant must give RMS and the Asset Trustee written notice that:
 - (i) the M5 East Consultant considers that RMS has achieved M5 East Planned Project Completion in respect of that Planned Project; or
 - (ii) the M5 East Consultant considers that RMS has not achieved M5 East Planned Project Completion, in which case that notice must contain details of the works which the M5 East Consultant believes must be carried out to achieve M5 East Planned Project Completion of that M5 East Planned Project (**Outstanding Works**).
- (l) The parties agree that that a M5 East Consultant's determinations set out in any notice given by the M5 East Consultant under clause 4A.4(k)(i) will be final and binding on the parties, except in the case of manifest error.
- (m) Subject to clause 4A.4(l), if a M5 East Consultant gives the Asset Trustee and RMS a notice that the M5 East Consultant considers that RMS has achieved M5 East Planned Project Completion in respect of an M5 East Planned Project pursuant to clause 4A.4(k)(i), the parties agree that RMS will have satisfied its obligations under clause 4A.4(a) in respect of that M5 East Planned Project.
- (n) Subject to clause 4A.4(l), if a M5 East Consultant gives RMS and the Asset Trustee a notice under clause 4A.4(k)(ii), the Asset Trustee and RMS must meet within 20 Business Days after receipt of that notice to discuss that notice and to agree the scope of the Outstanding Works to be carried out, having regard to that notice (**Agreed Outstanding Works**).
- (o) If RMS and the Asset Trustee agree that Agreed Outstanding Works will be carried out prior to the M5E Transfer Date, RMS must carry out the Agreed Outstanding Works.
- (p) If RMS and the Asset Trustee agree that Agreed Outstanding Works will be carried out on or after the M5E Transfer Date:
 - (i) clause 14.1 will apply as if RMS had issued a Change Proposal requiring the Asset Trustee to carry out the Agreed Outstanding Works, and the Asset Trustee must:
 - (A) use reasonable endeavours to carry out those Agreed Outstanding Works during scheduled maintenance periods; and
 - (B) Mitigate the cost of carrying out those Agreed Outstanding Works; and

- (ii) if, despite using its reasonable endeavours to do so, the Asset Trustee cannot carry out any of those Agreed Outstanding Works during a scheduled maintenance period and must obtain a ROL pursuant to clause 9.6 in order to carry out those Agreed Outstanding Works, RMS must pay the Project Trustee an amount equal to the toll revenue that the Project Trustee demonstrates to RMS's satisfaction (acting reasonably) that the Project Trustee expected to earn from the aggregate tolls levied on the M5 East Motorway and the New M5 Motorway during the period in which traffic on the M5 East Motorway was restricted, closed, interfered with or obstructed in accordance with the ROL (**Agreed Outstanding Works Closure**) which must exclude:
 - (A) any toll revenue earned by the Project Trustee from the tolls levied on the M5 East Motorway during the period of the Agreed Outstanding Works Closure;
 - (B) any toll revenue earned by the Project Trustee from traffic on the New M5 Motorway; and
 - (C) the Project Trustee's expected operation and maintenance costs and the Asset Trustee's expected Asset Renewal costs for the period of the Agreed Outstanding Works Closure (calculated in accordance with the Base Case Financial Model), to the extent that these have not been incurred as a result of the Agreed Outstanding Works Closure.
- (q) The parties agree that:
 - (i) RMS is only liable to pay the Trustees the amounts referred to in clause 4A.4(p)(ii) to the extent that those amounts are not included in the calculation of the Change Costs payable in respect of the Change referred to in clause 4A.4(p)(i); and
 - (ii) the Trustees will have no entitlement to be paid any amount under this clause 4A.4 to the extent that those amounts were incurred as a consequence of the wrongful act or omission, negligence, Wilful Misconduct or breach of a Trustee or a Related Party of a Trustee.
- (r) Subject to clause 4D, The Trustees' entitlement to be paid any amount under this clause 4A.4 will be the sole remedy for the recovery of any Loss which a Trustee or its Related Party suffers or incurs arising out of or in any way in connection with the Planned Projects (including a breach of this deed by RMS).

4A.5 **Warranties**

- (a) Each Trustee warrants to RMS that it has checked, examined, analysed and carefully considered Part B of the SWTC and that:
 - (i) it has satisfied itself as to the completeness, correctness, accuracy, appropriateness, suitability and adequacy of Part B of the SWTC;
 - (ii) it has satisfied itself that there are no omissions, ambiguities, discrepancies or inconsistencies in Part B of the SWTC;
 - (iii) Part B of the SWTC is proper, adequate and fit for its intended purpose, including for the purpose of enabling that Trustee to carry out the Asset Trustee's Activities or the Project Trustee's Activities (as applicable) in accordance with, and to ensure that those Trustee's Activities comply with, this deed including the other warranties in this clause 4B.5;

- (iv) it will be fully and exclusively responsible and liable for all risks howsoever they may arise as a result of the use by the Trustee of, or reliance upon, Part B of the SWTC; and
 - (v) the use of, or reliance upon, the SWTC does not affect any of its obligations under this deed, or entitle the Trustee to make any Claim against RMS arising out of or in any way in connection with Part B of the SWTC.
- (b) The Project Trustee warrants to RMS that it will operate, maintain and repair the M5 East Motorway so that the M5 East Motorway will be capable of achieving Final Handover at the end of the Term.
 - (c) The Asset Trustee warrants to RMS that it will undertake the Asset Renewal in respect of the M5 East Motorway so that the M5 East Motorway will be capable of achieving Final Handover at the end of the Term.
 - (d) This clause 4A.5 is to be read subject to any risk that RMS has accepted in respect of the M5 East Motorway accordance with this clause 4A.

4A.6 Parties to consult

- (a) If, prior to the M5E Transfer Date, the M5 East Consultant identifies a component of the M5 East Motorway identified in Schedule 64 :
 - (i) in the course of making its determination under clause 4A.3(c); or
 - (ii) in the M5 East Condition Report,
 and that defect is a defect which:
 - (iii) does not result in an M5 East Asset not being in the condition required by the M5 East Motorway Agreed Condition Specification; and
 - (iv) the Asset Trustee determines will have adverse financial and operational impacts for the Project,
 the Asset Trustee may give RMS written notice identifying that defect, and the adverse financial and operational impacts for the Project that the Asset Trustee has identified will arise as a consequence of that defect.
- (b) If the Asset Trustee gives RMS of a notice in accordance with clause 4A.6(a), the Asset Trustee and RMS must meet within 20 Business Days after receipt of that notice to discuss:
 - (i) the nature of that defect;
 - (ii) the inspection or testing of that defect that the Asset Trustee proposes to undertake during the Term; and
 - (iii) any work that the Asset Trustee proposes to undertake to rectify that defect; and
 - (iv) the adverse financial and operational impacts for the Project that the Asset Trustee has identified in that notice.

4AA KGI WORKS

4AA.1 KGI Warranties

- (a) On and from the later of:
 - (i) the M5E Transfer Date; and
 - (ii) if RMS has notified the Asset Trustees prior to the M5E Transfer Date that RMS is pursuing, or intends to pursue, warranty claims against the KGI Contractor under the KGI Warranties, the date on which RMS notifies the

Asset Trustee that RMS is no longer pursuing or no longer intends to pursue those claims under the KGI Warranties,

RMS assigns to the Asset Trustee all of RMS's rights, title and interest in the KGI Warranties and the Asset Trustee accepts the assignment.

- (b) RMS must provide the Asset Trustee with a full list and copies of all KGI Warranties at least 60 Business Days prior to the M5E Transfer Date.
- (c) RMS must give a written notice of assignment to the KGI Contractor and each KGI Warrantor within 5 Business Days of such assignment in a form reasonably requested by the Asset Trustee.

4AA.2 **Additional beneficiary under the KGI Side Deed Poll**

- (a) On the M5E Transfer Date, RMS must provide written notice to the KGI Contractor under clause 5(a) of the KGI Side Deed Poll notifying the KGI Contractor that the Asset Trustee is to become an additional beneficiary under the KGI Side Deed Poll.
- (b) If for any reason the Asset Trustee is unable to enforce its rights as a beneficiary under the KGI Side Deed Poll, RMS must, if requested in writing by the Asset Trustee, exercise its rights under clause 5(b) of the KGI Side Deed Poll to enforce its rights on behalf of the Asset Trustee.

4B **M5 WEST**

4B.1 **M5 West Transfer**

- (a) Subject to the express provisions of this deed, on and from the M5W Transfer Date:
 - (i) the Asset Trustee accepts all risks associated with the M5 West Motorway, including the risk of loss or damage to the M5 West Motorway until the end of the Term; and
 - (ii) RMS will:
 - (A) grant a lease to the Asset Trustee of the M5 West Motorway pursuant to clause 18; and
 - (B) to the extent to which RMS is entitled to do so, transfer to the Project Trustee ownership of RMS's rights, title and interests in all relevant operational assets, plant and equipment and any Intellectual Property Rights that are:
 - (aa) identified to RMS by the Project Trustee in writing prior to the M5W Transfer Date; and
 - (bb) required for the operations, maintenance and repair of the M5 West Motorway.
- (b) RMS agrees not to:
 - (i) amend Schedule 3 of the document referred to in paragraph (a) of the definition of "M5 West Project Documents" so as to increase the tolls which may be levied by Interlink without the prior consent of the Project Trustee; and
 - (ii) extend the term of the Existing M5 West Project Documents beyond 10 December 2026.

- (c) Except to the extent set out in this clause 4B, RMS is not obliged to replace or repair any element of the M5 West Motorway.

4B.2 **M5 West Consultant**

- (a) The Asset Trustee and RMS must, no later than 3 years prior to the M5W Transfer Date, jointly engage one or more independent condition consultant (**M5 West Consultant**) to make determinations on the matters that this clause 4B expressly requires be determined by a M5 West Consultant.
- (b) The cost of engaging the M5 West Consultant will be shared equally between the Asset Trustee and RMS.
- (c) The parties acknowledge and agree that:
 - (i) without limiting the effect which the determinations of a M5 West Consultant will have upon the rights and obligations of the parties under this clause 4B, a M5 West Consultant will not have any power to give any Directions to any of the parties; and
 - (ii) each M5 West Consultant will be obliged to act independently of RMS, the Trustees and their respective Related Parties, and will not be an employee, agent or consultant of RMS or the Trustees.
- (d) The parties must provide the M5 West Consultants and each other with all information and documents, and allow the M5 West Consultant and each other to access the M5 West Motorway, as may be necessary or reasonably required by the M5 West Consultant to allow each M5 West Consultant to perform its obligations under this clause 4B.

4B.3 **M5 West Asset Works**

- (a) RMS must undertake such works (if any), or procure that such works (if any) are undertaken, as may be necessary to ensure that:
 - (i) the M5 West Assets are in the condition required by the M5 West Motorway Agreed Condition Specification;
 - (ii) the M5 West Motorway is otherwise fit for the purpose for which the M5 West Motorway was designed; and
 - (iii) the M5 West Motorway is capable of being operated by an experienced and competent operator using Good Industry Practice so as to comply with the M5 West Motorway Planning Approval,on the M5W Transfer Date (**M5 West Asset Works**).
- (b) RMS may engage any entity to perform any of the M5 West Asset Works prior to the M5W Transfer Date, provided that any such engagement will not relieve RMS of its obligations under clause 4B.3(a).
- (c) A M5 West Consultant must inspect the M5 West Motorway and determine whether the M5 West Assets are in the condition required by the M5 West Motorway Agreed Condition Specification (**M5 West Condition Assessment**) as soon as reasonably practicable after:
 - (i) the engagement of the relevant M5 West Consultant;

- (ii) 18 months prior to the M5W Transfer Date or such other time agreed between the Asset Trustee and RMS; and
 - (iii) the M5W Transfer Date.
- (d) RMS and the Asset Trustee may attend any inspection of the M5 West Motorway referred to in clause 4B.3(c).
- (e) Within 20 Business Days after completion of an M5 West Condition Assessment referred to in clauses 4B.3(c)(i) or 4B.3(c)(ii), the relevant M5 West Consultant must give the Asset Trustee and RMS a report (**M5 West Condition Report**) which either:
 - (i) confirms that the M5 West Assets are in the condition required by the M5 West Motorway Agreed Condition Specification; or
 - (ii) contains details of any M5 West Assets that the M5 West Consultant believes are not in the condition required by the M5 West Motorway Agreed Condition Specification.
- (f) Within 20 Business Days after completion of an M5 West Condition Assessment referred to in clause 4B.3(c)(iii), the relevant M5 West Consultant must give the Asset Trustee and RMS an M5 West Condition Report which either:
 - (i) confirms that the M5 West Assets are in the condition required by the M5 West Motorway Agreed Condition Specification; or
 - (ii) contains details of any M5 West Assets that the M5 West Consultant believes are not in the condition required by the M5 West Motorway Agreed Condition Specification on the M5W Transfer Date.
- (g) The parties agree that that the M5 West Consultant's determinations set out in an M5 West Condition Report issued by the M5 West Consultant under clause 4B.3(f) will be final and binding on the parties, except in the case of manifest error.
- (h) Subject to clause 4B.3(g), if a M5 West Consultant gives the Asset Trustee and RMS an M5 West Condition Report pursuant to clause 4B.3(f)(i) which confirms that the M5 West Assets are in the condition required by the M5 West Motorway Agreed Condition Specification, the parties agree that RMS will have satisfied its obligations under clause 4B.3(a).
- (i) Subject to clause 4B.3(g), if a M5 West Consultant gives the Asset Trustee and RMS an M5 West Condition Report pursuant to clause 4B.3(f)(ii) which contains details of any M5 West Assets that the M5 West Consultant believes are not in the condition required by the M5 West Motorway Agreed Condition Specification:
 - (i) RMS and the Asset Trustee must meet within 20 Business Days after receipt of that M5 West Condition Report to discuss that M5 West Condition Report and to agree:
 - (A) whether any further inspection or testing is required to confirm the findings in that M5 West Condition Report; and
 - (B) the M5 West Asset Works to be carried out by the Trustees in respect of the M5 West Assets identified in that M5 West Condition Report;
 - (ii) clause 14.1 will apply as if RMS had issued a Change Proposal requiring the Asset Trustee to carry out the M5 West Asset Works agreed between the parties pursuant to clause 4B.3(i)(i)(B), and the Asset Trustee must:

- (A) use reasonable endeavours to carry out those M5 West Asset Works during scheduled maintenance periods; and
- (B) Mitigate the cost of carrying out those M5 West Asset Works; and
- (iii) if, despite using its reasonable endeavours to do so, the Asset Trustee cannot carry out any of those M5 West Asset Works during a scheduled maintenance period and must obtain a ROL pursuant to clause 9.6 in order to carry out those M5 West Asset Works, RMS must pay the Project Trustee an amount equal to the toll revenue that the Project Trustee demonstrates to RMS's satisfaction (acting reasonably) that the Project Trustee expected to earn from the tolls levied on the M5 West Motorway during the period in which traffic on the M5 West Motorway was restricted, closed, interfered with or obstructed in accordance with the ROL (**M5 West Asset Works Closure**), which must exclude:
 - (A) any toll revenue earned by the Project Trustee from the tolls levied on the M5 West Motorway during the period of the M5 West Asset Works Closure;
 - (B) any additional toll revenue earned by the Project Trustee from additional traffic on the New M5 Motorway or the M5 East Motorway directly as a result of, and during any period of, the M5 West Asset Works Closure; and
 - (C) the Project Trustee's expected operation and maintenance costs and the Asset Trustee's expected Asset Renewal costs for the period of the M5 West Asset Works Closure (calculated in accordance with the Base Case Financial Model), to the extent that these have not been incurred as a result of the M5 West Asset Works Closure.
- (j) The parties agree that:
 - (i) RMS is only liable to pay the Trustees the amounts referred to in clause 4B.3(i)(iii) to the extent that those amounts are not included in the calculation of the Change Costs payable in respect of the Change referred to in clause 4B.3(i)(ii); and
 - (ii) the Trustees will have no entitlement to be paid any amount under this clause 4B.3 to the extent that those amounts were incurred as a consequence of the wrongful act or omission, negligence, Wilful Misconduct or breach of a Trustee or a Related Party of a Trustee.
- (k) Subject to clause 4D, the Trustees' entitlement to be paid any amount under this clause 4B.3 will be the sole remedy for the recovery of any Loss which a Trustee or its Related Party suffers or incurs arising out of or in any way in connection with the M5 West Asset Works or the condition of the M5 West Motorway (including a breach of this deed by RMS).

4B.4 **Warranties**

- (a) Each Trustee warrants to RMS that it has checked, examined, analysed and carefully considered Part C of the SWTC and that:
 - (i) it has satisfied itself as to the completeness, correctness, accuracy, appropriateness, suitability and adequacy of Part C of the SWTC;
 - (ii) it has satisfied itself that there are no omissions, ambiguities, discrepancies or inconsistencies in Part C of the SWTC;

- (iii) Part C of the SWTC is proper, adequate and fit for its intended purpose, including for the purpose of enabling that Trustee to carry out the Asset Trustee's Activities or the Project Trustee's Activities (as applicable) in accordance with, and to ensure that those Trustee's Activities comply with, this deed including the other warranties in this clause 4A.5;
 - (iv) it will be fully and exclusively responsible and liable for all risks howsoever they may arise as a result of the use by the Trustee of, or reliance upon, Part C of the SWTC; and
 - (v) the use of, or reliance upon, the SWTC does not affect any of its obligations under this deed, or entitle the Trustee to make any Claim against RMS arising out of or in any way in connection with Part C of the SWTC.
- (b) The Project Trustee warrants to RMS that it will operate, maintain and repair the M5 West Motorway so that the M5 West Motorway will be capable of achieving Final Handover at the end of the Term.
 - (c) The Asset Trustee warrants to RMS that it will undertake Asset Renewal in respect of the M5 West Motorway so that the M5 West Motorway will be capable of achieving Final Handover at the end of the Term.
 - (d) This clause 4B.4 is to be read subject to any risk that RMS has accepted in respect of the M5 West Motorway in accordance with this clause 4B.

4B.5 Parties to consult

- (a) If, prior to the M5W Transfer Date, the M5 West Consultant identifies a defect in a component of the M5 West Motorway identified in Schedule 64:
 - (i) in the course of making its determination under clause 4B.3(c); or
 - (ii) in the M5 West Condition Report,
 and that defect is a defect which:
 - (iii) does not result in an M5 West Asset not being in the condition required by the M5 West Motorway Agreed Condition Specification; and
 - (iv) the Asset Trustee determines will have adverse financial and operational impacts for the Project,
 the Asset Trustee may give RMS written notice identifying that defect, and the adverse financial and operational impacts for the Project that the Asset Trustee has identified will arise as a consequence of that defect.
- (b) If the Asset Trustee gives RMS a notice in accordance with clause 4B.5(a), the Asset Trustee and RMS must meet within 20 Business Days after receipt of that notice to discuss:
 - (i) the nature of that defect;
 - (ii) the inspection or testing of that defect that the Asset Trustee proposes to undertake during the Term;
 - (iii) any work that the Asset Trustee proposes to undertake to rectify that defect; and
 - (iv) the adverse financial and operational impacts for the Project that the Asset Trustee has identified in that notice.

4B.6 Western Sydney Orbital Interface

If requested by RMS, the Trustees must enter into an interface agreement or protocol with respect to the operating interface between the M5 West Motorway and the Western Sydney Orbital Motorway during the period after the M5W Transfer Date with the

concessionaire of the Western Sydney Orbital Motorway (such interface agreement or protocol to be in a form satisfactory both parties (acting reasonably)).

4C **RMS OPTION REGARDING THE M5 WEST MOTORWAY**

4C.1 **RMS may exclude M5 West Motorway from the Project**

RMS may, in its absolute discretion and without being under any obligation to do so, exclude the M5 West Motorway from the Project pursuant to this clause.

4C.2 **Early Option Termination**

RMS may, at any time after the date of this deed, in its absolute discretion and without being under any obligation to do so, give to the Trustees irrevocable notice that it will not exercise the RMS M5 West Option, in which case this clause 4C will be of no further effect and the M5 West Motorway will remain part of the Project.

4C.3 **Conditions Precedent**

RMS's right to exercise the RMS M5 West Option and give an Option Exercise Notice is conditional on:

- (a) **(Ministerial Consents and Approvals)** all other necessary Ministerial consent and approvals have been obtained in relation to the RMS M5 West Option; and
- (b) **(No Termination Notice)** RMS has not issued a notice under clause 4C.2.

4C.4 **Notice of exercise**

- (a) Subject to clause 4C.2 and satisfaction of the conditions precedent under clause 4C.3, RMS may at any time during the Option Exercise Period issue to the Project Trustee and the Asset Trustee a written notice titled "M5 West Option – Decision to Exercise".
- (b) The Option Exercise Notice must set out each of the following:
 - (i) evidence of satisfaction of the conditions precedent under clause 4C.3 to the reasonable satisfaction of Asset Trustee; and
 - (ii) details of the proposed method of payment of any amounts under this clause 4C.

4C.5 **Notice of acceptance**

- (a) Within 7 days of receipt by Asset Trustee of the Option Exercise Notice, the Asset Trustee may give written notice to RMS titled "M5 West Option – Acceptance Notice".
- (b) The Option Acceptance Notice may set out each of the following:
 - (i) confirmation of acceptance of the satisfaction of the conditions precedent under clause 4C.3;
 - (ii) details of any claim that the Asset Trustee or any of its Related Parties would have under the indemnity under clause 4C.7; and
 - (iii) subject to the Trustees using their best endeavours to Mitigate the effects of the exercise of the RMS M5 West Option, amounts which a Trustee must pay as a consequence of the exercise of the RMS M5 West Option, including:

- (A) in respect of any Tax payable by a Trustee as a result of the exercise of the RMS M5 West Option, including but not limited to any income tax, withholding tax, capital gains tax or GST payable on or as a result of the Option Exercise Price or an Indemnified Party becoming directly or indirectly entitled to a share of the income of the Asset Trust to the extent it includes the Option Exercise Price;
- (B) Subcontractor Break Costs; and
- (C) reasonable third party advisor costs.

4C.6 **Payment**

- (a) Within the earlier of 21 days after providing the Option Exercise Notice under clause 4C.4 and 7 days of receipt by RMS of the Option Acceptance Notice, RMS must pay to the Asset Trustee the total of the following:
 - (i) the Option Exercise Price;
 - (ii) subject to clause 4C.6(b), all other amounts claimed under the Option Acceptance Notice pursuant to clauses 4C.5(b)(ii), 4C.5(b)(iii)(A) or 4C.5(b)(iii)(C); and
 - (iii) subject to clause 4C.14, any Subcontractor Break Costs claimed under the Option Acceptance Notice,

in immediately available funds, without set off or deduction including but not limited to any deduction for Tax.
- (b) The parties acknowledge that payment of amounts claimed under the Option Acceptance Notice, other than the Option Exercise Price, may be paid at a later date as agreed between the parties once any such amounts are fully determined.

4C.7 **Indemnity**

RMS must indemnify the Asset Trustee, the Project Trustee, any entity that is a beneficiary under the Asset Trust or the Project Trust and their Related Parties (each an **M5W Option Indemnified Party**) from and against any Loss suffered or incurred by an M5W Option Indemnified Party and any Claim against an M5W Option Indemnified Party:

- (a) in respect of any Tax payable by an M5W Option Indemnified Party as a result of the exercise of the RMS M5 West Option including but not limited to any income tax, withholding tax, capital gains tax or GST payable on or as a result of the Option Exercise Price or an Indemnified Party becoming directly or indirectly entitled to a share of the income of Asset Trust to the extent it includes the Option Exercise Price;
 - (b) as a result of a breach by RMS of the undertaking under clause 4C.12 below;
 - (c) subject to clause 4C.14, Subcontractor Break Costs; and
 - (d) reasonable third party advisor costs,
- caused by, arising out of or in connection with the exercise of the RMS M5 West Option.

4C.8 **Exclusion of M5**

From the date of payment of the amounts under clause 4C.6, the M5 West Motorway will no longer be part of the concession and will be excluded from the Motorway and the Project.

4C.9 **Further financing**

If RMS exercises the RMS M5 West Option, RMS acknowledges that the Project Trustee may undertake a further financing which will be deemed to be a No Consent Refinancing for the purposes of clause 36A.

4C.10 **Further acts**

Immediately following payment under clause 4C.6, the parties agree to negotiate in good faith the necessary amendments to the Project Documents, including this deed, to give further effect to the RMS M5 West Option and to any further financing transaction undertaken by the Project Trustee following the exercise of the RMS M5 West Option.

4C.11 **Base Case Finance Model**

The parties agree to negotiate in good faith the necessary updates to the Base Case Financial Model following the exercise of the RMS M5 West Option.

4C.12 **No dealings**

Subject to clause 37, RMS undertakes that it and its Related Parties will not transfer or enter into any transaction, arrangement or dealing which would or would have the effect of transferring any benefit in relation to the RMS M5 West Option other than to the NSW Government.

4C.13 **Lapse**

If RMS has not provided an Option Exercise Notice by the last day of the Option Exercise Period or has not made full payment pursuant to clause 4C.6 by the date on which it is required to do so, the RMS M5 West Option lapses and may not be exercised.

4C.14 **Subcontracts**

- (a) RMS is only liable for Subcontractor Break Costs incurred by the Trustees pursuant to clauses 4C.6(c) and 4C.7(c) in excess of \$[REDACTED] if the Trustees have obtained RMS's prior written consent before entering into the M5 West Subcontracts under which those Subcontractor Break Costs are payable.
- (b) The Trustees must obtain RMS's prior written consent to enter into any Subcontract for works or services in respect of the M5 West Motorway that will not be effected on an arm's length basis, such consent must be obtained prior to the earlier to occur of:
 - (i) receipt by the Trustees of a notice issued by RMS under clause 4C.2; and
 - (ii) the date on which the Option Exercise Period expires without RMS issuing an Option Exercise Notice.

4C.15 **No deductions, set-off or counterclaim**

All payments under this clause 4C must be:

- (a) made without demand from the Trustees;

- (b) free of any set-off or counterclaim; and
- (c) without deduction or withholding for any present or future Taxes unless RMS is compelled by law to deduct or withhold the same.

4C.16 Post Option Exercise

If RMS exercises the RMS M5 West Option pursuant to this clause 4C, RMS must not toll or levy or collect any charge for use of the M5 West Motorway during the period commencing on 11 December 2026 and ending on 10 December 2036.

4D. COMPENSATION EVENTS

- (a) If a Compensation Event referred to in paragraph (h) of the definition of "Compensation Event" occurs after M5E Transfer Date or the M5W Transfer Date (as relevant), the Trustees may claim compensation in accordance with the process set out in this clause 4D.
- (b) If Compensation Event referred to in paragraph (h) of the definition of "Compensation Event" occurs after the M5E Transfer Date or the M5W Transfer Date (as relevant):
 - (i) the Trustees must:
 - (A) take all reasonable steps to Mitigate the consequences of that Compensation Event;
 - (B) otherwise comply with all reasonable directions of RMS concerning that Compensation Event and the consequences thereof; and
 - (C) ensure that their Related Parties comply with the requirements of this clause 4D(b);
 - (ii) clause 14.1 will apply as if RMS had issued a Change Proposal requiring the Trustees to carry out work the rectification work in respect of the M5 East Motorway or the M5 West Motorway (as relevant); and
 - (iii) RMS must pay the Project Trustee within 20 Business Days of completion of the rectification work in respect of the M5 East Motorway or the M5 West Motorway (as relevant) (or such other period agreed between the parties) an amount calculated as equal to the toll revenue that the Project Trustee demonstrates to RMS's satisfaction (acting reasonably) that the Project Trustee expected to have earned (as at the date of this deed) from the tolls levied on:
 - (A) in the event of a catastrophic structural failing of a structural component of the M5 East Motorway, the M5 East Motorway and the New M5 Motorway; or
 - (B) in the event of a catastrophic structural failing of a structural component of the M5 West Motorway, the M5 West Motorway

in the period from the occurrence of the relevant event until the full rectification of the M5 East Motorway or the M5 West Motorway (as relevant) during which traffic on the M5 East Motorway or the M5 West Motorway (as relevant) was restricted, closed, interfered with or obstructed (**Compensation Period**), and such amount must:

- (C) not exceed the toll revenue that the Project Trustee expected to earn from tolls levied on the M5 East Motorway and the M5 West Motorway (as applicable) as forecast in the Base Case Financial Model (as at the date of this deed) during the Compensation Period;
- (D) in the case of the M5 East Motorway:
 - (aa) exclude any toll revenue actually earned by the Project Trustee from traffic on the New M5 Motorway or the M5 East Motorway;
 - (bb) exclude the amount by which toll revenues actually earned by the Project Trustee exceed the amount of toll revenue forecast in the Base Case Financial Model (as at the date of this deed) in respect of the M5 West Motorway during the Compensation Period; and
 - (cc) include the amount by which toll revenues actually earned by the Project Trustee is less than the amount forecast in the Base Case Financial Model (as at the date of this deed) in respect of the M5 West Motorway during the Compensation Period; and
- (E) in the case of the M5 West Motorway:
 - (aa) exclude any toll revenue actually earned by the Project Trustee from traffic on the M5 West Motorway;
 - (bb) exclude the amount by which toll revenues actually earned by the Project Trustee exceeds the amount of toll revenue forecast in the Base Case Financial Model (as at the date of this deed) in respect of the M5 East Motorway and New M5 Motorway during the Compensation Period; and
 - (cc) include the amount by which toll revenues actually earned by the Project Trustee is less than forecast in the Base Case Financial Model (as at the date of this deed) in respect of the M5 East Motorway and the New M5 Motorway during the Compensation Period;

less any savings in the Project Trustee's operation and maintenance costs and the Asset Trustee's Asset Renewal costs during the Compensation Period (each calculated in accordance with the Base Case Financial Model as at the date of this deed).

5. **CONDITIONS PRECEDENT**

5.1 **Commencement of obligations**

The rights and obligations of the parties under this deed (other than Day 1 Clauses which commence on the date of this deed) will commence on Financial Close.

5.2 **Satisfaction of conditions precedent**

- (a) RMS must use all reasonable endeavours to satisfy the Conditions Precedent referred to in paragraphs 7, 7A, 8 and 9 of Schedule 1 by the Target Financial Close Date.

- (b) The Trustees must use all reasonable endeavours to satisfy the Conditions Precedent referred to in paragraphs 1 to 6 (inclusive) of Schedule 1 by the Target Financial Close Date.
- (c) The parties may each waive in writing any of the Conditions Precedent in accordance with the following:
 - (i) RMS may waive any of the Conditions Precedent referred to in paragraphs 2, 3, 5, 6 and 7A of Schedule 1;
 - (ii) the Trustees may waive any of the Conditions Precedent referred to in paragraphs 7 and 9 of Schedule 1; and
 - (iii) RMS and the Trustees may together waive the Conditions Precedent referred to in paragraphs 1, 4 and 8 of Schedule 1.
- (d) Each of the Trustees and RMS must give the other party written notice when that Trustees or RMS, as applicable, have reasonably formed the view that a Condition Precedent that is for its respective benefit has been satisfied, and each of the Trustees and RMS, as applicable, must give written notice to the other parties of whether or not it agrees with such notice.
- (e) RMS's Representative will notify the Trustees promptly of the date on which RMS's Representative is satisfied that all Conditions Precedent have been satisfied or unconditionally waived.

5.3 **Target Financial Close Date**

- (a) If a Condition Precedent has not been satisfied (or waived under clause 5.2) by 11:59pm on the Target Financial Close Date, then any party may terminate this deed by prior notice in writing to the other party.
- (b) The period of the notice referred to in clause 5.3(a) will expire 5 Business Days after 11:59pm on the Target Financial Close Date and this deed will only be terminated if the Conditions Precedent have not been satisfied (or waived under clause 5.2) within that period.
- (c) If this deed is terminated pursuant to this clause 5.3:
 - (i) each of the other RMS Project Documents will be taken to have terminated at the time this deed is terminated;
 - (ii) RMS must return all Security Bonds provided by the Trustees to RMS within 5 Business Days after the date of termination of this deed; and
 - (iii) no party will have any Claim against any other party under or in respect of the RMS Project Documents or in respect of the reimbursement of costs or expenses or otherwise in connection with the Project, except for any Claim in relation to breaches of any Day 1 Clause.

5.4 **Base Case Financial Model Update**

- (a) The Base Case Financial Model will be updated (with RMS's consent (acting reasonably)) after Financial Close and as soon as reasonably practicable after the Borrower has entered into the swap transactions contemplated by the Swap Agreements and only to adjust for the swap rates actually transacted.

- (b) References in this deed to the Base Case Financial Model as at the date of this deed or at Financial Close will be a reference to the Base Case Financial Model updated pursuant to this clause 5.4.

6. **PLANNING APPROVAL AND EPBC ACT APPROVAL**

6.1 **Planning Approval and EPBC Act Approval application**

- (a) The parties acknowledge and agree that:
 - (i) RMS is the proponent under:
 - (A) the EP&A Act in respect of the Planning Approval;
 - (B) the EPBC Act in respect of the EPBC Act Approval; and
 - (C) the submission of any Planning Application Documents; and
 - (ii) as at the date of this deed, RMS has prepared and submitted:
 - (A) the Planning Approval Applications for the New M5 Main Works; and
 - (B) the EPBC Approval Application,
including all associated plans and specifications.
- (b) At any time upon request from RMS, the Asset Trustee must, in respect of any Planning Approval Application:
 - (i) prepare any applications, documentation, plans or reports required to be prepared in respect of the Planning Approval Application process or the EPBC Approval Application process (including in respect of any environmental impact statement required under the EP&A Act or required under the EPBC Act) (**Planning Application Documents**) and provide them to RMS within a reasonable period of RMS's request;
 - (ii) provide reasonable assistance to RMS in relation to the Planning Approval Application and the EPBC Approval Application, including by attending any relevant meeting as required by the RMS Representative and providing any information available to the Asset Trustee, at the Asset Trustee's cost;
 - (iii) co-operate with RMS in relation to the Planning Approval Application and the EPBC Approval Application; and
 - (iv) otherwise perform the Early Planning Works.
- (c) Not used.
- (d) The Asset Trustee must, to the extent that it has involvement in the preparation of a Planning Application Document:
 - (i) prepare each Planning Application Document and perform the Early Planning Works in accordance with Good Industry Practice;
 - (ii) use its best endeavours to ensure that each Planning Application Document complies with the EP&A Act, the EPBC Act and any other applicable legislation; and
 - (iii) provide all assistance necessary to enable:

- (A) the submission of each Planning Application Document required to be displayed and released under clause 6.1(d)(iii)(B) to the Department of Planning & Environment for adequacy review by no later than 23 September 2015; and
 - (B) the public display and release (by no later than 30 October 2015) of each Planning Application Document required to be displayed and released for the purposes of the EP&A Act, the EPBC Act and any other applicable legislation to the public in order to obtain the Primary Planning Approval and the EPBC Act Approval.
- (e) Except to the extent expressly stated otherwise in this clause 5.4, or clause 16.9, the Trustees will not be entitled to make, and RMS will not be liable upon, any Claim arising out of or in any way in connection with:
 - (i) any Planning Approval Application;
 - (ii) the EPBC Approval Application;
 - (iii) any Unforeseeable PA Requirements;
 - (iv) any Unforeseeable EPBC Requirements; and
 - (v) any Early Works.
- (f) The parties acknowledge and agree that:
 - (i) in relation to the Planning Approval:
 - (A) while the Baseline Conditions constitute the considered estimation of RMS the Trustees and the Contractor of the conditions and requirements that may be imposed under the Primary Planning Approval for the New M5 Main Works, the terms of any Primary Planning Approval which the Minister for Planning may issue arise from the exercise of a statutory discretion in accordance with the terms of the EP&A Act; and
 - (B) the exercise of the statutory discretion under the EP&A Act rests with the Minister for Planning whose decision will be informed by a detailed environmental impact assessment; and
 - (ii) in relation to the EPBC Act Approval:
 - (A) while the Baseline Conditions constitute the considered estimation of RMS, the Trustees and the Contractor of the conditions and requirements that may be imposed under the EPBC Act Approval, the terms of any EPBC Act Approval which the Minister for the Environment may issue arise from the exercise of a statutory discretion in accordance with the terms of the EPBC Act; and
 - (B) the exercise of the statutory discretion under the EPBC Act rests with the Minister for the Environment, whose decision may be informed by a detailed environmental impact assessment.
- (g) The Asset Trustee must use its best endeavours to assist RMS to ensure that the conditions of the Primary Planning Approval and the EPBC Act Approval are, in substance, as close as possible to the Baseline Conditions, having regard to the degree of control the parties and the proponent for the approvals have over this outcome.

6.2 **Lodgement of the Planning Approval and EPBC Act Approval application and issue of the Planning Approval and the EPBC Act Approval**

- (a) The parties acknowledge that in respect of the New M5 Main Works RMS has submitted:
- (i) the Planning Approval Application to the Minister for Planning; and
 - (ii) the EPBC Approval Application to the Minister for the Environment;
- prior to the date of this deed.
- (b) RMS will give notice to the Trustees, within 1 Business Day of:
- (i) the Primary Planning Approval being issued by the Minister for Planning; and
 - (ii) the EPBC Act Approval being issued by the Minister for the Environment,
- with each notice being accompanied by a copy of the approval that is the subject of the relevant notice.
- (c) Subject to clause 6.11(g), within 8 Business Days of:
- (i) the Primary Planning Approval being issued by the Minister for Planning, the RMS must give notice ("**PPA Notice**") to the Trustees:
 - (A) confirming that RMS considers that there are no Unforeseeable PA Requirements; or
 - (B) confirming that RMS considers that there are Unforeseeable PA Requirements and that RMS intends to exercise its rights to:
 - (aa) require a Change, in which case clause 6.7 will apply; or
 - (bb) terminate this deed, in which case clause 6.9 will apply,
- and RMS must then exercise the relevant rights described in clause 6.7 or clause 6.9 (as the case may be) within a reasonable time; and
- (ii) the EPBC Act Approval being issued by the Minister for the Environment, RMS must give notice ("**EPBCA Notice**") to the Trustees:
 - (A) confirming that RMS considers that there are no Unforeseeable EPBC Requirements; or
 - (B) confirming that RMS considers that there are Unforeseeable EPBC Requirements and that RMS intends to exercise its rights to:
 - (aa) require a Change, in which case clause 6.7 will apply; or
 - (bb) terminate this deed, in which case clause 6.9 will apply,
- and RMS must then exercise the relevant rights described in clause 6.7 or clause 6.9 (as the case may be) within a reasonable time.

6.3 Unforeseeable requirements of the Planning Approval and the EPBC Act Approval

- (a) For the purposes of this deed:
- (i) Unforeseeable PA Requirements of the Primary Planning Approval are requirements and conditions of the Primary Planning Approval which are not part of, and are materially different to the Baseline Conditions; and
 - (ii) Unforeseeable EPBC Requirements of the EPBC Act Approval are requirements and conditions of the EPBC Act Approval which are not part of, and are materially different to the Baseline Conditions,
- but:
- (iii) do not include the requirement to achieve ventilation outlet plume velocity of less than 4.3 m/s at PANS-OPs surface as required by Appendix B.3, section 1.7.3 e) of Part A of the SWTC;
 - (iv) do not include (subject to paragraph (v)) any other conditions of the Airport Parties which were reasonably foreseeable by the Asset Trustee at 2 September 2015 as a condition of approval required under Part 12 of the *Airports Act 1996* (Cth) or the *Airports (Protection of Airspace) Regulations 1996* (Cth); and
 - (v) do include any conditions to achieve more onerous requirements than specified in clause 6.3(a)(iii) (in relation to the matters in that clause) required by Department of Infrastructure and Regional Development or CASA or any other party (**Airport Parties**) or conditions which otherwise were not reasonably foreseeable by the Asset Trustee at 2 September 2015 as a condition of approval required under Part 12 of the *Airports Act 1996* (Cth) or the *Airports (Protection of Airspace) Regulations 1996* (Cth).
- It is agreed that RMS as proponent will seek and, as between the parties to this deed, RMS bears the risk of obtaining the approvals referred to in clauses 6.3(a)(iii), (iv) and (v) and any other approvals required from the Airport Parties to the extent necessary to obtain (in the time periods contemplated by this deed) the Planning Approval and EPBC Act Approval in accordance with this deed, and:
- (vi) the Asset Trustee's obligations under clauses 6.1(b), (d) and (g) will apply in respect of those approvals; and
 - (vii) the provisions of this clause 6 will apply if those approvals delay the Planning Approval or EPBC Act Approval.
- (b) Not used.
- (c) If RMS and the Trustees are unable to agree on whether any requirement of:
- (i) the Primary Planning Approval is an Unforeseeable PA Requirement; or
 - (ii) the EPBC Act Approval is an Unforeseeable EPBC Requirements,
- such disagreement will be treated as a dispute in accordance with clause 32.

6.4 **Not used**

6.5 **Early Works**

- (a) Prior to RMS's PPA Notice issued under clause 6.2(c), the Asset Trustee may only carry out the Early Works and the Trustees must not carry out any other Project Works, Temporary Works or Trustee's Activities without the prior written approval of RMS unless:
 - (i) RMS has issued a PPA Notice to the Asset Trustee pursuant to clause 6.2(c)(i)(A); or
 - (ii) RMS has issued a PPA Notice to the Asset Trustee pursuant to clause 6.2(c)(i)(B)(aa) and a Change Order to the Asset Trustee pursuant to clause 6.7.
 - (aa) Prior to RMS's EPBCA Notice issued under clause 6.2(c)(ii) and without limiting clause 6.5(a), the Trustees may only carry out such Project Works, Temporary Works and Trustee's Activities as do not require EPBC Act Approval.
 - (b) Prior to the later of the issue of RMS's PPA Notice under clause 6.2(c)(i) and its EPBCA Notice issued under clause 6.2(c)(ii);
 - (i) not used;
 - (ii) where the period that the Early Works are performed extends beyond:
 - (A) the Planning Approval Target Date because the Primary Planning Approval has not been issued by that date; or
 - (B) the EPBC Act Approval Target Date because the EPBC Act Approval has not been issued by that date,
- RMS must require the Asset Trustee to continue to perform Early Works and must agree with the Asset Trustee, within a reasonable time, a reasonable increase in the Planning Termination Sum (subject to clauses 6.7, 6.8 or 6.11, without affecting the total amount payable to the Asset Trustee in respect of the New M5 Main Works D&C Deed contract sum) to reflect such extended period of performance of the Early Works; and
- (iii) in circumstances other than as contemplated by clause 6.5(b)(ii), where the scope and extent of the Early Planning Works that must actually be performed by the Asset Trustee is greater than that reasonably foreseen by the Asset Trustee, clause 14.1 will apply as if RMS had issued a Change Proposal to increase the scope and extent of the Early Planning Works. However:
 - (A) such a Change will be deemed not to be an Compensation Event or Act of Prevention;
 - (B) the Change Costs resulting from the Change will only be paid to the extent that the threshold in clause 6.8(b) is exceeded; and
 - (C) the Asset Trustee is only obliged to comply with the Change to the extent that it is able to require the Contractor to carry out the Change under the New M5 Main Works D&C Deed.

6.6 **Not Used**

6.7 **Direction to Proceed**

- (a) Without limiting clause 6.9, if:
- (i) the Minister for Planning grants, or indicates that they will grant, the Primary Planning Approval in respect of the New M5 Main Works, subject to an Unforeseeable PA Requirement;
 - (ii) the Minister for the Environment grants, or indicates that it will grant the EPBC Act Approval subject to an Unforeseeable EPBC Requirement;
 - (iii) RMS, acting reasonably and after having consulted with the Asset Trustee, considers that a Change is required to ensure that:
 - (A) the Primary Planning Approval in respect of the New M5 Main Works is granted;
 - (B) the Primary Planning Approval in respect of the New M5 Main Works is granted without being subject to an Unforeseeable PA Requirement;
 - (C) the EPBC Act Approval is granted; or
 - (D) the EPBC Act Approval is granted without being subject to an Unforeseeable EPBC Requirement; or
 - (iv) RMS issues a notice under clauses 6.2(c)(i)(B)(aa) or 6.2(c)(ii)(B)(aa) electing to issue a Change Proposal,
RMS:
 - (v) may within a reasonable period of time issue a Change Proposal to the Asset Trustee or the Project Trustee (as relevant) in accordance with clause 14.1; and
 - (vi) must issue a Change Order in accordance with sections 1.4(b), 1.7(b), 1.7(d) or 1.7(e)(i) of the Change Procedure,
setting out the details of a proposed Change to enable:
 - (vii) the Primary Planning Approval in respect of the New M5 Main Works to be granted, or granted without being subject to an Unforeseeable PA Requirement;
 - (viii) the Trustees to comply with the Unforeseeable PA Requirement;
 - (ix) the EPBC Act Approval to be granted, or granted without being subject to an Unforeseeable EPBC Requirement; or
 - (x) the Trustees to comply with the Unforeseeable EPBC requirement.
- (b) The Trustees must:
- (i) take all reasonable steps to mitigate the cost of the Change;
 - (ii) for this purpose, comply with all reasonable Directions of RMS concerning the Change, and its consequences; and

(iii) ensure that their Subcontractors comply with this clause 6.7(b),
and RMS's liability in respect of any Change Order issued pursuant to clause 6.7(a) will be reduced to the extent that the Trustees fail to comply with these obligations.

- (c) Despite any other provision of this clause 5.4, clause 14 or the Change Procedure:
- (i) the parties will each bear the aggregate of the Change Costs arising from all Changes proposed pursuant to clause 6.7(a) as follows:
- (A) subject to clause 6.8, the Asset Trustee will bear 100% of the Change Costs up to the amount referred to in clause 6.8; and
- (B) thereafter RMS will bear 100% of the Change Costs that are not borne by the Asset Trustee; and
- (ii) the Trustees will not be entitled to claim any Change Costs in respect of such a Change other than Change Costs in accordance with this clause 6.7(c).

6.7A **Compensation for Revenue**

Where as a result of an Unforeseeable PA Requirement RMS:

- (a) has not terminated the Project Deed pursuant to clause 6.9(a)(i); and
- (b) has issued a Change Order pursuant to clause 6.7(a) which adversely affects the use, patronage or capacity of the Motorway or the Project Trustee's ability to levy or collect tolls (**Planning Approval Event**),

RMS must, in addition to any Change Costs payable under clause 6.7, pay to the Project Trustee a lump sum amount calculated to reasonably compensate the Project Trustee for lost toll revenue that arises as a direct consequence of the Planning Approval Event, being the amount by which:

- (c) the toll revenue forecast in the Base Case Financial Model at the date of the deed (**Forecast Toll Revenue**); exceeds
- (d) the revised toll revenue which is forecast in a Base Case Financial Model which is updated by the Trustees to take into account the impact of the Unforeseeable PA Requirement,

and such amount must not exceed the Forecast Toll Revenue.

6.8 **Reimbursement for certain costs**

- (a) Subject to clause 6.8(b) but without limiting any other provision of this deed, the Trustees are responsible for bearing all costs and expenses of:
- (i) complying with their obligations arising out of or in connection with the Planning Approval and the EPBC Act Approval; and
- (ii) the Early Planning Works,
- including under clause 6.7(c).
- (b) RMS will reimburse the Trustees' following costs and expenses of complying with their obligations arising out of or in connection with the Planning Approval and the EPBC Act Approval:

- (i) Change Costs arising from all Changes pursuant to clause 6.2(c) and 6.7(a); and
 - (ii) Trustee's Delay Costs payable by RMS pursuant to clause 6.11(c),
- to the extent that they (in aggregate) exceed \$██████████ (as determined by the Independent Certifier appointed for the review of the New M5 Main Works).
- (c) Without limiting the rights of RMS to request information pursuant to clause 12.2, the Trustees must submit a monthly written report to the RMS's Representative that identifies in reasonable detail any costs of the kind referred to in clause 6.8(a)(ii), clause 6.8(b)(i) or clause 6.8(b)(ii) that have been incurred or reasonably anticipated to be incurred.

6.9 Termination

- (a) Despite any other provision of this clause 5.4, if:
 - (i) the Minister for Planning grants, or indicates that it will grant, the Primary Planning Approval in respect of the New M5 Main Works subject to an Unforeseeable PA Requirement;
 - (ii) the Primary Planning Approval in respect of the New M5 Main Works is not granted by the Planning Approval Longstop Date;
 - (iii) the Minister for the Environment grants, or indicates that it will grant, the EPBC Act Approval subject to an Unforeseeable EPBC Requirement; or
 - (iv) the EPBC Act Approval is not granted by EPBC Act Approval Longstop Date,

RMS may, and if the Primary Planning Approval has not been granted by the Project Approval Long Stop Date RMS must, terminate this deed by written notice to the Trustees and this deed will then be without further effect, except:

 - (v) in relation to rights and obligations arising before such termination; and
 - (vi) RMS must pay the Planning Termination Sum to the Asset Trustee in accordance with clause 31.11(d).
- (b) The parties agree that termination pursuant to this clause 6.9 will be immediate.
- (c) The Trustees acknowledge and agree that RMS will not have any Liability to the Trustees and the Trustees will not be entitled to make or bring any Claim, demand, action, proceeding or suit for damage against RMS, arising out of or in connection with the termination of this deed or the New M5 Main Works Deed under this clause 6.9 other than under clause 6.9(a) above.

6.10 Revised Schedule 17

Within 15 Business Days of each of RMS's PPA Notice and EPBCA Notice under clause 6.2(c) (other than 6.2(c)(i)(B)(bb) or 6.2(c)(ii)(B)(bb)), the RMS Representative will provide to the Trustees a revised version of Schedule 17 (with such revisions as are reasonable and necessary to reflect the terms of the Planning Approval in respect of the New M5 Main Works or the EPBC Act Approval, as applicable) with which the Trustees must comply.

6.11 Consequences of late Planning Approval or EPBC Act Approval

- (a) If the Primary Planning Approval has not been granted by the Minister for Planning by the Planning Approval Target Date:
- (i) subject to clause 6.11(c), RMS must pay to the Asset Trustee:
 - (A) ■% of the Trustee's Delay Costs arising as a direct result of the first month of the delay; and
 - (B) ■ of the Trustee's Delay Costs arising as a direct result of any delay thereafter,

caused by the Primary Planning Approval not being granted by the Planning Approval Target Date, from the Planning Approval Target Date for each day that the Primary Planning Approval is not granted up to the Planning Approval Longstop Date;
 - (ii) the Date for Opening Completion and Date for Completion will each be extended by a single day for each day after the Planning Approval Target Date that the Primary Planning Approval has not been granted up to the Planning Approval Longstop Date; and
 - (iii) the Final Expiry Date will be extended by a single day for each day after the Planning Approval Target Date that the Primary Planning Approval has not been granted up to the Planning Approval Longstop Date.
- (b) If the Primary Planning Approval has been granted by the Minister of Planning by the Planning Approval Target Date, but the EPBCA Notice has not been granted by the later of the EPBC Act Approval Target Date and the date which is 30 Business Days after the date on which the Primary Planning Approval is granted:
- (i) the Date for Opening Completion and Date for Completion will each be extended by a single day for each day after the later of the EPBC Act Approval Target Date and the date which is 30 Business Days after the date on which the Primary Planning Approval is granted that the EPBCA Notice has not been granted up to the EPBC Act Approval Longstop Date; and
 - (ii) the Trustees will be entitled to claim a Compensation Event in accordance with clause 16.9.
- (c) The Asset Trustee's entitlement to:
- (i) that portion of the Trustee's Delay Costs:
 - (A) under clause 6.11(a)(i)(A) that is payable to the Contractor will not exceed ■% of the relevant amount per day specified in Schedule 56; and
 - (B) under clause 6.11(a)(i)(B) that is payable to the Contractor will not exceed the relevant amount per day specified in Schedule 56,

for each day that the Date for Opening Completion and Date for Completion are each extended; and
 - (ii) the Trustee's Delay Costs under clause 6.11(a)(i) will be payable by RMS to the Asset Trustee only to the extent that the monetary aggregate set out in clause 6.8(b) has been exceeded.

- (d) The Trustees acknowledge that:
- (i) the Trustee's Delay Costs payable under clause 6.11(c) must be calculated in a manner that is transparent and avoids any double counting with any other payment that RMS must make to the either of the Trustees under this deed;
 - (ii) the relief given by RMS to the Trustees under this clause 6.11 is in full satisfaction of all claims, demands, actions, proceedings or suits for damages which either of the Trustees may make or bring against RMS arising out of or in connection with the Primary Planning Approval in respect of the New M5 Main Works not being granted by the Planning Approval Target Date, and the Trustees will have no other entitlement in connection with such delay, other than its rights (including under clause 16.9) in respect of the Compensation Event arising if the PPA Notice is not issued by the Planning Approval Longstop Date;
 - (iii) the Trustees will have no entitlement under this clause 6.11 in connection with any delay caused by the Primary Planning Approval in respect of the New M5 Project not being granted by the Planning Approval Longstop Date, and the Trustees sole entitlement in the event that the PPA Notice in respect of the New M5 Project is not issued by the Planning Approval Longstop Date is to compensation in accordance with clauses 16.9(c) or 6.11(g) or, if RMS issues a termination notice under clause 6.9(a), in accordance with clause 6.9; and
 - (iv) the Trustees will have no entitlement under this clause 6.11 in connection with any delay caused by the EPBCA Notice after the Primary Planning Approval is granted in respect of the New M5 Project not being issued by the EPBC Act Approval Target Date, and the Trustees sole entitlement in the event that the EPBCA Notice in respect of the New M5 Project is not granted by the EPBC Act Approval Target Date is to compensation in accordance with clauses 16.9(c) or 6.11(g) or, if RMS issues an termination notice under clause 6.9(a), in accordance with clause 6.9.
- (e) Where the Primary Planning Approval is granted after the Planning Approval Target Date or the EPBCA Notice is issued after the EPBC Act Approval Target Date (as relevant), RMS will give the Trustees written notice once the Primary Planning Approval or the EPBC Act Approval has been granted, confirming the extended Date for Opening Completion or the Date for Completion resulting from the operation of clause 6.11(a) or clause 6.11(b) (as relevant).
- (f) If RMS does not issue a termination notice under clause 6.9(a) prior to Planning Approval Longstop Date or the EPBC Act Approval Longstop Date, RMS acknowledges that a reasonable increase in the Planning Termination Sum (D&C) agreed with the Contractor to reflect the extended period of performance of the Early Works will be recoverable under clause 16.9(c)(i)(A) in respect of the Compensation Event referred to in paragraphs (d) or (e) of the definition of "Compensation Event".
- (g) Where:
- (i) the Primary Planning Approval is granted after the Planning Approval Long Stop Date; or
 - (ii) the EPBCA Notice is issued after the EPBC Act Approval Long Stop Date (as applicable),

but before the Project Approval Long Stop Date, and where RMS has not terminated this deed pursuant to clause 6.9(a), the parties agree:

(iii) if the Date for Opening Completion is extended pursuant to clause 16.2(c), in connection with a Compensation Event referred to in paragraphs (d) or (e) of the definition of "Compensation Event" and, as a result the "Sunset Date" (as defined in the New M5 Main Works D&C Deed) is later than 30 November 2021, the Asset Trustee will (or will procure that the Borrower will), provided that the Trustees have first consulted with RMS for a period of no less than 5 Business Days prior to the commencement of those negotiations, negotiate with the Senior Lenders (as that term is defined in the Senior Syndicated Facility Agreement) to attempt to agree the terms (including any increase in margin) of an extension of its "Availability Period", "Conversion Date", "Financiers Sunset Date" or "Final Repayment Date" (as each of those term is defined in the Senior Syndicated Facility Agreement) to ensure that the "Final Repayment Date" is at least 12 months after the "Financiers Sunset Date" (as extended);

(iv) the Asset Trustee will either:

(A) advise RMS of the revised terms negotiated between the Asset Trustee or the Borrower and the Senior Lenders under clause 6.11(g)(iii) and the additional financing costs that the Asset Trustee expects the Borrower, Asset Trustee or the Project Trustee will incur as a result of the extension of the "Sunset Date"; or

(B) notify RMS if it has not been possible to agree the revised dates or costs under clause 6.11(g)(iii) within 30 days of commencing the negotiation, in which case, RMS must terminate this deed pursuant to clause 6.9(a)(ii) or clause 6.9(a)(iv) (as applicable); and

(v) where the Asset Trustee has advised RMS of the terms negotiated between the Asset Trustee or the Borrower and the Senior Lenders in accordance with clause 6.11(g)(iv)(A), within 14 days of the receipt of the information in clause 6.11(g)(iv)(A), RMS must either:

(A) issue (as relevant):

(aa) a PPA Notice under either clause 6.2(c)(i)(A) or clause 6.2(c)(i)(B)(aa); or

(bb) a EPBCA Notice under either clause 6.2(c)(ii)(A) or clause 6.2(c)(ii)(B)(aa),

and pay to the Asset Trustee a lump sum amount calculated on a net present value basis to compensate the Borrower, the Asset Trustee or the Project Trustee (as applicable) for the additional fees, margin and costs payable to the Senior Lenders as a result of any extension of the Senior Construction Facility (as that term is defined in the Senior Syndicated Facility Agreement), which must be calculated:

(cc) on the basis of the total senior loan financing costs to be incurred up to Completion as set out in the Base Case Financial Model; and

(dd) without double counting any other payment RMS has made or is obliged to make to the Trustees under this deed (including under this clause 5.4 or clause 16.9),

and consent to the amendments to the Debt Financing Documents and the Project Documents that are required to implement the matters set out in clause 6.11(g)(iv)(A); or

(B) terminate this deed pursuant to clause 6.9(a)(ii) or clause 6.9(a)(iv) (as applicable).

(h) If:

(i) on or prior to the Date of Opening Completion RMS has (for any reason in connection with this clause 6.11) paid a Trustee an amount of money on account of the Financing Delay Costs in respect of a period occurring after the actual Date of Opening Completion; and

(ii) the actual Date of Opening Completion occurs prior to 18 February 2020,

then by no later than that date which is 20 Business Days after the actual Date of Opening Completion, the Project Trustee must refund to RMS the amount calculated as the Financing Delay Costs paid by RMS in respect of the period between the actual Date of Opening Completion and 18 February 2020.

7. COMPLIANCE WITH LAW AND APPROVALS

7.1 Compliance with Law

The Trustees must:

- (a) in carrying out the Asset Trustee's Activities and the Project Trustee's Activities, comply with;
- (b) ensure that their Related Parties, in carrying out the Asset Trustee's Activities and the Project Trustee's Activities, comply with; and
- (c) ensure that the Project Works, the Temporary Works and the Motorway comply with,

all:

- (d) applicable Laws, including any change in Law after the date of this deed; and
- (e) NSW Government Policies,

and must not engage in, and must ensure that their Related Parties in carrying out the Asset Trustee's Activities or the Project Trustee's Activities do not engage in, any fraud, bribery or corruption.

7.2 Consents and Approvals

(a) In relation to any document required to be prepared pursuant to the Planning Approval or the EPBC Act Approval which relates to the Asset Trustee's Activities or the Project Trustee's Activities and which is also required to be submitted to an Authority, the Trustees must promptly:

- (i) provide RMS's Representative with copies of any such documents;
- (ii) provide RMS with an opportunity to comment on any such documents;
- (iii) consider any comments made by RMS in relation to any such documents;

- (iv) deliver a final version of any such documents in order to enable RMS to submit the relevant document to any Authority in accordance with the requirements of the Planning Approval; and
 - (v) provide RMS with such assistance as may be reasonably required by RMS to enable RMS to comply with all applicable Laws.
- (b) Each Trustee must:
- (i) expeditiously apply for and obtain from each relevant Authority all Approvals required to perform the Asset Trustee's Activities or the Project Trustee's Activities (other than the Planning Approval, the EPBC Act Approval and the Approvals specified in Part A of Schedule 17);
 - (ii) comply with the lawful requirements of each such Authority to permit their proper consideration of the applications for Approvals;
 - (iii) comply with, carry out and fulfil all conditions and requirements of all Approvals (including those which RMS is expressed under the terms of the Approval to be required to comply with, carry out and fulfil) to the extent relevant to the Asset Trustee's Activities or the Project Trustee's Activities, subject to the terms of Part B of Schedule 17 (which sets out the conditions and requirements of the Baseline Conditions that will be complied with and fulfilled by the parties if the Baseline Conditions form a part of the Planning Approval and the EPBC Act Approval, as applicable);
 - (iv) in respect of any Approval relating to the Asset Trustee's Activities or the Project Trustee's Activities, pay all fees, effect all insurances, provide any bonds and execute any undertakings or agreements required by any relevant Authority; and
 - (v) otherwise comply with clause 7.1.

7.3 **Modification Application Documents**

- (a) The parties agree that subject to the terms of Part B of Schedule 17 (which sets out the conditions and requirements of the Baseline Conditions that will be complied with and fulfilled by the parties if the Baseline Conditions form a part of the Planning Approval and the EPBC Act Approval, as applicable), the Asset Trustee must:
- (i) prepare any applications, documentation, plans or reports required to be prepared in respect of any proposed modification to the Planning Approval or the EPBC Act Approval (including, if applicable, the documents referred to in clause 7.2(a) and any other documents required to be submitted with the application for modification);
 - (ii) carry out and provide to RMS all surveys, investigations, reports and studies reasonably requested by RMS's Representative, to such standard and within such time as reasonably directed by RMS's Representative,
- together with the documents referred to in clause 7.3(a)(i) (**Modification Application Documents**); and
- (iii) provide whatever other assistance and information the RMS Representative reasonably requests to allow it to obtain the necessary amendments or modifications to the Planning Approval or the EPBC Act Approval.

- (b) The Asset Trustee warrants that:
 - (i) it will use its best endeavours to ensure that each Modification Application Document will comply with the EP&A Act, the EPBC Act and any other applicable legislation; and
 - (ii) it will prepare each Modification Application Document in accordance with Good Industry Practice.
- (c) The Asset Trustee:
 - (i) acknowledges and agrees that RMS is the proponent under the EP&A Act and the EPBC Act in respect of the submission of any Modification Application Documents; and
 - (ii) acknowledges that RMS will rely upon the Asset Trustee's warranties in this clause 7.3.

7.4 **Planning Approval Change Events and EPBC Act Approval Change Events**

- (a) Without limiting clause 7.4(b), clause 14.1 will apply as if RMS had issued a Change Order if a Planning Approval Change Event or an EPBC Act Approval Change Event occurs after the date of this deed and prior to the Date of Opening Completion and requires:
 - (i) a Change to be made to the Project Works, the Temporary Works or the process required to design and construct the Project;
 - (ii) a reduction in the Permitted Working Hours; or
 - (iii) a Change to the Motorway or its operation.
- (b) The Trustees must:
 - (i) take all reasonable steps to mitigate the cost of the Change;
 - (ii) for this purpose, comply with all reasonable directions of RMS concerning the Change, and its consequences; and
 - (iii) ensure that their Subcontractors comply with this clause 7.4(b),

and RMS's liability under clause 7.4(a) will be reduced to the extent that the Trustees fail to comply with these obligations.
- (c) Except to the extent expressly stated otherwise in this clause 7.4 or clause 23A, the Trustees will not be entitled to make, and RMS will not be liable upon, any Claim arising out of or in any way in connection with:
 - (i) a modification to the Planning Approval;
 - (ii) a Planning Approval Change Event;
 - (iii) a modification to the EPBC Act Approval; or
 - (iv) a EPBC Act Approval Change Event.

7.4A **Modifications to the Planning Approval and the EPBC Act Approval**

The Trustees:

- (a) acknowledge and agree that:
 - (i) as between RMS and the Trustees, only RMS is permitted to make or apply for modifications to the Planning Approval and the EPBC Act Approval;
 - (ii) RMS may refuse to make, seek or apply for such modification or discontinue or withdraw or change an application for such modification at any time; and
 - (iii) RMS need not apply for any modification to the Planning Approval on behalf of the Trustees unless the Asset Trustee first submits its proposal for modification to RMS's Representative for its review and RMS's Representative consents to the modification;
- (b) must not make, seek to or apply for any modification to the Planning Approval or the EPBC Act Approval other than through RMS; and
- (c) must pay to RMS all fees, costs and expenses arising out of, or in any way in connection with, such modification to the Planning Approval or the EPBC Act Approval instigated by the Trustees.

7.5 **Environmental assessment**

- (a) If there is a legal challenge brought about by way of commencement of court proceedings in relation to the environmental assessment or determination in respect of the Project, the Project Works, the Temporary Works or the Motorway under:
 - (i) the EP&A Act;
 - (ii) the EPBC Act; or
 - (iii) any other law,

(including a legal challenge to the Planning Approval or the EPBC Act Approval) (**Legal Challenge**), the Trustees must continue to perform their obligations under this deed unless, as a result of that Legal Challenge, they are otherwise ordered by a court or directed by RMS's Representative.
- (b) Subject to clause 7.5(c), as between RMS and the Trustees, RMS is responsible for dealing with the Legal Challenge as it sees fit in its absolute discretion.
- (c) If requested to do so by RMS, the Asset Trustee must procure that the Contractor provides reasonable assistance to RMS in dealing with any Legal Challenge, including by attending any relevant meetings and providing any information available to the Contractor, at the Asset Trustee's cost.
- (d) For the purposes of clause 7.5(a), RMS's Representative may by written notice direct the Trustees to suspend any or all of its obligations under this deed until such time as RMS gives the Trustees further written notice and the Trustees must comply with that notice.
- (e) RMS will have no liability to the Trustees in respect of an order by a court or direction by RMS's Representative that the Trustees cease to perform all or part of their obligations under this deed as a result of a Legal Challenge to the extent that the Legal Challenge:

- (i) is initiated or upheld, or the court order is made, due to:
 - (A) a Trustee's breach of, or failure to comply with its obligations under a Project Document;
 - (B) a wrongful act or omission of the Trustees or their Related Parties; or
 - (C) a failure by the Trustees or any of their Related Parties of the Trustees to comply with the EP&A Act or the EPBC Act; or
- (ii) relates to or arises out of or in connection with any Change proposed by the Trustees in accordance with section 2.2 of the Change Procedure or otherwise carried out by the Trustees without RMS having issued a Change Order in respect of that Change.

7.6 Landfill EPL and Trade Waste Agreement

RMS must accept (or procure that RMS's nominee accepts) the transfer of:

- (a) the Landfill EPL which satisfies the requirements of section 1.1.3(a)(iii) of Appendix B.30 to Part A of the SWTC; and
- (b) the Trade Waste Agreement which satisfies the requirements of section 1.1.3(b)(iii) of Appendix B.30 to Part A of the SWTC,

once the Date of Completion has occurred and the NSW EPA and Sydney Water, as applicable, have approved the transfer.

7.7 Authorisation for the purpose of the EPBC Act Approval

RMS will grant the Asset Trustee (or its nominee as relevant) such authorisation in relation to the EPBC Act Approval as it is necessary for RMS to provide for the Asset Trustee to lawfully carry out the Asset Trustee's Activities in accordance with this deed, provided that the Asset Trustee complies with terms of this deed and the requirements of the EPBC Act and the EPBC Act Approval.

7.8 Roads Act declarations and directions

- (a) RMS must recommend to the Minister to make, and ensure that the Minister:
 - (i) makes a declaration under section 52 of the Roads Act that such part of the Motorway not declared to be a tollway is declared as a tollway:
 - (A) in respect of the New M5 Motorway no later than the earlier of:
 - (aa) the date which is 6 months after RMS acquires all land required to enable the declaration to be made; or
 - (bb) the Date of Opening Completion for the New M5 Main Works;
 - (B) in respect of the M5 East Motorway, no later than the M5E Transfer Date;
 - (C) in respect of the M5 West Motorway where RMS has not exercised the RMS M5 West Option in accordance with clause 4C, the M5W Transfer Date if, on that date, the existing declaration in respect of the M5 West Motorway is no longer effective; and

- (ii) directs in accordance with section 63 of the Roads Act that all of the functions of a road authority in respect of that part of the Motorway declared to be a tollway as contemplated by clause 7.8(a)(i)(A) are the responsibility of RMS no later than the Date of Opening Completion for the New M5 Main Works; and
 - (iii) declare by order published in the Gazette that the Project Trustee is a toll operator in respect of the Motorway for the purposes of the definition of "toll operator" in the dictionary under the Roads Act no later than:
 - (A) in respect of the New M5 Motorway, the Date of Opening Completion of the New M5 Main Works;
 - (B) in respect of the M5 East Motorway, the M5E Transfer Date; and
 - (C) in respect of the M5 West Motorway where RMS has not exercised the RMS M5 West Option in accordance with clause 4C, the M5W Transfer Date.
- (b) RMS must ensure that the declarations and directions:
- (i) referred to in clauses 7.8(a)(i), 7.8(a)(ii) and 7.8(a)(iii);
 - (ii) provided by RMS to satisfy the condition precedents referred to in paragraphs 7 and 7A of Schedule 1 to this deed; and
 - (iii) where RMS does not exercise the RMS M5 West Option and where the Minister does not make a declaration in accordance with clause 7.8(a)(i)(C), previously given by the Minister in respect of the M5 West Motorway in accordance with sections 52 and 63 of the Roads Act,

are effective from the date on which they are made until the end of the Term.

8. RELATIONSHIP OF RMS AND THE TRUSTEES

8.1 RMS's Representative

- (a) RMS:
 - (i) must appoint a person to be RMS's Representative for the purposes of this deed;
 - (ii) may at any time replace RMS's Representative, in which event RMS must appoint another person as RMS's Representative; and
 - (iii) must give written notice of all appointments under clauses 8.1(a)(i) and 8.1(a)(ii) to the Trustees.
- (b) RMS's Representative may:
 - (i) by written notice to the Trustees appoint persons to exercise any of RMS's Representative's functions under this deed;
 - (ii) not appoint more than one person to exercise the same function under this deed; and
 - (iii) vary or revoke any appointment under clause 8.1(b)(i) by notice in writing to the Trustees.

- (c) RMS's Representative may continue to exercise a function under this deed despite appointing another person to exercise the function under clause 8.1(b).
- (d) An appointee of RMS's Representative under clause 8.1(b) may:
 - (i) by written notice to the Trustees appoint persons to exercise any of the appointee's functions under this deed;
 - (ii) not appoint more than one person to exercise the same function under this deed; and
 - (iii) revoke any appointment under clause 8.1(d)(i) by notice in writing to the Trustees.
- (e) The parties acknowledge and agree that RMS's Representative acts at all times as the servant or agent of RMS and is subject to the directions of RMS and will act solely in the interests of RMS.
- (f) Unless expressly provided otherwise in this deed, a representative of RMS appointed pursuant to this clause 8.1 is not obliged to review, or comment upon, any documentation or information which either Trustee gives to RMS in respect of the Project.

8.2 **Not used**

8.3 **Trustee's representatives**

- (a) The Trustees must, prior to the date of this deed, each give notice in writing to RMS in which the Project Trustee and the Asset Trustee each nominates the person that will act as a representative of and be authorised to act on behalf of that particular Trustee in discharging its functions under this deed.
- (b) Each Trustee may nominate more than one such person, and if so, it must in its written notice specify the functions which each person is authorised to discharge. Each Trustee may not nominate more than one person to discharge the same function or functions of that particular Trustee under this deed.
- (c) The Trustees may by notice in writing to RMS substitute a person appointed under this clause with another person.

8.4 **Authorities**

- (a) This deed will not in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of RMS to exercise any of its functions and powers pursuant to any Law.
- (b) Each Trustee acknowledges and agrees that, without limiting clause 8.4(a), anything which RMS does, fails to do or purports to do pursuant to its functions and powers under any Law will be deemed not to be an act or omission by RMS (including a breach of contract) under or in connection with this deed and will not entitle the Trustees to make any Claim against RMS.
- (c) The parties agree that clauses 8.4(a) and 8.4(b) are taken not to limit any Liability which RMS would have had to the Trustees under this deed as a result of a breach by RMS of a term of this deed but for clauses 8.4(a) and 8.4(b).

- (d) Each Trustee acknowledges and agrees that:
- (i) there are Authorities (other than RMS) with jurisdiction over aspects of the Asset Trustee's Activities, Project Trustee's Activities parts of the Construction Site, and other areas affected by the Trustee's Activities (including Extra Land);
 - (ii) such Authorities may from time to time exercise their statutory functions and powers in such a way as to disrupt, interfere with or otherwise affect the Asset Trustee's Activities or Project Trustee's Activities (including the exercise by persons (including individuals) acting on behalf of such Authorities of powers and functions including as necessary for such Authorities to comply with their statutory functions and powers);
 - (iii) notwithstanding any other provision of this deed, RMS is not authorised to:
 - (A) exercise any power, function or duty within the responsibility of any other Authority; or
 - (B) influence, override or direct any Authority in the proper exercise of its legal duties and functions;
 - (iv) notwithstanding any requirement that RMS use its best endeavours or reasonable endeavours to do anything or bring about any outcome under any Project Document, RMS is not obliged to:
 - (A) interfere with or influence the exercise by any Authority of a statutory power or discretion;
 - (B) exercise a power or discretion or otherwise act in a manner that it regards as not being in the public interest; or
 - (C) develop policy or legislate by reference only, or predominantly, to the interests of the Project; and
 - (v) except to the extent expressly stated otherwise in this deed, it bears the full risk of all occurrences of the kind referred to in clause 8.4(d)(ii) and will not be entitled to make, and RMS will not be liable upon, any Claim arising out of or in any way in connection with such occurrences.

8.5 **Senior Project Group**

- (a) A Senior Project Group must be established, and the parties must participate in the Senior Project Group, in accordance with Schedule 30A.
- (b) The parties may agree to establish additional project management groups.

8.6 **RMS action**

- (a) If:
 - (i) either Trustee:
 - (A) fails to perform an obligation under this deed, including the rectification of Defects; and
 - (B) has not within a reasonable time after the date of receipt of a written notice from RMS requiring such failure to be remedied or a direction from RMS under clause 17.1(b), taken steps to remedy the failure, or

having taken or procured such steps, fails to remedy or procure the remedy of the failure within a reasonable time; or

- (ii) RMS considers that urgent action is reasonably necessary to minimise the risk of harm to:
 - (A) the health or safety of persons;
 - (B) the Environment;
 - (C) any property; or
 - (D) the safe operation of any road,

then RMS may take such action as RMS considers necessary to remedy the failure by the relevant Trustee (including requiring the New M5 Main Works, the Construction Site, the Motorway or part of either to be closed) or to take that urgent action to minimise that risk of harm and RMS may for this purpose enter and remain on the Construction Site, any Extra Land, the Maintenance Site, the Motorway Stratum and any other land upon which the Asset Trustee's Activities or the Project Trustee's Activities are being carried out.

- (b) Subject to clause 4A (in respect of the M5 East Motorway) and clause 4B (in respect the M5 West Motorway), any Loss suffered or incurred by RMS in taking action referred to in clause 8.6(a)(i) or, as a result of a wrongful act or omission of the Trustees, clause 8.6(a)(ii), will be a debt due and payable from the Project Trustee to RMS.

8.7 **Document management and transmission**

- (a) Without limiting clause 42.1, the Trustees must:
 - (i) implement and use the PDCS to manage and transmit all documentation connected with the Project in accordance with the processes, procedures and systems in the SWTC or as otherwise reasonably required by RMS's Representative;
 - (ii) align its document management and quality processes to complement and utilise the functions and features of the PDCS;
 - (iii) use the PDCS mail module for all correspondence relating to the Project between RMS and the Trustees;
 - (iv) upload all Design Documentation and other documentation which is required for the performance of the Asset Trustee's Activities to the PDCS; and
 - (v) strictly adhere to the documentation numbering system, metadata structures and revision code sequences which are required by RMS.
- (b) Documents supplied to the Trustees will remain the property of RMS and must be returned by the Trustees to RMS on demand in writing. The documents must not, without the prior written approval of RMS, be used, copied or reproduced for any purpose other than the execution of the Asset Trustee's Activities or the Project Trustee's Activities as relevant.
- (c) Each Trustee must keep all of the records relating to the Asset Trustee's Activities and Project Trustee's Activities (as relevant in a secure and fire proof storage).

- (d) Neither Trustee will be entitled to make, and RMS will not be liable upon, any Claim arising out of or in any way in connection with complying with its obligations under this clause 8.7.
- (e) Each Trustee must ensure that any documentation that it provides to RMS in computer readable form contains no virus or computer software code which is intended or designed to:
 - (i) permit access to or use of a computer system by a third person not authorised by RMS; or
 - (ii) disable, damage or erase, or disrupt or impair the normal operation of any other software or data on a computer system.

9. TRUSTEES FUNDAMENTAL OBLIGATIONS

9.1 Trustees general obligations

- (a) The Asset Trustee must carry out the Asset Trustee's Activities, including:
 - (i) investigating, financing, funding, planning, designing, constructing and commissioning the Project Works and the Temporary Works;
 - (ii) contracting for the provision of, acquiring or otherwise procuring or providing all Materials, Construction Plant and Utility Services required for the performance of its obligations under this deed;
 - (iii) performing the New M5 Main Works D&C Phase Maintenance; and
 - (iv) undertaking the Asset Renewal,

in accordance with this deed.
- (b) The Project Trustee must carry out the Project Trustee's Activities, including:
 - (i) operating, maintaining and repairing the Motorway; and
 - (ii) after:
 - (A) in respect of the New M5 Motorway, the Date of Opening Completion;
 - (B) in respect of the M5 East Motorway, the M5E Transfer Date; and
 - (C) in respect of the M5 West Motorway, the M5W Transfer Date,

unless otherwise expressly permitted by this deed, keeping all traffic lanes of the Motorway open to the public for the safe, efficient and continuous passage of vehicles at all times during the Term; and
 - (iii) undertaking the O&M Work,

in accordance with this deed.
- (c) The Asset Trustee and the Project Trustee must yield up possession of the Motorway to RMS in accordance with clause 34 at the end of the Term.

- (d) The Asset Trustee warrants that:
 - (i) the Project Works will:
 - (A) be completed in accordance with, and satisfy the requirements of, this deed;
 - (B) upon Opening Completion (or in the case of the SPI Interface Works, upon SPI Interface Works Completion) be fit for their intended purposes; and
 - (C) thereafter, at all relevant times during the Term (assuming no early termination), remain fit for their intended purposes;
 - (ii) the Temporary Works will at all relevant times be fit for their intended purposes;
 - (iii) the New M5 Main Works D&C Phase Maintenance and the Asset Renewal will be completed in accordance with, and satisfy the requirements of, this deed; and
 - (iv) upon Opening Completion (or in the case of the SPI Interface Works, upon SPI Interface Works Completion), the design life of each part of the Project Works will meet or exceed the design life standards specified in section 5.2 of Part A of the SWTC.
- (e) The Project Trustee warrants that:
 - (i) the O&M Work will be completed in accordance with, and satisfy the requirements of, this deed; and
 - (ii) the Motorway will be capable of achieving Final Handover at the end of the Term.
- (f) Each Trustee will be liable to RMS for the acts and omissions of its Related Parties and their respective employees and agents as if such acts or omissions were acts or omissions of the relevant Trustee.

9.2 Subcontracts

- (a) The engagement by the Asset Trustee of the Contractor to perform some or all of the Asset Trustee's obligations under this deed will not limit or affect the Asset Trustee's obligations or Liability under any RMS Project Document.
- (b) The:
 - (i) Asset Trustee will be vicariously liable to RMS for the acts and omissions of its Related Parties, the Contractor, any other Subcontractors, the Contractor's subcontractors and their respective related parties (excluding RMS) in performing the Asset Trustee's Activities as if such acts or omissions were the acts or omissions of the Asset Trustee; and
 - (ii) Project Trustee will be vicariously liable to RMS for the acts and omissions of its Related Parties, the Operator, any other Subcontractors, the Operator's subcontractors and their respective related parties (excluding RMS) in performing the Project Trustee's Activities as if such acts or omissions were the acts or omissions of the Project Trustee.

- (c) RMS and each Trustee acknowledge and agree that each Trustee's obligations under this deed are not lessened or otherwise affected by RMS's awareness of the terms of any Subcontract.
- (d) The Trustees must notify RMS of any proposed contract with a contract sum of more than \$██████:
- (i) in respect of the Project Works, the Temporary Works or the New M5 Main Works D&C Phase Maintenance where the Asset Trustee or the Contractor is a party to that contract; or
 - (ii) in respect of the Asset Renewal, regardless of whether or not the Asset Trustee is a party to that contract,
- and if RMS requires, give RMS access to, or a copy of, any such contract (including all plans specifications and drawings relating to that contract).
- (e) Each Trustee must ensure that every Subcontract which has a contract value of \$10 million or more includes a clause providing that if the Project Deed is terminated for any reason or RMS takes over the Asset Trustee's Activities or the Project Trustee's Activities (as relevant):
- (i) subject to the Contractor's Side Deed, the Operator's Side Deed or any side deed entered into pursuant to clause 19.12(b)(v)(B) (as applicable), the relevant Trustee and the relevant Subcontractor must, after RMS's Representative has given a Direction the relevant Trustee to do so, consent to a novation of the Subcontract to RMS; or
 - (ii) if RMS does not elect to novate the Subcontract, the relevant Trustee may terminate the Subcontract and pay to the Subcontractor an early termination amount which is not greater than (and which may be less than, or \$nil) the amount determined by the Independent Certifier as being:
 - (A) in respect of the New M5 Main Works D&C Deed or any other Subcontract entered into in connection with the Project Works, the aggregate of:
 - (aa) contract value of the work properly executed in accordance with the Subcontract;
 - (bb) reasonable costs and expenses properly incurred in expectation of completing the work under the Subcontract;
 - (cc) Liabilities to third parties (excluding any "related entity" (as defined in the Corporations Act)) for termination; and
 - (dd) ██████ of the unpaid balance of the contract sum on account of profit foregone,

less the total amounts paid up to and including the date of termination on account of the contract sum; and
 - (B) in respect of the O&M Deed or any other Subcontract entered into in connection with the O&M Work or Asset Renewal, the aggregate of:
 - (aa) the amounts which have accrued to the Subcontractor under the Subcontract but which remain unpaid by the relevant Trustee;

- (bb) reasonable costs and expenses properly incurred in expectation of performing the services under the Subcontract;
 - (cc) Liabilities to third parties (excluding any "related entity" (as defined in the Corporations Act)) for termination; and
 - (dd) ■% of the sum of the amounts that would otherwise be payable to the Subcontractor under the Subcontract in the 2 years after the date of termination on account of profit foregone.
- (f) The Asset Trustee must ensure that the Contractor, and the Project Trustee must ensure that the Operator, include an equivalent clause to clause 9.2(e)(ii) in each contract which has a contract value of \$10 million or more entered into by the Contractor or the Operator (respectively) with any subcontractor, supplier or consultant.
- (g) Where RMS is the Tolling Contractor (Back Office), the parties acknowledge and agree that the Trustees will be taken not to be in default of this deed, to the extent that such default is caused or contributed to by any failure by RMS to comply with the Tolling Services Agreement.

9.3 Utility Services

- (a) The Asset Trustee:
- (i) must obtain (and the Project Trustee must pay for) any Utility Services and all connections for all Utility Services either Trustee needs to perform their obligations under the Project Documents; and
 - (ii) must investigate, protect, relocate, remove, modify, support, reinstate and provide for Utility Services necessary for the Trustees to comply with their obligations under the Project Documents;
- (aa) Each of the Asset Trustee and the Project Trustee:
- (i) must ensure there are no unplanned disruptions to the Utility Services in carrying out the Asset Trustee's Activities or the Project Trustee's Activities (as relevant) and that planned disruptions to the Utility Services are minimised and that otherwise no Utility Services are damaged, destroyed, disconnected, disrupted, interfered with or interrupted by reason of the performance of the Asset Trustee's Activities or the Project Trustee's Activities (as relevant);
 - (ii) must, to the extent not prohibited by Law, indemnify RMS from and against any claims against RMS, or Loss suffered or incurred by RMS, arising out of or in connection with any damage to, disconnection or destruction of, disruption to or interference with or interruption to, any Utility Service arising out of or in connection with any act or omission of the Trustees or their Related Parties;
 - (iii) is responsible for, and assumes the risk of, all additional work, increased costs and any other Loss, delay or disruption (including any delay in achieving SPI Interface Works Completion, Opening Completion and Completion) it suffers or incurs arising out of or in any way in connection with the existence, location, condition and availability of all Utility Services required for the execution of the Asset Trustee's Activities or the Project Trustee's Activities (as relevant); and

- (iv) must enter into any agreement required by any Authority in connection with the matters set out in clauses 9.3(a) and 9.3(aa).

9.4 Long service levy

Before any construction work commences under this deed, the Asset Trustee must:

- (a) pay (or procure payment) to the Long Service Corporation or that body's agent all amounts due and payable for the long service levy in respect of the Asset Trustee's Activities under the *Building and Construction Industry Long Service Payments Act 1986* (NSW); and
- (b) produce to RMS's Representative the documents evidencing payment of the amounts referred to in clause 9.4(a).

9.5 Project Plans (Asset Trustee)

- (a) The Asset Trustee must prepare and develop the Project Plans specified in Appendix C.1 of Part A of the SWTC (other than those Project Plans referred to in clause 9.5A(a)) in accordance with Schedule 35.
- (b) No review of, comments upon, notice in respect of any Project Plan identified in clause 9.5(a) or any other act or omission of RMS's Representative (including a direction under section 5 of Schedule 35) about any such Project Plan will lessen or otherwise affect:
 - (i) the Liabilities or responsibilities of the Trustees under this deed or otherwise according to Law; or
 - (ii) RMS's rights against the Trustees, whether under this deed or otherwise according to Law.
- (c) The Asset Trustee:
 - (i) must comply with each Project Plan which has been submitted to RMS's Representative under this clause 9.5 and in respect of which RMS's Representative has not given a notice under section 2(a)(ii) of Schedule 35; and
 - (ii) agrees that compliance with any Project Plan will not in any way lessen or affect:
 - (A) the Liabilities or responsibilities of the Trustees under this deed or otherwise according to Law; or
 - (B) RMS's rights against the Trustees, whether under this deed or otherwise according to Law.
- (d) The Asset Trustee must comply with the restrictions upon the carrying out of the Asset Trustee's Activities specified in the SWTC.
- (e) To the extent they are relevant to operation, maintenance, repair and reinstatement of the New M5 Motorway, the M5 East Motorway or the M5 West Motorway during the Term, all Project Plans identified in clause 9.5(a) must be incorporated into the relevant O&M Manual.

9.5A **Project Plans (Project Trustee)**

- (a) The Project Trustee must prepare and develop the following Project Plans specified in Appendix C.1 of Part A of the SWTC:
 - (i) the Operations and Maintenance Plan;
 - (ii) the Traffic Management and Safety Plan; and
 - (iii) the Incident Response Plan,in accordance with Schedule 35.
- (b) No review of, comments upon, notice in respect of any Project Plan identified in clause 9.5A(a) or any other act or omission of RMS's Representative (including a direction under section 5 of Schedule 35) about any such Project Plan will lessen or otherwise affect:
 - (i) the Liabilities or responsibilities of the Trustees under this deed or otherwise according to Law; or
 - (ii) RMS's rights against the Trustees, whether under this deed or otherwise according to Law.
- (c) The Project Trustee:
 - (i) must comply with each Project Plan which has been submitted to RMS's Representative under this clause 9.5A and in respect of which RMS's Representative has not given a notice under section 2(a)(ii) of Schedule 35; and
 - (ii) agrees that compliance with any Project Plan identified in clause 9.5A(a) will not in any way lessen or affect:
 - (A) the Liabilities or responsibilities of the Trustees under this deed or otherwise according to Law; or
 - (B) RMS's rights against the Trustees, whether under this deed or otherwise according to Law.
- (d) The Project Trustee must comply with the restrictions upon the carrying out of the Project Trustee's Activities specified in the SWTC.
- (e) To the extent they are relevant to operation, maintenance, repair and reinstatement of the New M5 Motorway, the M5 East Motorway and the M5 West Motorway during the Term, all Project Plans identified in clause 9.5A(a) must be incorporated into the relevant O&M Manual.

9.6 **Control of traffic (Asset Trustee)**

- (a) Before the Asset Trustee undertakes any Project Works, Temporary Works, Asset Renewal, M5 East Asset Works, Agreed Outstanding Works, M5 West Asset Works or New M5 Main Works D&C Phase Maintenance, which would have the effect of restricting, closing, interfering with or obstructing the free flow of traffic on any road (including the M5 East Motorway or the M5 West Motorway), the Asset Trustee must undertake all matters necessary to carry out such Project Works, Temporary Works, Asset Renewal, M5 East Asset Works, Agreed Outstanding Works, M5 West Asset Works or New M5 Main Works D&C Phase Maintenance including, but not limited to:

- (i) obtaining all relevant Approvals (subject to clause 7.2);
 - (ii) preparing and submitting (or procuring that the Contractor prepares and submits):
 - (A) a traffic management plan for each stage of the Project Works (**Project Works Traffic Management Plan**) to the Transport for NSW Transport Management Centre and RMS, at least 25 Business Days prior to the commencement of physical works for that stage; and
 - (B) applications for a road occupancy licence (**ROL**) in accordance with the requirements of Appendix C.4 of Part A of the SWTC, to the Transport for NSW Transport Management Centre (with a copy to RMS) at least 10 Business Days prior to any road occupancy that requires a ROL (which can overlap with the 25 Business Day period in clause 9.6(a)(ii)(A) above),

in accordance with Good Industry Practice;
 - (iii) using all reasonable endeavours in accordance with Good Industry Practice to agree and obtain approved Project Works Traffic Management Plans and ROLs;
 - (iv) complying with road occupancy requirements, including all Project Works Traffic Management Plans and ROLs;
 - (v) paying any relevant Lane Occupancy Fees in accordance with Schedule 58; and
 - (vi) accepting and implementing the reasonable requirements of the parties who have input into the approval of the Project Works Traffic Management Plans (once approved, the **Approved Project Works Traffic Management Plans**) and ROLs.
- (b) The Asset Trustee:
- (i) is responsible for the control, direction and protection of all road, cyclist and pedestrian traffic in any way affected by the carrying out of the Asset Trustee's Activities;
 - (ii) must manage all such traffic to ensure:
 - (A) its continuous, safe and efficient movement;
 - (B) the traffic carrying capacity of Local Areas is maintained; and
 - (C) that any delays and disruptions to such traffic and the movement of such traffic are kept to an absolute minimum;
 - (iii) must carry out the Project Works and the Temporary Works in a way which minimises interference with the operation and use of the M5 East Motorway and the M5 West Motorway;
 - (iv) prior to the M5E Transfer Date and subject to clause 9.6(a), must ensure that:
 - (A) two lanes of the eastbound carriageway of the M5 East Motorway are available at all times;

- (aa) between 4:30am and 9:30pm (inclusive) on each Monday, Tuesday, Wednesday and Thursday; and
 - (bb) during the period commencing at 4:30am on each Friday and ending at 9:30pm on the following Sunday,

with a posted speed of not less than 80km/hour;
 - (B) two lanes of the westbound carriageway of the M5 East Motorway are available at all times:
 - (aa) between 5:00am and 10:00pm (inclusive) on each Monday, Tuesday, Wednesday and Thursday; and
 - (bb) during the period commencing at 5:00am on each Friday and ending at 10:00pm on the following Sunday,

with a posted speed of not less than 80km/hour;
 - (C) all lanes of each carriageway of the M5 West Motorway are available at all times between 5:00am and 9:30pm (inclusive) with a posted speed of not less than 80km/hour; and
 - (D) neither carriageway of the M5 East Motorway or the M5 West Motorway is closed in its entirety at any time on any day (except where a Planned Lane Closure has been approved in accordance with this deed),
- except as required to deal with an Emergency.
- (v) must coordinate its activities so as to ensure that no unnecessary interference is caused to members of the public (including the passage of people, vehicles and traffic) or the operations of Authorities;
 - (vi) must at all times comply with the construction traffic management plan prepared in accordance with the Planning Approval and the requirements of the SWTC and any Third Party Agreement in respect of road traffic management and safety;
 - (vii) must comply with the directions of any relevant Authority (including the Transport for NSW Transport Management Centre) and RMS (in its capacity as an Authority) with respect to such management; and
 - (viii) acknowledges and agrees that the Transport for NSW Transport Management Centre operates independently of RMS, and that nothing the Transport for NSW Transport Management Centre does, fails to do or purports to do pursuant to its functions and powers under any Law (including a decision not to grant a ROL) will:
 - (A) be considered as an act or omission of RMS;
 - (B) constitute an Act of Prevention; or
 - (C) entitle the Trustees to make any Claim.
- (c) The Asset Trustee must give the public sufficient notice of the arrangements agreed under clause 9.6(a) and in designing and implementing the Project Works Traffic Management Plans and all aspects of the Asset Trustee's Activities, seek to

minimise delays and disruption to traffic to the extent consistent with the performance of the Asset Trustee's Activities in accordance with this deed.

- (d) Despite any ROL issued for any lane or shoulder closure, RMS's Representative may at any time direct the Asset Trustee to temporarily suspend any Asset Trustee's Activities and to re-open the lane or shoulder.

9.6A Control of Traffic (Project Trustee)

- (a) Before the Project Trustee undertakes any O&M Work which would have the effect of restricting, closing, interfering with or obstructing the free flow of traffic on any road (including the M5 East Motorway or the M5 West Motorway), the Project Trustee must undertake all activities necessary to carry out such O&M Work including, but not limited to:

- (i) obtaining all relevant Approvals (subject to clause 7.2);
- (ii) preparing and submitting (or procuring that the Operator prepares and submits):
 - (A) a traffic management plan for each stage of the O&M Work (**O&M Work Traffic Management Plan**) to the Transport for NSW Transport Management Centre and RMS, at least 25 Business Days prior to the commencement of physical works for that element; and
 - (B) applications for a ROL in accordance with the requirements of Appendix C.4 of Part A of the SWTC, to the Transport for NSW Transport Management Centre (with a copy to RMS) at least 10 Business Days prior to any road occupancy that requires a ROL (which can overlap with the 25 Business Day period in clause 9.6A(a)(ii)(A) above),

in accordance with Good Industry Practice;

- (iii) using all reasonable endeavours in accordance with Good Industry Practice to agree and obtain approved O&M Work Traffic Management Plans and ROLs;
 - (iv) complying with road occupancy requirements, including all O&M Work Traffic Management Plans and ROLs;
 - (v) paying any relevant Lane Occupancy Fees in accordance with Schedule 58; and
 - (vi) accepting and implementing the reasonable requirements of the parties who have input into the approval of the O&M Work Traffic Management Plans (once approved, the **Approved O&M Work Traffic Management Plans**) and ROLs.
- (b) The Project Trustee:
 - (i) is responsible for the control, direction and protection of all road, cyclist and pedestrian traffic in any way affected by the carrying out of the Project Trustee's Activities;
 - (ii) must manage all such traffic to ensure:
 - (A) its continuous, safe and efficient movement;

- (B) the traffic carrying capacity of Local Areas is maintained; and
- (C) that any delays and disruptions to such traffic and the movement of such traffic are kept to an absolute minimum;
- (iii) must coordinate its activities so as to ensure that no unnecessary interference is caused to members of the public (including the passage of people, vehicles and traffic) or the operations of Authorities;
- (iv) must at all times comply with the traffic management plan prepared in accordance with the Planning Approval and the requirements of the SWTC and any Third Party Agreement in respect of road traffic management and safety;
- (v) must comply with the directions of any relevant Authority (including the Transport for NSW Transport Management Centre) and RMS (in its capacity as an Authority) with respect to such management; and
- (vi) acknowledges and agrees that the Transport for NSW Transport Management Centre operates independently of RMS, and that nothing that the Transport Management Centre does, fails to do or purports to do pursuant to its functions and powers under any Law (including a decision not to grant a ROL) will:
 - (A) be considered an act or omission of RMS;
 - (B) constitute an Act of Prevention; or
 - (C) entitle the Trustees to make any Claim.
- (c) The Project Trustee must give the public sufficient notice of the arrangements agreed under clause 9.6A(a) and in designing and implementing the O&M Work Traffic Management Plans and all aspects of the Project Trustee's Activities, seek to minimise delays and disruption to traffic to the extent consistent with the performance of the Project Trustee's Activities in accordance with this deed.
- (d) Despite any ROL issued for any lane or shoulder closure, RMS's Representative may at any time direct the Project Trustee to temporarily suspend any Project Trustee's Activities and to re-open the lane or shoulder.

9.7 **Principal contractor (Project Work)**

- (a) In this clause 9.7 and clauses 9.7A, 9.8 and 9.8A, the terms "relevant entity", "principal contractor", "workplace", "construction project" and "construction work" have the same meaning as assigned to those terms in the WHS Legislation. For the purposes of the WHS Legislation and this deed, the Project Works and the Temporary Works are taken to be part of the same "construction project".
- (b) RMS and the Asset Trustee acknowledge and agree that:
 - (i) RMS, the Asset Trustee and the Contractor are party to the Principal Contractor Deed;
 - (ii) pursuant to the Principal Contractor Deed, RMS has engaged Leighton Contractors as the principal contractor in respect of the Project Works and the Temporary Works; and

- (iii) without limiting the Principal Contractor Deed, Leighton Contractors has undertaken to discharge the duties imposed on a principal contractor by the WHS Legislation in respect of the Project Works and the Temporary Works.
- (c) Without limiting the Asset Trustee's obligations under any other provision of this deed or the Principal Contractor Deed, if:
- (i) the engagement of Leighton Contractors as principal contractor pursuant to the Principal Contractor Deed is not effective for any reason or is not effective in respect of the whole of the New M5 Main Works; or
 - (ii) the Principal Contractor Deed is terminated for any reason before the New M5 Main Works is complete,
- then:
- (iii) to the extent the M5 Project includes construction work, RMS:
 - (A) engages the Asset Trustee as the principal contractor in respect of the New M5 Main Works on and from the date on which RMS's engagement and authorisation of Leighton Contractors as principal contractor is terminated; and
 - (B) authorises the Asset Trustee to have management and control of each workplace at which the construction work is to be carried out and to discharge the duties of a principal contractor under WHS Legislation; and
 - (iv) the Asset Trustee accepts the engagement as principal contractor and agrees to discharge the duties imposed on a principal contractor by the WHS Legislation.
- (d) The parties agree that the Asset Trustee's engagement and authorisation as principal contractor pursuant to clause 9.7(c) will continue:
- (i) subject to clause 9.7(d)(ii), until the earlier of:
 - (A) the termination of this deed;
 - (B) the Date of Opening Completion;
 - (C) in respect of each discrete part of the Third Party Works, the point in time when the relevant discrete part of the Third Party Works has been determined by the Independent Certifier to have been completed in accordance with clauses 17.3, 17.4 or 17.5 (as applicable);
 - (D) in respect of the SPI Interface Works, the Date of SPI Interface Works Completion (as defined under the New M5 Main Works D&C Deed); and
 - (E) in respect of the areas specified in the Site Access Schedule, the termination or expiry of the rights referred to in clause 11.1(a),

(unless sooner revoked by RMS); and
 - (ii) in respect of any work the subject of clause 26.1(c) or rectification work carried out under clause 17.1 that is construction work, during the period any such work is carried out.

- (e) The Asset Trustee must:
 - (i) ensure that if any Law, including in the State or Territory in which the Project Works or the Temporary Works are situated or being carried out (as the case may be) requires that:
 - (A) a person:
 - (aa) be authorised or licensed (in accordance with the WHS Legislation) to carry out any work at that workplace, that person is so authorised or licensed and complies with any conditions of such authorisation or licence; and/or
 - (bb) has prescribed qualifications or experience or, if not, is to be supervised by a person who has prescribed qualifications or experience (as defined in the WHS Legislation), that person has the required qualifications or experience or is so supervised; or
 - (B) a workplace, plant or substance (or design) or work (or class of work) be authorised or licensed, that workplace, plant or substance (or design), or work (or class of work) is so authorised or licensed;
 - (ii) not direct or allow a person to carry out work or use plant or a substance at a workplace unless the requirements of clause 9.7(e)(i) are met (including any requirement to be authorised, licensed, qualified or supervised); and
 - (iii) if requested by RMS or required by the WHS Legislation, produce evidence of any approvals, certificates, authorisations, licences, prescribed qualifications or experience or any other information relevant to work health and safety (as the case may be) to the satisfaction of RMS before the Asset Trustee or a Subcontractor (as the case may be) commences such work.
- (f) If the engagement of the Asset Trustee as principal contractor under this clause is not effective for any reason, the Asset Trustee agrees that it will exercise and fulfil the functions and obligations of the principal contractor under the WHS Legislation as if it had been validly engaged and authorised as principal contractor under clause 9.7(c).

9.7A **Principal Contractor (O&M Work)**

- (a) Without limiting the Project Trustee's obligations under any other provision of this deed, to the extent that:
 - (i) the O&M Work;
 - (ii) the Asset Renewal; and
 - (iii) any other work carried out pursuant to clause 17 or the Change Procedure after the date referred to in clause 9.7(d),
 (together the **O&M Phase Work**) includes construction work:
 - (iv) RMS engages the Project Trustee as the principal contractor in respect of the O&M Phase Work;
 - (v) the Project Trustee acknowledges that clause 18.1 and the M5 Subleases permit the Project Trustee to manage and control each workplace at which

the O&M Phase Work is to be carried out and to discharge the duties of a principal contractor under the WHS Legislation;

- (vi) the Project Trustee accepts the engagement as principal contractor and agrees to discharge the duties imposed on a principal contractor by the WHS Legislation; and
- (vii) the Project Trustee's engagement and authorisation as principal contractor pursuant to this clause 9.7A(a) will continue until the termination of this deed (unless sooner revoked by RMS).

(b) The Project Trustee must:

- (i) ensure that if any Law, including in the State or Territory in which the O&M Phase Works are situated or being carried out (as the case may be) requires that:
 - (A) a person:
 - (aa) be authorised or licensed (in accordance with the WHS Legislation) to carry out any work at that workplace, that person is so authorised or licensed and complies with any conditions of such authorisation or licence; and/or
 - (bb) has prescribed qualifications or experience or, if not, is to be supervised by a person who has prescribed qualifications or experience (as defined in the WHS Legislation), that person has the required qualifications or experience or is so supervised; or
 - (B) a workplace, plant or substance (or design) or work (or class of work) be authorised or licensed, that workplace, plant or substance (or design), or work (or class of work) is so authorised or licensed;
 - (ii) not direct or allow a person to carry out work or use plant or a substance at a workplace unless the requirements of clause 9.7A(b)(i) are met (including any requirement to be authorised, licensed, qualified or supervised); and
 - (iii) if requested by RMS or required by the WHS Legislation, produce evidence of any approvals, certificates, authorisations, licences, prescribed qualifications or experience or any other information relevant to work health and safety (as the case may be) to the satisfaction of RMS before the Project Trustee or a Subcontractor (as the case may be) commences such work.
- (c) If the engagement of the Project Trustee as principal contractor under this clause is not effective for any reason, the Project Trustee agrees that it will exercise and fulfil the functions and obligations of the principal contractor under the WHS Legislation as if it had been validly engaged and authorised as principal contractor under clause 9.7A(a).

9.8 **Work health and safety (Asset Trustee)**

- (a) The Asset Trustee must carry out the Project Works, the Temporary Works and the Asset Renewal:
 - (i) safely and in a manner that does not put the health and safety of persons at risk; and

- (ii) in a manner that protects property.
- (b) If there is a risk of injury to people or damage to property arising from the Project Works, the Temporary Works or the Asset Renewal:
- (i) RMS's Representative may direct the Asset Trustee to change its manner of working or to cease working to minimise that risk; and
 - (ii) the Asset Trustee must, at its cost, comply with any direction by RMS's Representative under clause 9.8(b)(i).
- (c) The Asset Trustee must:
- (i) ensure that in carrying out the Asset Trustee's Activities under this deed:
 - (A) it complies with all Laws and other requirements of this deed for work, health, safety and rehabilitation management;
 - (B) all Subcontractors engaged by the Asset Trustee and all subcontractors and consultants engaged by the Contractor comply with their respective obligations under the WHS Legislation; and
 - (C) it complies with its obligations under the WHS Legislation to consult, cooperate and coordinate activities with all other persons who have a work health and safety duty in relation to the same matter;
 - (ii) have a Corporate WHS Management System which complies with the Law and is otherwise in accordance with the NSW Government Work Health & Safety Management Systems and Auditing Guidelines (5th Edition) (September 2013);
 - (iii) exercise and fulfil, or procure that Leighton Contractors exercises and fulfils, all of the functions and obligations of a principal contractor under the WHS Legislation so as to:
 - (A) ensure that the responsibilities imposed on a principal contractor by the WHS Legislation are discharged; and
 - (B) enable RMS to satisfy its obligations under the WHS Legislation in connection with the Construction Site;
 - (iv) notify RMS's Representative immediately (and in any event, within 12 hours after such matter arising) of all work health, safety and rehabilitation matters arising out of, or in any way in connection with, the Asset Trustee's Activities;
 - (v) institute systems to obtain regular written assurances from all Subcontractors about their ongoing compliance with WHS Legislation including the due diligence obligations contained therein;
 - (vi) provide RMS's Representative with the written assurances referred to in clause 9.8(c)(v), together with written assurances from the Asset Trustee about the Asset Trustee's ongoing compliance with the WHS Legislation;
 - (vii) provide RMS's Representative with a written report of all work health, safety and rehabilitation matters (including matters concerning or arising out of, or in any way in connection with, clauses 9.7 and 9.8) or any other relevant matters as RMS's Representative may reasonably require from time to time,

including a summary of the Asset Trustee's compliance with the WHS Legislation;

- (viii) cooperate with RMS to ensure that all parties are able to comply with their respective obligations under the WHS Legislation;
 - (ix) exercise a duty of utmost good faith to RMS in carrying out the Asset Trustee's Activities to enable RMS to discharge its duties under the WHS Legislation;
 - (x) ensure that it does not do anything or fail to do anything that would cause RMS to be in breach of the WHS Legislation; and
 - (xi) ensure that each Subcontract includes provisions equivalent to clause 9.8 except for the Tolling Equipment Works Subcontract, which must instead contain provisions requiring the Tolling Equipment Works Contractor to:
 - (A) to the extent such matters are within the Tolling Equipment Works Contractor's control, provide and maintain a working environment that is safe and without risks to the health of any persons in accordance with all applicable Laws relating to work health and safety;
 - (B) comply with all applicable Laws relating to work health and safety;
 - (C) take all reasonable care to identify any work health and safety hazards associated with the services carried out by the Tolling Equipment Works Contractor and assess the risk of any hazard identified;
 - (D) identify and implement appropriate measures to eliminate, or where it is not possible to eliminate, control any reasonably foreseeable risks associated with such services, including preparing written work method statements if required by any applicable Laws relating to work health and safety; and
 - (E) provide the Asset Trustee with details of such risk assessments and the work method statements carried out by the Tolling Equipment Works Contractor and evidence of the implementation of measures to control any risks to the Asset Trustee and its personnel.
- (d) To the extent not prohibited by Law, the Asset Trustee must indemnify RMS from and against any claims against RMS, or Loss suffered or incurred by RMS, arising out of or in any way in connection with:
- (i) the failure of Leighton Contractors to exercise or fulfil the functions and responsibilities of the principal contractor under WHS Legislation; or
 - (ii) the Asset Trustee's failure to otherwise comply with clauses 9.7 or 9.8,

except to the extent the appointment or engagement of Leighton Contractors as principal contractor is revoked by RMS (in which case the Asset Trustee must indemnify RMS from and against any claim against RMS, or Loss suffered or incurred by RMS, arising out of or in any way in connection with a failure by the Asset Trustee or Leighton Contractors referred to in clause 9.8(d)(i) or 9.8(d)(ii) before that revocation).

9.8A Work Health and Safety (Project Trustee)

- (a) The Project Trustee must carry out the O&M Work:
 - (i) safely and in a manner that does not put the health and safety of persons at risk; and
 - (ii) in a manner that protects property.
- (b) If there is a risk of injury to people or damage to property arising from the O&M Work:
 - (i) RMS's Representative may direct the Project Trustee to change its manner of working or to cease working to minimise that risk; and
 - (ii) the Project Trustee must, at its cost, comply with any direction by RMS's Representative under clause 9.8A(b)(i).
- (c) The Project Trustee must:
 - (i) ensure that in carrying out the Project Trustee's Activities under this deed:
 - (A) it complies with all Laws and other requirements of this deed for work, health, safety and rehabilitation management;
 - (B) all Subcontractors and consultants engaged by the Project Trustee comply with their respective obligations under the WHS Legislation; and
 - (C) it complies with its obligations under the WHS Legislation to consult, cooperate and coordinate activities with all other persons who have a work health and safety duty in relation to the same matter;
 - (ii) have a Corporate WHS Management System which complies with the Law and is otherwise in accordance with the NSW Government Work Health & Safety Management Systems and Auditing Guidelines (5th Edition) (September 2013);
 - (iii) exercise and fulfil all of the functions and obligations of a principal contractor under the WHS Legislation so as to:
 - (A) ensure that the responsibilities imposed on a principal contractor by the WHS Legislation are discharged; and
 - (B) enable RMS to satisfy its obligations under the WHS Legislation in connection with the Construction Site;
 - (iv) notify RMS's Representative immediately (and in any event, within 12 hours after such matter arising) of all work health, safety and rehabilitation matters arising out of, or in any way in connection with, the Project Trustee's Activities;
 - (v) institute systems to obtain regular written assurances from all Subcontractors about their ongoing compliance with WHS Legislation including the due diligence obligations contained therein;
 - (vi) provide RMS's Representative with the written assurances referred to in clause 9.8A(a)(v), together with written assurances from the Project Trustee about the Project Trustee's ongoing compliance with the WHS Legislation;

- (vii) provide RMS's Representative with a written report of all work health, safety and rehabilitation matters (including matters concerning or arising out of, or in any way in connection with, clauses 9.7A and 9.8A) or any other relevant matters as RMS's Representative may reasonably require from time to time, including a summary of the Project Trustee's compliance with the WHS Legislation;
 - (viii) cooperate with RMS to ensure that all parties are able to comply with their respective obligations under the WHS Legislation;
 - (ix) exercise a duty of utmost good faith to RMS in carrying out the Project Trustee's Activities to enable RMS to discharge its duties under the WHS Legislation;
 - (x) ensure that it does not do anything or fail to do anything that would cause RMS to be in breach of the WHS Legislation; and
 - (xi) ensure that each Subcontract includes provisions equivalent to clause 9.8A.
- (d) To the extent not prohibited by Law, the Project Trustee must indemnify RMS from and against any claims against RMS, or Loss suffered or incurred by RMS, arising out of or in any way in connection with:
- (i) the failure of the Project Trustee to exercise or fulfil the functions and responsibilities of the principal contractor under WHS Legislation; or
 - (ii) the Project Trustee's failure to otherwise comply with clauses 9.7A or 9.8A.

9.9 **Project WHS Management Plan**

- (a) The Asset Trustee acknowledges that preparation of the Project WHS Management Plan in accordance with clause 9.5 is a condition precedent to the commencement of RMS's obligations to provide access under clause 11.1.
- (b) Without limiting any requirement of the WHS Legislation or this deed, the Project WHS Management Plan must:
 - (i) set out in adequate detail the procedures the Asset Trustee will implement to manage the Asset Trustee's Activities, the New M5 Main Works D&C Phase Maintenance, the Asset Renewal, the Project Works and the Temporary Works from a work health and safety perspective;
 - (ii) describe how the Asset Trustee proposes to ensure that the Project Works, Asset Trustee's Activities, the Temporary Works, the Asset Renewal, and the New M5 Main Works D&C Phase Maintenance are performed consistently with the WHS Legislation and any other Law;
 - (iii) address the matters specified in the WHS Legislation;
 - (iv) comply with the requirements applicable to a "Work Health and Safety Management Plan" or "Site Specific Safety Management Plan" set out in section 9 of the NSW Guidelines; and
 - (v) comply with the requirements applicable to a "Project WHS Management Plan" set out in the NSW Government Work Health and Safety Management Systems and Auditing Guidelines (5th edition) (September 2013).

- (c) Without limiting clause 9.5, the Asset Trustee must:
 - (i) continue to correct any defects in or omissions from the Project WHS Management Plan (whether identified by RMS's Representative or the Asset Trustee); and
 - (ii) regularly review and, as necessary, revise the Project WHS Management Plan in accordance with the WHS Legislation,

and submit an amended draft of its Project WHS Management Plan to RMS's Representative, after which clause 9.5 will reapply (to the extent applicable).
- (d) The Asset Trustee must document and maintain detailed records of inspections or audits undertaken as part of the Project WHS Management Plan.
- (e) The Asset Trustee must carry out the Project Works and the Temporary Works in accordance with, and otherwise implement, the latest Project WHS Management Plan.

9.10 **Site induction (Asset Trustee)**

- (a) Without limiting the Asset Trustee's obligations under clause 7.2(b) to comply with the conditions and requirements of all Approvals, the Asset Trustee must:
 - (i) provide safety and environmental site induction for persons nominated by RMS's Representative on the Construction Site and for all personnel directly or indirectly engaged by the Asset Trustee and requiring access to the Construction Site, any Extra Land and any other land upon which the Asset Trustee's Activities are being carried out; and
 - (ii) ensure such persons satisfactorily complete such site induction before such persons are given such access or commence such work.
- (b) The induction must:
 - (i) comply with all applicable Law, Project Plans and RMS's procedures, policies and rules; and
 - (ii) otherwise be in accordance with the requirements of this deed.
- (c) The Asset Trustee must keep and maintain comprehensive and detailed induction records and provide RMS's Representative or its nominee, upon request, with access to such records.

9.10A **Site Induction (Project Trustee)**

- (a) Without limiting the Project Trustee's obligations under clause 7.2(b) to comply with the conditions and requirements of all Approvals, the Project Trustee must:
 - (i) provide safety and environmental site induction for persons nominated by RMS's Representative on the Maintenance Site and for all personnel directly or indirectly engaged by the Project Trustee and requiring access to any land upon which the Project Trustee's Activities are being carried out; and
 - (ii) ensure such persons satisfactorily complete such site induction before such persons are given such access or commence such work.

- (b) The induction must:
 - (i) comply with all applicable Law, Project Plans and RMS's procedures, policies and rules; and
 - (ii) otherwise be in accordance with the requirements of this deed.
- (c) The Project Trustee must keep and maintain comprehensive and detailed induction records and provide RMS's Representative or its nominee, upon request, with access to such records.

9.11 **Community relations**

The Trustees:

- (a) acknowledge that the areas where the Asset Trustee's Activities and the Project Trustee's Activities are being carried out are of great importance to many people, including local residents and businesses; and
- (b) must manage and participate in all community relations and involvement programs and activities as:
 - (i) required by the SWTC;
 - (ii) contained in the Community Involvement Plan; or
 - (iii) reasonably required by RMS from time to time.

9.12 **Environmental Requirements**

The parties must comply with the requirements of Schedule 18.

9.13 **Liability under the NGER Legislation**

- (a) Without limiting any other clause in this deed, the Trustees acknowledge and agree that, if the Asset Trustee's Activities, the Project Trustee's Activities, the Project Works and the Temporary Works constitute a "facility" within the meaning of the NGER Legislation, then for the purposes of the NGER Legislation:
 - (i) the Asset Trustee has operational control of that facility or facilities up to and including the Date of Opening Completion and the Asset Trustee will comply with any obligations arising in respect of the Asset Trustee's Activities and the Project Trustee's Activities, or the Project Works and the Temporary Works under the NGER Legislation up to and including the Date of Opening Completion; and
 - (ii) the Project Trustee has operational control of that facility or facilities after the Date of Opening Completion and the Project Trustee will comply with any obligations arising in respect of the Asset Trustee's Activities and the Project Trustee's Activities under the NGER Legislation after the Date of Opening Completion.
- (b) If, despite the operation of clause 9.13(a), RMS incurs, or but for this clause 9.13 would incur, a Liability under or in connection with the NGER Legislation as a result of or in connection with the Asset Trustee's Activities or the Project Trustee's Activities, or the design and construction of the Project Works and the Temporary Works, and the NGER Legislation provides that such Liability can be transferred by RMS to the Asset Trustee or the Project Trustee (as applicable), the Trustees must,

upon the written request of RMS, do all things reasonably necessary to transfer the Liability to the Asset Trustee or the Project Trustee (as applicable).

9.14 **Indemnity**

Each Trustee must at all times indemnify RMS and its Related Parties from and against any Claim against, or Loss suffered or incurred by, RMS or its Related Parties, arising out of or in connection with any inaccuracy or omission in information the Trustee provides to RMS under clause 9.13 and sections 4 and 5 of Schedule 18.

9.15 **Aboriginal participation in construction**

- (a) The Trustees must comply with the NSW Government Aboriginal Participation in Construction Guidelines (2007) (**Guidelines**). Despite any other provision of this deed, including clauses 1.2(g) and 7.1, RMS acknowledges and agrees that, prior to Completion, the Trustees are not required to comply with any later or subsequent NSW Government policy or guidelines on Aboriginal Participation in Construction.
- (b) The Asset Trustees must:
 - (i) prior to commencing any Asset Trustee's Activities on the Construction Site, submit to RMS a "Statement of Opportunities for Aboriginal Participation" (as defined in the Guidelines) and document and submit to RMS's Representative a Project Aboriginal Participation Plan; and
 - (ii) implement the Project Aboriginal Participation Plan.
- (c) The Asset Trustee must systematically manage its Aboriginal participation processes in accordance with the Project Aboriginal Participation Plan.
- (d) The Asset Trustee must demonstrate to RMS, whenever requested, that it has met and is meeting at all times its obligations under clauses 9.15(a) to 9.15(c) inclusive.
- (e) The Asset Trustee acknowledges that RMS's Representative may review the Project Aboriginal Participation Plan:
 - (i) prior to the commencement of the Asset Trustee's Activities on the Construction Site; and
 - (ii) periodically during the course of the carrying out of the Asset Trustee's Activities,

including by conducting an on-site verification that the Project Aboriginal Participation Plan is being correctly implemented, that performance targets are being met and that the stated outcomes are being achieved.

9.16 **Management of customers, stakeholders and other affected parties**

- (a) Each Trustee must, in carrying out the Asset Trustee's Activities or the Project Trustee's Activities (as relevant):
 - (i) do all things necessary to minimise the disturbance, nuisance or inconvenience to the occupants of land adjoining the Construction Site, Extra Land, Maintenance Site or Motorway Stratum or located in the vicinity of the Construction Site, Extra Land, Maintenance Site or Motorway Stratum (including Existing Operations and Utility Services);

- (ii) to the extent reasonably possible in performing the Asset Trustee's Activities or the Project Trustee's Activities (as relevant), not interfere with the free movement of traffic into and out of, adjacent to, around, on or about the Construction Site or block or impair access to any premises, carparks, roadways, pedestrian ways, public spaces, parks, bicycle paths or facilities associated with the Existing Operations and Utility Services and must comply with RMS's reasonable directions in relation to them; and
 - (iii) program and coordinate the Asset Trustee's Activities or the Project Trustee's Activities (as relevant) using best practices so as to minimise the effect of the Asset Trustee's Activities or the Project Trustee's Activities (as relevant) on occupants of land adjoining the Construction Site, Extra Land, Maintenance Site or Motorway Stratum or located in the vicinity of the Construction Site, Extra Land, Maintenance Site or Motorway Stratum (including Existing Operations and Utility Services).
- (b) The Trustees must, in dealing with customers of the Motorway, stakeholders and other third parties affected by the Asset Trustee's Activities or the Project Trustee's Activities (as relevant) (Stakeholders):
- (i) ensure that a representative of the Asset Trustee can be contacted by Stakeholders during normal business hours and that the Asset Trustee's and the Project Trustee's contact details are publicly available, including on the Project website;
 - (ii) give reasonable consideration to all feedback received from Stakeholders; and
 - (iii) actively manage any issues raised by Stakeholders.
- and must otherwise comply with their obligations under Schedule 66.
- (c) The Trustees must immediately notify RMS in writing if any:
- (i) complaint is made or any proceedings are instituted or threatened;
 - (ii) letter of demand is issued; or
 - (iii) order or direction is made,
- by anyone (including any Authority or any landowner, lessee or licensee on or near the Construction Site, Extra Land, Maintenance Site or Motorway Stratum) against any Trustee or any of its Related Parties in respect of any aspect of the carrying out of the Asset Trustee's Activities or the Project Trustee's Activities (as relevant), including:
- (iv) Contamination, noise or vibration arising out of, or in any way in connection with, the Asset Trustee's Activities or the Project Trustee's Activities (as relevant);
 - (v) a Trustee's non-compliance with any Environmental Document (or condition or requirement thereunder), any Project Plan or any Law regarding the Environment;
 - (vi) the Contractor's use or occupation of the Construction Site or any Extra Land; or
 - (vii) Loss or damage of the kind referred to in clause 26.2.

- (d) Without limiting the Asset Trustee's obligations under section 12 of Part A of the SWTC, the Trustees must (at their own cost):
 - (i) deal proactively with any complaint, proceedings, letter of demand, order or direction referred to in clauses 9.16(b) and 9.16(c);
 - (ii) take all reasonable measures to resolve those matters as soon as possible (including defending any proceedings); and
 - (iii) keep a register of all complaints, proceedings, orders, letters of demand and directions referred to in clause 9.16(c), which:
 - (A) contains full details of:
 - (aa) each complaint, proceedings, letter of demand, order and direction; and
 - (bb) the action taken by the Asset Trustee or the Project Trustee (as the case may be) with respect to each complaint, proceedings, letter of demand, order and direction;
 - (B) is promptly updated to take into account any developments with respect to any complaint, proceedings, letter of demand, order or direction; and
 - (C) may be inspected by RMS's Representative whenever RMS's Representative reasonably requires.
- (e) Each Trustee must notify anyone who may be adversely affected by the Asset Trustee's Activities or the Project Trustee's Activities (as relevant) before the relevant work is carried out including notification of:
 - (i) the likely duration of that work; and
 - (ii) the 24 hour telephone number, postal address and email address established by the Trustees, in case any person wishes to make a complaint.

9.17 Existing Operations

- (a) Each Trustee acknowledges that:
 - (i) Existing Operators must not be prevented from continuing their Existing Operations during the course of the carrying out of the Asset Trustee's Activities or the Project Trustee's Activities; and
 - (ii) the access ways to the Construction Site are used by other persons (including in connection with the Existing Operations) and will not be available exclusively to the Asset Trustee or the Project Trustee.
- (b) The Asset Trustee bears the risk of coordinating its access to the Construction Site with any other relevant party (including Existing Operators) that use the access ways to the Construction Site.
- (c) Without limiting any other obligations of the Trustees under the Project Documents, the Asset Trustee must:

- (i) comply with RMS's reasonable directions in connection with:
 - (A) the Existing Operations (including access to and use of the Construction Site); and
 - (B) work health and safety issues to enable RMS to comply with, and not place RMS in breach of, its obligations under any Law relating to work health and safety;
 - (ii) comply with all reasonable policies, procedures and rules of RMS applying from time to time (as notified by RMS) in respect of the Existing Operations (including in relation to workplace health and safety and/or the Environment);
 - (iii) keep itself informed as to the requirements to comply with and not do anything which may place RMS in breach of Law applying to the Existing Operations on the Construction Site;
 - (iv) ensure that, in carrying out and completing the Asset Trustee's Activities, the Project Works properly interface and integrate with, and connect to, the physical infrastructure of the Existing Operations so as to enable the Project Works, when completed, to fully comply with the requirements of this deed; and
 - (v) immediately:
 - (A) repair and make good any damage to the physical infrastructure of the Existing Operations to the extent arising out of or in any way in connection with the Asset Trustee's Activities; and
 - (B) when directed by RMS's Representative, take such action as is required to ensure that its obligations in this clause 9.17(c) are complied with.
- (d) If the Asset Trustee becomes aware that a person who is not an Existing Operator (**Other Operator**):
- (i) owns, operates or controls any infrastructure (including existing infrastructure and Utility Services); or
 - (ii) undertakes any business or operation,

on or in the vicinity of the Construction Site or the New M5 Main Works Site (**Other Operations**), the Asset Trustee must use reasonable endeavours to:
 - (iii) ensure that the Other Operator is not prevented from carrying out the Other Operations by the Asset Trustee's Activities;
 - (iv) comply with RMS's reasonable directions in connection with the Other Operations; and
 - (v) not do anything to place RMS in breach of Law applying to the Other Operations on the Construction Site or New M5 Main Works Site.
- (e) The Asset Trustee must ensure that its Related Parties at all times comply with this clause 9.17.

9.18 **Third Party Agreements**

- (a) The Asset Trustee:
- (i) acknowledges that it has reviewed and carefully considered the Third Party Agreements (in the forms contained in Schedule 24); and
 - (ii) must comply with its obligations in Schedule 23.
- (b) The Trustees acknowledge that RMS may enter into other Third Party Agreements after the date of this deed, and where RMS requires clause 9.18 and Schedule 23 to apply to such Third Party Agreements then:
- (i) RMS must obtain the Asset Trustee's prior written consent to the terms of such Third Party Agreements;
 - (ii) the RMS Representative will provide to the Asset Trustee a revised version of Schedule 23 (with such revisions as are reasonable and necessary to reflect such Third Party Agreements); and
 - (iii) subject to the terms of the Asset Trustee's consent pursuant to clause 9.18(b)(i), clause 14.1 will apply as if RMS had issued a Change Proposal requiring the Asset Trustee to comply with the revised version of Schedule 23,
- but the Asset Trustee will only be required to comply with the revised version of Schedule 23 if RMS subsequently issues a Change Order.
- (c) RMS and the Trustees acknowledge and agree that:
- (i) the Trustees must use their best endeavours to enter into a direct agreement with RailCorp which will give them equivalent rights that RMS has under the Master Access Deed to arrange Track Possessions or any other access which the Trustees may require to the Railway Corridor or RailCorp's Facilities for the purpose of carrying out the Trustee's Activities; and
 - (ii) if the Trustees enter into a direct agreement with RailCorp, the parties agree that clause 23.3 of this deed will not apply to the New M5 Main Works or the Motorway from when that direct agreement and any necessary amendments that may be required to the New M5 Main Works D&C Deed come into full force and effect.

9.19 **Not used**

9.20 **Jobs Act**

The Trustees must:

- (a) take reasonable steps directed towards allowing Australian entities to have full, fair and reasonable opportunities to bid for the supply of key goods and services for the New M5 Project; and
- (b) without limiting clause 7.1, cooperate with RMS and SMC in relation to compliance with the requirements of the *Australian Jobs Act 2013* (Cth).

9.21 **Green and Gold Bell Frogs**

Design and construction of the Green and Gold Bell Frog habitat

- (a) The parties agree the following risk allocation for design and construction of the Green and Gold Bell Frog habitat works contemplated by section 2 of Appendix D.1 of Part A of the SWTC (GGBF Habitat Works) despite any provision of this deed (including clause 1.7) to the contrary:
- (b) The Biodiversity Offset Strategy for Green and Gold Bell Frogs will include the reference design set out in Attachment D.1-1 of Part A of the SWTC (as amended to ensure approval of the Biodiversity Offset Strategy) (the GGBF Reference Design).
- (c) As part of its design development obligations under clause 13, the Asset Trustee must develop the GGBF Reference Design in accordance with the requirements of this deed. The Final Design Documentation for the GGBF Habitat Works must be consistent with the GGBF Reference Design and the Asset Trustee must construct the GGBF Habitat Works in accordance with the Final Design Documentation.

Relocation and survival of the Green and Gold Bell Frogs

- (d) The Asset Trustee is not responsible for the survival of the Green and Gold Bell Frogs following any relocation or the success of any Green and Gold Bell Frog breeding program.

10. **SECURITY**

10.1 **Provision of Security Bond**

The Asset Trustee must procure that the Contractor provides to RMS prior to Financial Close a Security Bond for \$[REDACTED] in total which must be:

- (a) in the form of Schedule 47;
- (b) in favour of RMS;
- (c) where required, duly stamped;
- (d) issued by a bank licensed in Australia with a credit rating of no less than the Required Rating, or as otherwise approved by RMS in its absolute discretion; and
- (e) payable at an office of the issuer in Sydney (or such other place as RMS may approve).

10.2 **Release of Security Bond**

- (a) Subject to clause 10.2(b) and to RMS's rights to have recourse to the Security Bonds and to the cash proceeds if one or more of the Security Bonds are converted into cash, RMS must within 20 Business Days after the correction of all Defects in the Local Area Works, release the Security Bond provided by the Contractor under clause 10.1 (or the remaining proceeds of the Security Bond if it has been converted into cash).
- (b) Despite any other provision of this deed to the contrary, where:
 - (i) this deed may otherwise require RMS to release a Security Bond; or
 - (ii) this deed is terminated by RMS,

RMS may continue to hold the Security Bond after the date for its release or the termination of this deed to the extent of any claim which RMS may have against the Asset Trustee or the Contractor arising out of, or in any way in connection with, this deed or the Asset Trustee's Activities (as applicable) whether for damages or otherwise. However, the Security Bond must be released within 6 months of such date if the claim is not notified to the Trustees and made within that time.

10.3 **Recourse to Security Bond**

RMS:

- (a) may, without notice, only convert and have recourse to:
 - (i) any Security Bond at any time; or
 - (ii) the proceeds of any Security Bond if it has been converted into cash,to the extent of a bona fide Claim arising out of or in connection with this deed or any other Project Documents;
- (b) is not obliged to pay the Contractor, the Asset Trustee or any Related Party of the Asset Trustee interest on:
 - (i) any Security Bond; or
 - (ii) the proceeds of any Security Bond if it has been converted into cash; and
- (c) does not hold the proceeds referred to in clauses 10.3(a)(ii) or 10.3(b)(ii) on trust for the Contractor, the Asset Trustee or any Related Party of the Asset Trustee.

10.4 **Replacement of Security Bond**

- (a) If the issuer of a Security Bond ceases to have the Required Rating, then the Asset Trustee must procure that the Contractor:
 - (i) promptly and within 5 Business Days of the Asset Trustee becoming aware of that circumstance, notify RMS of that circumstance;
 - (ii) subject to clause 10.4(a)(iii), within 15 Business Days of being requested to do so by RMS, procure the issue to RMS of a replacement Security Bond which satisfies the requirements of clause 10.1 applicable to the relevant Security Bond (subject to any reduction in the amount of the Security Bond in accordance with clause 10.3), provided that, if at that time, 3 of the 4 Major Australian Banks no longer have the Required Rating, the Asset Trustee may procure that the Contractor may procure a replacement Security Bond from the Major Australian Bank with the then highest rating below the Required Rating. However, if the conditions applying to such replacement Security Bond are materially different to the Security Bond which it is replacing, the Asset Trustee may seek RMS's consent (not to be unreasonably withheld or delayed) to procure a replacement Security Bond from a foreign bank with a branch in Sydney which has the same rating; and
 - (iii) if, at any time after the Contractor has procured a replacement Security Bond from a Major Australian Bank which does not have the Required Rating or a foreign bank pursuant to clause 10.4(a)(ii), 3 of the 4 Major Australian Banks have the Required Rating, the Asset Trustee must procure that the Contractor:

- (A) promptly, and within 5 Business Days of becoming aware of that circumstance, notify RMS of that circumstance; and
 - (B) within 15 Business Days of becoming aware of that circumstance, procure the issue to RMS of a replacement Security Bond for the undrawn amount of the affected Security Bond from a Major Australian Bank with the Required Rating which satisfies the requirements of clause 10.1 applicable to the relevant Security Bond and this clause 10.4.
- (b) Not less than 20 Business Days before the expiry of any Security Bond, the Asset Trustee must procure the issue to RMS of a replacement Security Bond for the undrawn amount of the Security Bond that it is to replace which satisfies the requirements of clause 10.1 which are applicable to the relevant Security Bond and, following receipt of such replacement Security Bond, RMS must promptly surrender (or procure the surrender of) the Security Bond that has been replaced.
 - (c) If the Asset Trustee fails to procure that the Contractor replace a Security Bond as and when required by clause 10.4(a) or 10.4(b), RMS may have recourse to the relevant Security Bond and hold the proceeds as cash security until the relevant Security Bond is replaced under clauses 10.4(a) or 10.4(b) as relevant.

10.5 **No Injunction**

The Asset Trustee must not, and must procure that its Related Parties do not, take any steps to injunct or otherwise restrain:

- (a) any issuer of any Security Bond provided under this clause 10 from paying RMS pursuant to the unconditional undertaking;
- (b) RMS from taking steps for the purposes of making a demand under any Security Bond provided under this clause 10 or receiving payment under any such Security Bond; or
- (c) RMS using the proceeds received under any Security Bond provided under this clause 10.

11. **ACCESS AND CONSTRUCTION SITE**

11.1 **Access**

- (a) Subject to clause 9.9(a), Schedule 19 and any other provision of this deed, and the Asset Trustee's compliance with clause 26.5, the Planning Approval or the EPBC Act Approval or any other Approval affecting access to land, RMS must:
 - (i) give, or ensure the Asset Trustee and its Related Parties and invitees have access to each area of the Construction Site specified in the Site Access Schedule by the relevant dates set out in the Site Access Schedule (and if a period is specified in relation to access to a part of the Construction Site, then by the last day of that period); and
 - (ii) thereafter continue to allow, or ensure that the Asset Trustee and its Related Parties and invitees continue to be allowed, access to each such area of the Construction Site specified in the Site Access Schedule.
- (b) The rights under clause 11.1(a) in respect of the areas of the Construction Site (or any part of them) specified in the Site Access Schedule will expire upon:
 - (i) the dates specified in the Site Access Schedule (if any); and

- (ii) otherwise:
 - (A) in respect of Temporary Areas, three months after the Date of Completion;
 - (B) not used; and
 - (C) otherwise, the Date of Opening Completion.
- (c) The parties acknowledge and agree that access to the Construction Site or any part of it in accordance with the Site Access Schedule pursuant to this clause 11.1 and Schedule 19 will confer on the Asset Trustee a right to such management and control as is necessary to enable the Asset Trustee to execute the Asset Trustee's Activities in accordance with this deed and discharge its responsibilities under the WHS Legislation, including for Leighton Contractors (or, if the Asset Trustee has been appointed as Principal Contractor under clause 9.7, the Asset Trustee) to discharge its responsibilities as Principal Contractor.
- (d) The Asset Trustee acknowledges and agrees that it is responsible, at its own cost, for securing all rights of ingress to and egress from the Construction Site as required to allow the Asset Trustee to carry out the Asset Trustee's Activities.
- (e) The Asset Trustee acknowledges that the Construction Site incorporates motorways and other roads that will (subject to the terms of this deed) remain open to traffic at all times.

11.2 Mitigation

The Asset Trustee must take all reasonable steps to Mitigate any delay caused by, or any other effect of, a failure by RMS to give, or ensure that the Asset Trustee has, access to the Construction Site in accordance with the Site Access Schedule pursuant to clause 11.1, including making any reasonable changes to the sequencing or timing of, or the construction methodologies used in, the Asset Trustee's Activities and, where reasonably practicable, changing the Overall D&C Program or the Subsidiary D&C Programs to reflect this.

11.3 Property Works

- (a) The Asset Trustee must:
 - (i) carry out the Property Works:
 - (A) in accordance with section 6.1 of Part A of the SWTC; and
 - (B) so that they are, upon Opening Completion, fit for their intended purpose;
 - (ii) after completion of the Property Works with respect to a Non-RMS Parcel, including the work described in clause 11.3(f), provide to RMS's Representative:
 - (A) a certificate in the form of Schedule 20, duly executed by the owner or owners of any part of the Non-RMS Parcel; or
 - (B) a statement signed by the Asset Trustee to the effect that such owner or owners have failed or refused to sign a certificate in the form of Schedule 20 within 15 Business Days of it being provided by the Asset Trustee to the owner or owners following completion of the Property Works including the work described in clause 11.3(f); and

- (iii) indemnify RMS from and against any claims against RMS, or Loss suffered or incurred by RMS, arising out of or in any way in connection with a claim by the owner or owners of any part of a Non-RMS Parcel where:
 - (A) such owner or owners have not duly signed a certificate in the form of Schedule 20; and
 - (B) the claim or Loss arises out of or in any way in connection with a claim that the Property Works have not been carried out in accordance with this deed.
- (b) The acceptance of a certificate or statement provided by the Asset Trustee under clause 11.3(a)(ii) by RMS's Representative is not approval by RMS or RMS's Representative of the Asset Trustee's performance of its obligations under this clause 11.3.
- (c) Where any Property Works are required to be carried out on a Non-RMS Parcel, the Asset Trustee must give a written notice to the owner or owners of the property (with a copy to RMS's Representative) which:
 - (i) describes the Property Works to be carried out;
 - (ii) requests access for the purposes of carrying out the Property Works; and
 - (iii) specifies the intended date for commencement of the Property Works,
 not less than 10 Business Days prior to the day on which the Asset Trustee intends to commence the Property Works.
- (d) If the owner or owners of a property do not provide the Asset Trustee with sufficient access to carry out the Property Works from either:
 - (i) the date notified in the notice under clause 11.3(c); or
 - (ii) such other date as may be agreed between the Asset Trustee and the owner or owners,
 the Asset Trustee must:
 - (iii) give RMS's Representative a notice stating this; and
 - (iv) not carry out the Property Works until RMS's Representative gives the Asset Trustee a notice specifying that the owner or owners of the property have agreed to give access, in which event clause 11.3(c) will reapply.
- (e) Upon being given access to any property for the purpose of carrying out any Property Works, the Asset Trustee must promptly carry out those Property Works in a manner which minimises inconvenience and disruption to the owners, occupiers and users of the Non-RMS Parcel.
- (f) The Asset Trustee must:
 - (i) rehabilitate any part of a Non-RMS Parcel to the state agreed with the owner of such Non-RMS Parcel prior to commencing the work or, if no such agreement is reached, the state it was in immediately prior to the Asset Trustee obtaining access; and

- (ii) otherwise repair any damage or degradation to such a part arising out of or in any way in connection with the performance of its obligations under this clause 11.3.

11.4 **Extra Land**

- (a) The Asset Trustee must:
 - (i) subject to this clause 11.4, carry out the Project Works to ensure that, on Opening Completion, the whole of the New M5 Main Works, excluding associated ancillary infrastructure including cables, signage, conduits and cameras, is located within the New M5 Main Works Site;
 - (ii) procure for itself and, at its own cost, the occupation or use of or relevant rights over any land or buildings in addition to the Construction Site, which is necessary or which it requires for the execution of the Asset Trustee's Activities (which may include additional land or buildings required for the Third Party Works); and
 - (iii) indemnify RMS from and against any claims against RMS, or Loss suffered or incurred by RMS, arising out of or in any way in connection with a claim by the owner or occupier of any part of the Extra Land where:
 - (A) such owner or occupier has not executed a release in the form of Schedule 20; and
 - (B) the claim or Loss arises out of or in connection with the Asset Trustee's Activities.
- (b) Without limiting clause 11.4(a):
 - (i) to the extent that the Asset Trustee is not able to comply, or has not complied, with clause 11.4(a)(i), the Asset Trustee must procure at the Asset Trustee's cost and transfer to RMS or its nominee by the Date of Opening Completion, any land outside the boundaries of the New M5 Main Works Site on which the New M5 Main Works are located;
 - (ii) the Asset Trustee must promptly give written notice to RMS containing details of the land which the Asset Trustee is obliged to procure; and
 - (iii) RMS may give written notice to the Asset Trustee that RMS will procure all or part of the land the subject of the Asset Trustee's notice.
- (c) The Asset Trustee acknowledges that:
 - (i) integration of the requirements for access to Extra Land is at the sole risk of the Asset Trustee; and
 - (ii) RMS will not be liable upon any Claim (insofar as is permitted by Law) by the Asset Trustee arising out of or in any way in connection with:
 - (A) identifying and obtaining access to Extra Land; or
 - (B) any delay, additional costs or other effects on the Asset Trustee's Activities related to the ability of the Asset Trustee or its Subcontractors to obtain access to Extra Land.

- (d) If RMS gives the Asset Trustee a notice pursuant to clause 11.4(b)(iii), the Asset Trustee indemnifies RMS against the costs incurred by RMS in procuring the relevant land, including but not limited to:
 - (i) any compensation payable by RMS in respect of the acquisition of that land under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) and any other reasonable compensation; and
 - (ii) reasonable legal and property valuer and other expert fees payable by RMS in connection with the procurement of the land and any reasonable surveyor's fees.

11.5 Access and inspection by RMS

- (a) The Trustees must ensure that at all times RMS's Representative, any person authorised or nominated by RMS (including visitors invited by RMS, who may include existing or prospective contractors, financiers or equity investors, and other contractors and consultants who are to perform work on the Construction Site), the Environmental Representative, the Independent Certifier and the personnel referred to in clause 40.3(b):
 - (i) subject to reasonable safety and security constraints (including compliance with the Contractor's reasonable access rules, site induction requirements and safety and security procedures), have safe and convenient access during business hours or on reasonable notice (except in the case of an emergency, when the right of access will be immediate) to:
 - (A) the Construction Site and Extra Land;
 - (B) the Project Works and the Temporary Works;
 - (C) the New M5 Main Works, New M5 Main Works Site, Licensed Maintenance Areas and Motorway Stratum;
 - (D) all other areas relevant to the Asset Trustee's Activities or the Project Trustee's Activities; and
 - (E) the Design Documentation and any other documentation created for the purposes of the Asset Trustee's Activities or the Project Trustee's Activities; and
 - (ii) be entitled to exercise this right of access for the purposes of:
 - (A) observing progress in and inspecting the Asset Trustee's Activities or the Project Trustee's Activities and monitoring compliance by the Trustees with their obligations under this deed;
 - (B) seeking comments from others in respect of the Asset Trustee's Activities or the Project Trustee's Activities; and
 - (C) exercising any right or performing any obligation which RMS has under any Project Document.
- (b) The Trustees must provide RMS, RMS's Representative, and the Independent Certifier with every reasonable facility necessary for the inspection of the Asset Trustee's Activities or the Project Trustee's Activities.

- (c) RMS and RMS's Representative may at any time provide comments to the Independent Certifier in respect of the Asset Trustee's Activities (with a copy to the Asset Trustee).
- (d) If RMS believes that the Project Works or the Temporary Works are not being constructed, or the Asset Trustee's Activities are not being carried out, in accordance with the requirements of this deed, RMS may give notice to the Asset Trustee specifying the non-conformance or the Defect.
- (e) If the Asset Trustee disagrees with any notice given by RMS pursuant to clause 11.5(d), it must within 5 Business Days after receipt of such a notice give notice of its disagreement to RMS. RMS and the Asset Trustee must use reasonable endeavours to resolve the matter the subject of the disagreement. If the matter is not resolved within 5 Business Days thereafter, either party may by notice to the other and the Independent Certifier refer the matter for determination by the Independent Certifier, who must within 5 Business Days make a determination as to the matter and notify the parties in writing of its determination together with its reasons for making its determination.
- (f) If RMS gives a notice under clause 11.5(d) and the Asset Trustee does not give a notice under clause 11.5(e) (or if the Asset Trustee does give a notice under clause 11.5(e) and the Independent Certifier determines that the Project Works or the Temporary Works are not being constructed, or the Asset Trustee's Activities are not being carried out, in accordance with the requirements of this deed), the Asset Trustee must correct the non-conformance or the Defect the subject of the notice under clause 11.5(d).
- (g) Neither RMS, RMS's Representative nor any person authorised by RMS under clause 11.5(a) owes any duty to the Trustees to:
 - (i) inspect the Asset Trustee's Activities or the Project Trustee's Activities; or
 - (ii) review any construction, maintenance or repair for errors, omissions or compliance with the requirements of this deed if it does so inspect.
- (h) No inspection or review of the Asset Trustee's Activities or the Project Trustee's Activities or of any construction, maintenance or repair by RMS, RMS's Representative, or any person authorised by RMS under clause 11.5(a) will in any way lessen or otherwise affect:
 - (i) the obligations or warranties of the Trustees under this deed or otherwise according to Law; or
 - (ii) RMS's rights against the Trustees, whether under this deed or otherwise according to Law.

11.6 **Physical conditions**

- (a) Without limiting clauses 11.7(b) and 13.2(e), the Trustees warrants and for all purposes it will be deemed to be the case that, prior to the date of this deed, the Trustees have:
 - (i) examined the RMS Project Documents, the Construction Site and its surroundings, and any other information that was made available in writing by RMS, WDA or any other person on RMS's or WDA's behalf, to the Trustees for the purpose of submitting a proposal for the Project;
 - (ii) examined, and relied solely upon its own assessment, skill, expertise and enquiries in respect of, all information relevant to the risks, contingencies

and other circumstances having an effect on its proposal for the Project and its obligations under the RMS Project Documents;

- (iii) satisfied itself as to the correctness and sufficiency of its proposal and that it has made adequate allowance for the costs of complying with all of its obligations under the RMS Project Documents and of all matters and things necessary for the due and proper performance and completion of the Asset Trustee's Activities or the Project Trustee's Activities (as relevant);
 - (iv) informed itself of:
 - (A) all matters relevant to the employment of labour at the Construction Site; and
 - (B) all industrial matters relevant to the Construction Site, the Maintenance Site, the Asset Trustee's Activities and the Project Trustee's Activities;
 - (v) been given the opportunity to itself undertake, and to request others to undertake, tests, enquiries and investigations:
 - (A) relating to the subject matter of the Information Documents; and
 - (B) for design purposes and otherwise;
 - (vi) had a sufficient opportunity to obtain and obtained all necessary legal, geotechnical and other technical advice in relation to the terms of the RMS Project Documents, the Information Documents, the Site Conditions, as well as the risks, contingencies and other circumstances having an effect on its proposal, the performance of its obligations and its potential Liabilities under the RMS Project Documents; and
 - (vii) undertaken sufficient tests, enquiries and investigations, had sufficient information and obtained a sufficient understanding of the risks involved to enable it to make an informed decision about whether or not to enter into the RMS Project Documents and assume the obligations and potential risks and Liabilities which it imposes on the Trustees.
- (b) Without limiting or otherwise affecting clauses 11.6(c), 11.6(d) or 11.7, RMS makes no representation and gives no warranty to the Trustees in respect of:
- (i) the Site Conditions likely to be encountered during the execution of the Asset Trustee's Activities or otherwise in respect of the condition of:
 - (A) the Construction Site, Extra Land or their surroundings; or
 - (B) any structure or other thing on, under, above or adjacent to the Construction Site or Extra Land; or
 - (ii) the existence, location, condition or availability of any Existing Operations or Utility Service on, under, above, adjacent to or related to the Construction Site or Extra Land.
- (c) Subject to clause 11.10, the Asset Trustee accepts:
- (i) the Construction Site and any Extra Land; and
 - (ii) any structures or other things on, above or adjacent to, or under the surface of, the Construction Site and any Extra Land,

in their present condition subject to all defects and Site Conditions and agrees that it is responsible for, and assumes the risk of:

(iii) all Loss, delay or disruption it suffers or incurs; and

(iv) any adverse effect on the Project Works or the Temporary Works,

arising out of, or in any way in connection with, the Site Conditions encountered in performing the Asset Trustee's Activities.

(d) Subject to clause 11.10, the Asset Trustee must investigate, design and construct the Project Works and the Temporary Works in accordance with this deed and acknowledges that it will not be relieved of its obligations under this deed, irrespective of:

(i) the Site Conditions encountered in performing the Asset Trustee's Activities;

(ii) whatever may be the condition or characteristics (including all sub-surface conditions) of:

(A) the Construction Site or any Extra Land, the Environment or their surroundings; or

(B) any structure or other thing on, above or adjacent to, or under the surface of, the Construction Site or any Extra Land, the Environment or their surroundings; and

(iii) any assumptions, projections, estimates, contingencies or otherwise that the Asset Trustee may have made in relation to the Site Conditions or the conditions or the characteristics of any of the matters referred to in clause 11.6(d)(ii).

11.7 **Information Documents**

(a) The parties acknowledge that, prior to the date of this deed, the Contractor (or each entity that comprises the Contractor) signed each Deed of Disclaimer and provided them to SMC, Asset Trustee or WDA in respect of information (including Information Documents) provided by RMS, Asset Trustee, SMC or WDA to the Contractor.

(b) Without limiting or otherwise affecting clause 11.7(c):

(i) RMS does not warrant, guarantee or assume any duty of care or other responsibility for or make any representation about the accuracy, adequacy, suitability or completeness of the Information Documents;

(ii) whether or not an Information Document or any part thereof forms a schedule to this deed, the Asset Trustee and the Project Trustee acknowledge that:

(A) the Information Document or part thereof does not form part of this deed and that clause 11.7(c) applies to the Information Document or part thereof; and

(B) where an Information Document or any part thereof forms a schedule to this deed, it does so only for the purposes of identification of that document or part thereof;

- (iii) insofar as is permitted by Law, RMS will not be liable upon any Claim by the Asset Trustee, the Project Trustee, the Contractor or the Operator arising out of or in any way in connection with:
 - (A) the provision of, or the purported reliance upon, or use of the Information Documents to or by the Asset Trustee, the Project Trustee or any other person to whom the Information Documents are disclosed; or
 - (B) a failure by RMS to provide any information to the Asset Trustee or the Project Trustee.
- (c) The Asset Trustee and the Project Trustee:
 - (i) warrants that it did not in any way rely upon:
 - (A) any information, data, representation, statement or document made by, or provided to the Asset Trustee or the Project Trustee by WDA, RMS or anyone on behalf of WDA or RMS or any other information, data, representation, statement or document for which WDA or RMS is responsible or may be responsible whether or not obtained from WDA, RMS or anyone on behalf of WDA or RMS; or
 - (B) the accuracy, adequacy, suitability or completeness of such information, data, representation, statement or document,

for the purposes of entering into this deed or carrying out the Asset Trustee's Activities or the Project Trustee's Activities but nothing in this clause 11.7(c)(i) will limit or otherwise affect the Asset Trustee's or the Project Trustee's obligations under this deed;
 - (ii) warrants that it enters into this deed based on its own investigations, interpretations, deductions, information and determinations; and
 - (iii) acknowledges that it is aware that RMS has entered into this deed relying upon:
 - (A) the warranties, acknowledgements and agreements in clauses 11.7(c)(i) and 11.7(c)(ii); and
 - (B) the warranties and acknowledgements in the Deeds of Disclaimer submitted by the Contractor.
- (d) The Asset Trustee and the Project Trustee release and indemnify RMS from and against:
 - (i) any Claim against RMS by, or Liability of RMS to, any person; or
 - (ii) (without being limited by clause 11.7(d)(i)) any Loss suffered or incurred by RMS,

arising out of or in any way in connection with:

 - (iii) the provision of, or the purported reliance upon, or use of, the Information Documents to or by the Asset Trustee, the Project Trustee or any other person to whom the Information Documents are disclosed by the Asset Trustee, the Project Trustee or a failure by RMS to provide any information to the Asset Trustee or the Project Trustee; or

- (iv) the Information Documents being relied upon or otherwise used by the Asset Trustee, the Project Trustee or their Related Parties in the preparation of any information or document, including any Information Document which is "misleading or deceptive" or "false and misleading" (within the meaning of those terms in sections 18 and 29 (respectively) of the Australian Consumer Law in Schedule 2 to the Competition and Consumer Act 2010 (Cth) or any equivalent provision of State or Territory legislation).
- (e) The parties acknowledge that the Asset Trustee:
 - (i) is obliged under this deed to plan, design, construct and commission the Project Works to meet anticipated traffic volumes for the New M5 Main Works as detailed in the SWTC and Traffic Data; and
 - (ii) for the purposes of clause 11.7(e)(i), is not obliged to undertake tests, enquiries and investigations relating to the subject matter of the Traffic Data.
- (f) The parties agree that the Asset Trustee bears all risk (for the purpose of the Project Works) associated with the functional performance of all Excluded Site Conditions to the extent that they connect or interface with the Project Works, but if RMS requires the Asset Trustee to:
 - (i) correct an Excluded Site Condition; or
 - (ii) upgrade any Existing Structure, including to ensure that any Existing Structure complies with the standards and requirements of this deed where that upgrade is not contemplated by, or a necessary consequence of, the Project Works,
 it must do so as a Change under clause 14.1(a).

11.8 **Artefacts**

As between RMS and the Trustees, any Artefacts found on or under the surface of the Construction Site are the property of RMS.

The Asset Trustee must upon the discovery of any Artefact on or under the surface of the Construction Site:

- (a) at its cost, immediately notify RMS's Representative that an Artefact has been found;
- (b) at its cost, ensure that the Artefact is protected and not disturbed any further;
- (c) comply with all requirements of Authorities and Directions of RMS's Representative in relation to the Artefact; and
- (d) continue to perform the Asset Trustee's Activities except to the extent otherwise:
 - (i) directed by RMS's Representative;
 - (ii) ordered by a court or tribunal; or
 - (iii) required by Law.

11.9 **Native Title Claim**

- (a) If there is a Native Title Claim with respect to the Construction Site or the Maintenance Site, or any part of it, the Asset Trustee and the Project Trustee must continue to perform their respective obligations under this deed unless otherwise:
 - (i) directed by RMS;
 - (ii) ordered by a court or tribunal; or
 - (iii) required by Law.
- (b) For the purposes of clause 11.9(a)(i), RMS may by written notice direct the Asset Trustee or the Project Trustee (as relevant) to suspend any or all of its obligations under this deed and the Asset Trustee or the Project Trustee (as relevant) must comply with that notice until such time as RMS gives the Asset Trustee or the Project Trustee (as relevant) further written notice.

11.10 **Contamination**

- (a) If:
 - (i) prior to the Date of Opening Completion, the Asset Trustee discovers any Contamination or potential Contamination (which is not Known Core SPI Site Contamination) in, on or under the Construction Site, the Extra Land, the Motorway Stratum or the Licensed Maintenance Area, or
 - (ii) during the Term, the Project Trustee discovers any Contamination or potential Contamination in, on or under the Maintenance Site or the Extra Land,

(whether or not the Asset Trustee, the Project Trustee or their Related Parties have caused or contributed to that Contamination), the relevant Trustee must:
 - (iii) notify RMS immediately of the discovery of the Contamination or potential Contamination; and
 - (iv) give any notice required by Law.
- (b) Prior to the Date of Opening Completion, the Asset Trustee must comply, and ensure that its Related Parties comply, with any Contamination Notice relating to Contamination referred to in clauses 11.10(e)(i)(A) or 11.10(e)(i)(B) which is on, in, under, over or that emanated or is emanating from the Construction Site, the Extra Land, the Motorway Stratum or the Licensed Maintenance Areas, regardless of whether:
 - (i) the Contamination Notice is addressed to RMS, the Asset Trustee or some other person; or
 - (ii) the Contamination occurred before or after the Asset Trustee or its Related Parties were given access to the relevant land.
- (ba) During the Term, the Project Trustee must comply, and ensure that its Related Parties comply, with any Contamination Notice relating to Contamination referred to in clauses 11.10(e)(ii)(A) or 11.10(e)(ii)(B), regardless of whether:
 - (i) the Contamination Notice is addressed to RMS, the Project Trustee or some other person; or

- (ii) the Contamination occurred before or after the Project Trustee or its Related Parties were given access to the relevant land.
- (c) If RMS, the Asset Trustee, the Project Trustee or any other person receives a Contamination Notice (other than a Contamination Notice relating to Contamination referred to in clauses 11.10(e)(i)(A), 11.10(e)(i)(B), 11.10(e)(ii)(A) or 11.10(e)(ii)(B)), RMS must either:
- (i) direct the Asset Trustee or the Project Trustee (as applicable) to provide RMS and any person authorised by RMS with such access to the Construction Site, the Extra Land and the Maintenance Site as is required to enable RMS to comply with that Contamination Notice, in which case the Asset Trustee or the Project Trustee (as applicable) must promptly comply with RMS's direction; or
 - (ii) propose a Change in accordance with section 1 of the Change Procedure to require the Asset Trustee or the Project Trustee (as applicable) to comply with that Contamination Notice.
- (d) Subject to their respective obligations at Law, the parties must not do anything with the intent, directly or indirectly, of causing or being likely to cause the service of a Contamination Notice.
- (e) In addition to the requirements of the Environmental Documents and without limiting clause 11.6:
- (i) the Asset Trustee bears the risk of all Contamination:
 - (A) on, in, over, under, about or (subject to clause 11.10(ea) in the case of the Core SPI Site) migrating to or from the Construction Site or any Extra Land which is disturbed by or interfered with in the carrying out of the Asset Trustee's Activities; or
 - (B) which otherwise arises out of or in connection with the Asset Trustee's Activities; and
 - (ii) the Project Trustee bears the risk of all Contamination:
 - (A) on, in, over, under, about or (subject to clauses 11.10(ea) or 11.10(eb) in the case of the Core SPI Site) migrating to or from the Maintenance Site or any Extra Land which is disturbed by or interfered with in the carrying out of the Project Trustee's Activities; or
 - (B) which otherwise arises out of or in connection with the Project Trustee's Activities,
- and:
- (iii) to the extent that either of clauses 11.10(e)(i)(A) or 11.10(e)(i)(B) applies, the Asset Trustee must:
 - (A) dispose of, or otherwise deal with, such Contamination in accordance with Law and the Environmental Documents;

- (B) subject to clause 11.10(g), remediate the Construction Site and any Extra Land to the standard required by Law and the Environmental Documents to the extent to which:
 - (aa) it is in any way degraded by such Contamination; and
 - (bb) the Contamination is of such a nature that an Authority could issue a statutory notice requiring it to be remediated; and
- (iv) to the extent that either of clauses 11.10(e)(ii)(A) or 11.10(e)(ii)(B) applies, the Project Trustee must:
 - (A) dispose of, or otherwise deal with, such Contamination in accordance with Law and the Environmental Documents;
 - (B) remediate the Maintenance Site and any Extra Land to the standard required by Law and the Environmental Documents to the extent to which:
 - (aa) it is in any way degraded by such Contamination; and
 - (bb) such Contamination is of such nature that an Authority could issue a statutory notice requiring it to be remediated.
- (ea) Clause 11.10(e) will only apply to Contamination migrating from the Core SPI Site to outside the Core SPI Site if such migration:
 - (i) was caused or contributed to by:
 - (A) a breach of contract by the Asset Trustee or the Project Trustee;
 - (B) a negligent act or omission of the Asset Trustee or the Project Trustee;
 - (C) unlawful conduct by the Asset Trustee or the Project Trustee; or
 - (D) a failure by the Asset Trustee to perform the Asset Trustee's Activities or a failure by the Project Trustee to perform the Project Trustee's Activities in accordance with Good Industry Practice; or
 - (ii) could not have been reasonably prevented by using:
 - (A) a different design (including a design which required a different or greater extent of works); or
 - (B) different construction techniques or methodologies.
- (eb) During the Term, RMS bears the risk of all Contamination the subject of clause 11.10(ea) which is not the subject of clause 11.10(ea)(i) or 11.10(ea)(ii) and RMS must pay to the Project Trustee the amount in respect of any Loss suffered by the Project Trustee in respect of such Contamination, in addition to any amounts payable in respect of a Change pursuant to clause 11.10(c)(ii) (but without double counting).
- (f) Except to the extent prohibited by Law, the Trustees must indemnify RMS from and against any claims against RMS, or Loss suffered or incurred by RMS, arising out of or in any way in connection with such Contamination referred to in clauses 11.10(e)(i) or 11.10(e)(ii) other than that subject of clause 11.10(ea) or clause 11.10(eb).

- (g) The parties acknowledge and agree that, in interpreting the requirement that the Core SPI Site be remediated to the standard required by Law and the Environmental Documents, the uses that the Core SPI Site must be suitable for are the uses contemplated in the SWTC, the Baseline Conditions and the Concept Design.
- (h) Without limiting clauses 11.10(a) to 11.10(g) or any other provision of this deed, the Asset Trustee must undertake testing and site investigations (including sampling and testing of soil and groundwater) on land adjacent to the Core SPI Site prior to the commencement of physical works on the Core SPI Site to establish a baseline measurement of the Contamination (if any) on such land (**Contamination Baseline Tests**). The scope and methodology for the Contamination Baseline Tests must be developed by the Asset Trustee using Good Industry Practice and provided to RMS for review and comment at least 15 days prior to the date on which the Asset Trustee proposes to commence the Contamination Baseline Tests.
- (i) Notwithstanding clause 11.10(h), the Asset Trustee is not required to perform any Contamination Baseline Tests on any land adjacent to the Core SPI Site unless:
 - (i) the Asset Trustee is permitted to access such land under the terms of this deed; or
 - (ii) RMS has procured access to such land for the Asset Trustee.
- (j) The parties agree that:
 - (i) the Asset Trustee must:
 - (A) provide RMS with at least 3 Business Days' notice of any Contamination Baseline Tests;
 - (B) permit RMS and its nominees to witness any Contamination Baseline Tests;
 - (C) bear the cost of all Contamination Baseline Tests; and
 - (D) provide RMS with the results of any Contamination Baseline Tests including all test data, reports and other relevant information; and
 - (ii) the results of the Contamination Baseline Tests will be used as evidence of the baseline level of Contamination on land adjacent to the Core SPI Site for the purpose of determining whether any Contamination that migrates from the Core SPI Site is Contamination referred to in clauses 11.10(e)(i) or 11.10(e)(ii).

11.11 **Environmental Representative**

- (a) The Environmental Representative (or such other entity as is approved by the NSW Government Department of Planning & Environment) is to be engaged by RMS, the Asset Trustee and the Contractor at the Asset Trustee's and the Contractor's cost on the terms of the Deed of Appointment of Environmental Representative.
- (b) The Asset Trustee must procure that the Environmental Representative will perform the functions of the "Environmental Representative" or the "ER" under the applicable Planning Approvals and this deed.

- (c) The Asset Trustee acknowledges that the Environmental Representative is:
 - (i) obliged to act independently of RMS, the Asset Trustee the Contractor and any of their subcontractors;
 - (ii) required to discharge certain functions as identified in the Planning Approval and in accordance with the Deed of Appointment of Environmental Representative;
 - (iii) required to oversee the implementation of all environmental management plans and monitoring programs required under the Planning Approval and will advise RMS upon achievement of the outcomes contemplated in the Planning Approval; and
 - (iv) required to advise RMS and RMS's Representative on the Asset Trustee's and the Contractor's compliance with the Planning Approval.
- (d) The Asset Trustee must provide, and must ensure that the Contractor provides, the Environmental Representative with all information and documents and allow, and must ensure that the Contractor allows, the Environmental Representative:
 - (i) to attend meetings; and
 - (ii) to access such premises,as may be:
 - (iii) necessary or reasonably required by the Environmental Representative or RMS's Representative to allow the Environmental Representative to perform its obligations under the Deed of Appointment of Environmental Representative; or
 - (iv) lawfully requested by the Environmental Representative or directed by RMS's Representative.
- (e) The Asset Trustee must:
 - (i) comply, and ensure that the Contractor complies, with the lawful requirements of the Environmental Representative, including so as to allow the Environmental Representative to discharge any functions of the Environmental Representative provided for in the Planning Approval; and
 - (ii) not interfere with or improperly influence, and ensure that the Contractor does not interfere with or improperly influence, the Environmental Representative in the performance of any of its functions in connection with this deed.
- (f) Nothing that the Environmental Representative does or fails to do pursuant to the purported exercise of its functions under the Deed of Appointment of Environmental Representative will entitle the Trustees or the Contractor to make any Claim against RMS.
- (g) The parties acknowledge and agree that the Asset Trustee will propose a person to be appointed as the Environmental Representative and that that appointment is subject to the approval of the Minister for Planning (which approval has not been given as at the date of this deed).
- (h) RMS and the Asset Trustee must, within 15 Business Days (or such other date as agreed by the parties) after the later of:

- (i) the date on which RMS gives a PPA Notice; and
- (ii) the date on which the Minister for Planning approves that person (or such other person agreed by RMS or the Asset Trustee) being appointed as the Environmental Representative,

execute the Deed of Appointment of Environmental Representative.

11.12 **SPI Managing Contractor Works**

- (a) The parties acknowledge and agree that as at the date of this deed, RMS has engaged the SPI Managing Contractor to carry out and complete the SPI Managing Contractor Works:
 - (i) in accordance with the SPI Managing Contractor Works SWTC; and
 - (ii) on or before the SPI Managing Contractor Works Completion Date.
- (b) The Trustees must:
 - (i) permit the SPI Managing Contractor to carry out its work;
 - (ii) fully co-operate with the SPI Managing Contractor;
 - (iii) carefully co-ordinate and interface the Trustee's Activities with the work carried out or to be carried out by the SPI Managing Contractor; and
 - (iv) carry out the Trustee's Activities so as to avoid interfering with, disrupting or delaying the work of the SPI Managing Contractor.
- (c) RMS's Representative will notify the Trustees, the Contractor and the Independent Certifier when RMS considers that the SPI Managing Contractor Works have been completed. Upon receipt of such notice from RMS, the Independent Certifier will promptly complete and execute a certificate in the form of Schedule 43 and provide that certificate to the Trustees, RMS's Representative and the Contractor.
- (d) If the certificate provided by the Independent Certifier under clause 11.12(c) states that the SPI Managing Contractor Works have not been carried out in accordance with the SPI Managing Contractor Works SWTC, RMS's Representative must either:
 - (i) procure that the SPI Managing Contractor Works be rectified so that such works comply with the SPI Managing Contractor Works SWTC (in which case clause 11.12(c) and this clause 11.12(d) will reapply); or
 - (ii) direct a Change under clause 14.
- (e) If RMS's Representative directs a Change under clause 14, and on and from the date of the relevant Change Order, the Trustees will no longer be entitled to relief for the event described in paragraph (f) of the definition of "Compensation Event".
- (f) The Trustees acknowledge and agree that:
 - (i) failure of the SPI Managing Contractor Works:
 - (A) to be carried out in accordance with the SPI Managing Contractor Works SWTC; or
 - (B) to be completed by the SPI Managing Contractor Works Completion Date,

will not be a breach of this deed by RMS; and

- (ii) subject to clauses 11.12(d)(ii) and 11.12(e):
 - (A) the Trustees are not entitled to make, and must not make, any Claim of any nature arising out of or in connection with; and
 - (B) Trustees' rights under this deed and the Trustees' warranties and obligations under this deed (including the Asset Trustee's obligations under clauses 13.2 and 15.1), will not in any way be lessened or otherwise affected by,

the fact that the SPI Managing Contractor Works have not been carried out in accordance with the SPI Managing Contractor Works SWTC or completed on or before the SPI Managing Contractor Works Completion Date.

- (g) The Asset Trustee agrees to pay RMS an amount up to the SPI Contribution to assist RMS to funding of the SPI Managing Contractor Works.
- (h) If RMS wishes to make a Claim against the Asset Trustee for amounts payable to the SPI Managing Works Contractor, RMS must provide the Asset Trustee with evidence of the amount claimed by the SPI Managing Works Contractor and an invoice from RMS (payable no earlier than 15 Business Days after receipt of that invoice) in respect of the amount RMS seeks to claim from the Asset Trustee. The Asset Trustee will not be obliged to pay any amount claimed by RMS if:
 - (i) RMS has not provided the Asset Trustee with an invoice in respect of that amount claimed which complies with this clause 11.12(g);
 - (ii) RMS has not provided the Asset Trustee with evidence of the amount claimed by the SPI Managing Works Contractor; or
 - (iii) the amount claimed by RMS is:
 - (A) greater than the amount claimed by the SPI Managing Works Contractor; or
 - (B) will result in the total amount claimed by RMS in respect of the SPI Managing Contractor Works performed by the SPI Managing Contractor exceeding the SPI Contribution.
- (i) The parties agree that on and from the Date of Opening Completion, RMS will assume the responsibility for the continued compliance with the Landfill EPL under the EP&A Act in respect of the Core SPI Site.

11.13 **Landfill Closure Works Deed Poll**

As a condition precedent to Completion, the Asset Trustee must procure that the Contractor executes the Landfill Closure Works Deed Poll in favour of the beneficiaries to it.

12. **QUALITY**

12.1 **Quality Management System**

- (a) The:
- (i) Asset Trustee must implement a Quality Management System for the management of all aspects of the Asset Trustee's obligations under this deed; and
 - (ii) Project Trustee must implement a Quality Management System for the management of all aspects of the Project Trustee's obligations under this deed,
- in accordance with Schedule 36, including in accordance with the applicable requirements of the SWTC, including section 3.11 of Part A of the SWTC and the Quality Plan.
- (b) The Asset Trustee must develop and implement a Quality Plan in accordance with this deed including the SWTC, including section 3.12 and Appendix C.1 of Part A of the SWTC.

12.2 **Access to Information**

- (a) Without limiting any other provision of this deed:
- (i) RMS may at any time notify the Trustees that it requires access to any information held by the Trustees which relates to the Asset Trustee's Activities or the Project Trustee's Activities;
 - (ii) upon receipt of a notice under clause 12.2(a)(i), the Trustees must immediately provide RMS (and any person authorised by RMS) with access to, or a copy of, the required information, except to the extent that the information is subject to legal professional privilege; and
 - (iii) RMS (and any person authorised by RMS) may review, copy, retain or otherwise deal with such information.
- (b) The Trustees acknowledge that RMS may require information pursuant to this clause 12.2 to facilitate the procurement of other contracts as part of the WestConnex Program of Works, or to provide to an existing or prospective financier or equity investor.

12.3 **Independent Certifier**

- (a) The Independent Certifier is to be engaged by RMS, the Project Trustee and the Asset Trustee on the terms of the Independent Certifier Deed at the Asset Trustee's cost.
- (b) The Independent Certifier's role is to, amongst other things:
- (i) without limiting the rights or obligations of the parties under this deed, independently certify in accordance with the Independent Certifier Deed that:
 - (A) the Project Works and the Temporary Works; and
 - (B) the O&M Work and Asset Renewal,

comply with the requirements of this deed; and

- (ii) make determinations on matters that this deed expressly requires be determined by the Independent Certifier.
- (c) The parties acknowledge and agree that:
- (i) without limiting the effect which the determinations of the Independent Certifier will have upon the rights and obligations of the parties under this deed, the Independent Certifier does not have any power to give any Directions to either Trustee;
 - (ii) the Independent Certifier is obliged to act independently of RMS, the Asset Trustee, the Project Trustee and any of their respective Related Parties, and is not an employee, agent or consultant of RMS, the Asset Trustee or the Project Trustee; and
 - (iii) any determination by the Independent Certifier in respect of a matter required by this deed to be determined by the Independent Certifier will be final and binding upon the parties, except:
 - (A) a determination referred to in clause 17.1(c); or
 - (B) in the case of manifest error.
- (d) The Asset Trustee must provide the Independent Certifier with all information and documents and allow the Independent Certifier:
- (i) to attend design meetings;
 - (ii) access to all premises where the Asset Trustee's Activities are being carried out; and
 - (iii) to insert Hold Points in the Project Plans and designate the Nominated Authority to release the Hold Points,
- all as may be:
- (iv) necessary or reasonably required by the Independent Certifier or RMS's Representative, to allow the Independent Certifier to perform its obligations under the Independent Certifier Deed; or
 - (v) reasonably requested by the Independent Certifier.
- (e) RMS's Representative may provide comments to the Independent Certifier in accordance with clause 11.5 in respect of the Asset Trustee's Activities and the Project Trustee's Activities (with a copy to the Asset Trustee or the Project Trustee as relevant).
- (f) The Asset Trustee, the Project Trustee and RMS acknowledge and agree that the Contractor shall be entitled to attend all meetings between RMS, the Asset Trustee, the Project Trustee and the Independent Certifier in respect of the Services (as defined in the Independent Certifier Deed), other than those relating to the payment of the Fee (as defined in the Independent Certifier Deed) or the administration of the Independent Certifier Deed, provided that the Asset Trustee, the Project Trustee and RMS are not obliged to invite the Contractor to, or provide the Contractor with advance notice of, such meetings.

12.4 **Not Used**

12.5 **Replacement of Independent Certifier**

- (a) If the Independent Certifier Deed is terminated before its scheduled expiry, or if any incumbent Independent Certifier ceases to act as Independent Certifier, the Asset Trustee, the Project Trustee and RMS must, unless otherwise agreed by RMS, the Project Trustee and the Asset Trustee, prior to termination or cessation, and in any case within 10 Business Days after the termination of the Independent Certifier Deed or cessation, whichever is applicable, appoint another person to act as Independent Certifier.
- (b) If RMS, the Project Trustee and the Asset Trustee cannot agree such appointment, RMS, the Project Trustee and the Asset Trustee will request that the President of Engineers Australia (or its replacement or equivalent) nominate an Independent Certifier who has equivalent qualifications, experience and expertise to the incumbent Independent Certifier and is independent and such Independent Certifier will be appointed as soon as practicable in accordance with the previous Independent Certifier Deed.

12.6 **No relief from obligations**

The Asset Trustee will not be relieved from any of its Liabilities or responsibilities under this deed (including under clause 17) or otherwise according to Law nor will the rights of RMS against the Asset Trustee, whether under this deed or otherwise according to Law be limited or otherwise affected by or as a consequence of any of the following:

- (a) the implementation of, and compliance with, any quality system or the Quality Plan by the Asset Trustee;
- (b) compliance with any requirements of the Independent Certifier Deed;
- (c) any release, authorisation, approval or agreement by RMS's Representative, or any other person acting on behalf of RMS or RMS's Representative;
- (d) any failure by RMS, RMS's Representative or any other person acting on behalf of RMS or engaged by RMS to detect any Defect; or
- (e) any monitoring or audit arranged by RMS's Representative under, or any discussions between the Quality Manager and RMS's Representative as contemplated under Schedule 36.

13. **DESIGN AND DESIGN DOCUMENTATION**

13.1 **Design development**

- (a) The Asset Trustee must hold regular meetings of its design team including its designers and the Independent Certifier.
- (b) The Asset Trustee must give reasonable prior written notice to RMS's Representative of those meetings and of any other meetings at which design issues are to be discussed to enable RMS's Representative and its delegates to attend. RMS may request the Asset Trustee to ensure the presence at the meeting of any relevant persons from the Contractor or any of the Asset Trustee's Subcontractors or the Contractor's Subcontractors or consultants involved in the design of any part of the Project Works.

- (c) The Asset Trustee must give RMS's Representative:
 - (i) an agenda for each design meeting no less than 48 hours prior to each meeting (which must include an accurate schedule of all design issues as at the date of issue of the agenda); and
 - (ii) minutes of each design meeting within 2 Business Days after each meeting.

The Asset Trustee agrees that no such agenda or minutes of meeting shall be relied upon by the parties as a document constituting or evidencing the giving or receipt of a notice required to be given under or in accordance with this deed.

13.2 Design obligations

- (a) The Asset Trustee acknowledges that prior to the date of this deed, it prepared the Concept Design. The Asset Trustee agrees that it bears absolutely all risks howsoever they may arise as a result of the use by the Asset Trustee of, or the reliance by the Asset Trustee upon, the Concept Design in performing the Asset Trustee's Activities and that such use and reliance will not limit any of its obligations under this deed.
- (b) The Asset Trustee is responsible for, and assumes the risk of, any Loss it suffers or incurs arising out of or in connection with:
 - (i) the design and construction of the Project Works and the Temporary Works in accordance with the Concept Design costing more, or taking longer, than anticipated; and
 - (ii) any differences between the Project Works and the Temporary Works which the Asset Trustee is required to design and construct (ignoring for this purpose any differences which are the subject of a Change Order or a notice issued by RMS under section 2.3 of the Change Procedure) and the Concept Design including:
 - (A) differences necessitated by any Site Conditions encountered; and
 - (B) differences required to ensure that:
 - (aa) the Project Works will:
 - (a) upon Opening Completion (or in respect of the SPI Interface Works, SPI Interface Works Completion) be fit for their intended purposes; and
 - (b) thereafter, at all relevant times during the Term (assuming no early termination), remain fit for their intended purposes;
 - (bb) the Temporary Works will at all relevant times be fit for their intended purposes;
 - (cc) the New M5 Motorway will be capable of achieving Final Handover at the end of the Term;
 - (dd) upon Opening Completion (or in the case of the SPI Interface Works, upon SPI Interface Works Completion), the design life of each part of the Project Works will meet or exceed the design life standards set out in section 5.2 of Part A of the SWTC; and

(ee) the New M5 Main Works D&C Phase Maintenance and Asset Renewal will be completed in accordance with the requirements of this deed,

and satisfy the requirements of this deed irrespective of any assumptions, projections, estimates, contingencies or otherwise that the Asset Trustee may have made in relation to any of the matters set out in clauses 13.2(b)(i) or 13.2(b)(ii) above.

(c) The Asset Trustee warrants to RMS that:

- (i) the Asset Trustee remains responsible for ensuring that the Project Works and the Temporary Works will satisfy the requirements of this deed despite the Concept Design (as further developed by the Asset Trustee under this deed);
- (ii) if the Project Works and the Temporary Works are designed and constructed in accordance with the Concept Design, the Project Works and the Temporary Works will satisfy the requirements of this deed but nothing in this clause 13.2(c)(ii) affects or limits clauses 13.2(a) or 13.2(b), which will prevail to the extent of any inconsistency;
- (iii) the Asset Trustee will carry out and complete the Asset Trustee's Activities in accordance with the Concept Design but nothing in this clause 13.2(c)(iii) affects or limits clauses 13.2(a) or 13.2(b), which will prevail to the extent of any inconsistency;
- (iv) the Asset Trustee will not make any adjustments to the Concept Design without the prior written approval of the RMS Representative;
- (v) the Asset Trustee has checked, examined, analysed and carefully considered Part A of the SWTC and the Environmental Documents (that exist as at the date of this deed) and that:
 - (A) it has satisfied itself as to the completeness, correctness, accuracy, appropriateness, suitability and adequacy of Part A of the SWTC;
 - (B) it has satisfied itself that there are no omissions, ambiguities, discrepancies or inconsistencies in or between Part A of the SWTC and Environmental Documents;
 - (C) Part A of the SWTC is proper, adequate and fit for its intended purpose, including for the purpose of enabling the Asset Trustee to carry out the Asset Trustee's Activities in accordance with, and to ensure that the Asset Trustee's Activities comply with, this deed including the other warranties in this clause 13.2;
 - (D) it will be fully and exclusively responsible and liable for the design of the Project Works and the Temporary Works (including the Design Documentation), including any submitted or re-submitted to the Independent Certifier or RMS's Representative in accordance with this deed;
 - (E) it will be fully and exclusively responsible and liable for all risks howsoever they may arise as a result of the use by the Asset Trustee of, or reliance upon, Part A of the SWTC; and
 - (F) the use of, or reliance upon, the SWTC does not affect any of its obligations under this deed, or entitle the Asset Trustee to make any

Claim against RMS arising out of or in any way in connection with Part A of the SWTC;

- (vi) the Design Documentation will:
 - (A) satisfy the requirements of Part A of the SWTC, the Third Party Agreements and the other requirements of this deed;
 - (B) be and will remain at all relevant times fit for its intended purpose; and
 - (C) be prepared, certified, verified, completed and used in accordance with the requirements of this deed;
 - (vii) construction will be carried out in accordance with the Design Documentation which the Asset Trustee is entitled to use for construction purposes in accordance with clause 13.3(d);
 - (viii) construction carried out in accordance with the Design Documentation which the Asset Trustee is entitled to use in accordance with clause 13.3(d) will satisfy the requirements of this deed;
 - (ix) the Project Works will:
 - (A) be completed in accordance with, and satisfy the requirements of, this deed;
 - (B) upon Opening Completion (or in the case of the SPI Interface Works, upon SPI Interface Works Completion), be fit for their intended purposes; and
 - (C) thereafter, at all relevant times during the Term (assuming no early termination), remain fit for their intended purposes;
 - (x) the New M5 Motorway will be capable of achieving Final Handover at the end of the Term;
 - (xi) upon Opening Completion (or in the case of the SPI Interface Works, upon SPI Interface Works Completion), the design life of each part of the Project Works will meet or exceed the design life standards set out in section 5.2 of Part A of the SWTC; and
 - (xii) the New M5 Main Works D&C Phase Maintenance and Asset Renewal will be completed in accordance with, and satisfy the requirements of, this deed.
- (d) The Asset Trustee agrees that its obligations under, and the warranties given in, this clause 13.2 will remain unaffected and that it will bear and continue to bear full Liability and responsibility for the design (including the Design Documentation), construction, commissioning, testing and completion of the Project Works and the Temporary Works notwithstanding:
- (i) any design work carried out by others prior to the date of this deed and incorporated into the Concept Design, the Design Documentation or this deed;
 - (ii) any Change the subject of a Direction by RMS's Representative; or
 - (iii) the termination (for any reason) of this deed.

- (e) Despite any provision to the contrary in this deed:
 - (i) the Trustees will not be regarded as being in breach of any obligation under this deed in respect of or relating to:
 - (A) any requirement that the Project Works, Motorway and any related Design Documentation be fit for their purpose, intended purpose or intended use (or any similar reference); or
 - (B) the warranties in clause 13.2(c)(v),by reason alone that the Trustees have relied on the Traffic Data; and
 - (ii) for the avoidance of doubt, the Asset Trustee otherwise retains the full risk of traffic volumes, and the Traffic Data, in relation to the Project in accordance with clause 4.1 of this deed.

13.3 Preparation of Design Documentation

- (a) The Asset Trustee must give the Independent Certifier and RMS, throughout the preparation of the Design Documentation, the opportunity to review, to comment on and to monitor the design performance of the Asset Trustee in accordance with this clause 13.3.
- (b) The Asset Trustee must develop and complete all Design Documentation in accordance with this deed and the Design Plan.
- (c) The Asset Trustee must ensure that the Design Documentation, with respect to the Final Design Documentation Stage, for each discrete design element of the Project Works and the Temporary Works must be:
 - (i) certified by the Asset Trustee and verified by the Independent Certifier as:
 - (A) being appropriate for construction; and
 - (B) complying with this deed (to the extent applicable to the Project Works) including the SWTC and, in particular, the durability requirements in section 5.3 and the design life requirements in section 5.2 of Part A of the SWTC;
 - (ii) where a Subcontractor has been involved in the preparation of the design, certified by the Subcontractor as:
 - (A) being appropriate for construction; and
 - (B) complying with this deed (to the extent applicable to the Project Works) including the SWTC and, in particular, the durability requirements in section 5.3 and the design life requirements in section 5.2 of Part A of the SWTC; and
 - (iii) certified by the Asset Trustee as not involving or constituting a Change which has not been the subject of a Change Order or a notice issued by RMS under section 2.3 of the Change Procedure or a notice under clause 14,in accordance with the Project Documentation Schedule.
- (d) Unless otherwise agreed in writing by RMS, the Asset Trustee must not use for construction purposes any Design Documentation to the extent that it has not been:

- (i) certified by the Asset Trustee under clause 13.3(c);
- (ii) submitted to RMS for the opportunity to make comment; and
- (iii) verified by the Independent Certifier, with any comments by RMS provided in the period contemplated by the Project Documentation Schedule addressed by the Independent Certifier as part of the verification,

in accordance with the Project Documentation Schedule.

- (e) RMS and the Asset Trustee acknowledge and agree that:
 - (i) the receipt or review of, or any consultation or comments regarding, any Design Documentation by RMS is solely for the purpose of monitoring the performance of the Asset Trustee;
 - (ii) RMS does not assume a duty or owe a duty to the Asset Trustee to review the SWTC, Concept Design or Design Documentation for errors, omissions or compliance with the requirements of this deed, or to consult with the Asset Trustee, or make any comments regarding any Design Documentation; and
 - (iii) neither:
 - (A) any review or rejection of, or consultation or comments by RMS, nor any failure by RMS regarding any Design Documentation or any other Direction by RMS in respect of any Design Documentation; nor
 - (B) the verification of any Design Documentation by the Independent Certifier,
 will lessen or otherwise affect:
 - (C) the Asset Trustee's warranties under clause 13.2 or any of its other Liabilities or responsibilities under this deed or otherwise according to Law; or
 - (D) RMS's rights against the Asset Trustee, whether under this deed or otherwise according to Law.

13.4 **Change in Codes and Standards**

- (a) Where there is a Change in Codes and Standards:
 - (i) the Asset Trustee must give a written notice to RMS's Representative within the later of 20 Business Days after the Change in Codes and Standards or when the Asset Trustee first became aware (or ought reasonably to have first become aware of the change) containing details of the Change in Codes and Standards; and
 - (ii) if a notice is given by the Asset Trustee which complies with clause 13.4(a)(i), then within 10 Business Days after the notice having been given, RMS's Representative will either:
 - (A) direct the Asset Trustee to disregard the Change in Codes and Standards where doing so will not result in the Project Works not complying with the requirements of Law; or
 - (B) notify the Asset Trustee that it intends to direct a Change in respect of the Change in Codes and Standards, but the Asset Trustee will only

be required to comply with the Change in Codes and Standards if RMS subsequently issues a Change Order.

- (b) If RMS's Representative gives a notice under clause 13.4(a)(ii)(A), the Asset Trustee will not be regarded as being in breach of this deed to the extent that it disregarded the relevant Change in Codes and Standards.
- (c) If RMS's Representative gives a notice under clause 13.4(a)(ii)(B), the Asset Trustee will not have any Claim for Change Costs against RMS:
 - (i) except to the extent that the relevant Design Documentation, before the issue of a notice under clause 13.4(a)(ii)(B) complied, or would have complied, with the requirements of this deed, including any requirement that the Design Documentation be fit for its intended purpose (or any similar reference); or
 - (ii) to the extent that, notwithstanding the Change in Codes and Standards, the Asset Trustee would have had to make a change to the Project Works or the Temporary Works or a change to the methods of construction used in carrying out the Project Works or the Temporary Works, in order that the Project Works and the Temporary Works be fit for their intended purposes (or any similar reference).

14. **CHANGES**

14.1 **Any party may propose a Change**

- (a) RMS may require the Asset Trustee and/or the Project Trustee to carry out a Change in accordance with section 1 of the Change Procedure.
- (b) The Trustees will not be obliged to carry out any Change proposed by RMS if the proposed Change will amend clause 21 or Schedule 44A or will affect the Project Trustee's ability to levy or collect tolls (including by way of a Change which requires the removal of any tolling equipment).
- (c) Either Trustee may propose a Change to RMS in accordance with paragraph 2 of the Change Procedure.

14.2 **Pre-Agreed Changes**

- (a) RMS's Representative may, in its absolute discretion and without being under any obligation to do so, direct by way of a Change any Pre-Agreed Change by giving written notice to the Trustees.
- (b) RMS and the Trustees agree that if a notice pursuant to clause 14.2(a) is given in respect of a Pre-Agreed Change by the relevant date specified in Schedule 38, this deed will be deemed to be amended in accordance with the relevant amendments set out in Schedule 38 from the date the Trustees receive such notice.
- (c) Where RMS's Representative directs a Pre-Agreed Change by giving written notice to the Trustees by the relevant date referred to in clause 14.2(b), each Trustee, in respect of that Pre-Agreed Change:
 - (i) must carry out its obligations under this deed as amended by clause 14.2(b); and

- (ii) acknowledges that:
 - (A) the Change Costs for each Pre-Agreed Change are as set out in Schedule 38;
 - (B) the payment of the Change Costs set out in Schedule 38 in respect of a Pre-Agreed Change by RMS to the Trustees will be full compensation for any Loss or delay the Trustees suffer or incur arising out of or in connection with the issue of such a notice and the Trustees will not be entitled to be paid any further amount in respect of the Pre-Agreed Change; and
 - (C) the Trustees are not entitled to make any Claim for:
 - (aa) any acceleration to the carrying out of the Asset Trustee's Activities which the Asset Trustee must perform at any time in order to achieve SPI Interface Works Completion by the Date for SPI Interface Works Completion, Opening Completion by the Date for Opening Completion and Completion by the Date for Completion; or
 - (bb) any delay to the carrying out of the Asset Trustee's Activities, in connection with the issue of such a notice or the amendment of this deed pursuant to clause 14.2(b).
- (d) Nothing in this clause 14.2 prevents RMS's Representative from issuing a Change Proposal or a Change Order pursuant to clause 14.1 or the Change Procedure that involves the same (or similar) changes to the Project Works as a Pre-Agreed Change after the relevant date for giving notice of the Pre-Agreed Change specified in Schedule 38.
- (e) If RMS's Representative issues a Change Order pursuant to clause 14.1 which involves the same or similar changes to the Project Works as are required by a Pre-Agreed Change and which is issued or directed (as relevant) after the relevant date in Schedule 38 for that Pre-Agreed Change, the parties agree that the Change Costs or Change Savings of the Change will be determined in accordance with clause 14.1.

14.3 **Payment for Changes**

- (a) If a Change directed by RMS in accordance with clause 14.1(a) or clause 14.2(e) results in Change Costs:
 - (i) if RMS directed the Trustees to proceed to implement the Change under section 1.4(b), section 1.7(b) or section 1.7(e) of the Change Procedure the Trustees may claim the Change Costs progressively within 10 Business Days after each month in which the relevant work was undertaken unless otherwise agreed between the parties; and
 - (ii) if RMS directed the Trustees to proceed to implement the Change under section 1.7(d) or section 1.9 of the Change Procedure, RMS must pay each Trustee its Change Costs:
 - (A) pending determination by RMS pursuant to section 1.7(d) of the Change Procedure agreement between the parties or determination in accordance with the Dispute Resolution Procedure, as reasonably determined by RMS; and

- (B) following any determination referred to in clause 14.3(a)(ii)(A) (or agreement between the parties), as so determined (or agreed),

progressively within 10 Business Days after each month in which the relevant work was undertaken. If the Change Costs paid under clause 14.3(a)(ii)(A) are more or less than the Change Costs for the relevant month as subsequently determined or agreed, the difference must be paid by the relevant party to the other.

- (b) If a Change directed by RMS under clause 14.1(a), clause 14.2(e) or section 1 of the Change Procedure results in Change Savings (or in the case of a Change directed by RMS under section 2 of the Change Procedure, is expected to result in Change Savings, as advised by a Trustee under section 2.2(a)(iii) of the Change Procedure), RMS and the Trustees agree that:
 - (i) in the case of a Change directed by RMS under clause 14.1(a), clause 14.2(e) or section 1 of the Change Procedure, RMS is entitled to receive 100% of the Change Savings; and
 - (ii) in the case of a Change directed by RMS under section 2.3 of the Change Procedure, RMS is entitled to receive 50% of the greater of:
 - (A) the actual Change Savings; or
 - (B) the estimated Change Savings (as advised by a Trustee under section 2.2(a)(iii) of the Change Procedure).
- (c) Where an amount is payable to RMS pursuant to clause 14.3(b) then:
 - (i) to the extent that it relates to the Project Works, this may be:
 - (A) set off against Change Costs in respect of the Project Works payable by RMS to the Asset Trustee under clause 14.3(a); or
 - (B) where this is not set-off, it must be paid by the Asset Trustee to RMS progressively within 10 Business Days after each month in which the relevant work which has been deleted or omitted would have been undertaken but for the Change; or
 - (ii) to the extent that it relates to the O&M Work or the Asset Renewal, the Project Trustee or the Asset Trustee (as applicable) must pay this to RMS in the manner and at the time as agreed between RMS and the Project Trustee or the Asset Trustee (as applicable).
- (d) If RMS and the Trustees are unable to reach the agreement required by clause 14.3(c)(ii) within 20 Business Days after the date of the relevant Change Order, any party may refer the matter for dispute resolution in accordance with the Dispute Resolution Procedure, with the dispute to be determined on the basis that timing of the payment must not have an adverse impact upon the ability which, prior to the change:
 - (i) the Borrower, the Asset Trustee or the Project Trustee had to repay the Debt Financiers interest, amortisation and any net interest rate management agreement payments owing under the Debt Financing Documents on the dates on which such amounts are due to be repaid thereunder; and

- (ii) the Group had to give the Equity Investors the lower of the:
 - (A) Equity Return they would have received if the Change had not been made; and
 - (B) Projected Equity Return.
- (e) Except where the Trustees are directed to carry out a Change pursuant to a Change Order, RMS will not be liable to the Trustees for any Loss or otherwise upon any Claim arising out of or in any way in connection with any Change.

14.4 **Trustee's entitlements**

This clause 14 is an exhaustive code of the Asset Trustee's and the Project Trustee's rights in any way in connection with any Change. Each Trustee waives all rights at Law to make any Claim against RMS in any way in connection with any of the matters set out in this clause 14 otherwise than in accordance with the terms of this deed.

14.5 **Approvals for Changes**

- (a) Subject to clause 14.5(b), the Trustees must apply for and obtain all:
 - (i) necessary amendments or modifications to any existing Approvals; and
 - (ii) new Approvals that may be,
 - required for the execution of a Change.
- (b) Where the amendment or modification to any Approval required for the execution of the Change relates to the Planning Approval or the EPBC Act Approval, clauses 7.3, 7.4 and 7.4A will apply.
- (c) The Trustees must implement the Change once the Approvals referred to in this clause 14.5 have been amended, modified or granted to permit the Change to be implemented.

15. **CONSTRUCTION**

15.1 **Construction**

- (a) The Asset Trustee must construct the Project Works and the Temporary Works:
 - (i) in accordance with the requirements of this deed including:
 - (A) the SWTC;
 - (B) the Design Documentation which the Asset Trustee is entitled to use for construction purposes in accordance with clause 13.3(d); and
 - (C) any Direction of RMS's Representative given or purported to be given under a provision of this deed, including any Change directed or approved by RMS in accordance with the Change Procedure or clause 14.2; and
 - (ii) using good workmanship and Materials which are:
 - (A) free of Defects and other imperfections; and
 - (B) of the quality specified in the SWTC;

- (iii) so that the Temporary Works will at all relevant times be fit for their intended purposes;
 - (iv) so that the Project Works will:
 - (A) upon Opening Completion (or in the case of the SPI Interface Works, upon SPI Interface Works Completion) be fit for their intended purposes; and
 - (B) thereafter, at all relevant times during the Term (assuming no early termination), remain fit for their intended purposes;
 - (v) so that the Motorway will be capable of achieving Final Handover at the end of the Term; and
 - (vi) so that upon Opening Completion (or in the case of the SPI Interface Works, upon SPI Interface Works Completion), the design life of each part of the Project Works will meet or exceed the design life standards specified in section 5.2 of Part A of the SWTC.
- (b) The Asset Trustee warrants that the Project Works will:
- (i) upon Opening Completion (or in the case of the SPI Interface Works, upon SPI Interface Works Completion), be fit for their intended purpose; and
 - (ii) thereafter, at all relevant times during the Term (assuming no early termination), remain fit for their intended purpose.
- (c) In carrying out the Asset Trustee's Activities, the Asset Trustee must:
- (i) provide all things and take all measures necessary to protect people and property;
 - (ii) avoid unnecessary or unreasonable interference with the passage of people and vehicles; and
 - (iii) prevent nuisance and unreasonable noise and disturbance.

15.2 Performance of Asset Trustee's Activities

- (a) Without limiting clause 15.1, in performing the Asset Trustee's Activities, the Asset Trustee must:
 - (i) act in a timely and expeditious manner; and
 - (ii) once it has commenced any construction activities on the Construction Site, regularly and diligently proceed with the construction of the Project Works and the Temporary Works in accordance with this deed.
- (b) Without limiting clause 15.1, the Asset Trustee warrants that it will perform the Asset Trustee's Activities using the workmanship and Materials required by this deed and which are fit for their intended purposes.

15.3 Training management

The Asset Trustee must satisfy its obligations as a contractor under the Training Management Guidelines, including by:

- (a) ensuring that it has an Enterprise Training Management Plan (as referred to in the Training Management Guidelines) that complies with the requirements of the Training Management Guidelines;
- (b) preparing a Project Training Management Plan in accordance with the Training Management Guidelines and submitting the Project Training Management Plan to RMS;
- (c) complying with the Project Training Management Plan the Asset Trustee is permitted to use in accordance with clause 9.5(c);
- (d) co-operating with and assisting RMS with any reviews undertaken by RMS of the Asset Trustee's compliance with the Training Management Guidelines;
- (e) maintaining records evidencing the Asset Trustee's compliance with the Training Management Guidelines; and
- (f) making available all records maintained in accordance with clause 15.3(e) to RMS.

15.4 **Cleaning up**

In carrying out the Project Works, the Temporary Works and the New M5 Main Works D&C Phase Maintenance, the Asset Trustee must keep the Construction Site, Extra Land, the Project Works and the Temporary Works clean and tidy and regularly remove from the Construction Site, Extra Land and Project Works any waste or surplus material arising from such performance.

15.5 **Signage**

- (a) Subject to clause 15.5(b), the Asset Trustee must not erect, install, paint or display any advertising, promotional or similar signage or material on, in or near any part of the Project Works, the Temporary Works or the Construction Site (or permit any third party to do so) at any time prior to the Date of Opening Completion.
- (b) Prior to the Date of Opening Completion, the Asset Trustee may only (with the prior written approval of RMS) erect the following signage on or near the Construction Site or Local Areas (as applicable):
 - (i) temporary directional signage to assist businesses in the vicinity of the Construction Site, access to which has been, or is likely to be, adversely affected by the Asset Trustee's Activities;
 - (ii) signage required by Law or reasonably required for the safety and security of the Project Works and the Temporary Works;
 - (iii) project identification signage approved by RMS;
 - (iv) such directional signage as is reasonably required for the purposes of informing persons undertaking any part of the Asset Trustee's Activities; and
 - (v) directional and other signage necessary to inform, and direct the movement of, motorists, pedal cyclists and pedestrians in the vicinity of the Construction Site.

15.6 **Work methods**

Whether or not this deed or the SWTC prescribes a particular work method or a work method is otherwise part of this deed or reviewed or approved (expressly or impliedly) by RMS or RMS's Representative, the fact that any work method that the Asset Trustee

adopts or proposes to adopt is impractical or impossible or that the Asset Trustee, with or without the approval of RMS's Representative, uses another work method will:

- (a) not entitle the Asset Trustee to make any Claim against RMS arising out of or in any way in connection with the work method proving to be impractical or impossible or any change in the work method; and
- (b) not cause this deed to be frustrated.

15.7 As constructed documentation and reports

The Asset Trustee must prepare and submit to RMS's Representative and the Independent Certifier as constructed documentation and reports as required by and in accordance with the requirements of the Project Documentation Schedule or as otherwise reasonably requested by RMS's Representative.

16. TIME AND COMPLETION

16.1 Start and progress

The Asset Trustee must:

- (a) subject to clause 5, commence the Asset Trustee's Activities, the Project Works and the Temporary Works from the date of this deed; and
- (b) regularly and diligently progress the Asset Trustee's Activities, the Project Works and the Temporary Works in accordance with this deed to achieve SPI Interface Works Completion, Opening Completion and Completion of the Project Works.

16.2 Date for SPI Interface Works Completion, Date for Opening Completion and Date for Completion

- (a) The Asset Trustee must use its best endeavours to achieve:
 - (i) SPI Interface Works Completion by the Date for SPI Interface Works Completion;
 - (ii) Completion by the Date for Completion; and
 - (iii) Opening Completion by the Date for Opening Completion.
- (b) If the Asset Trustee fails to comply with its obligations under clause 16.2(a), and this deed is not terminated for an Event of Default in accordance with clause 31.6, the Trustees' liability to RMS will be capped at \$[REDACTED].
- (c) If the New M5 Main Works D&C Date for SPI Interface Works Completion, New M5 Main Works D&C Date for Completion or the New M5 Main Works D&C Date for Opening Completion are extended in accordance with the New M5 Main Works D&C Deed, the Date for SPI Interface Works Completion, Date for Completion and Date for Opening Completion will be extended by a period of time equal to the extension of the New M5 Main Works D&C Date for SPI Interface Works Completion, New M5 Main Works D&C Date for Completion and the New M5 Main Work Works D&C Date for Opening Completion (as relevant), provided that in determining the Delay Period for the Trustee's Revenue Loss, any extension to the Date for SPI Interface Works Completion, Date for Completion or Date for Opening Completion as a result of a Compensation Event will be disregarded.

16.3 **Asset Trustee's programming obligations**

- (a) Within 10 Business Days after the date of this deed, the Asset Trustee must prepare and submit to the Independent Certifier and RMS's Representative subsidiary programs for the Asset Trustee's Activities, including all design and construction activities (including procurement of Materials and Utility Services).
- (b) The Subsidiary D&C Programs must:
 - (i) be based upon the Overall D&C Program; and
 - (ii) contain the details which RMS's Representative reasonably requires.
- (c) The Overall D&C Program and all Subsidiary D&C Programs must be:
 - (i) reviewed and updated by the Asset Trustee on a monthly basis to take into account:
 - (A) changes to the Asset Trustee's program for the Asset Trustee's Activities and delays which may have occurred; and
 - (B) any extensions to the Date for SPI Interface Works Completion, Date for Opening Completion or Date for Completion pursuant to clause 16.2(c); and
 - (ii) given to the Independent Certifier and RMS's Representative with the reports required by the Project Documentation Schedule in both hard copy form and in electronic form approved by RMS.
- (d) No submission of or Direction relating to, or review of or comment upon, a program (including the Overall D&C Program and any Subsidiary D&C Program) prepared by the Asset Trustee, by RMS or RMS's Representative, nor the inclusion of the Overall D&C Program as a schedule to this deed, will:
 - (i) relieve the Asset Trustee from or alter its Liabilities or obligations under this deed, especially (without limitation) the obligations of the Asset Trustee under clause 16.2;
 - (ii) evidence or constitute notification of a delay or the claiming of, or the granting of, any relief relating to a Compensation Event, or a Direction by RMS's Representative to accelerate, disrupt, prolong or vary any, or all, of the Asset Trustee's Activities; or
 - (iii) affect the time for performance of RMS's or RMS's Representative's obligations under this deed, including obliging RMS or RMS's Representative to do anything earlier than is necessary to enable the Asset Trustee to achieve SPI Interface Works Completion by the Date for SPI Interface Works Completion, Opening Completion by the Date for Opening Completion and Completion by the Date for Completion.
- (e) If the Asset Trustee chooses to compress the Asset Trustee's Activities or otherwise accelerate progress:
 - (i) neither RMS nor RMS's Representative will be obliged to take any action to assist or enable the Asset Trustee to achieve SPI Interface Works Completion before the Date for SPI Interface Works Completion, Opening Completion before the Date for Opening Completion or Completion before the Date for Completion; and

- (ii) the time for the carrying out of RMS's or RMS's Representative's obligations will not be affected.

16.4 Risk and notice of delay

- (a) Except as expressly provided for in this deed, the Asset Trustee accepts the risk of all delays in, and disruption to, the carrying out of the Asset Trustee's Activities and performance of its obligations, and the obligations of its Related Parties, under the RMS Project Documents both before and after the Date for SPI Interface Works Completion, the Date for Opening Completion and the Date for Completion.
- (b) The Asset Trustee must within 5 Business Days of when the Asset Trustee first becomes aware (or should reasonably have first become aware) of the commencement of an occurrence causing any delay or which is likely to cause delay to the Asset Trustee's Activities, give RMS's Representative written notice of any delay or likely delay to the Asset Trustee's Activities, details of the cause and how the Date for SPI Interface Works Completion, Date for Opening Completion and the Date for Completion are likely to be affected (if at all).

16.5 Delay

If:

- (a) the Asset Trustee becomes aware of any matter which will, or is likely to, give rise to a delay in the Asset Trustee achieving SPI Interface Works Completion, Opening Completion or Completion;
- (b) on or after the date which is 18 months after Financial Close, the D&C Independent Certifier gives a notice to the Asset Trustee under clause 16.5(b) of the New M5 Main Works D&C Deed,

then:

- (c) in the case of clause 16.5(a), the Asset Trustee must immediately give RMS a written notice setting out detailed particulars of the delay; and
- (d) in the case of clause 16.5(b), the Asset Trustee must provide RMS with a copy of the notice issued by the D&C Independent Certifier under clause 16.5(b) of the New M5 Main Works D&C Deed and promptly provide RMS with a detailed corrective action plan showing how the Contractor proposes to Mitigate the effects of the delay.

The parties agree that clause 16.5(d) shall not apply to the extent that the Asset Trustee has been prevented from undertaking the Asset Trustee's Activities in accordance with this deed as a consequence of a Force Majeure event.

16.6 Corrective action plan

- (a) RMS may (acting reasonably) within 5 Business Days of receipt of a corrective action plan under clause 16.5 give written notice to the Asset Trustee that it does not believe that implementation of the corrective action plan will enable the Asset Trustee to Mitigate the effects of the delay.
- (b) If RMS gives the Asset Trustee a notice under this clause 16.6 the Asset Trustee must promptly (and in any event within 5 Business Days) amend and resubmit the corrective action plan to RMS after which this clause 16.6 will continue to apply until RMS does not issue a notice under clause 16.6(a).

- (c) The Asset Trustee must thereafter use reasonable endeavours to diligently pursue a corrective action plan for which RMS does not issue a notice under clause 16.6(a).
- (d) The Asset Trustee will not be relieved of any Liability or responsibility under this deed or otherwise at Law arising out of or in connection with (nor will RMS's rights be affected by):
 - (i) any notice given by the Independent Certifier under clause 16.5(b) or given by RMS under this clause 16.6; or
 - (ii) implementation of any corrective action plan in respect of which RMS has or has not issued a notice under this clause 16.6.

16.7 Not Used

16.8 Not Used

16.9 Compensation Events

- (a) If the Asset Trustee is or will be delayed in achieving Opening Completion by the Date for Opening Completion or Completion by the Date for Completion by a Compensation Event, the Asset Trustee may claim compensation in accordance with the process set out in Schedule 39 and this clause 16.9.
- (b) If a Compensation Event occurs, the Asset Trustee must:
 - (i) take all reasonable steps to Mitigate the consequences of the Compensation Event;
 - (ii) otherwise comply with all reasonable directions of RMS concerning the Compensation Event and the consequences thereof; and
 - (iii) ensure that its Related Parties comply with the requirements of this clause 16.9(b).
- (c) Subject to clauses 16.9(b) 16.9(ca), and 16.9(e), RMS must pay:
 - (i) in respect of Compensation Events referred to in paragraph (a) of the definition of "Act of Prevention" and paragraphs (b), (c), (d), (e) or (f) of the definition of "Compensation Event":
 - (A) the Asset Trustee the Trustee's Delay Costs arising as a direct result of the Compensation Event; and
 - (B) where the Compensation Event occurs prior to the Date of Opening Completion, the Project Trustee the Trustee's Revenue Loss arising as a direct result of the Compensation Event; and
 - (ii) in respect of a Compensation Event referred to in paragraph (b) of the definition of "Act of Prevention" or in paragraph (g) of the definition of "Compensation Event", where the Compensation Event occurs prior to the Date of Opening Completion, the Project Trustee the Trustee's Revenue Loss arising as a direct result of the Compensation Event.
- (ca) The Trustees are not entitled to recover any amounts:
 - (i) pursuant to this clause 16.9(c) in respect of an accepted Trustee Change Notice; or

- (ii) pursuant to clause 16.9(c)(ii), unless and to the extent that the Asset Trustee is delayed in achieving Opening Completion by the Date for Opening Completion or Completion by the Date for Completion.
- (d) The Trustee's entitlement to the Trustee's Delay Costs under clause 16.9(c) will not exceed the amount per day specified in Schedule 56 for each phase of the Trustee's Activities as set out in Schedule 56 for the period when the delay occurs.
- (e) The Trustee's Delay Costs and the Trustee's Revenue Loss payable to the Trustees under clause 16.9(c) will be the sole remedy for the recovery of any Loss which the a Trustee or its Related Parties suffers or incurs arising out of or in any way in connection with any delay and disruption that:
 - (i) the Asset Trustee encounters in carrying out the Project Works or the Temporary Works; and
 - (ii) arises out of, or in any way in connection with, a Compensation Event (including a breach of this deed by RMS).
- (f) Clauses 16.9(d) and 16.9(e) are a limitation upon RMS's liability to the Asset Trustee and its Related Parties for any Losses suffered or incurred by the Asset Trustee or its Related Parties arising out of or in any way in connection with any such delay or disruption and the Asset Trustee waives, and must ensure that its Related Parties waive, all rights at Law to make any Claim against RMS in respect of such delay or disruption, and RMS will not be liable to the Asset Trustee or its Related Parties in these circumstances for such delay or disruption other than in respect of the matters for which RMS may be liable under this clause 16.9.
- (g) Notwithstanding the occurrence of a Compensation Event, the Asset Trustee must continue to perform all of its obligations under the Project Documents to the extent that the Asset Trustee is not prevented from performing those obligations by that Compensation Event.
- (h) The parties acknowledge that, notwithstanding any other provisions of this clause 16:
 - (i) no act or omission of RMS in its capacity as the Tolling Contractor (Back Office) will give rise to a Compensation Event for the purposes of this clause 16.9; and
 - (ii) the Trustees will not be entitled to Trustee's Delay Costs or Trustee's Revenue Loss in connection with any act or omission referred to in clause 16.9(h)(i).
- (i) The parties acknowledge that the Trustees will only be entitled to claim compensation or Change Costs in connection with the Compensation Event referred to in paragraph (h) of the definition of "Compensation Event" in accordance with clause 4D.

16.10 **Revenue Refund**

If:

- (a) on or prior to the Date of Opening Completion RMS has (for any reason in connection with a Compensation Event) paid the Project Trustee an amount of money on account for the Trustee's Revenue Loss in respect of a period occurring after the actual Date of Opening Completion; and

- (b) the actual Date of Opening Completion occurs earlier than the Date for Opening Completion determined under this deed,

then by no later than that date which is 20 Business Days after the Date of Opening Completion the Project Trustee must refund to RMS the amount of the Trustees' Revenue Loss paid by RMS in respect of the period occurring after the actual Date of Opening Completion.

16.11 Process for SPI Interface Works Completion, Opening Completion and Completion

- (a) The Asset Trustee must give RMS's Representative and the Independent Certifier:
 - (i) 6 month's;
 - (ii) 3 month's;
 - (iii) 1 months; and
 - (iv) 1 week's,prior written notice of the estimated Date of SPI Interface Works Completion, the estimated Date of Opening Completion and the estimated Date of Completion.
- (b) Subject to clause 16.11(h), RMS's Representative, the Asset Trustee and the Independent Certifier must, within 5 Business Days after receipt of each notice given under clause 16.11(a)(iv), jointly inspect the Project Works and the Asset Trustee's Activities at a mutually convenient time.
- (c) Within 2 Business Days of the joint inspection referred to in clause 16.11(b), the Independent Certifier must give the Asset Trustee and RMS a notice either:
 - (i) containing a list of items which it believes must be completed before SPI Interface Works Completion, Opening Completion or Completion (as the case may be) is achieved; or
 - (ii) stating that it believes that SPI Interface Works Completion, Opening Completion or Completion (as the case may be) is so far from being achieved that it is not practicable to issue a list as contemplated in clause 16.11(c)(i).
- (d) When the Asset Trustee considers SPI Interface Works Completion, Opening Completion or Completion (as the case may be) has been achieved, the Asset Trustee must notify RMS's Representative and the Independent Certifier in writing and provide them with an executed certificate in the form of Schedule 41.
- (e) Thereafter, and subject to clause 16.11(h), RMS's Representative, the Asset Trustee and the Independent Certifier must as soon as reasonably practicable jointly inspect the Project Works and the Asset Trustee's Activities at a mutually convenient time.
- (f) Following the joint inspection under clause 16.11(e), the Independent Certifier must within 5 Business Days after receipt of a notice under clause 16.11(d), or of receipt of a notice under clause 16.11(g):
 - (i) if SPI Interface Works Completion, Opening Completion or Completion (as the case may be) has been achieved, provide to RMS's Representative and the Asset Trustee a document signed by the Independent Certifier in the form set out in Schedule 42; or

- (ii) if SPI Interface Works Completion, Opening Completion or Completion (as the case may be) has not been achieved, issue a notice to the Asset Trustee and RMS in which it states:
 - (A) the items which remain to be completed before SPI Interface Works Completion, Opening Completion or Completion (as the case may be) is achieved; or
 - (B) that SPI Interface Works Completion, Opening Completion or Completion (as the case may be) is so far from being achieved that it is not practicable to notify the Asset Trustee of the items which remain to be completed as contemplated by clause 16.11(f)(ii)(A).
- (g) If the Independent Certifier issues a notice under clause 16.11(f)(ii), the Asset Trustee must proceed with the Asset Trustee's Activities and thereafter when it considers SPI Interface Works Completion, Opening Completion or Completion (as the case may be) has been achieved, it must give RMS's Representative and the Independent Certifier written notice to that effect after which clauses 16.11(d), 16.11(e) and 16.11(f) will reapply.
- (h) The Asset Trustee acknowledges and agrees that:
 - (i) RMS's Representative may invite any other person to attend any joint inspection provided for by this clause 16.11(h) (including the Independent Certifier); and
 - (ii) RMS's Representative may provide comments to the Independent Certifier (with a copy to the Asset Trustee) in relation to any non-compliance of the Asset Trustee's Activities with this deed.
- (i) RMS and the Asset Trustee acknowledge and agree that:
 - (i) Completion cannot occur until (among other things) SPI Interface Works Completion and Opening Completion have occurred;
 - (ii) once SPI Interface Works Completion has occurred, the Asset Trustee is not obliged to re-satisfy the requirements of SPI Interface Works Completion in order to achieve Opening Completion and Completion; and
 - (iii) once Opening Completion has occurred the Contractor is not obliged to re-satisfy the requirements of Opening Completion in order to achieve Completion.

16.12 Effect of a Notice of SPI Interface Works Completion, Notice of Opening Completion and Notice of Completion

- (a) A Notice of SPI Interface Works Completion, Notice of Opening Completion and Notice of Completion will not:
 - (i) constitute approval by RMS or RMS's Representative of each Trustee's performance of its obligations under this deed;
 - (ii) be taken as an admission or evidence that the Project Works or New M5 Main Works D&C Phase Maintenance comply with this deed; or
 - (iii) prejudice any rights or powers of RMS or RMS's Representative.
- (b) Without limiting clause 16.12(a), the parties agree that, in the absence of manifest error by the Independent Certifier, the Independent Certifier's certification as set

out in a Notice of SPI Interface Works Completion, a Notice of Opening Completion and a Notice of Completion is final and binding on the parties for the purposes only of establishing that SPI Interface Works Completion, Opening Completion or Completion (as the case may be) has occurred.

16.13 **Defects or omissions**

Notwithstanding that Opening Completion or Completion may have occurred, the Asset Trustee must as soon as practicable after Opening Completion (and in any event within 6 months after the Date of Opening Completion) correct any Defects which existed at the time of the issue of the Notice of Opening Completion.

16.14 **Opening of the New M5 Main Works**

- (a) The Project Works may not be opened for public use prior to the Date of Opening Completion.
- (b) The Project Trustee must open all traffic lanes of the Project Works to the public for the safe, efficient and continuous passage of vehicles as soon as practicable after the Date of Opening Completion and may then operate the Toll Collection System and levy tolls in relation to the New M5 Motorway in accordance with clause 21.
- (c) The Project Trustee must:
 - (i) give notice to RMS of its good faith estimate of the date on which it anticipates that a traffic lane of the Project Works could be opened for public use at least 60 Business Days before the anticipated date of opening and update that estimate as soon as practicable if it materially changes;
 - (ii) give notice to RMS of the date on which it intends to open the Project Works for public use at least 20 Business Days before to the intended date of opening;
 - (iii) otherwise liaise with RMS to ensure the opening of the Project Works is managed effectively;
 - (iv) effect all insurances required in relation to the Project Works under clause 26 prior to opening any part of the Project Works for public use; and
 - (v) do all things required to be done under this deed (including the SWTC) prior to the Project Works being opened to public use.
- (d) The parties acknowledge that, notwithstanding any provision of this deed, the opening of the Project Works prior to the Date of Completion will not affect or limit:
 - (i) the Asset Trustee's obligations to achieve Completion and rectify Defects in accordance with this deed;
 - (ii) any right or obligation of the Trustees under any Project Document which is conditional upon, or which arises as a consequence of, Completion; or
 - (iii) the calculation or payment of any amount which is conditional upon, or the right to payment of which arises as a consequence of, Completion.

16.15 **Opening of M5 East Motorway**

The Project Trustee must open all traffic lanes of the M5 East Motorway to the public for the safe, efficient and continuous passage of vehicles as soon as practicable after the M5E

Transfer Date and may then operate the Toll Collection System and levy tolls in relation to the M5 East Motorway in accordance with clause 21.

16.16 Opening of M5 West Motorway

Subject to clause 4C, the Project Trustee must open all traffic lanes of the M5 West Motorway to the public for the safe, efficient and continuous passage of vehicles as soon as practicable after the M5W Transfer Date and may then operate the Toll Collection System and levy tolls in relation to the M5 West Motorway in accordance with clause 21.

17. DEFECTS CORRECTION PERIODS

17.1 Correction of Defects

- (a) The Asset Trustee must correct all Defects in the Local Area Works, Utility Service Works and Property Works during the relevant Defects Correction Period.
- (b) Without limiting clause 17.1(a), if during a Defects Correction Period, RMS discovers or believes there is a Defect in the Local Area Works, Utility Service Works or Property Works, RMS may, without prejudice to any other rights which RMS may have under this deed or otherwise at Law, give the Asset Trustee a written direction specifying the Defect and requiring the Asset Trustee to correct the Defect (or a part of it) and specifying a reasonable time within which this must occur.
- (c) If the Asset Trustee disagrees with any direction given by RMS under clause 17.1(b), it must within 5 Business Days after receipt of such a notice, give notice of its disagreement to RMS. RMS and the Asset Trustee must use reasonable endeavours to resolve the matter the subject of the disagreement. If the matter is not resolved within 10 Business Days after the date of the Asset Trustee's notice, either RMS or the Asset Trustee may, by notice to the other and the Independent Certifier, refer the matter for determination by the Independent Certifier, who must within 10 Business Days after receipt of the referral make a determination as to the matter and notify the parties in writing of its determination together with its reasons for making its determination.
- (d) If RMS directs the Asset Trustee to correct a Defect under clause 17.1(b) prior to the expiration of the relevant Defects Correction Period and the Asset Trustee does not give a written notice under clause 17.1(c) or, if it does, the Independent Certifier determines that a Defect exists, the Asset Trustee must correct the Defect (or the part of it):
 - (i) within the time specified in RMS's direction;
 - (ii) at times agreed with RMS and in accordance with the requirements of any other relevant Authority;
 - (iii) so as to minimise the impact on the use of the relevant part of the Local Area Works, Utility Service Works, Property Works or Project Works; and
 - (iv) so as to minimise the inconvenience to possible users of the Motorway, any Local Area, a Utility Service, the Property Works or any access and the adjacent community.
- (e) The Asset Trustee must give notice to RMS and the Independent Certifier that a Defect has been corrected promptly after the correction of the Defect.

17.2 **Not used**

17.3 **Local Area Works**

Each discrete part of the Local Area Works has:

- (a) a Defects Correction Period which begins when:
 - (i) either:
 - (A) the relevant Authority which has jurisdiction in respect of the discrete part of the Local Area Works gives written notice to the Asset Trustee that the Authority is satisfied that the discrete part is complete; or
 - (B) if the Asset Trustee is unable to obtain the notice referred to in clause 17.3(a)(i)(A) despite:
 - (aa) promptly seeking that notice upon completion of the discrete part of the Local Area Works;
 - (bb) giving the relevant Authority not less than 20 Business Days to provide the notice requested; and
 - (cc) otherwise using its best endeavours to obtain that notice,
the Asset Trustee gives RMS written notice that it has been unable to obtain that notice and that in its view, the relevant Local Area Works are complete; and
 - (ii) RMS and the Independent Certifier have been provided with a copy of the relevant notice,
and which expires 36 months after the Date of Opening Completion; and
- (b) a further Defects Correction Period of 12 months in respect of any work the subject of a direction under clause 17.1(b) (relating to the discrete part of the Local Area Works) during the Defects Correction Period, which begins on the date of the correction of the Defect (or the part of it),

provided that the Defects Correction Period under this clause 17.3 will not exceed an aggregate period of 48 months after the Date of Opening Completion.

17.4 **Utility Service Works**

Each discrete part of the Utility Service Works (except in respect of those Utility Services that form part of the New M5 Main Works) has:

- (a) a Defects Correction Period which begins when:
 - (i) either:
 - (A) the relevant Authority which has jurisdiction in respect of the Utility Service gives written notice to the Asset Trustee that the Authority is satisfied that the discrete part is complete; or
 - (B) if the Asset Trustee is unable to obtain the notice referred to in clause 17.4(a)(i)(A) despite:

- (aa) promptly seeking that notice upon completion of the discrete part of the Utility Service Works;
- (bb) giving the relevant Authority not less than 20 Business Days to provide the notice requested; and
- (cc) otherwise using its best endeavours to obtain that notice,

the Asset Trustee gives RMS written notice that it has been unable to obtain that notice and that in its view, the relevant Utility Service Works are complete; and

- (ii) RMS and the Independent Certifier have been provided with a copy of the relevant notice,

and which expires 12 months after the Date of Opening Completion; and

- (b) a further Defects Correction Period of 12 months in respect of any work the subject of a direction under clause 17.1(b) (relating to the discrete part of the Utility Service Works) during the Defects Correction Period, which begins on the date of correction of the Defect (or the part of it),

provided that the Defects Correction Period under this clause 17.4 will not exceed an aggregate period of 24 months after the Date of Opening Completion.

17.5 **Property Works**

Each discrete part of the Property Works has:

- (a) a Defects Correction Period which begins upon the later of:
 - (i) the completion of that discrete part of the Property Works; and
 - (ii) the submission by the Asset Trustee to RMS and the Independent Certifier of a certificate or signed statement (as the case may be) under clause 11.3,

and which expires 12 months after the Date of Opening Completion; and

- (b) a further Defects Correction Period of 12 months in respect of any work the subject of a direction under clause 17.1(b) (relating to the discrete part of the Property Works) during the Defects Correction Period, which begins on the date of correction of the Defect (or part of it),

provided that the Defects Correction Period under this clause 17.5 will not exceed an aggregate period of 24 months after the Date of Opening Completion.

17.6 **Failure by the Asset Trustee to comply with direction**

If the Asset Trustee fails to comply with a notice given under clause 17.1(b), RMS may (without limiting any other rights it may have, including under clause 8.6) apply for a court order for specific performance.

17.7 **Rights not affected**

Neither RMS's rights, nor the Asset Trustee's liability, whether under this deed or otherwise according to law in respect of Defects, whether before or after the expiration of any relevant Defects Correction Period or this deed, will be in any way affected or limited by:

- (a) the rights conferred upon RMS or the Independent Certifier by this clause 17 or any other provision of this deed;
- (b) the exercise of, or the failure by RMS or the Independent Certifier to exercise, any such rights; or
- (c) any direction of RMS under this clause 17.

18. **M5 LEASES**

18.1 **M5 Leases**

- (a) The parties acknowledge and agree that each of the M5 Leases cannot be registered under the *Real Property Act 1900* (NSW) in its present form.
- (b) The Asset Trustee must procure surveys and other documents in accordance with the SWTC.
- (c) RMS must grant the Asset Trustee the M5 Leases and a licence over the Licensed Maintenance Areas in accordance with Schedule 22.
- (d) Between the Date of Opening Completion and the date on which each of the M5 Leases is registered at Land and Property Information (NSW), the respective rights and obligations of RMS and the Asset Trustee will be as set out in the draft motorway stratum leases comprising Exhibit D and the parties will be bound by the provisions of the draft motorway stratum leases comprising Exhibit D:
 - (i) in respect of the M5 East New Lease from and including the M5E Transfer Date;
 - (ii) in respect of the M5 West New Lease from and including the M5W Transfer Date; and
 - (iii) in respect of the New M5 Main Works Lease from and including the Date of Opening Completion,

even though the parties may not have executed the M5 Leases or it may not have been completed in accordance with Schedule 22.

18.2 **Easements**

RMS:

- (a) may create the Easements referred to in Appendix A of Schedule 21 in accordance with Schedule 21; and
- (b) subject to Schedule 21, must create the Easements referred to in Appendix B of Schedule 21 in accordance with Schedule 21.

18A **SMART MOTORWAYS**

18A.1 **Smart Motorways**

The Trustees acknowledge and agree that, notwithstanding any other provision of this deed or any other Project Document, RMS may, at its absolute discretion, implement or operate Smart Motorways or upgrade Smart Motorways or Smart Motorway Software at any time during the Term in accordance with this clause 18A.

18A.2 **Project Works and Motorway**

Without limiting the Trustee's obligations under clauses 13, 15 or 19, where RMS provides a Smart Motorways Notice in accordance with clause 18A.3:

- (a) the Asset Trustee must design and construct the Project Works and carry out the Asset Trustee's Activities; and
- (b) the Project Trustee must carry out the Project Trustee's Activities and O&M Work,

so that RMS may implement or operate Smart Motorways or upgrade Smart Motorways or Smart Motorways Software on the Motorway.

18A.3 **Implementation or operation of Smart Motorways**

- (a) RMS must give the Trustees at least 60 Business Days' prior written notice of its intention to implement or operate Smart Motorways or upgrade Smart Motorways or Smart Motorways Software, including details of:

- (i) any RMS SM Works that RMS proposes to carry out on the Construction Site, the Motorway Stratum or the Maintenance Site;
- (ii) any access to the Construction Site, the Motorway Stratum and the Maintenance Site that RMS will require to carry out the proposed RMS SM Works (if any) or implement or operate Smart Motorways or upgrade Smart Motorways or Smart Motorways Software;
- (iii) any traffic adjustments within or adjacent to the Construction Site, the Motorway Stratum or the Maintenance Site proposed by RMS in connection with the RMS SM Works (if any) or implementation or operation of Smart Motorways or upgrade of Smart Motorways or Smart Motorways Software;
- (iv) any Smart Motorways Change that RMS proposes; and
- (v) any other matter that RMS considers is relevant to the implementation or operation of Smart Motorways or upgrade of Smart Motorways or Smart Motorways Software,

(Smart Motorways Notice).

- (b) RMS must meet with the Trustees within 20 Business Days after receipt by the Trustees of a Smart Motorways Notice to negotiate in good faith with the Trustees in connection with the matters set out in the Smart Motorways Notice, including negotiating the terms on which:
 - (i) the parties will cooperate to enable RMS to carry out the RMS SM Works (if any) and implement or operate Smart Motorways or upgrade Smart Motorways or Smart Motorways Software;
 - (ii) the Asset Trustee or the Project Trustee (as relevant) will give RMS and its nominees access to those parts of the Construction Site, Motorway Stratum or Maintenance Site required by RMS to carry out the RMS SM Works (if any) and implement or operate Smart Motorways or upgrade Smart Motorways or Smart Motorways Software; and
 - (iii) the Trustees will permit reasonable traffic adjustments within or adjacent to the Construction Site, the Motorway Stratum or the Maintenance Site.

- (c) The Trustees must:
 - (i) comply with clause 18A.4 with respect to any Smart Motorways Change proposed by RMS; and
 - (ii) take all reasonable steps necessary to Mitigate any Loss suffered by the Trustees as a result of the implementation or operation of Smart Motorways or upgrade Smart Motorways or Smart Motorways Software, including by:
 - (A) installing such equipment as is necessary to prevent untolled use of the Motorway; and
 - (B) opening the shoulder of the carriageway to traffic where a temporary lane closure is required.
- (d) RMS must, in implementing or operating Smart Motorways or upgrading Smart Motorways or Smart Motorways Software:
 - (i) co-ordinate all activities associated with the construction and installation of any RMS SM Works;
 - (ii) use reasonable endeavours to minimise any interference with the construction, operation and use of the Motorway; and
 - (iii) require that its Related Parties comply with the requirements of clauses 18A.3(d)(i) and 18A.3(d)(ii).
- (e) RMS must not damage, destroy or interfere with the Motorway, Construction Site, Motorway Stratum or Maintenance Site other than as agreed under clause 18A.3(b).
- (f) The parties will agree under clause 18A.3(b) which aspects of the RMS SM Works will form part of the Motorway upon completion of those RMS SM Works.
- (g) The Trustees must not damage, destroy or interfere with any RMS SM Works, Smart Motorways Software or Traffic Management Assets which remain the property of RMS.

18A.4 **Changes to the Trustee's Activities**

Subject to clause 23A, if RMS proposes a Smart Motorways Change, then sections 1.2 to 1.9 (inclusive) of Schedule 37 will apply as if:

- (a) RMS had given the Trustees a Change Proposal in respect of the Smart Motorways Change pursuant to section 1.1(a) of Schedule 37; and
- (b) references to "Change" in Schedule 37 were references to "Smart Motorways Change".

18A.5 **Maintenance**

- (a) Subject to clause 18A.5(b), the Project Trustee must maintain and repair the Traffic Management Assets and any RMS SM Works or works the subject of any Smart Motorways Change (other than which remain the property of RMS).
- (b) Subject to clause 18A.3, the Trustees will not be responsible for any maintenance of or upgrades to any Smart Motorways Software.

18A.6 **RMS's liability in connection with Smart Motorways**

Subject to clause 23A, the parties acknowledge and agree that:

- (a) the Trustee's sole entitlement to compensation in connection with Smart Motorways or any Smart Motorways Change is to:
 - (i) the Change Costs payable by RMS in respect of that Smart Motorways Change (if any); and
 - (ii) any compensation pursuant to clause 23A for a Smart Motorways Event; and
- (b) RMS will not be under any obligation to:
 - (i) implement or operate Smart Motorways or upgrade Smart Motorways or Smart Motorways Software; or
 - (ii) regardless of whether or not Smart Motorways has been implemented or upgraded, control, improve or manage the flow of traffic and traffic congestion.

18A.7 **Trustees not relieved from its obligations**

RMS gives no representations or warranties in relation to the implementation (or non-implementation) of Smart Motorways during the Term, and nothing in this clause 18A, including:

- (a) the implementation of Smart Motorways or a Smart Motorways Change; or
- (b) RMS implementing or not implementing Smart Motorways or a Smart Motorways Change, or not controlling, improving or managing the flow of traffic and congestion following the implementation of Smart Motorways,

will relieve the Trustees from any of its obligations or liabilities under this deed or limit any of the risks the Trustees accept under this deed.

19. **OPERATION, MAINTENANCE AND REPAIR**

19.1 **General obligation**

- (a) Without limiting the Project Trustee's obligations under this clause 19, in respect of:
 - (i) the M5 East Motorway, on and from M5E Transfer Date until the Expiry Date, the Project Trustee must operate, maintain and repair the M5 East Motorway;
 - (ii) the M5 West Motorway, on and from M5W Transfer Date until the Expiry Date, the Project Trustee must operate, maintain and repair the M5 West Motorway; and
 - (iii) the New M5 Motorway, on and from the Date of Opening Completion until the Expiry Date the Project Trustee must operate, maintain and repair the New M5 Motorway,

so that:

- (iv) subject to clause 19.2, all traffic lanes of the Motorway (including all on-ramps, off-ramps, exits and entries) are at all relevant times during the Term open to the public for the safe, efficient and continuous passage of vehicles;
 - (v) not used;
 - (vi) each part of the Motorway is in a condition which will be capable of achieving Final Handover at the end of the Term;
 - (vii) each part of the Motorway will otherwise remain at all relevant times fit for its intended purposes (taking into account the purpose for which the M5 East Motorway and the M5 West Motorway were designed) and that Defects are corrected as soon as possible; and
 - (viii) the requirements of the Environmental Documents are at all times met.
- (b) Not used.
 - (c) Not used.
 - (d) The Project Trustee must, at its own cost, carry out all work necessary or desirable to enable the obligations specified in clause 19.1(a) to be fulfilled.

19.1A Maintenance during construction

- (a) The Asset Trustee must carry out all maintenance work specified in Part A of the SWTC, subject to clause 19.1A(e) (including all related documentation, asset condition assessment and reporting) on all roads (including motorways) within the Construction Site and all relevant completed parts of the Project Works, commencing from the date that the NSW Government Department of Planning & Environment approves the "Construction Environmental Management Plan" referred to in Schedule 28 until the Date of Opening Completion of the New M5 Main Works. The Asset Trustee acknowledges that other entities will maintain roads prior to this date, and the Asset Trustee will cooperate and coordinate with such entities and will, subject to clause 9.7, allow them to perform such work.
- (b) Various types of maintenance activities, measures, intervention levels and response times are described in Part A of the SWTC. In addition to this information which describes the most common and minimum work to be carried out, the Asset Trustee must undertake other maintenance activities:
 - (i) reasonably expected to provide for safe and uninterrupted passage of road users;
 - (ii) required due to the New M5 Main Works and as a consequence of the Asset Trustee's Activities; and
 - (iii) required by the SWTC as a result of damage by traffic incidents, to the extent that the cost of the relevant maintenance activities does not exceed \$15,000 per incident.
- (ba) Where the cost of maintenance activities required by the SWTC as a result of damage by traffic exceeds \$15,000 per incident, the Asset Trustee is not required to undertake such maintenance activities unless directed to do so by RMS as a Change. If RMS directs such a Change, the Asset Trustee must bear the first \$15,000 of Change Costs.

For the avoidance of doubt, clause 19.1(b)(iii) and this clause 19.1(ba) do not apply to damage to the Project Works or the Temporary Works and the Asset Trustee bears the risk of such loss or damage in accordance with clause 26.1.

- (c) The Asset Trustee must carry out any maintenance work that is required on roads and paths outside the Construction Site which results from the New M5 Main Works, the Temporary Works or the Asset Trustee's Activities.
- (d) The Asset Trustee must provide its maintenance management procedures to RMS's Representative within 60 days of the date that it is given access to the roads within the Construction Site pursuant to the Site Access Schedule.
- (e) The scope of the New M5 Main Works D&C Phase Maintenance for roads in Local Areas does not include Section 2 Intervention Standards – items 2.1(2) to 2.1(9) (inclusive) of Attachment 1 to Appendix C.6 of Part A of the SWTC.

19.2 **Obligation to keep Motorway open**

- (a) During the Term, each Trustee must keep all traffic lanes of the Motorway (including all on-ramps, off-ramps, exits and entries) open to the public for the safe, efficient and continuous passage of vehicles (whether or not the Toll Collection System is operational) except to the extent:
 - (i) it has been authorised to close the Motorway or a traffic lane of the Motorway under a road occupancy licence granted by RMS in accordance with section 10 and Appendices C4 and C5 of Part A of the SWTC, or RMS otherwise consents in writing; or
 - (ii) it is necessary to close the Motorway or a traffic lane of the Motorway as a result of:
 - (A) the requirements of any Law or relevant Authority which have the effect of Law and which necessitate the closing of the Motorway or a traffic lane of the Motorway;
 - (B) the occurrence of a Force Majeure event which prevents the safe passage of vehicles;
 - (C) a material threat to the health or safety of the public;
 - (D) maintenance of and/or repairs to the Motorway carried out in accordance with this deed, including the SWTC;
 - (E) access by RMS or any person authorised by RMS in accordance with clause 19.15 or 22.3;
 - (F) traffic management measures required to respond to congestion or Incidents in the road network surrounding the Motorway in accordance with protocols agreed in writing by the Project Trustee and RMS; or
 - (G) the Trustees are conducting any work the subject of a Change directed under clause 4A.3(i)(ii) or 4B.2(i)(ii).
- (b) If a Trustee closes or proposes to close any part of the Motorway for any reason whatsoever, that Trustee must promptly notify RMS in writing specifying the reasons for such closure.

19.2A **Entry into O&M Deed**

- (a) Subject to the Financiers Tripartite Deed, the Project Trustee must enter into the O&M Deed to appoint the Operator (or enter into such other arrangements which satisfy the requirements of this deed and are otherwise acceptable to RMS (acting reasonably)) for the provision of:
 - (i) the New M5 Main Works O&M Work, no later than 18 months prior to the anticipated Date of Opening Completion in respect of the New M5 Main Works;
 - (ii) the M5 East O&M Work, no later than 18 months prior to the anticipated M5E Transfer Date; and
 - (iii) in respect of the M5 West O&M Work, no later than 6 months prior to the M5W Transfer Date.
- (b) RMS and the Trustees acknowledge and agree that:
 - (i) the Project Trustee will only be required to carry out the O&M Work and the Asset Trustee will only be required to carry out Asset Renewal, on and from:
 - (A) the Date of Opening Completion of the New M5 Main Works;
 - (B) the M5E Transfer Date; and
 - (C) the M5W Transfer Date; and
 - (ii) prior to the Date of Completion of the New M5 Main Works, the Asset Trustee will undertake the maintenance obligations under this deed in respect of the New M5 Main Works.

19.3 **Performance of O&M Work**

- (a) Without limiting clause 19.1, in performing the O&M Work, the Project Trustee must:
 - (i) comply with O&M Best Practices and for this purpose develop, implement and continuously improve maintenance standards and systems to reflect O&M Best Practices, including performance and intervention standards, appropriate response times and management and control systems;
 - (ii) keep the Motorway and any maintenance plant clean and tidy and regularly remove from any place where the O&M Work is being performed any waste or surplus material arising from such performance;
 - (iii) act in a timely and expeditious manner;
 - (iv) once it has commenced any O&M Work, proceed with the O&M Work with due expedition and without delay and must take all steps reasonably available to it (including re-sequencing and re-scheduling the commencement of other O&M Work) to minimise any disruption to, or compromise of the safety of, the users of the Motorway;
 - (v) minimise the impact of the performance of the O&M Work on motorists and other users of the Motorway;
 - (vi) perform the O&M Work using good workmanship and materials which are fit for their intended purposes; and

- (vii) subject to clause 19B, if, in the performance of the O&M Work, it is required to replace any worn, failed or defective parts, use replacement parts which are:
 - (A) of equal quality to those required under this deed; and
 - (B) fit for their intended purpose.
- (b) If any damage is caused by the Project Trustee, its employees, agents or contractors or any employee of an agent or contractor in the performance of the O&M Work to any property or Utility Service, the Project Trustee must promptly make good the damage at its own cost and pay any compensation payable in connection with the damage.
- (c) Upon completion of any O&M Work, the Project Trustee must promptly and in a good and workmanlike manner remove all temporary protection measures installed in connection with it.

19.4 **O&M Manuals**

- (a) In respect of:
 - (i) the New M5 Main Works, as a condition precedent to Opening Completion, the Asset Trustee must develop the O&M Manuals in respect of the New M5 Motorway;
 - (ii) the M5 East Motorway, 12 months before the M5E Transfer Date, the Asset Trustee must develop the O&M Manuals in respect of the M5 East Motorway; and
 - (iii) the M5 West Motorway, 12 months before the M5W Transfer Date, the Asset Trustee must develop the O&M Manuals in respect of the M5 West Motorway,

and thereafter the Project Trustee must maintain the O&M Manuals, in accordance with the requirements of this deed and the Project Documentation Schedule.

- (aa) The Trustees may request in writing that RMS procures for the Trustees reasonable access to the Existing M5 East Documents and the Existing M5 West Documents:
 - (i) in relation to the Existing M5 East Documents, during the period commencing on the date that is 18 months prior to the M5E Transfer Date and ending on the M5E Transfer Date; and
 - (ii) in relation to the Existing M5 West Documents, during the period commencing on the date that is 18 months prior to the M5W Transfer Date and ending on the M5W Transfer Date.
- (ab) The Trustees acknowledge and agree that:
 - (i) RMS is not obliged to provide any Existing M5 East Document or Existing M5 West Document to the Trustees;
 - (ii) the Trustees may not copy or remove the Existing M5 East Documents or the Existing M5 West Documents from the place in which they are kept; and
 - (iii) the Existing M5 East Documents and the Existing M5 West Documents are "Information Documents" for the purposes of this deed.

- (b) The O&M Manuals must contain the contents required by the SWTC.
- (c) RMS owes no duty to the Trustees to review the O&M Manuals or any draft submitted by either Trustee for errors, omissions or compliance with this deed.
- (d) No review of, comments upon, or notice given in respect of the O&M Manuals or any draft or any other act or omission of RMS in respect of the O&M Manuals or any draft will lessen or otherwise affect:
 - (i) either Trustee's Liabilities or responsibilities under this deed or otherwise according to law; or
 - (ii) RMS's rights against the Trustees, whether under this deed or otherwise according to law.
- (e) The Asset Trustee warrants that:
 - (i) on:
 - (A) Opening Completion, the O&M Manuals in respect of the New M5 Motorway;
 - (B) the M5E Transfer Date, the O&M Manuals in respect of the M5 East Motorway; and
 - (C) the M5W Transfer Date, the O&M Manuals in respect of the M5 West Motorway,

will be fit for their intended purposes; and
 - (ii) in addition to the warranties referred to in section 4 of Schedule 35, for the Project Plans incorporated into the O&M Manuals under clause 9.4(e), that compliance with the O&M Manuals will enable the Project Trustee, during the Term, to fulfil the Project Trustee's obligations under this deed.
- (f) The Project Trustee, in respect of the O&M Work:
 - (i) must comply with the O&M Manuals as submitted to RMS in accordance with the Project Documentation Schedule; and
 - (ii) agrees that compliance by it with the O&M Manuals will not in any way lessen or affect:
 - (A) its Liabilities or responsibilities under this deed or otherwise according to law; or
 - (B) RMS's rights against it, whether under this deed or otherwise according to law.
- (g) The Asset Trustee, in respect of the Asset Renewal:
 - (i) must comply with the O&M Manuals as submitted to RMS in accordance with the Project Documentation Schedule; and
 - (ii) agrees that compliance by it with the O&M Manuals will not in any way lessen or affect:
 - (A) its Liabilities or responsibilities under this deed or otherwise according to law; or

- (B) RMS's rights against it, whether under this deed or otherwise according to law.

19.5 **Failure to comply with obligations**

- (a) If, other than to the extent permitted or excused pursuant to this deed:
 - (i) the O&M Manuals have not been maintained or complied with, as required by this deed;
 - (ii) the O&M Manuals are deficient as a mechanism for ensuring that at the end of the Term the Motorway will be in the handover condition required by the terms of this deed;
 - (iii) the Project Trustee otherwise fails to comply with its obligations under clauses 19.1 or 19B; or
 - (iv) the Asset Trustee otherwise fails to comply with its obligations under clauses 19A.1 or 19B,

RMS may, at any time during the Term, issue to the Project Trustee or the Asset Trustee (as applicable) a notice requiring the Project Trustee or the Asset Trustee (as applicable) to rectify any specified non-conformances within 12 months.

- (b) If at the end of such 12 month period the non-conformances specified in a notice issued by RMS in accordance with clause 19.5(a) have not been rectified in full to the extent to which they can be rectified, RMS may issue to the Project Trustee or the Asset Trustee (as applicable) a notice to that effect and the Project Trustee or the Asset Trustee (as applicable) must provide to RMS an unconditional undertaking for an amount determined by RMS (which must be reasonable having regard to the nature of the non-conformances) up to \$20 million (Indexed) which complies with the requirements of clause 10, as security for that Trustee's performance of its obligations under clause 19.1 or 19A.1 (as applicable).

19.6 **Not used**

19.7 **Inspection**

RMS, its employees and agents (including any subcontractors and their employees) may, at any time during the Term, enter during business hours or on reasonable notice (except in the case of an emergency, when the right of access will be immediate) the Maintenance Site, the Motorway Stratum, the Motorway and the Motorway Control Centre to inspect and observe the operation, maintenance and repair of the Motorway or to exercise any right or perform any obligation which RMS has under any Project Document.

19.8 **Changes to Motorway**

Subject to clause 14, the Trustees must:

- (a) not make (or permit to be made) any:
 - (i) structural changes to the Motorway; or
 - (ii) changes to the Motorway which are inconsistent with or outside the requirements of the SWTC,

without RMS's prior written approval (which approval must be given to the extent that the change is required in order for the Trustees to comply with the Law); and

- (b) notify RMS of any other change made to the Motorway.

19.9 **Advertising signage**

Subject to clause 15.5(b), the Trustees must not (at any time during the Term) erect, install, paint or display any advertising, promotional or similar signage or material on, in or near any part of the Motorway (or permit any third party to do so).

However, this clause 19.9 will not prevent the Trustees from installing and maintaining operational directional signage which is specified in Appendix B.8 of Part A of the SWTC (but on the basis that the Trustees obtain all other necessary Approvals in respect of such signage).

19.10 **Fixtures, fittings and equipment**

The Trustees must ensure that all fixtures and fittings comprised in the Motorway and all dedicated equipment used by it in connection with the Motorway, will be:

- (a) owned by a Trustee;
- (b) owned by a Trustee's Subcontractor with an option in favour of a Trustee to acquire title to them upon expiry or termination of the relevant Subcontract; or
- (c) the subject of an agreement:
 - (i) with an option in favour of a Trustee to acquire title to them for nominal cost at the end of the term of such agreement; and
 - (ii) which includes a right for a Trustee to assign its rights and obligations under the agreement to RMS (or its nominee) prior to the end of the term of such agreement on an early termination of this deed.

19.11 **Operating qualifications**

- (a) The Trustees must:
 - (i) ensure that each Relevant Entity:
 - (A) is reputable and has sufficient experience and expertise in successfully operating, maintaining and repairing (as applicable) tollways, freeways or other roads;
 - (B) has in place arrangements for ensuring the availability of the appropriate skills and resources to perform its obligations to the standards required by this deed;
 - (C) is of sufficiently high financial and commercial standing to perform its obligations to the standards required by this deed; and
 - (D) is engaged on commercial terms negotiated on an arm's length basis having regard to the obligations of the Trustees under this deed; and
 - (ii) if the Relevant Entity is a Key Relevant Entity, provide RMS with prior written details of the Relevant Entity and the terms and conditions of its appointment.

- (b) Subject to clause 19.12, the Trustees must not:
 - (i) terminate the appointment of any Key Relevant Entity unless another person, in respect of which clause 19.11(a) has been complied with, is appointed to perform the obligations which were performed by that Key Relevant Entity; or
 - (ii) make, or consent to, any modification, variation or amendment of a material nature to the O&M Deed or to any other agreement under which a Key Relevant Entity is appointed, unless such modification, variation or amendment is on commercial terms and has been negotiated on an arm's length basis and prior written details have been given to RMS,

unless RMS otherwise consents in writing, which consent must not be unreasonably withheld or delayed.
- (c) The engagement by a Trustee of any other Relevant Entity will not limit or affect either of the Trustee's Liabilities under this deed.

19.12 Appointment or replacement of Key Relevant Entity

- (a) If, at any time, a Trustee proposes to appoint or replace a Key Relevant Entity, that Trustee must first obtain prior written consent from RMS for the appointment or novation.
- (b) RMS must not withhold such consent where:
 - (i) RMS has been provided with written details of the proposed replacement Key Relevant Entity, the terms and conditions of the proposed appointment or novation and any other information reasonably requested by RMS;
 - (ii) the proposed replacement Key Relevant Entity is a reputable corporation;
 - (iii) where the Key Relevant Entity that that Trustee proposes to appoint or replace is the Operator, in RMS's reasonable opinion, the proposed new or replacement Key Relevant Entity (whether by itself or by way of support from its unitholders in a form acceptable to RMS acting reasonably):
 - (A) has sufficient expertise and ability; and
 - (B) is of sufficiently high financial and commercial standing,

to properly carry out the obligations of the Operator under the relevant Project Documents;
 - (iv) all terms and conditions of the proposed appointment or novation are reasonably acceptable to RMS;
 - (v) the proposed new or replacement Key Relevant Entity has agreed to:
 - (A) be bound by the terms of the relevant Project Documents;
 - (B) if the Key Relevant Entity will perform Asset Renewal, enter into a side deed with RMS and the Asset Trustee on terms reasonably satisfactory to RMS (acting reasonably); and
 - (C) where the proposed replacement Key Relevant Entity will replace RMS as the Tolling Contractor (Back Office), enter into a side deed with

the Project Trustee and RMS on terms acceptable to RMS (acting reasonably); and

- (vi) a person other than RMS bears all reasonable costs and expenses (including legal costs and expenses) of and incidental to:
 - (A) any enquiries which RMS may make for the purposes of determining whether to consent to the appointment or novation;
 - (B) the procurement of the new or replacement Key Relevant Entity; and
 - (C) the preparation, negotiation and execution of any relevant documentation and any stamp duty or similar charges in relation to such documentation,

and must notify the Trustees that RMS gives or withholds its consent no later than 20 Business Days after RMS has received the information referred to in clause 19.12(b)(i).

- (c) For the purposes of clause 19.12(a), RMS must not take into account its own commercial interests as a back office services provider when making its determination whether to consent to a proposed replacement Key Relevant Entity replacing RMS as the Tolling Contractor (Back Office).

19.13 **Notice of damage and accidents**

- (a) During the Term, the Trustees must promptly give RMS a detailed written report of:
 - (i) any material damage to or defect or disrepair in the Motorway of which it is aware;
 - (ii) the action which the Trustees propose to take to correct that material damage, defect or disrepair, and the estimated time that correction will require; and
 - (iii) any Incidents or other accidents involving material damage or injury which occur on the Motorway of which it is aware.
- (b) If the Trustees provide or are required to provide a report to RMS in accordance with clause 19.13(a), the relevant Trustee must thereafter take the action referred to in that report and provide any additional information reasonably requested by RMS in respect of the subject matter of such report.

19.14 **Not used**

19.15 **Cableways**

- (a) The Project Trustee acknowledges that the New M5 Main Works must include cableways for the accommodation of RMS's cables in accordance with Section 13 of Appendix B.12 of Part A of the SWTC.
- (b) Neither Trustee may use or permit the cableways to be used other than as directed by RMS.
- (c) RMS and any person authorised by RMS may enter the Maintenance Site, the Motorway Stratum, the New M5 Main Works Site and the Motorway Control Centre during business hours or on reasonable notice (except in the case of an emergency when no notice will be required) for the purposes of installing, maintaining,

repairing and removing cables and associated equipment in or from the cableways, provided they use their best endeavours to minimise any disruption to the Project Trustee's or the Asset Trustee's operations and comply with the Asset Trustee's or the Project Trustee's or its contractor's reasonable occupational health and safety requirements.

19.16 **Security**

The Project Trustee must provide such security measures as are necessary for the protection and security of the O&M Work and the Motorway, and the Asset Trustee must provide such security measures as are necessary for the protection and security of the Asset Renewal, against theft, vandalism, unauthorised entry into the Motorway or the Maintenance Site and any other unlawful acts.

19.17 **WestConnex Operational Integration**

- (a) The Trustees acknowledge and agree that:
 - (i) the Project Works are intended to form part of the broader WestConnex Program of Works; and
 - (ii) RMS may, at any time during the Term, elect to require the Trustees, by notice in writing, to integrate the operation of the Motorway with the broader WestConnex Program of Works (or part thereof).
- (b) If RMS provides a notice to the Trustees as contemplated by clause 19.17(a)(ii), the Trustees must provide all cooperation, documents, information and other assistance as required by RMS in order to implement the integration of operations across the WestConnex Program of Works (or part thereof).
- (c) RMS and the Trustees acknowledge and agree that to achieve operational integration across the WestConnex Program of Works (or part thereof), the parties must enter into negotiations and thereafter negotiate in good faith in an endeavour to agree on a method of achieving the relevant operational integration.
- (d) RMS and the Trustees acknowledge that in any negotiations under clause 19.17(c), they will take a flexible approach, including giving consideration to:
 - (i) amending the Project Documents;
 - (ii) varying the Term;
 - (iii) varying the financial or other contributions of the parties; and/or
 - (iv) taking such other action as may be appropriate.

19.18 **Handover Cooperation**

Prior to:

- (a) in respect of the M5 East Motorway, the M5E Transfer Date; and
- (b) in respect of the M5 West Motorway, the M5W Transfer Date,

RMS must do all things reasonably required by the Project Trustee to ensure the smooth and orderly transmission of responsibility for the operation, maintenance and repair of the M5 East Motorway or the M5 West Motorway (as applicable), including:

- (c) meetings with the Project Trustee and such other persons notified by the Project Trustee to discuss the operation, maintenance and repair of the M5 East Motorway or the M5 West Motorway (as applicable); and
- (d) providing access to their operations for managers and supervisors of the Project Trustee or its nominee for the purpose of familiarisation.

19A **Asset renewal**

19A.1 **General obligation**

- (a) The Asset Trustee must undertake the Asset Renewal throughout the Term so that:
 - (i) subject to clause 19.2, all traffic lanes of the Motorway (including all on-ramps, off-ramps, exits and entries) are at all relevant times during the Term open to the public for the safe, efficient and continuous passage of vehicles;
 - (ii) not used;
 - (iii) not used;
 - (iv) the Motorway is in a condition which will be capable of achieving Final Handover at the end of the Term;
 - (v) the Motorway otherwise remains at all relevant times fit for its intended purposes and that Defects are corrected as soon as possible; and
 - (vi) the requirements of the Environmental Documents are at all times met.
- (b) Not used.
- (c) Not used.
- (d) The Asset Trustee must, at its own cost, carry out all work necessary or desirable to enable the obligations specified in clause 19A.1(a) to be fulfilled.

19A.2 **Performance of Asset Renewal**

- (a) Without limiting clause 19A.1, in performing the Asset Renewal, the Asset Trustee must:
 - (i) comply with O&M Best Practices and for this purpose develop, implement and continuously improve maintenance standards and systems to reflect O&M Best Practices, including performance and intervention standards, appropriate response times and management and control systems;
 - (ii) keep the Motorway and any maintenance plant clean and tidy and regularly remove from any place where the Asset Renewal is being performed any waste or surplus material arising from such performance;
 - (iii) act in a timely and expeditious manner;

- (iv) once it has commenced any Asset Renewal, proceed with the Asset Renewal with due expedition and without delay and must take all steps reasonably available to it (including re-sequencing and re-scheduling the commencement of other Asset Renewal) to minimise any disruption to, or compromise of the safety of, the users of the Motorway;
 - (v) minimise the impact of the performance of the Asset Renewal on motorists and other users of the Motorway;
 - (vi) perform the Asset Renewal using good workmanship and materials which are fit for their intended purposes; and
 - (vii) subject to clause 19B, if, in the performance of the Asset Renewal, it is required to replace any worn, failed or defective parts, use replacement parts which are:
 - (A) of equal quality to those required under this deed; and
 - (B) fit for their intended purpose.
- (b) If any damage is caused by the Asset Trustee, its employees, agents or contractors or any employee of an agent or contractor in the performance of the Asset Renewal to any property or Utility Service, the Asset Trustee must promptly make good the damage at its own cost and pay any compensation payable in connection with the damage.
 - (c) Upon completion of any Asset Renewal, the Asset Trustee must promptly and in a good and workmanlike manner remove all temporary protection measures installed in connection with it.

19B Performance standards

- (a) Each of:
 - (i) the Project Trustee, in carrying out its obligations under clause 19.1; and
 - (ii) the Asset Trustee, in carrying out its obligations under clause 19A.1,
 must:
 - (iii) operate and maintain the Motorway so that the performance of the Motorway meets the performance standards specified in sections 9 and 10 of Part A of the SWTC; and
 - (iv) where clause 19B(a)(iii) requires the Trustees to carry out any repair, replacement or renewal of any component of the Motorway, carry out that repair, replacement or renewal:
 - (A) in respect of any component of the New M5 Motorway, so it meets the performance standards specified in Part A of the SWTC;
 - (B) in respect of any component of the M5 East Motorway, so it meets the performance standards specified in Part A or Part B of the SWTC; and
 - (C) in respect of any component of the M5 West Motorway, so it meets the performance standards specified in Part A or Part C of the SWTC.

- (b) The Trustees agree that:
 - (i) the standards, tasks, obligations and other provisions contained in or referred to in those parts of the SWTC referred to in clauses 19B(a)(iii) and 19B(a)(iv) represent the minimum requirements which the Trustees must satisfy for the purpose of fulfilling their obligations under clauses 19B(a)(i) and 19B(a)(ii);
 - (ii) the Trustees bear the risk that their compliance with the minimum requirements referred to in clause 19B(a)(i), and the development and compliance with the maintenance standards of the kind referred to in the SWTC, will not enable the obligations specified in clauses 19B(a)(i) and 19B(a)(ii) to be satisfied; and
 - (iii) the Trustees must, at their own cost, carry out all work in addition to that necessary or desirable to meet the minimum requirements specified in clause 19B(b)(i) to enable obligations in clauses 19B(a)(i) and 19B(a)(ii) to be fulfilled.
- (c) The Trustees will not be in breach of clause 19B(a)(iii) to the extent that the M5 East Motorway or the M5 West Motorway is not capable of meeting the performance standards referred to in that clause because:
 - (i) an M5 East Asset is not in the condition required by Part B of the SWTC between the M5E Transfer Date and the date on which that M5 East Asset is required to be repaired, replaced or renewed in accordance with clause 19B(a)(iv); or
 - (ii) an M5 West Asset is not in the condition required by Part C of the SWTC between the M5W Transfer Date and the date on which the M5 West Asset is required to be repaired, replaced or renewed in accordance with clause 19B(a)(iv).

19C Maintenance on SPI Lease Area

Notwithstanding any other provision of this deed, during the Term, the Project Trustee's obligation to maintain the SPI Lease Area is limited to:

- (a) maintenance of:
 - (i) the Carriageways, bridges (superstructure and substructure) and any other structure directly supporting the Carriageway;
 - (ii) the Motorway Control Centre;
 - (iii) the intelligent transport system infrastructure associated with the New M5 Motorway;
 - (iv) drainage and pump stations that convey runoff from the Carriageways;
 - (v) motorway boundary fences associated with the New M5 Motorway;
 - (vi) lighting infrastructure associated with the New M5 Motorway; and
 - (vii) road furniture associated with the New M5 Motorway; and
- (b) routine maintenance to the extent necessary for the Project Trustee to comply with its operation and maintenance obligations.

19D **Road Owners Coordination Agreement**

RMS and each Trustee acknowledge and agree that RMS's awareness of the terms of the Road Owners Coordination Agreement will not lessen or otherwise affect RMS's rights under this deed.

20. **REPORTING AND NOTICES**

20.1 **Accounting and financial reporting**

- (a) The Trustees must each keep proper books of account and all other records relating to the Project.
- (b) The Trustees must each have their accounts audited annually.
- (c) The Trustees must each ensure that their respective books of account and records referred to in clause 20.1(a) are available to RMS at all reasonable times for examination, audit, inspection, transcription and copying.
- (d) Without limiting its obligations under clause 34, if this deed is terminated, the Trustees must each give RMS all books of account and records referred to in clause 20.1(a) which are necessary for the continued operation, maintenance and repair of the Motorway.
- (e) RMS must give the Trustees access to any books of account or records given to RMS by the Trustees for a period of 7 years after the date on which such books of account or records were given to RMS under clause 20.1(d).
- (f) The Project Trustee must, during the Term, give to RMS a Monthly Operational Management Report as soon as practicable and in any event not later than 10 Business Days after the end of each month.
- (g) Not later than 30 November in each year, the Trustees must each give to RMS the audited financial statements (including all notes to and forming part of the financial statements) for the previous financial year for each member of the Group.
- (h) The Trustees must each provide to RMS, in respect of each member of the Group:
 - (i) as soon as practicable and in any event not later than 120 Business Days after the close of its financial year, a copy of its audited statement of financial position and statement of financial performance for that financial year; and
 - (ii) as soon as practicable and in any event not later than 40 Business Days after the first half of its financial year, a copy of its statement of financial position and statement of financial performance, certified as correct by a director and secretary of the relevant member of the Group.
- (i) The Trustees must each give to RMS:
 - (i) copies of all documents or information given to or received by it from the Australian Securities and Investments Commission or ASX Limited (if applicable) promptly after the information is first given or received; and
 - (ii) such other information relating to the Project as RMS may reasonably require from time to time.

- (j) The Project Trustee must, during the Term, provide the following information to RMS either by way of a written report in the format reasonably required by RMS from time to time or by providing RMS with access to a web based database:
 - (i) on a 24 hourly basis, the daily numbers of vehicles using the Motorway by vehicle class (passenger or commercial) for each Tollable Section at the point of toll collection;
 - (ii) on a monthly basis:
 - (A) the hourly, daily and monthly aggregate of vehicles using the Motorway by vehicle class (passenger or commercial) for each Tollable Section at the point of toll collection; and
 - (B) the daily and monthly aggregate of tolls collected in accordance with clause 21 of this deed; and
 - (iii) within 20 Business Days after the end of each financial year during the Term:
 - (A) the number of vehicles using the Motorway each month by vehicle class (passenger or commercial) for each Tollable Section at the point of toll collection; and
 - (B) the aggregate monthly and annual aggregate of tolls collected in accordance with clause 21 of this deed.

20.2 **Copies of notices**

Each party must provide to the other party as soon as practicable certified copies of all material notices received by it under the Project Documents from any of its co-contracting parties in order that the other party is kept informed at all times of any material developments which could have a serious effect upon a party's rights pursuant to any of the Project Documents.

20.3 **Advice regarding rights**

Each party undertakes to advise the other party as soon as practicable after an event has occurred which to a party's actual knowledge could in any way materially prejudice the other party's rights under this deed by reason of the legitimate exercise of significant rights available to third parties arising from the Project Documents.

21. **PAYMENTS AND REVENUE**

21.1 **Tolls**

- (a) Subject to clause 21.1(b), the Project Trustee may levy tolls for:
 - (i) the use of the M5 East Motorway (or part of it) from the M5E Transfer Date until the Expiry Date;
 - (ii) the use of the M5 West Motorway (or part of it) from the M5W Transfer Date until the Expiry Date; and
 - (iii) the use of the New M5 Motorway (or part of it) from the Date of Opening Completion until the Expiry Date;

for the passage of motor vehicles during the Term in accordance with the Toll Calculation Schedule.

- (b) The Project Trustee must not (and must ensure that any party with whom it contracts, including the Operator, does not) levy or impose any charge, toll or fee for or in connection with the use of the Motorway other than in accordance with the Toll Calculation Schedule.
- (c) The Project Trustee may only levy tolls by means of the Toll Collection System.
- (d) Without limiting any of the Project Trustee's obligations under this deed, the Project Trustee must comply with the *Roads Regulation 2008* (NSW).

21.2 Entitlement to toll revenue

Subject to clause 2.2 of the M5 Leases, the Project Trustee will be entitled to all revenue collected by the Toll Collection System during the Term.

21.3 Other revenue

- (a) The Project Trustee must not (without the prior written approval of RMS) engage in, or permit the Motorway or the Motorway Stratum to be used for, any business or revenue generating activity, other than the collection of tolls by the Project Trustee in accordance with this deed (**Non-toll Business**).
- (b) If the Project Trustee wishes to engage in a Non-toll Business (including permitting others to have access to the Motorway or the Motorway Stratum for the purpose of installing and operating Utility Services or service centres), it must provide full written details of the proposal to RMS for its written approval.
- (c) Any proposal put to RMS for approval under clause 21.3(b) must be consistent with clause 2.2 of the M5 Leases.
- (d) In giving or withholding approval to a proposal submitted to RMS pursuant to clause 21.3(b), RMS must act reasonably.

21.4 Interoperability

The Project Trustee must ensure that, during the Term, it complies with the document entitled "Memorandum of Understanding - Electronic Toll Collection" dated 30 October 2009 (as amended or updated from time to time).

22. TRANSPORT NETWORK MANAGEMENT

22.1 No restrictions on RMS

The Trustees acknowledge that nothing in this deed will in any way limit or restrict the ability or power of RMS or the NSW Government, directly or through any Authority to:

- (a) develop, construct, operate and/or maintain directly, by sub-contractors or otherwise, other tollways, tunnels, freeways and other roads in New South Wales;
- (b) maintain, manage, develop, change or extend the Sydney road and transport network or any traffic or transport system;
- (c) extend, alter, close or upgrade existing tollways, tunnels, freeways and other roads;
- (d) extend, alter or upgrade existing public transport routes or services;
- (e) construct new public transport routes or establish new transport services;

- (f) develop the transport and public transport network generally;
- (g) implement NSW Government policies; or
- (h) contract with any person for any of these things or to otherwise do anything which, subject to this deed, they are empowered to do by Law.

22.2 **Traffic connections to Motorway**

The parties acknowledge that the Trustees have prepared their Base Case Financial Model on the assumption that, subject to any traffic diversions, restrictions or road or lane closures which are necessary as a result of:

- (a) the occurrence of special events, including the transportation of visiting dignitaries;
- (b) the requirements of RMS, any relevant Authority or emergency service provider including in relation to the safe and efficient management of traffic or as a consequence of planned or unplanned incident management (in each case whether in relation to the Motorway or another part of the Sydney road and transport network);
- (c) the existence of a material threat to the health or safety of the public; or
- (d) maintenance and/or repairs of a road or lane,

the connections to the Motorway specified in Schedule 26A will not be closed (or materially reduced) during the Term.

22.3 **Permitted RMS Activities**

- (a) The Trustees acknowledge and agree that, notwithstanding the terms of the M5 Leases but subject to this clause 22.3, RMS and its nominees may do any one or more of the following activities (each a **Permitted RMS Activity**):
 - (i) connect any road or other means of vehicle, public transport, pedestrian or bicycle access to the Motorway;
 - (ii) construct, operate and maintain any road or other means of vehicle, public transport, pedestrian or bicycle access above or below the Motorway;
 - (iii) construct, operate and maintain Utility Services (in whole or in part) in the Motorway Stratum or the New M5 Main Works Site;
 - (iv) construct, operate and maintain any other infrastructure or improvement (in whole or in part) in the Motorway Stratum or the New M5 Main Works Site;
 - (v) connect any such Utility Services or other infrastructure or improvements to the Motorway or to any other structures located within the Motorway Stratum or the New M5 Main Works Site; and
 - (vi) undertake a New Connection Project.
- (b) RMS must not undertake a Permitted RMS Activity:
 - (i) in respect of the New M5 Motorway or the Construction Site prior to the Date of Opening Completion, without the consent of the Trustees or, in respect of a New Connection Project, directing a Change pursuant to clause 14.1; or

- (ii) in respect of:
 - (A) the M5 East Motorway, after the M5E Transfer Date;
 - (B) the M5 West Motorway, after the M5W Transfer Date; and
 - (C) the New M5 Motorway after the Date of Opening Completion,

which would, following completion of the work being carried out for or in connection with the Permitted RMS Activity:

 - (D) prevent the Trustees from undertaking the Project in accordance with this deed;
 - (E) materially adversely affect the workmanship, durability or functional integrity of any element of the Motorway;
 - (F) materially adversely affect a Trustee's ability to achieve Final Handover of the Motorway in accordance with the requirements of this deed; or
 - (G) without the consent of the Trustees (not to be unreasonably withheld), impede the safe and free flow of traffic along, onto or from the Motorway (including the New M5 Main Works) at its design speed and volume.
- (c) If RMS proposes to undertake a Permitted RMS Activity then:
 - (i) RMS must give the Trustees reasonable notice of that fact; and
 - (ii) the Trustees must co-operate with RMS to enable RMS to undertake the Permitted RMS Activity.
- (d) If RMS decides to undertake a Permitted RMS Activity and RMS has provided notice to the Trustees under clause 22.3(c)(i), then:
 - (i) the Trustees must:
 - (A) give RMS and its nominees sufficient access to the Construction Site, the New M5 Main Works Site, the Motorway Stratum, and the Maintenance Site, to enable RMS to carry out any investigatory work or pre-construction activity and to undertake the Permitted RMS Activity;
 - (B) co-operate with RMS to facilitate the Permitted RMS Activity, including permitting reasonable traffic adjustments within or adjacent to the Motorway; and
 - (C) take all reasonable steps to mitigate any Loss suffered by it as a result of the Permitted RMS Activity including by:
 - (aa) installing such equipment as is necessary to prevent untolled use of the Motorway; and
 - (bb) opening the shoulder of the carriageway to traffic where a temporary lane closure is required;

- (ii) RMS must:
 - (A) co-ordinate all activities associated with the Permitted RMS Activity;
 - (B) minimise any interference with the construction, operation and use of the Motorway (including the New M5 Main Works);
 - (C) pay to the Project Trustee the aggregate amount calculated in accordance with Schedule 45A; and
 - (D) ensure that its Related Parties comply with the requirements of this clause 22.3(d)(ii); and
- (iii) RMS will not be under any obligation to install or pay for the installation of equipment necessary to prevent untolled use of the Motorway.
- (e) Subject to clause 22.3(d)(ii) and clause 23A, the Trustees acknowledge and agree that RMS is not liable for any Claim in respect of Loss suffered or incurred by the Trustees or any changes in toll revenue derived by the Trustees arising out of or in any way in connection with a Permitted RMS Activity.
- (f) Upon the completion of any works undertaken by RMS or its nominees pursuant to this clause 22.3 (other than works contemplated by clause 22.3(a)(ii)), the Trustee's maintenance and repair obligations under this deed will apply to the works as if the works formed part of the Motorway.

22.4 **New Connection Projects**

The Trustees acknowledge and agree that:

- (a) the Project Works are intended to form part of the broader WestConnex Program of Works, and particularly that the SPI Interface Works are required to facilitate "Stage 3" as described in the WestConnex Program of Works; and
- (b) RMS may elect to pursue New Connection Projects to give effect to the WestConnex Program of Works (or part thereof) and if it does so, will give written notice to the Trustees setting out reasonable detail of the proposed works.

23. **INTERFACES**

23.1 **Not used**

23.2 **Not used**

23.3 **Master Access Deed**

- (a) In this clause 23.3, "Access Authority Instrument" means an AAI within the meaning of the Master Access Deed, in respect of the Rail Corridor Works, and the terms "Application Fee", "Assessment Deposit", "RailCorp's Costs", "RailCorp's Facilities", "RailCorp's Operations", "Railway", "Railway Corridor", "Safety Interface Agreement" and "Track Possession" have the meanings given to them in the Master Access Deed.
- (b) Subject to clause 9.18(c), the Master Access Deed has been entered into between RMS and RailCorp for the purpose of obtaining approval for the carrying out of the Rail Corridor Works. The Trustees acknowledge that they have carefully reviewed the Master Access Deed and that they are aware that:

- (i) the Trustees have obligations to RMS which reflect those of RMS to RailCorp under the Master Access Deed;
 - (ii) the balance of this clause 23.3 refers to the terms of the Master Access Deed as if they were directly between the Trustees and RailCorp even though those obligations are to be performed by the Trustees to RMS to satisfy RMS's obligations to RailCorp;
 - (iii) RMS will be responsible to RailCorp under the terms of the Master Access Deed and any Safety Interface Agreement (if any and insofar as it relates to the Asset Trustee's Activities or the Project Trustee's Activities) in respect of all parts of the Asset Trustee's Activities or the Project Trustee's Activities that relate to the Rail Corridor Works;
 - (iv) the Trustees will be responsible to RMS in respect of those parts of the Asset Trustee's Activities and the Project Trustee's Activities that relate to the Rail Corridor Works which have been allocated to RMS; and
 - (v) RMS is relying upon the Trustees to properly perform the Asset Trustee's Activities or the Project Trustee's Activities (as relevant) so that RMS can fully meet its obligations to RailCorp under the Master Access Deed and the relevant Safety Interface Agreement or otherwise at Law.
- (c) Without limiting any other part of this deed:
- (i) the Trustees must comply with, carry out and fulfil each condition, requirement and obligation of RMS relating to the Master Access Deed and the relevant Safety Interface Agreement as part of the Asset Trustee's Activities or the Project Trustee's Activities (as relevant), including those conditions, requirements and obligations which RMS is expressly or impliedly required to comply with, carry out and fulfil but only to the extent that those conditions, requirements and obligations relate to the scope and extent of the Project Works, Temporary Works or Asset Trustee's Activities or the Project Trustee's Activities (as relevant), so as to ensure that RMS is able to fully meet its obligations to the Master Access Deed and the relevant Safety Interface Agreement or otherwise at Law, except:
 - (A) for any obligation which, by its nature, can only be performed solely by RMS;
 - (B) as specified in Schedule 33; or
 - (C) to the extent that RMS notifies the Trustees that it has already performed, or will be responsible for performing, an obligation, in which case the Trustees must cooperate in obtaining, producing and providing all necessary information and assistance to enable RMS to perform the relevant obligation, including participating in meetings with RMS and RailCorp if requested to do so by RMS;
 - (ii) in complying with clause 23.3(c)(i), the Trustees must take all action necessary to ensure RMS complies with its obligations to RailCorp relating to the Master Access Deed and the relevant Safety Interface Agreement within the time required, including, in the case of any notice given to RMS by RailCorp relating to a notice under clause 28.2(a) of the Master Access Deed to remedy a default under clause 28.1(a) or clause 28.1(b) of the Master Access Deed, to ensure RailCorp is not entitled to terminate:
 - (A) the Access Authority Instrument pursuant to clause 28.2(b)(iii) of the Master Access Deed; or

- (B) the Master Access Deed pursuant to clause 28.2(b)(iv) of the Master Access Deed;
- (iii) the Trustees must, in carrying out the Asset Trustee's Activities or the Project Trustee's Activities (as relevant):
 - (A) comply with any directions of RMS's Representative in relation to compliance with the conditions and requirements of the Master Access Deed and the relevant Safety Interface Agreement;
 - (B) ensure that no act or omission of the Trustees constitutes, causes or contributes to any breach by RMS of its obligations to RailCorp relating to the Master Access Deed or the relevant Safety Interface Agreement;
 - (C) provide to RMS's Representative at the same time as RailCorp, any notice or submission that the relevant Trustee issues to RailCorp;
 - (D) provide to RMS's Representative promptly, and in any case within one Business Day of receiving it, a copy of any notice or other document received from RailCorp;
 - (E) ensure that RMS's Representative is notified sufficiently in advance of and invited to attend all proposed meetings between the relevant Trustee and RailCorp; and
 - (F) otherwise act consistently with the terms of the Master Access Deed;
- (iv) a Trustee must, if nominated by RMS, following a nomination by RailCorp under clause 11.3(b) of the Master Access Deed and in the Access Authority Instrument, procure that the Contractor accept appointment by RailCorp as Principal Contractor and, without limiting any obligations under this deed, perform as, and comply with the obligations of, the Principal Contractor under the Master Access Deed;
- (v) whenever in connection with the terms of the Master Access Deed or the relevant Safety Interface Agreement RMS makes an acknowledgment or gives a release or warranty to RailCorp, then, subject to the other terms of this deed, the Trustees are deemed to make the same acknowledgement or give the same release or warranty to RMS on the same terms and conditions as the acknowledgement, release or warranty made or given by RMS in the same way as if the relevant terms of the acknowledgement, release or warranty were set out in full in this deed with the appropriate changes to the parties;
- (vi) the Trustees acknowledge that the Master Access Deed contains a number of provisions pursuant to which RMS acknowledges that RailCorp has made no representation or other inducement, except for representations or inducements expressly set out in the Master Access Deed, and that RMS in entering into the Master Access Deed has not relied on any representation or other inducement by or on behalf of RailCorp, except for representations or inducements expressly set out in the Master Access Deed. The Trustees agree that RMS similarly makes and has made no representation or other inducement, except for representations or inducements expressly set out in this deed or the Master Access Deed, on which the Trustees rely in entering into this deed, except for representations or inducements expressly set out in this deed or the Master Access Deed;

- (vii) the Trustees bear the risk of all Contamination in accordance with clause 22 of the Master Access Deed on the same basis as if the relevant provisions of clause 22 of the Master Access Deed had been set out in full in this deed, *mutatis mutandis*;
 - (viii) subject to clause 23.3(h) and clause 23.3(i), the Trustees acknowledge and agree that RMS will not be liable upon any Claim by the Trustees arising out of or in connection with any act or omission by RMS or RailCorp arising out of or in any way in connection with the Master Access Deed, the relevant Safety Interface Agreement or the Rail Corridor Works, including the cancellation of, or changing of any date for, a Track Possession; and
 - (ix) nothing in this deed authorises the Trustees, and the Trustees must not under any circumstances purport, to exercise any right of RMS under, or to be RMS's agent for the purposes of, the Master Access Deed.
- (d) Without limiting any clause of this deed, the Trustees indemnify RMS against any claim against RMS by RailCorp or any liability RMS may incur to RailCorp arising out of or in connection with:
- (i) an interruption to the Railway, RailCorp's Operations or any of RailCorp's Facilities to the extent that it is caused or contributed to by the Trustees;
 - (ii) an act, omission or neglect of the Trustees or any of either Trustee's employees, contractors or agents in undertaking the Asset Trustee's Activities or the Project Trustee's Activities, including the Rail Corridor Works;
 - (iii) a breach by the Trustees of this deed, whether deliberate, unintentional, negligent or otherwise; or
 - (iv) occupation of the Railway Corridor by the Trustees or any of either Trustee's employees, contractors or agents including, but not limited to any claim or liability arising out of or in connection with:
 - (A) loss of or damage to property of RMS or RailCorp;
 - (B) damage, expense, loss or liability in respect of loss or damage to any other property belonging to any third party; and
 - (C) damage, expense, loss or liability in respect of personal injury to or death of any person.
- (e) Each Trustee's liability to indemnify RMS under clause 23.3(d) will be reduced proportionally to the extent that such liability was attributable to the wrongful, negligent or unlawful acts or omissions or wilful misconduct of or a breach of this deed by any of RMS, or RMS's employees or agents or to the extent clause 23.3(b) of the Master Access Deed applies.
- (f) Subject to clause 23.3(c)(i)(B), the Asset Trustee is responsible for paying, are liable for and must pay all amounts that RMS is or would otherwise be liable to pay to RailCorp under or in connection with the Master Access Deed, including RailCorp's Costs, any Application Fee, Assessment Deposit, further Assessment Deposit, amounts under clause 25.2 and clause 28.5 of the Master Access Deed and (subject to clause 23.3(e)) any amounts payable under each and every indemnity provision of the Master Access Deed as if the Asset Trustee was named in the Master Access Deed instead of RMS.

Upon receipt of a statement or invoice from RMS or RailCorp in respect of any amount that the Trustees are responsible for paying under this clause 23.3(f), RMS will promptly pass a copy to the Trustees, and the Asset Trustee must pay RMS the required amount within 8 days of receipt of the statement or invoice.

If the Asset Trustee fails to make the payment within the time required, the amount of the payment will be a debt due from the Asset Trustee to RMS.

RMS will promptly refund to the Asset Trustee any surplus Assessment Deposit that RailCorp refunds to RMS in relation to clause 6.3 of the Master Access Deed.

- (g) Each Trustee is responsible for directly arranging with RailCorp any Track Possession which it may require for the carrying out of the Asset Trustee's Activities or the Project Trustee's Activities.

For this purpose, the Trustees must comply with the procedure in the Master Access Deed for arranging a Track Possession or any other access which the relevant Trustee may require to the Railway Corridor or RailCorp's Facilities for the purpose of carrying out the Asset Trustee's Activities or the Project Trustee's Activities (as relevant).

The Trustees acknowledge and agree that RMS will not be liable upon any Claim by the Trustees arising out of or in connection with:

- (i) the time it may take for RailCorp to grant a Track Possession;
 - (ii) the failure by RailCorp to grant a Track Possession for the date, time or duration requested or required by the Trustees;
 - (iii) the dates upon which Track Possessions are granted by RailCorp or the time or duration of any Track Possession granted by RailCorp;
 - (iv) the need for the Trustees to coordinate their activities, and cooperate, with third parties that may be sharing a Track Possession that is available to the Trustees;
 - (v) any conditions imposed by RailCorp in respect of the execution of the Asset Trustee's Activities or the Project Trustee's Activities (as relevant) to be undertaken during a Track Possession or at any other time; or
 - (vi) anything else arising out of or in connection with the need for Track Possessions by the Trustees.
- (h) If after the date of this deed, RailCorp changes the RailCorp's Technical Conditions from those in effect as at the date of this deed pursuant to clause 5.1(c) of the Master Access Deed, clause 5.4 of the Master Access Deed, clause 12.2 of the Master Access Deed, or clause 25 of the Master Access Deed, to the extent that the change to RailCorp's Technical Conditions necessitates a change to the Rail Corridor Works, then RMS must pay the relevant Trustee the reasonable net direct incremental costs incurred by the relevant Trustee arising directly out of the change referred to under this clause 23.3(h).
- (i) Despite clause 16 and the definitions of "Compensation Event" and "Act of Prevention":
- (i) none of the circumstances referred to under clause 23.3(h) will give rise to a Compensation Event or an Act of Prevention; and

(ii) the Asset Trustee will not be entitled to claim compensation or relief,

in relation to a change to RailCorp's Technical Conditions, the Rail Corridor Works or any Change or Direction in relation to a change contemplated under clause 23.3(h). Subject to any entitlement in accordance with clause 23.3(h), the Trustees acknowledge and agree that RMS will not be liable upon any Claim by the Trustees arising out of or in connection with a change to RailCorp's Technical Conditions or the Rail Corridor Works.

(j) The Trustees are responsible for the preparation, review and amendment of RailCorp Maintenance Plans under the Master Access Deed, including responsibility for meeting requirements under the Master Access Deed as to timing of preparation and submission of RailCorp Maintenance Plans. The RailCorp Maintenance Plans must address RailCorp's requirements in relation to the Rail Corridor Works. The Trustees must provide information and assistance to RMS in relation to the development of those RailCorp Maintenance Plans as they relate to RailCorp's requirements under the Master Access Deed. The Trustees must ensure that the RailCorp Maintenance Plans are included as separate and discrete subplans under this deed.

23A MATERIAL ADVERSE EFFECT

23A.1 Notice of Potential MAE Trigger

If:

- (a) at any time:
 - (i) an Uninsurable Force Majeure event occurs;
 - (ii) a Smart Motorways Event occurs; or
- (b) after the Date of Opening Completion, a Potential MAE Trigger occurs,

either the Asset Trustee or the Project Trustee must give RMS notice of the Uninsurable Force Majeure Event, the Smart Motorways Event or a Potential MAE Trigger (as applicable) within 3 months after the occurrence of the Uninsurable Force Majeure Event or Potential MAE Trigger the subject of that notice.

23A.2 Notice of Possible MAE Event

If:

- (a) at any time,
 - (i) an Uninsurable Force Majeure Event occurs;
 - (ii) a Smart Motorways Event occurs; or
 - (iii) RMS opens a New Connection Project for the safe, efficient and continuous passage of vehicles other than in a manner set out in Schedule 26B;
- (b) after the Date of Opening Completion:
 - (i) a Planning Approval Change Event or an EPBC Act Approval Change Event occurs which requires a Change to be made to the Motorway or to the O&M Work;

- (ii) any of the connections to the Motorway specified in Schedule 26A are closed or materially reduced during the Term for reasons other than as contemplated by clause 22.2;
- (iii) a Discriminatory Change in State Law occurs;
- (iv) a Qualifying Change in Law (other than a Discriminatory Change in State Law) which causes a net increase in the cost of carrying out the O&M Work occurs; or
- (v) the offence of failing or refusing to pay the toll for the use of the Motorway is not enforced, or recovery procedures are not pursued, in each case in a manner which in substance achieves the same outcome as the enforcement and recovery procedures pursued by the State of New South Wales or its Authorities for other comparable tollway offences on private tollways or on tollroads that are owned by SMC as at the date of this deed,

which a Trustee reasonably believes may have a Material Adverse Effect (each a **Possible MAE Event**) either Trustee must give RMS notice of the Possible MAE Event. A notice given under clause 23A.2(a) will only be valid if it is given within 6 months after the occurrence of the Possible MAE Event the subject of that notice.

- (c) Where RMS is the Tolling Contractor (Back Office), the parties acknowledge and agree that any acts or omissions of RMS in the performance of the Services (as that term is defined in the Tolling Services Agreement), including any breach of the Tolling Services Agreement by RMS, will not be considered to have a Material Adverse Effect or be a Possible MAE Event for the purposes of this clause 23A.

23A.3 Occurrence of Possible MAE Event

- (a) If a notice is given under clause 23A.2(a) then, as soon as possible, but no later than 20 Business Days after RMS has received that notice, the parties must negotiate in good faith and endeavour to agree on:
 - (i) whether or not the notice is valid; and
 - (ii) whether or not a Possible MAE Event has occurred.
- (b) If the parties do not reach agreement on the matters referred to in clause 23A.3(a) within 20 Business Days after commencing the negotiations then any party may refer the matter for dispute resolution under the Dispute Resolution Procedure.
- (c) If a dispute the subject of clause 23A.3(b) is not referred to dispute resolution under the Dispute Resolution Procedure within 18 months after the end of the 20 Business Day period referred to in clause 23A.3(b), the Trustees will be deemed to have accepted that a Possible MAE Event has not occurred.

23A.4 Notice of Material Adverse Effect

- (a) If it has been agreed or determined in accordance with clause 23A.3 that a Possible MAE Event the subject of a notice given under clause 23A.2(a) has occurred and a Trustee believes that the Possible MAE Event may have, has had or has started to have a Material Adverse Effect the Trustees must:
 - (i) give RMS notice of the Material Adverse Effect; and
 - (ii) use all reasonable endeavours to Mitigate the adverse consequences of the Possible MAE Event.

- (b) A notice given under clause 23A.4(a) will only be valid if it is given within 12 months after the Possible MAE Event the subject of that notice under clause 23A.2(a) has had or has started to have a Material Adverse Effect.

23A.5 Occurrence of MAE Event

- (a) If a notice is given under clause 23A.4(a) then, as soon as possible, but no later than 20 Business Days after RMS has received that notice, the parties must negotiate in good faith and endeavour to agree on:

- (i) whether or not the notice is valid; and
- (ii) whether or not the Possible MAE Event the subject of the notice has had or has started to have a Material Adverse Effect,

provided that, in determining whether an Uninsurable Force Majeure Event which arises prior to the Date of Opening Completion may have, has had or has started to have a Material Adverse Effect:

- (iii) all prolongation costs, including Trustee's Delay Costs (but excluding any loss of revenue the Project Trustee may suffer); and
- (iv) all escalation costs arising from deferment of the Project Works and the Temporary Works,

incurred by any Related Party of the Trustees or the Contractor during the 12 month period immediately following the occurrence of that Uninsurable Force Majeure Event will be disregarded.

- (b) If the parties do not reach agreement on the matters referred to in clause 23A.5(a) within 20 Business Days after commencing the negotiations then any party may refer the matter for dispute resolution under the Dispute Resolution Procedure.
- (c) If a dispute the subject of clause 23A.5(b) is not referred to dispute resolution under the Dispute Resolution Procedure within 18 months after the end of the 20 Business Day period referred to in clause 23A.5(b), the Trustees will be deemed to have accepted that the Possible MAE Event the subject of its notice under clause 23A.4(a) has not had or started to have a Material Adverse Effect.

23A.6 Good Faith Negotiations

- (a) As soon as practicable but no later than 20 Business Days after it has been agreed or determined in accordance with clause 23A.5 that the Possible MAE Event the subject of a notice issued under clause 23A.3(a) has had or started to have a Material Adverse Effect, the parties must enter into negotiations and thereafter negotiate in good faith in an endeavour to agree on a method of redress which will enable:
 - (i) the Borrower, the Asset Trustee or the Project Trustee to repay the Debt Financiers the interest, amortisation and any net interest rate management agreement payments that are or would have been owing under the Debt Financing Documents were it not for the relevant event, omission or circumstance, on the dates on which such amounts are or would have been due to be repaid thereunder (but not more than the amortisation payments contained in the Base Case Financial Model); and

- (ii) the Group to give to the Equity Investors the lower of:
 - (A) the Equity Return they would have received if the event, omission or circumstance had not occurred; and
 - (B) the Projected Equity Return,

provided that if, prior to the occurrence of the relevant event, omission or circumstance, the Borrower, the Asset Trustee or the Project Trustee was not able to repay to the Debt Financiers the interest, amortisation and net interest rate management agreement payments that are or would have been owing under the Debt Financing Documents were it not for the relevant event, omission or circumstance, on the dates on which such amounts are or would have been due to be repaid thereunder, then, in respect of clause 23A.6(a)(i) the parties will negotiate in good faith with a view to putting the Borrower, the Asset Trustee or the Project Trustee in the same or similar position with respect to such matters as it was in prior to the occurrence of the relevant event, omission or circumstance.

- (b) Subject to clause 23A.7, the parties acknowledge that in any negotiations they will take a flexible approach, including giving consideration to:
 - (i) amending the Project Documents;
 - (ii) varying the Term;
 - (iii) varying the financial or other contributions of the parties;
 - (iv) adjusting the Toll Calculation Schedule; and/or
 - (v) taking such other action as may be appropriate,

having regard to any payments made by RMS under the RMS Project Documents, whether under an indemnity, in respect of any delay costs, or otherwise.

23A.7 Payment as a last resort

- (a) RMS will not be required to consider or provide any method of redress under clause 23A.6(b) which requires RMS to make an up front payment to the Trustees in respect of the anticipated Material Adverse Effect of any Possible MAE Event.
- (b) The method of redress involving a payment of money by RMS to the Trustees or any of its Related Parties will be considered as a measure of last resort and will, unless RMS requires otherwise, only apply to the extent that the other methods of redress cannot reasonably be used so as to achieve the relevant objectives referred to in clause 23A.6(a).

23A.8 Disputes

- (a) If the parties do not reach agreement on a method of redress so as to achieve the relevant objectives referred to in clause 23A.6(a) within 90 Business Days after the parties commenced negotiations under clause 23A.6(a), any party may refer the matter to dispute resolution in accordance with the Dispute Resolution Procedure.
- (b) In making a determination, the expert or arbitrator must ensure that the method of redress does not involve a method of redress other than those set out in clauses 23A.6(b)(i) to 23A.6(b)(iv) (inclusive) without the parties' consent and is otherwise consistent with this clause 23A.

23A.9 **No over compensation**

RMS will not be obliged under any circumstances to make available or be bound by a method of redress to the extent that:

- (a) it will achieve an outcome in excess of that which is necessary to achieve the relevant objectives referred to in clause 23A.6(a);
- (b) the Possible MAE Event is caused or contributed to by a breach of a Project Document by the Trustees or their Related Parties or is otherwise within the control of the Trustees or their Related Parties; or
- (c) any other reasonable payment, compensation or redress has been made by RMS arising out of or in connection with the Possible MAE Event or the circumstances relating to the Possible MAE Event.

23A.10 **Implementation of redress**

- (a) The Trustees must ensure that any redress afforded under this clause 23A is efficiently applied and structured (including so as not to create or increase any Liability for Taxes or Liability which need not be incurred or need only be incurred to a limited extent).
- (b) No method of redress will be implemented before the Possible MAE Event has had a Material Adverse Effect, unless RMS agrees otherwise.

23A.11 **Tolling Contract (Back Office)**

The parties acknowledge that, notwithstanding any other provision of this clause 23A:

- (a) no act or omission of RMS in its capacity as the Tolling Contractor (Back Office) will give rise to a Possible MAE Event for the purposes of this clause 23A; and
- (b) the Trustees will not be entitled to redress under this clause 23A in connection with any act or omission referred to in clause 23A.11(a).

24. **RATES, TAXES AND GST**

24.1 **Rates and Taxes**

Subject to clause 25, and clause 38.2, the Asset Trustee will be liable for:

- (a) all land-based rates, Taxes and charges, including municipal rates, water, sewerage and drainage rates and land tax in respect of:
 - (i) the New M5 Motorway Stratum as from the Date of Opening Completion;
 - (ii) the M5 East Motorway as from the M5E Transfer Date; and
 - (iii) the M5 West Motorway as from the M5W Transfer Date; and
- (b) subject to clause 24.2, the Trustees will be liable for all other Taxes levied in respect of the Project, whether in connection with the Motorway, the performance of either Trustee's obligations under this deed or the execution of this deed, the licence or lease of the Motorway Stratum and other Project Documents or otherwise.

24.2 GST

- (a) Notwithstanding any other provision of this deed, any amount payable for a supply made under 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 respect of that cost, expense or other amount.
- (b) Subject to clause 24.2(e), if GST becomes payable on any supply made by a party (**Supplier**) under or in connection with this deed:
 - (i) any amount payable or consideration to be provided under 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 providing consideration for that supply (the **Recipient**), equal to the amount of GST payable on that supply as calculated by the Supplier in accordance with the GST law and payable at the same time and in the same manner as for the Agreed Amount; and
 - (iii) the Supplier will provide a tax invoice (or equivalent documentation which complies with the GST law) to the Recipient in respect of that supply, no later than the time at which the Agreed Amount for that supply is to be provided under this deed.
- (c) Subject to clause 24.2(e), if for any reason, the GST payable by the Supplier in respect of a supply it makes under this deed (incorporating any increasing adjustments or decreasing adjustments relating to that supply) varies from the additional amount it receives from the Recipient under clause 24.2(b) in respect of that supply, the Supplier will provide a refund or credit to or will be entitled to receive the amount of this variation from the Recipient (as appropriate). Where an adjustment event occurs in relation to a supply, the Supplier will issue an adjustment note to the Recipient in respect of that supply within 14 days after becoming aware of that adjustment event occurring.
- (d) If the Recipient is dissatisfied with any calculation to be made by the Supplier under this clause, 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 Arbitrators and Mediators Australia for expert determination, which will be final and binding on all parties (absent manifest error). The expert will act as an expert and not as an arbitrator and will take into account the terms of this deed, the matters required to be taken into account by the Supplier under this clause and any other matter considered by the expert to be relevant to the determination. The parties must release the expert from any liability in acting as an expert, except in the case of fraud on the part of the expert. However, this clause 24.2(d) shall not apply to any supply dealt with under clause 24.2(e).
- (e) The parties acknowledge that this clause 24.2(e) applies to the extent each party is making supplies to the other party for consideration, and is the Recipient of all supplies from the other party. Where two parties (or entities on whose behalf those parties are acting) in accordance with this deed exchange non-monetary consideration:
 - (i) notwithstanding clause 24.2(b), the additional amount payable on any supply by the Recipient to the Supplier shall be limited to an amount calculated as the monetary consideration provided by the Recipient for the

taxable supply being made by the Supplier multiplied by the applicable GST rate; unless

- (ii) it is determined, whether by agreement between the parties or by demand, assessment or private ruling issued by the Commissioner of Taxation that there is a disparity between:
 - (A) the sum of the GST exclusive market value of the non-monetary consideration and the GST exclusive monetary consideration (if any) being provided by the Recipient to the Supplier; and
 - (B) the sum of the GST exclusive market value of the non-monetary consideration and the GST exclusive monetary consideration (if any) being provided by the Supplier and having their nexus with the non-monetary consideration and monetary consideration being provided by the Recipient and referred to in clause 24.2(e)(ii)(A);
- (iii) Where clause 24.2(e)(ii) applies, the Supplier and the Recipient will use best endeavours to determine a mutually acceptable means of calculating additional amounts to be provided between the parties to ensure, as far as possible that neither the Supplier nor the Recipient suffers a net cost or loss. If within 30 Business Days of the determination under clause 24.2(e)(ii), the parties are unable to agree on a means of calculating the additional amounts payable, clause 24.2(b) shall apply without any limitation imposed by this clause 24.2(e), however:
 - (A) the Supplier must only issue a tax invoice or an adjustment note to reflect the application of clause 24.2(e)(iii) after the parties have either reached an agreement under this clause 24.2(e)(iii) or have determined that they are unable to reach such an agreement; and
 - (B) the additional amount payable pursuant to clause 24.2(e)(iii) will only be payable 5 Business Days after the receipt by the Recipient of the tax invoice or adjustment note issued by the Supplier in accordance with clause 24.2(e)(iii)(A);
- (iv) Where any party to this deed receives a demand, assessment or private ruling regarding the matters addressed in clause 24.2(e), it must notify the other parties to this deed of that fact and provide them with a copy of the demand, assessment or private ruling within 10 Business Days of receiving it. Before any party to this deed applies for a private ruling regarding the matters addressed in this clause 24.2(e), it must provide the other parties to this deed with a copy of the private ruling request it intends to lodge with the Commissioner of Taxation no less than 20 Business Days prior to its lodgement of same.

24.3 Consolidation

- (a) The Trustees must ensure that, while the Holding Trusts or the Trustees are a member of a tax consolidated group, the Holding Trusts or the Trustees, as the case may be:
 - (i) must be a party to a tax sharing agreement (within the meaning of that term in Division 721 of the Income Tax Assessment Act 1997) and tax funding agreement (within the meaning of these terms in Part 3-90 of the Income Tax Assessment Act 1997) for the consolidated group, each of which has terms reasonably acceptable to RMS; and

- (ii) must not amend, vary or terminate the tax sharing agreement or tax funding agreement referred to in clause 24.3(a)(i) in a way that may directly or indirectly lead to an impact to the Holding Trusts or the Trustees, as the case may be, without RMS's consent. Without limitation, the following changes will not be considered an amendment, variation or a termination for the purposes of this clause 24.3(a)(ii):
 - (A) any additions or deletions to the entities party to the tax sharing agreement and tax funding agreement (other than the deletion of the Holding Trusts or the Trustees, as the case may be); and/or
 - (B) changes to the tax funding agreement to ensure that it precludes the need for recognition of contributions by or distributions to SMC under the accounting standards as a consequence of any group liability (within the meaning of Division 721 of the Income Tax Assessment Act 1997); and/or
 - (C) changes to the tax sharing agreement to ensure that it continues to comply with the requirements of Division 721 of the Income Tax Assessment Act 1997.
- (b) The Trustees must ensure that (except with the prior written consent of RMS) no Entity other than a Holding Vehicle:
 - (i) is or becomes the holder of shares in the Trustees or the Holding Trusts;
 - (ii) has or acquires a beneficial interest in the Trustees or the Holding Trusts; or
 - (iii) has or acquires a relevant interest (within the meaning of section 608 of the Corporations Act) in shares in the Trustees or the Holding Trusts, other than as a result of having a relevant interest (within the meaning of the Corporations Act) in securities issued by a Holding Vehicle.
- (c) The Trustees must ensure that, where the Holding Vehicle of the Holding Trusts is a Stapled Entity, the securities of the Holding Vehicle must not be Unstapled unless:
 - (i) all of the securities of the Holding Vehicle are held either by a single Entity or a Stapled Entity; or
 - (ii) the Holding Trusts or the Trustees have obtained RMS's prior written consent.
- (d) RMS must not unreasonably withhold or delay its consent where such consent is sought by all or any of the Holding Trusts, or the Trustees under this clause 24.3.

25. **CHANGES IN LAW**

25.1 **No claim unless Qualifying Change in Law**

- (a) Subject to clauses 14, 16.9 and 23A and this clause 25, the Trustees will be liable for the consequences of, and will have no Claim against RMS arising out of or in any way in connection with, any changes in Law.
- (b) If a Qualifying Change in Law occurs, either Trustee must:
 - (i) within 20 Business Days after the later of the occurrence of the Qualifying Change in Law and when a Trustee first became aware of (or ought reasonably to have first become aware of) the Qualifying Change in Law,

give a written notice to RMS and RMS's Representative containing details of the Qualifying Change in Law; and

- (ii) subject to clause 16.9, 23A and this clause 25, comply with the Qualifying Change in Law at its own cost.

25.2 **Change in Law prior to Opening Completion**

- (a) If, prior to the Date of Opening Completion, a Qualifying Change in Law occurs which:

- (i) has a direct effect on the O&M Work, the Asset Renewal, the Project Works or the Temporary Works (which may include a direct effect on the method or means by which the Asset Trustee carries out the Project Works or the Temporary Works) such that a Change is required as a consequence of the occurrence of the Qualifying Change in Law; and
- (ii) results in an increase in the Project Trustee's or the Asset Trustee's direct costs of carrying out the O&M Work, the Asset Renewal, the Project Works or the Temporary Works (as applicable),

and the Asset Trustee or the Project Trustee (as applicable) wishes to make a Claim for Change Costs under this clause 25 on account of the Qualifying Change in Law then, the Asset Trustee or the Project Trustee (as applicable) must, within 20 Business Days after the occurrence of the Qualifying Change in Law, give a written notice to RMS's Representative:

- (iii) containing details of the Qualifying Change in Law; and
- (iv) setting out the Asset Trustee's or the Project Trustee's (as applicable) estimate of the increase in the Asset Trustee's or the Project Trustee's (as applicable) direct costs of carrying out the O&M Work the Asset Renewal, the Project Works or the Temporary Works (as applicable) that result directly from complying with the Qualifying Change in Law (and, to the extent applicable, a reasonable amount on account of overhead and profit of:
 - (A) the Contractor not exceeding the D&C Margin; and
 - (B) the Operator not exceeding the O&M Margin),

including sufficient information to support the estimate.

- (b) If the Asset Trustee or the Project Trustee issues a notice complying with the requirements of clause 25.2(a) and otherwise complies with the requirements of this clause 25, clause 14.1 will apply as if RMS had given a Change Order in respect of the Change which is required as a consequence of the occurrence of the Qualifying Change in Law provided that any Change Costs payable to the Asset Trustee or the Project Trustee (as applicable) in respect of the Qualifying Change in Law will be limited:

- (i) to the increase in the Asset Trustee's or the Project Trustee's (as applicable) direct costs of carrying out the O&M Work, the Asset Renewal, the Project Works and the Temporary Works (as applicable) that result directly from complying with the Qualifying Change in Law (and, to the extent applicable, a reasonable amount on account of overhead and profit of:
 - (A) the Contractor not exceeding the D&C Margin; and

- (B) the Operator not exceeding the O&M Margin); and
- (ii) in accordance with clause 25.2(c).
- (c) Subject to clause 25.2(d), RMS will only be liable to pay a portion of the Change Costs determined in accordance with clause 25.2(b) as follows:
 - (i) where the Change Costs, together with the Change Costs for other Qualifying Changes in Law under this clause 25.2, are less than or equal to \$ [REDACTED] in aggregate, RMS will not be liable for the Change Costs;
 - (ii) where the Change Costs, together with the Change Costs for other Qualifying Changes in Law under this clause 25.2, are greater than \$ [REDACTED] in aggregate but less than or equal to \$ [REDACTED] in the aggregate, RMS will not be liable for the portion of the Change Costs from \$ [REDACTED] to \$ [REDACTED] but will be liable for [REDACTED]% of the portion of the Change Costs from \$ [REDACTED] to \$ [REDACTED]; and
 - (iii) where the Change Costs, together with the Change Costs for other Qualifying Changes in Law under this clause 25.2, are greater than \$ [REDACTED] in aggregate, RMS will not be liable for the portion of the Change Costs from \$ [REDACTED] to \$ [REDACTED], but will be liable for [REDACTED]% of the portion of the Change Costs from \$ [REDACTED] to \$ [REDACTED] and [REDACTED]% of the portion of the Change Costs which is above \$ [REDACTED].
- (d) RMS will be liable to pay the full Change Costs determined in accordance with clause 25.2(b) in respect of a Qualifying Change in Law referred to in paragraph (c) of the definition of "Qualifying Change in Law".

25.3 **Qualifying Change in Law after Completion**

Clause 23A.2 will apply if a Qualifying Change in Law occurs after the Date of Opening Completion.

26. **LOSS OR DAMAGE AND INSURANCE**

26.1 **Risk of loss or damage**

- (a) The Trustees must, in carrying out the Asset Trustee's Activities and the Project Trustee's Activities (as relevant), take all reasonable precautions to avoid destruction and damage to any property (including any property of RMS).
- (b) From the date of this deed until:
 - (i) the Date of Opening Completion, the Asset Trustee bears the risk of Loss or damage to the Project Works (other than the SPI Interface Works, the Local Area Works, the Utility Service Works and the Property Works) and the Temporary Works;
 - (ii) in respect of any part of the SPI Interface Works, the date on which that part of the SPI Interface Works is handed over to the Stage 3 Contractor or RMS, the Trustees bear the risk of Loss or damage to the SPI Interface Works; and
 - (iii) the commencement of the relevant Defects Correction Period, the Asset Trustee bears the risk of Loss or damage to the Local Area Works, the Utility Service Works and the Property Works.

- (ca) From the Date of Opening Completion, the Trustees bear the risk of Loss or damage to the New M5 Motorway until the end of the Term.
- (cb) The Trustees do not bear the risk of Loss or damage to:
 - (i) the M5 East Motorway prior to the M5E Transfer Date; or
 - (ii) the M5 West Motorway prior to the M5W Transfer Date.
- (c) Subject to clause 26.9(b), the Trustees must in accordance with clause 26.9, promptly make good any Loss or damage to the Project Works (including the SPI Interface Works, the Temporary Works or the Motorway (as applicable)) which occurs during the period that either Trustee bears the risk of Loss or damage.

26.2 Certain third party claims

Despite any provision to the contrary, the Trustees will have no liability to RMS or its Related Parties, nor will RMS or its Related Parties be entitled to make any Claim against the Trustees, in respect of any Liability of RMS or its Related Parties to a third party for Pure Economic Loss arising directly as a result of:

- (a) the decision by RMS to proceed with the Project; or
- (b) the existence or location of the Motorway.

26.3 Insured Liability

- (a) Nothing in this deed operates to exclude or limit either Trustee's liability to RMS or its Related Parties for any Loss to the extent such Loss is an Insured Liability.
- (b) For the purposes of this deed, "**Insured Liability**" means:
 - (i) where the Trustees or any of their Related Parties or RMS or any of its Related Parties has an entitlement to recover or be indemnified in respect of such Loss under a Project Insurance:
 - (A) the amount or amounts actually recovered by the Trustees or their Related Parties or RMS or its Related Parties (as applicable) from; and
 - (B) the amount or amounts for which the Trustees or their Related Parties or RMS or its Related Parties are otherwise actually indemnified by,

the insurer or insurers of such Project Insurance; and
 - (ii) where, but for:
 - (A) the failure of the Trustees to comply with its obligations under this clause 26 to obtain a Project Insurance;
 - (B) the insolvency of the insurer or insurers of such Project Insurance; or
 - (C) any act or omission by the Trustees or their Related Parties (including, without limitation, any misrepresentation, non-disclosure, breach of a duty to the insurer, breach of the terms and conditions of any Project Insurance or failure to comply with those terms or conditions) not caused or contributed to by any act or omission of

RMS or its Related Parties which has resulted in a loss of or reduction of the recovery or indemnity under a Project Insurance,

the Trustees or their Related Parties or RMS or its Related Party would have been entitled to recover from, or be indemnified by, an insurer or insurers of such Project Insurance in respect of Loss, the amount or amounts which the Trustees or their Related Parties or RMS or its Related Party (as applicable) would have been entitled to recover from, or be indemnified by, an insurer or insurers of such Project Insurance.

26.4 **Damage to third party property**

- (a) Without limiting clause 27.1, where any damage to or loss or destruction of real or personal property of a third party (other than the Project Works or the Temporary Works) occurs which arises out of a breach by the Trustees of this deed or an act or omission of a Trustee, that Trustee must do one of the following (at the option of the relevant third party):
 - (i) promptly repair, replace or reinstate the damage, loss or destruction; or
 - (ii) reasonably compensate the third party, provided that, if doing so would prejudice the relevant Trustee's ability to claim under any of the Project Insurances, the relevant Trustee will notify RMS of the same and RMS will direct the relevant Trustee whether or not it should proceed.
- (b) Without limiting clause 8.6(a)(i)(B), if a Trustee fails to carry out the repair, replacement or reinstatement work or pay reasonable compensation within a reasonable time, RMS may carry out the repair, replacement or reinstatement work or pay reasonable compensation, and any Loss suffered or incurred by RMS will be a debt due and payable from the Project Trustee to RMS.

26.5 **Project Works Insurances**

- (a) The Trustees must effect and maintain the Project Works Insurances (or cause the Project Works Insurances to be effected and maintained) in accordance with Schedule 46.
- (b) The Trustees must:
 - (i) not do or permit, or omit to do, anything which prejudices any Project Works Insurance;
 - (ii) rectify anything which might, if not rectified, prejudice any Project Works Insurance;
 - (iii) reinstate that Project Works Insurance if it lapses;
 - (iv) not cancel, vary or allow any Project Works Insurance to lapse without the prior consent of RMS (such consent not to be unreasonably withheld or delayed);
 - (v) as soon as reasonably practicable notify RMS of any fact or circumstance or change in circumstances which could be reasonably expected to prejudice a Project Insurance;
 - (vi) in respect of each Project Works Insurance, comply with its duty of disclosure to all relevant insurers, including where failure to do so would breach, prejudice or invalidate the relevant policy;

- (vii) as soon as reasonably practicable notify RMS when it receives or gives a notice in connection with the cancellation of any Project Works Insurance;
 - (viii) do all things reasonably required by RMS or any other person in whose name a Project Works Insurance is effected to enable RMS or that other person to claim, collect or recover moneys due under any Project Works Insurance;
 - (ix) comply at all times with the terms of each Project Works Insurance; and
 - (x) ensure that, to the extent permitted by law, all Project Works Insurances which cover 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 assumed under clauses 26 and 27.
- (c) The Asset Trustee is responsible for, must pay (where relevant) and accepts all risks in connection with any deductibles or excess in respect of any claim on a Project Works Insurance policy.

26.5A **Insurances During the Term**

- (a) The Trustees must effect and maintain the Operations Insurances (or cause the Operations Insurances to be effected and maintained) in accordance with Schedule 46.
- (b) The Trustees must:
 - (i) not do or permit, or omit to do, anything which prejudices any Operations Insurance;
 - (ii) rectify anything which might, if not rectified, prejudice any Operations Insurance;
 - (iii) reinstate that Operations Insurance if it lapses;
 - (iv) not cancel, materially vary or allow any Operations Insurance to lapse without the prior consent of RMS (such consent not to be unreasonably withheld or delayed);
 - (v) as soon as reasonably practicable notify RMS of any fact or circumstance or change in circumstances which could be reasonably expected to prejudice an Operations Insurance;
 - (vi) in respect of each Operations Insurance, comply with its duty of disclosure to all relevant insurers, including where failure to do so would breach, prejudice or invalidate the relevant policy;
 - (vii) as soon as reasonably practicable notify RMS when it receives or gives a notice in connection with the cancellation of any Operations Insurance;
 - (viii) do all things reasonably required by RMS or any other person in whose name an Operations Insurance is effected to enable RMS or that other person to claim, collect or recover moneys due under any Project Insurance;
 - (ix) comply at all times with the terms of each Operations Insurance; and
 - (x) ensure that, to the extent permitted by law, all Operations Insurances which cover 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 assumed under clauses 26 and 27.

- (c) The Project Trustee is responsible for, must pay (where relevant) and accepts all risks in connection with any deductibles or excess in respect of any claim on an Operations Insurance policy.

26.6 **Premiums**

- (a) The Trustees must punctually pay all premiums in respect of all insurance policies effected by it in accordance with this clause 26 and give RMS evidence of payment of premiums if and when requested by RMS.
- (b) If the Trustees fail to effect or maintain any insurance policy referred to in this clause 26 or to pay a premium or other amount payable to the insurer in respect of such insurance, RMS may effect such insurance or pay such premium or other amount and any costs so incurred by RMS will be a debt due and payable by the Project Trustee to RMS.

26.7 **Dealing with claims**

In addition to the obligations to notify the insurer under any Project Insurance, the Trustees must:

- (a) subject to the terms of the Project Insurances, notify RMS of any occurrence or circumstance of which the Trustees are aware, or should reasonably have been aware, that could reasonably be expected to give rise to a claim under any Project Insurance (**Notifiable Claim**);
- (b) keep RMS fully informed of subsequent developments concerning the claim under any Project Insurance;
- (c) not compromise, settle or enforce a Notifiable Claim without the prior written consent of RMS (which must not be unreasonably withheld or delayed); and
- (d) diligently pursue any Notifiable Claim.

26.8 **Insurance proceeds**

- (a) The parties agree that the proceeds of each claim (if any) made under any Project Insurance, to the extent such proceeds are received in respect of reinstatement of physical loss or damage to the Project Works, the Temporary Works or the Motorway, must be deposited into a special purpose account in the joint names of the Asset Trustee, the Project Trustee and RMS with a financial institution notified to RMS in writing by the Asset Trustee and approved by RMS (which approval will not be unreasonably withheld or delayed), the details of which account must be notified to RMS in writing by the Asset Trustee upon the establishment of that account, until such time as the proceeds are applied in accordance with clause 26.8(b).
- (b) The parties agree that the Trustees and RMS will, to the extent permitted under the relevant insurance policies, procure the release, on a progressive basis, of the insurance proceeds contemplated in clause 26.8(a) for reinstatement work carried out by the Trustees, to the extent such proceeds are received in respect of physical loss or damage to the Project Works, the Temporary Works or the Motorway, such proceeds must be applied for the repair, reinstatement or replacement of the Project Works, the Temporary Works and/or the Motorway (as applicable).

26.9 Reinstatement

Subject to clause 26.12, if any physical loss or damage occurs:

- (a) to any part of the Project Works, the Temporary Works or the Motorway, during the period that the Trustees bear the risk of Loss or damage as specified in clause 26.1(b), the Trustees must (without limiting its other obligations under this deed):
 - (i) subject to allowing reasonable time for inspection by insurers and to the terms of any relevant Project Insurance policy, take immediate steps to clear any debris and begin initial repair work;
 - (ii) promptly consult with RMS and carry out such steps as are necessary to ensure:
 - (A) the prompt repair or replacement of the physical loss or damage so that:
 - (aa) it complies with the SWTC; and
 - (bb) there is minimal disruption to the Project Works, the Temporary Works and the Motorway; and
 - (B) that, to the greatest extent possible, the Trustees continue to comply with its obligations under the Project Documents;
 - (iii) manage all repair and replacement activities so as to minimise, to the extent reasonably practicable having regard to the repair and reinstatement activities to be undertaken, the impact on the Project Works, the Temporary Works or the Motorway;
 - (iv) keep RMS fully informed of the progress of the repair and replacement activities; and
 - (v) apply all relevant insurance proceeds in the repair or reinstatement of the Project Works, the Temporary Works or the Motorway; or
- (b) as a result of an Uninsurable Force Majeure Event and clause 23A applies, the Trustees obligation to carry out repair and reinstatement is suspended until the parties have agreed an outcome in accordance with clause 23A or, if the parties are unable to come to an agreement, a determination has been made under this deed which is final and binding on the parties.

The parties agree that any defects in the M5 East Motorway or the M5 West Motorway that require works the subject of a Change directed under clauses 4A.3(i)(ii) or 4B.3(i)(ii) will not of themselves constitute "physical loss or damage" for the purposes of this clause 26.9.

26.9A O&M Insurance Review

- (a) RMS and the Trustees will meet:
 - (i) 6 months prior to the expected Date of Opening Completion; and
 - (ii) 6 months prior to every 5th anniversary of the Date of Opening Completion,(each an **Insurance Review Commencement Date**) to review the minimum limits of liability, sub-limits of liability and deductibles for those insurance policies referred to in section 2 of Schedule 46 which must be effected and/or maintained

during the ensuing 5 year period with a view to reaching agreement upon the limits, sub-limits and deductibles which will apply during that ensuing 5 year period. To the extent that RMS and the Trustees are able to reach agreement within 2 months after the Insurance Review Commencement Date on the limits, sub-limits and deductibles to apply during the ensuing 5 year period, the Trustees must, from the commencement and for the duration of the relevant 5 year period, cause the relevant limits, sub-limits and deductibles to be adjusted to those agreed.

- (b) To the extent that RMS and the Trustees are unable to reach the agreement required by clause 26.9A(a) within 2 months after the Insurance Review Commencement Date then:
- (i) those limits, sub-limits and deductibles which have not been agreed will be referred for dispute resolution in accordance with the Dispute Resolution Procedure;
 - (ii) if the relevant limits, sub-limits and deductibles have not been agreed or determined pursuant to the Dispute Resolution Procedure before the commencement of the relevant 5 year period, then the Trustees must, pending the outcome of the Dispute Resolution Procedures, cause the then current levels of the relevant limits, sub-limits and deductibles to be Indexed from the date the relevant limit, sub-limit or deductible was last set or adjusted; and
 - (iii) as soon as practicable after the outcome of the Dispute Resolution Procedure (and notwithstanding any decision to appeal any determination of the arbitrator), the Trustees must cause the relevant limits, sub-limits and deductibles to be adjusted to those agreed or determined pursuant to the Dispute Resolution Procedure, for the balance of the relevant 5 year period.
- (c) The parties agree that the limits, sub-limits and deductibles pursuant to clause 26.9A(a) are to be agreed or determined (as the case may be) having regard to:
- (i) the nature of the Project;
 - (ii) the insurances which the Trustees have effected, or caused to be effected, at that time and the risks covered under those insurances;
 - (iii) the risks required to be insured by this clause 26;
 - (iv) the risks which a prudent insured in the position of the Trustees would seek to insure;
 - (v) the terms on which insurance is available;
 - (vi) the commercial reasonableness of those terms;
 - (vii) the insurances and risk management practices generally applying in the tollroad industry; and
 - (viii) any other factors which RMS and the Trustees may agree to be appropriate.
- (d) Any approval by RMS to the terms of any insurances pursuant to paragraphs 3(a)(ii) or 3(a)(iii) of Schedule 46 will not constitute evidence that, or estop RMS from denying that, any event falls within the definition of "Uninsurable Force Majeure Event".

26.10 **Direction by RMS to reinstate to different specifications**

- (a) RMS may require the Trustees to reinstate or repair the Project Works or the Motorway on the basis of different specifications by directing a Change pursuant to clause 14.
- (b) The reinstatement or repair work will only constitute a Change to the extent that it differs from what would have otherwise been required under this deed.
- (c) The available insurance proceeds will be taken into account in calculating the Change Costs of the Change.

26.11 **Procedure for Third Party Claims**

- (a) Where clause 27.1 applies as a result of a Claim made against RMS by a third party (**Third Party Claim**), then RMS must:
 - (i) promptly notify the Trustees of any occurrence or circumstance of which RMS is aware, or should reasonably have been aware, that could reasonably be expected to give rise to a Third Party Claim;
 - (ii) keep the Trustees informed of the progress of the Third Party Claim;
 - (iii) regularly consult with the Trustees in relation to the manner in which proceedings relating to the Third Party Claim are conducted and implement reasonable instructions of the Trustees as to the manner in which such proceedings should be conducted; and
 - (iv) not settle or pay the Third Party Claim, other than a Third Party Claim which:
 - (A) RMS is obliged by Law to pay; or
 - (B) is settled for an amount which is less than or equal to the amount RMS would otherwise have been liable to pay to the relevant third party,without the prior written consent of both Trustees (which must not be unreasonably withheld or delayed).
- (b) If a Third Party Claim is settled or paid without both Trustee's prior written consent (other than a Third Party Claim referred to in clause 26.11(a)(iv)(A) or clause 26.11(a)(iv)(B)) a Trustee will not be liable to indemnify RMS or its Related Parties in respect of such Third Party Claim to the extent that the liability is greater than it would otherwise have been but for such settlement or payment.
- (c) Despite anything to the contrary in this deed and with respect to the Third Party Works only, RMS will have no right to make a demand on any indemnity in this deed, or otherwise bring an action or Claim that arises from or in connection with this deed, after 12 years after the last day of the last of the Defects Correction Periods to expire.
- (d) The Trustees agree to diligently pursue the recovery of Losses in respect of the following:
 - (i) Insured Liability;
 - (ii) Loss in respect of death or personal injury or destruction or damage to real and personal property;

- (iii) Loss arising from any criminal acts, fraud or Wilful Misconduct on the part of the Trustees or their Related Parties;
- (iv) Loss to the extent that the Trustees or their Related Parties have recovered from or has been indemnified by a third party;
- (v) Loss which is the subject of the indemnities in clauses 9.8(d), 9.8A(d), 11.7(d), 29.2(a) and 29.3(e) of this deed;
- (vi) any Liability of RMS to a third party (including to another Indemnified Party) where:
 - (A) the Liability is not for a Loss that is described in paragraph (a) of the definition of Consequential Loss; or
 - (B) that third party could have recovered the Loss from the Trustees or their Related Parties directly; or
- (vii) liability that cannot be limited or excluded by law, including by commencing proceedings against a third party, unless:
 - (viii) those proceedings do not have reasonable prospects of success or reasonable prospects of yielding compensation in respect of the relevant Loss;
 - (ix) the Trustees or their Related Parties have otherwise recovered the Loss including by exercising a right of set-off or deduction or calling on security; or
 - (x) the Trustees or their Related Parties have determined in good faith and consistently with Good Industry Practice that it is not prudent to commence proceedings.

26.12 **Uninsurable Risks**

- (a) If the Asset Trustee or the Project Trustee believes that any risk that it is required to be insured under this deed is or becomes Uninsurable, then:
 - (i) it must notify RMS within 5 Business Days after it believes that the risk has become Uninsurable; and
 - (ii) clauses 26.12(b) to 26.12(f) will apply if the parties agree, or it is determined in accordance with the Dispute Resolution Procedure, that the risk is Uninsurable.
- (b) The Asset Trustee is not obliged to effect or maintain a particular Project Insurance to the extent that, and only for so long as the risk against which Project Insurance has been effected is Uninsurable (and did not become Uninsurable as a result of an act or omission of a Trustee, a Related Party of a Trustee or a Related Body Corporate of a Trustee).
- (c) Not used.
- (d) If a risk is Uninsurable, the Trustees must approach the insurance market on a regular basis (satisfactory to parties, acting reasonably) to establish whether that risk remains Uninsurable and must advise RMS accordingly.

- (e) If, in RMS's opinion (acting reasonably) a risk which is required to be insured against under a Project Insurance is no longer Uninsurable, RMS may give written notice to the Trustees.
- (f) If:
 - (i) a Trustee believes that a risk which is required to be insured against under a Project Insurance is no longer Uninsurable, that Trustee must notify RMS and promptly effect the relevant Project Insurance; or
 - (ii) RMS gives the Trustees a notice pursuant to clause 26.12(e) and the parties agree, or it is determined in accordance with the Dispute Resolution Procedure, that a risk which is required to be insured against under a Project Insurance is no longer Uninsurable, the Trustees must promptly effect the relevant Project Insurance.

27. INDEMNITY AND LIABILITY EXCLUSIONS

27.1 Indemnity from the Trustees

- (a) The Asset Trustee must indemnify RMS and its Related Parties (each an **Indemnified Party**) from and against any Loss suffered or incurred by an Indemnified Party and any Claim against an Indemnified Party, in respect of:
 - (i) any injury to, or disease or death of, persons; or
 - (ii) the loss of, loss of use or access to (whether total or partial), or destruction of or damage to, any real or personal property,

to the extent that it is caused by, to the extent it arises out of, or to the extent it is in any way connected with:

 - (iii) the Asset Trustee's Activities, including the Temporary Works and the Project Works or the Project;
 - (iv) RMS's ownership of the Construction Site, the Local Areas, the Temporary Areas, the Maintenance Site, the Motorway Stratum or the Licensed Maintenance Areas; or
 - (v) the use or occupation of the Construction Site, the New M5 Main Works Site, the Local Area Works Site, the Temporary Areas, the Maintenance Site, the Motorway Stratum or the Licensed Maintenance Areas, by the Asset Trustee or the Contractor.
- (b) The Project Trustee must indemnify the Indemnified Parties from and against any Loss suffered or incurred by an Indemnified Party and any Claim against an Indemnified Party, in respect of:
 - (i) any injury to, or disease or death of, persons; or
 - (ii) the loss of, loss of use or access to (whether total or partial), or destruction of or damage to, any real or personal property,

caused by, arising out of, or in any way in connection with:

 - (iii) the Project Trustee's Activities, including the O&M Work or the Project;

- (iv) RMS's ownership of the Construction Site, the New M5 Main Works Site, the Local Area Works Site, the Temporary Areas, the Maintenance Site, the Motorway Stratum or the Licensed Maintenance Areas; or
 - (v) the use or occupation of the Construction Site, the New M5 Main Works Site, the Local Area Works Site, the Temporary Areas, the Maintenance Site, the Motorway Stratum or the Licensed Maintenance Areas, by the Project Trustee.
- (c) Not used.
- (d) The Asset Trustee must indemnify RMS from and against:
- (i) any Liability to or claim by any other person; and
 - (ii) any Loss suffered or incurred by RMS,
- to extent that it is caused by, to the extent it arises out of, or to the extent it is in any way connected with, the Asset Trustee's breach of a term of any Project Document (such that its obligation to indemnify will be reduced proportionally to the extent that the relevant Liability or Loss was not caused by, did not arise out of, or was not connected with the Asset Trustee's breach).
- (da) The Project Trustee must indemnify RMS from and against:
- (i) any Liability to or claim by any other person; and
 - (ii) any Loss suffered or incurred by RMS,
- to extent that it is caused by, to the extent it arises out of, or to the extent it is in any way connected with, the Project Trustee's breach of a term of any Project Document (such that its obligation to indemnify will be reduced proportionally to the extent that the relevant Liability or Loss was not caused by, did not arise out of, or was not connected with the Project Trustee's breach).
- (e) Clauses 27.1(a) and 27.1(d) do not lessen or otherwise affect the Asset Trustee's other obligations under this deed.
- (f) Clauses 27.1(b) and 27.1(da) do not lessen or otherwise affect the Project Trustee's other obligations under this deed.
- (g) Subject to any express risk allocation to the contrary (including clauses 11.10 and 26.2), the Trustees have the same responsibilities to third parties in respect of persons, property and all other aspects of the Project which they would have if they held the freehold title to the Motorway Stratum and the Maintenance Site.

27.2 Exclusions from indemnity

- (a) Where under the terms of this deed:
- (i) a Trustee indemnifies an Indemnified Party from and against any Liability, Claim or Loss, that Trustee's liability to the Indemnified Party will be reduced to the extent that any breach of this deed or the other Project Documents or other act or omission (including any negligence) of RMS, including an act or omission (including any negligence) of its Related Parties, contributed to the Liability, Claim or Loss;
 - (ii) RMS indemnifies each Trustee from and against any Liability, Claim or Loss, RMS's liability to indemnify that Trustee will be reduced to the extent that

any breach of this deed or the other Project Documents or other act or omission (including any negligence) of a Trustee, including an act or omission (including any negligence) of a Trustee's Related Parties contributed to the Liability, Claim or Loss;

- (iii) a party is obliged to pay an amount in respect of any Loss suffered or incurred by the other party, it excludes Loss as a result of the negligence or wilful default of the payee party, its employees or agents; and
- (iv) a Trustee indemnifies an Indemnified Party from and against any Liability, Claim or Loss at any time after Completion, that Trustee will be released from any liability to the Indemnified Party to the extent that that liability relates to any Contamination which is migrating from the Core SPI Site to the Motorway Stratum, except to the extent:
 - (A) that Contamination is Contamination in respect of which the Trustee bears the risk pursuant to clause 11.10(e); or
 - (B) Contamination migrating from the Core SPI Site to outside the Core SPI Site where such Contamination is the subject of clauses 11.10(ea)(i) or 11.10(ea)(ii).
- (b) Clauses 27.2(a)(i) and 27.2(a)(iii) will not apply to reduce a Trustee's liability to indemnify or pay RMS to the extent that RMS is held to be vicariously liable at Law for any acts or omissions of that Trustee or its employees, agents or contractors.
- (c) Clause 27.2(a)(i) will not apply to reduce a Trustee's liability to indemnify RMS to the extent that the act or omission of RMS is an act or omission in the exercise of its rights or powers under this deed.

27.3 **Consequential Loss**

- (a) Subject to clauses 4A, 4B, 4C, 4D, 6.8, 6.11, 16.9 and 27.3(d), RMS has no liability to the Trustees, nor will the Trustees be entitled to make any Claim in respect of any Consequential Loss incurred or sustained by a Trustee:
 - (i) as a result of any act or omission of RMS (whether negligent or otherwise);
 - (ii) under any indemnity; or
 - (iii) as a result of a breach by RMS of a Project Document.
- (b) Subject to clause 27.3(c), and notwithstanding any other clause to the contrary the Trustees have no liability to an Indemnified Party, nor will any Indemnified Party be entitled to make any Claim in respect of any Consequential Loss incurred or sustained that Indemnified Party:
 - (i) as a result of any act or omission of a Trustee (whether negligent or otherwise);
 - (ii) under any indemnity; or
 - (iii) as a result of a breach by a Trustee of any Project Document.
- (c) Clause 27.3(b) does not operate to exclude or limit any liability incurred or Claim made by an Indemnified Party to the extent that any Loss suffered by the Indemnified Party as a result of such liability or Claim:
 - (i) is an Insured Liability;

- (ii) not used;
 - (iii) arises under or in connection with the Interlink Interface Agreement;
 - (iv) is a Loss caused by a Defect;
 - (v) is a Loss arising from death or personal injury;
 - (vi) is a Loss in respect of any criminal acts, fraud or Wilful Misconduct on the part of the Trustees or their Related Parties;
 - (vii) is a Loss which is the subject of the indemnities in clauses 9.8(d), 11.7(d), 11.10(f), 29.2(a), 29.3(e) and 34.5 and the payment obligation in clause 31.11, except to the extent that it is a Loss of the type described in paragraph (a) of the definition of Consequential Loss;
 - (viii) subject to clauses 26.2 and 26.4, in respect of any Liability of RMS or its Related Parties to a third party (including to another Indemnified Party) where:
 - (A) the Liability is not for a Loss that is described in paragraph (a) of the definition of Consequential Loss; or
 - (B) that third party could have recovered the Loss from the Trustees by pursuing a Trustee directly;
 - (ix) for Loss or a Liability to the extent that a Trustee or any of its Related Parties has recovered an amount from a third party (including any subcontractor and whether by way of indemnity or otherwise); or
 - (x) is a Liability which, by law, the parties cannot limit or contract out of.
- (d) Clause 27.3(a) does not operate to exclude or limit any liability incurred or Claim made by a Trustee or its Related Parties to the extent that any Loss suffered by that Trustee as a result of such liability or Claim:
- (i) is an Insured Liability;
 - (ii) is a Loss arising from death or personal injury;
 - (iii) is a Loss arising from any criminal acts, fraud or Wilful Misconduct on the part of RMS or its Related Parties;
 - (iv) is a Liability which, by law, the parties cannot limit or contract out of;
 - (v) is in respect of an amount payable under clause 14, 16, 21, 31.8, 31.10 or 31.11; or
 - (vi) is in respect of any sum payable in respect of any Change, Qualifying Change in Law, Change in Codes and Standards or Compensation Event.

27.4 **No circularity**

The provisions of clauses 27.2 and 27.3 do not operate to release the Trustees from any liability to RMS to the extent that an insurer of any policy of insurance required under this deed seeks to rely on 27.2 or 27.3 to deny liability which it otherwise has to indemnify an insured under the relevant policy.

27.5 **Mitigation**

Where under the terms of this deed, a party:

- (a) is obliged to pay an amount in respect of any Loss suffered or incurred by the other party; or
- (b) indemnifies the other party against any Liability, Claim or Loss,

that other party must (notwithstanding such obligation or indemnity) in each case take all reasonable steps to Mitigate that Loss, Liability or Claim and the cost of taking those steps will be recoverable from that party.

28. **NOT USED**

29. **INTELLECTUAL PROPERTY**

29.1 **Licence of Intellectual Property Rights**

- (a) Subject to clauses 29.1(b), 29.1(c) and 29.1(d), each Trustee (irrevocably for all time and despite any termination of this deed for any reason) grants to RMS an irrevocable, non-exclusive, royalty free, perpetual and fully assignable licence to use, possess, modify, vary or amend (and to sublicense others to use, possess, modify, vary or amend) all Intellectual Property Rights in or relating to:

- (i) the Design Documentation;
- (ii) the materials, documents, images, photographs, software, processes and methods relevant to the Project Works, the Temporary Works, the Asset Trustee's Activities and the Project Trustee's Activities (including processes and methods of working); and
- (iii) each of the Deliverables,

(together the **Contract Documentation and Deliverables**) for:

- (iv) the purposes of completing the construction, commissioning and testing of, using, operating, duplicating, extending, maintaining, upgrading, altering or otherwise dealing with the whole or any part of the Asset Trustee's Activities, the Project Trustee's Activities or the Project Works and the Temporary Works;
- (v) any purpose associated with further development of the Construction Site; and
- (vi) any other purpose associated with the WestConnex Program of Works,

which licence is effective immediately and will survive termination or expiry of this deed, provided that in respect of:

- (vii) software that is commercially available off-the-shelf third party software, the obligation of the Trustees is to license that item of software to RMS to the extent to which the Trustees are permitted to do so pursuant to the terms of the license granted to the Trustees by the third party licensor and on the terms of that licence; and
- (viii) customised third party software relating to tolling, customer management, operation or maintenance, the obligation on the Trustees is to license or to procure the licensing of that item of software (or software that has

substantially equivalent functionality) to RMS at the time and to the extent that is required by RMS to enable RMS to operate, maintain and toll the Motorway in accordance with this deed, unless the Trustees can demonstrate to the satisfaction of RMS (acting reasonably) that any such licence cannot reasonably be obtained for a reasonable cost.

- (b) The Asset Trustee grants to RMS a perpetual, non-exclusive, fully assignable, irrevocable and royalty-free licence to:
- (i) use and reproduce (within the meaning of the *Copyright Act 1968* (Cth)) the Licensed Software; and
 - (ii) upon termination or expiry of this deed for any reason, use, reproduce (within the meaning of the *Copyright Act 1968* (Cth)), modify, vary and amend the Licensed Software.
- (c) The Asset Trustee must procure that the owner or authorised licensor of the Procured Third Party Software grants to RMS a perpetual, non-exclusive, fully assignable and irrevocable licence on terms acceptable to RMS to:
- (i) use and reproduce (within the meaning of the *Copyright Act 1968* (Cth)), the Procured Third Party Software; and
 - (ii) upon termination or expiry of this deed for any reason, use, reproduce (within the meaning of the *Copyright Act 1968* (Cth)), modify, vary and amend the Procured Third Party Software,
- for any reason in connection with the Project Works, the operation of the Motorway or the WestConnex Program of Works.
- (d) With respect to the licenses, consents, warranties, indemnities and other promises the Trustees receive, procures or is given as part of carrying out the Asset Trustee's Activities or the Project Trustee's Activities, RMS acknowledges that the obligation for the Trustees to grant or procure the licenses or consents and give the warranties, indemnities and other promises contemplated by this clause 29 will be limited to the licenses, consents, warranties, indemnities and other promises:
- (i) the Trustees receives:
 - (A) in accordance with clause 29 of the New M5 Main Works D&C Deed; or
 - (B) in accordance with clauses 18.5, 18.6, 18.7, 18.8 and 25.2 of the Tolling Services Agreement; or
 - (ii) the Contractor receives in accordance with clause 21 of the Tolling Equipment Works Contract.

29.2 **Warranty**

- (a) The Trustees:
- (i) warrant that RMS's use of the Contract Documentation and Deliverables, or any other work provided by the Trustees under this deed will not infringe any author's moral rights under the *Copyright Act 1968* (Cth) or similar legislation in any jurisdiction;
 - (ii) warrants that there are no Security Interests other than the Permitted Security Interests, and that they will not allow any Security Interests to be

created, over any Intellectual Property Rights referred to in clause 29.1 other than the Permitted Security Interests; and

- (iii) must indemnify RMS to the extent any Claims, or costs, expenses, Losses or damages are suffered or incurred by RMS arising out of, or in any way in connection with, any actual or alleged infringement of any author's moral rights under the *Copyright Act 1968* (Cth) or similar legislation in any jurisdiction in connection with the Project Works, the Temporary Works, the Asset Trustee's Activities, the Project Trustee's Activities or the Contract Documentation and Deliverables.
- (b) For the purposes of clause 29.2(a), RMS's use of the Contract Documentation and Deliverables includes RMS's right to reproduce, publish, copy, adapt, communicate to the public, materially distort, destroy, mutilate or in any way change any part of the Contract Documentation and Deliverables or any part of the Project Works or the Temporary Works to which the Contract Documentation and Deliverables or any other work provided by the Asset Trustee or Project Trustee under this deed relates:
- (i) with or without attribution of authorship;
 - (ii) in any medium; and
 - (iii) in any context and in any way it sees fit.

29.3 **Trustees to procure for RMS**

- (a) The Trustees agree to, and agree to procure the cooperation of any third parties to:
- (i) execute such further documents and do such further things (including assisting in relation to any litigation commenced by or brought against RMS, its Related Parties or its licensees, assignees or successors and their licensees, or any other person authorised by it) as reasonably requested by RMS to give full effect to the provisions of this clause 29; and
 - (ii) allow or assist RMS (and its Related Parties, licensees, assignees and successors and their licensees, and any other person authorised by it) to obtain, perfect, assert, enforce or defend its (or their) interest in, rights and consents to the assigned or licensed Intellectual Property Rights (as the case may be) or any adaptation of it (or any part of the assigned or licensed Intellectual Property Rights (as the case may be) or of any such adaptation) or to prevent or obtain other remedies from others infringing any of those rights, interests and consents anywhere in the world.
- (b) Each Trustee irrevocably appoints RMS as its attorney to execute any document and do any act or thing which may be necessary to comply with the provisions of this clause 29.3 if that Trustee fails to execute the document or do the relevant act or thing within 5 Business Days of a written request by RMS's Representative.
- (c) The Trustees warrant that:
- (i) the use of the Intellectual Property Rights licensed under this clause 29 pursuant to the terms of this deed does not and will not infringe the Intellectual Property Rights of any party; and
 - (ii) the Trustees are able to grant the licence granted in clause 29.1.

- (d) Without limiting clause 29.3(c), if any action or Claim for infringement or alleged infringement of any Intellectual Property Rights results in the use or enjoyment by RMS, its Related Parties or its licensees, assignees or successors or their licensees, or other person authorised by it, of the Contract Documentation and Deliverables, the Asset Trustee's Activities, the Project Trustee's Activities or any part of them, being materially disrupted, impaired or adversely affected, the Trustees must at their own expense and at RMS's option:
 - (i) procure for the benefit of RMS, its Related Parties and its licensees, assignees and successors and their licensees and any other person authorised by it the right to continue to use and exploit the Intellectual Property Rights licensed pursuant to clause 29.1, in accordance with this deed; or
 - (ii) modify or replace the Contract Documentation and Deliverables, the Asset Trustee's Activities, the Project Trustee's Activities or relevant part of them, in respect of which Intellectual Property Rights are licensed pursuant to clause 29.1, so that no further infringement will occur and so that the modified or replaced Contract Documentation and Deliverables, the Asset Trustee's Activities, the Project Trustee's Activities or relevant part of them in respect of which Intellectual Property Rights are licensed pursuant to clause 29.1 will:
 - (A) comply with the requirements of this deed; and
 - (B) not limit or otherwise affect RMS's rights, or the Trustee's ability to comply with their obligations, under this deed or otherwise according to Law.
- (e) The Trustees indemnify, and agree to keep indemnified, RMS from and against any Claims against RMS, or Loss suffered or incurred by RMS, arising out of or in any way in connection with:
 - (i) a breach by the Asset Trustee or the Project Trustee of any warranty set out in this clause 29; or
 - (ii) any actual or alleged infringement of an Intellectual Property Right in connection with the Contract Documentation and Deliverables, the Asset Trustee's Activities, the Project Trustee's Activities or any part of them.

29.4 **Moral rights**

The Trustees, in respect of the Intellectual Property Rights set out in this clause 29:

- (a) to the extent permitted by Law, will not, and will take reasonable steps to ensure that their Related Parties do not, sue, enforce any Claim, bring any action or exercise any cure in respect of any breach or alleged breach of any person's Moral Rights (whether before or after the date of this deed) in respect of any Intellectual Property Rights against:
 - (i) RMS;
 - (ii) RMS's Related Parties; or
 - (iii) any third party to whom RMS sub-licences (whether express or implied), or grants any other right to use, possess, modify, vary or amend any Intellectual Property Right;

- (b) will take reasonable steps to procure (without coercion) that all individuals who are, or are to be, or may be, authors of any Intellectual Property Right, sign, date and return to the Asset Trustee a Moral Rights Consent (in consideration for the payment of \$1 to that individual) prior to those individuals commencing work on the creation of any Intellectual Property Rights, or as soon as practicable thereafter, in which each such individual becomes bound by the obligations to RMS as set out in the Moral Rights Consent, and to pay each such individual the sum of \$1 on behalf of RMS;
- (c) will within 5 Business Days after a request by RMS, provide to RMS any Moral Rights Consent which is obtained pursuant to clause 29.4(b) as requested by RMS; and
- (d) will maintain an up-to-date record of the names and contact details of each person who is an author of any Intellectual Property Right and the Intellectual Property Right of which such person is an author, and provide a copy of any updated records to RMS upon request.

29.5 Intellectual Property Rights in Planning Application Documents

- (a) Ownership of, and all Intellectual Property Rights in, the Planning Application Documents vests in RMS when each Planning Application Document comes into existence.
- (b) Upon request by RMS Representative, the Asset Trustee must do all things necessary to perfect the vesting of such ownership and Intellectual Property Rights in RMS.
- (c) RMS grants to each Trustee an irrevocable, non-exclusive and royalty free licence to use the Planning Application Documents (and to sublicense others to use the Planning Application Documents) for the purpose of performing the Asset Trustee's Activities or the Project Trustee's Activities and any of its other obligations under this deed.

30. CONFIDENTIALITY PUBLICITY AND PRIVACY

30.1 General restriction

Subject to clause 30.2, no party will, at any time, without the written consent of the other party, divulge or suffer or permit its servants, consultants or agents to divulge to any person (other than to the Borrower, the Contractor, the Operator, SMC, the Independent Certifier, the D&C Independent Certifier and their officers, employees, consultants, advisers and agents who require such reports, studies, information and data to enable them properly to carry out their duties):

- (a) any of the contents of this deed or the other Project Documents;
- (b) any information relating to the negotiations concerning the same; or
- (c) any information which may have come to a party's knowledge in the course of such negotiations or otherwise concerning the operations, dealings, transactions, contracts, commercial or financial arrangements or affairs of the other party.

30.2 Exceptions

The restrictions imposed by clause 30.1 will not apply to the disclosure of any information:

- (a) which is now or after the date of this deed comes into the public domain (other than by breach of this clause) or which is obtainable with no more than reasonable diligence from sources other than the parties;
- (b) which is required to be disclosed by Law or the Listing Rules of the ASX Limited (if applicable);
- (c) as required for any legitimate NSW Government purpose or process;
- (d) pursuant to the contract summary required to be published in accordance with Premier's Memorandum No. 2007-01 dated 8 January 2007 or the NSW Public Private Partnership Guidelines published by the NSW Government and dated August 2012;
- (e) to a court, arbitrator or administrative tribunal in the course of proceedings before it or him to which the disclosing party is a party or to an expert in the course of any determination by him to which the disclosing party is a party;
- (f) which, in the reasonable opinion of a party, is required to be disclosed to:
 - (i) any actual or prospective investor in or lender or provider of financial accommodation to (or assignee or novatee of, agent or trustee on behalf of, a lender or provider of financial accommodation to) the Group;
 - (ii) any officers, employees, professional advisers, auditors or consultants of any actual or prospective investor or lender or provider of financial accommodation (or assignee or novatee of, agent or trustee on behalf of, a lender or provider of financial accommodation) to enable them to properly carry out their duties;
 - (iii) any insurer in respect of the Project;
 - (iv) any of the Asset Trustee's, Project Trustee's, SMC's, or RMS's officers, employees, professional advisers, auditors or consultants; or
 - (v) any person to whom disclosure is reasonably necessary to enable that person to comply with, or exercise its rights under, the Project Documents to which it is a party and any Subcontractors, providing the Subcontractors agree to be bound by the confidentiality obligations which bind the Trustees under this clause 30;
- (g) by RMS that is not Commercially Sensitive Information; or
- (h) without limiting this clause 30.2 or clause 30.4, any disclosure by RMS's Representative of any Project Document relating to this deed and which a Trustee (acting reasonably) has agreed with RMS's Representative contains no Commercially Sensitive Information.

30.2A Third Party Confidential Information

Subject to clauses 30.2(a), 30.2(b), 30.2(c) and 30.2(e), the Trustees must not disclose (including to those persons or entities identified in clause 30.2(f)) any Third Party Confidential Information without RMS's prior written consent (which may, at RMS's absolute discretion, include consent to disclose such information to the Trustees'

Subcontractors provided that such disclosure is in accordance with any terms RMS is required to comply with in respect of that Third Party Confidential Information).

30.3 **Publicity**

- (a) The Trustees must not issue any information, publication, document or article for publication concerning the Project or the Asset Trustee's Activities or the Project Trustee's Activities in any media (or permit any third party to do so) without the prior written approval of RMS's Representative (acting reasonably) and only in a manner approved by RMS's Representative (acting reasonably).
- (b) If a Trustee or any of its Subcontractors receives a direct request from the media for comment in respect of any aspect of the Project or the Asset Trustee's Activities or the Project Trustee's Activities, the relevant Trustee must promptly provide details of such request to RMS's Representative.
- (c) The Trustees must not announce, promote or hold any event, function or party on the Construction Site, the Motorway or the Motorway Stratum (or permit any third party to do so) without the prior written approval of RMS (acting reasonably).

30.4 **Disclosure by RMS**

- (a) Notwithstanding the other provisions of this clause 30 but subject to clause 30.4(b), the parties acknowledge that:
 - (i) the Project Documents will be made available to the Auditor-General in accordance with the *Public Finance and Audit Act 1983* (NSW);
 - (ii) information concerning the Project Documents will be tabled in Parliament of the State of New South Wales by or on behalf of RMS and will be published in accordance with applicable government policies and guidelines;
 - (iii) the Project Documents and information concerning the Project Documents will be published on RMS's contracts register in accordance with the GIPA Act; and
 - (iv) RMS and RMS's Representative may make the Project Documents or any of them available to any person as required by any applicable Law, to the Minister (or Office of the Minister) with responsibility for RMS, or for any other legitimate government purpose or process.
- (b) The parties acknowledge that:
 - (i) RMS has consulted with the Trustees in relation to the disclosure of those parts of the Project Documents that are not Commercially Sensitive Information;
 - (ii) RMS will notify the Trustees, the Borrower, the Security Trustee, the Intercreditor Agent and the Senior Facility Agent (as applicable) of any proposed disclosure of any information that RMS considers (acting reasonably) may be Commercially Sensitive Information by RMS under the GIPA Act no later than 20 Business Days before the proposed date of disclosure;
 - (iii) following notification by RMS in accordance with clause 30.4(b)(ii), RMS will take reasonable steps to consult with the Trustees, the Borrower, the Security Trustee, Intercreditor Agent and the Senior Facility Agent (as applicable) before RMS discloses the information referred to in clause 30.4(b)(ii), including under the GIPA Act; and

- (iv) if, following:
 - (A) notification by RMS in accordance with clause 30.4(b)(ii); or
 - (B) consultation between RMS and the Trustees, the Borrower, the Security Trustee, Intercreditor Agent and the Senior Facility Agent (as applicable) in accordance with clause 30.4(b)(iii),
 - a Trustee, the Borrower, the Security Trustee, Intercreditor Agent or the Senior Facility Agent (as applicable) objects to disclosure of some or all of the information referred to in clause 30.4(b)(ii) on the basis that it is Commercially Sensitive Information, that Trustee, the Borrower, the Security Trustee, Intercreditor Agent or the Senior Facility Agent (as relevant) must provide details of any such objection within 5 Business Days of the date the Trustee, the Borrower, the Security Trustee, Intercreditor Agent or the Senior Facility Agent received notification from RMS or the date on which the consultation process concluded (as relevant).
- (c) RMS may take into account any objection received from a Trustee, the Borrower, the Security Trustee or the Intercreditor Agent (as applicable) pursuant to clause 30.4(b)(iv) in determining whether the information identified by a Trustee, the Borrower, the Security Trustee, Intercreditor Agent or the Senior Facility Agent (as applicable) as Commercially Sensitive Information should be disclosed.
- (d) Nothing in this clause 30.4 will limit or otherwise affect the discharge of RMS's obligations under the GIPA Act.

30.5 **Privacy**

- (a) Without limiting clause 7.1, the parties must comply with the Privacy Laws in carrying out and implementing the Project.
- (b) Where a party will be collecting or disclosing Personal Information from an individual in connection with the Project, it must:
 - (i) either:
 - (A) ensure that the disclosure is permitted under the Privacy Laws; or
 - (B) procure the consent of the individual to whom that Personal Information relates sufficient to enable such disclosure to occur and to enable the recipient to collect, use, and disclose that Personal Information for the purposes of the Project;
 - (ii) take reasonable steps to ensure that the Personal Information disclosed is accurate, complete and up-to-date; and
 - (iii) take reasonable steps to inform that individual of any matters required by the Privacy Laws.

31. **DEFAULT AND TERMINATION**

31.1 **Events of Default**

Each of the following events is an Event of Default:

- (a) the Asset Trustee fails to commence or to expeditiously and diligently progress the Asset Trustee's Activities as required by clause 16.1 or the Asset Trustee or the Project Trustee display an intention to permanently abandon the Project;

- (b) not used;
- (c) after the Date of Opening Completion, the M5E Transfer Date or the M5W Transfer Date, either Trustee closes or permits the closure of one or more traffic lanes of the New M5 Motorway, the M5 East Motorway or the M5 West Motorway (as relevant), other than in accordance with clause 19.2 (an **Unauthorised Closure Default**);
- (d) either Trustee fails in a material respect to operate, maintain, repair or insure the Motorway in accordance with this deed;
- (e) any member of the Group defaults in a material respect in the due observance and performance of any of its other obligations under this deed or any other RMS Project Document;
- (f) an Insolvency Event occurs in relation to any member of the Group, whether or not a Trustee is then in breach of this deed (a **Group Insolvency Default**);
- (g) an Insolvency Event occurs in relation to the Contractor, the Operator, the Contractor Guarantor or the Operator Guarantor (in each case whether or not the a Trustee is then in breach of this deed) and that Contractor, Operator, Contractor Guarantor or Operator Guarantor is not replaced:
 - (i) if the Insolvency Event has occurred in relation to the Contractor or the Contractor Guarantor, within 180 days after the occurrence of the Insolvency Event; or
 - (ii) if the Insolvency Event has occurred in relation to the Operator or the Operator Guarantor, within 30 days after the occurrence of the Insolvency Event,
 by a party which is:
 - (iii) reputable, solvent and has the resources and experience to perform its obligations under the New M5 Main Works D&C Deed or the O&M Deed (or in the case of the Contractor Guarantor or the Operator Guarantor, the Contractors' obligations under the New M5 Main Works D&C Deed or the Operator's obligations under the O&M Deed, as the case may be); and
 - (iv) otherwise acceptable to RMS; or
- (h) a Trustee breaches in a material respect a representation or warranty given by it under this deed or any other undertaking given by it in a RMS Project Document (other than the Tolling Service Agreement).

31.2 **Notice of default**

- (a) Upon the occurrence of an Event of Default, RMS may, by notice in writing to both Trustees, require a Trustee to Remedy the Event of Default within such period (subject to clause 31.2(b)) specified in the notice as is in the opinion of RMS (acting reasonably) required to Remedy the Event of Default (the **Remedy Period**).
- (b) The parties agree that if an Event of Default is:
 - (i) a failure to pay money, the Remedy Period to be specified by RMS is 20 Business Days;

- (ii) an Unauthorised Closure Default, the Remedy Period to be specified by RMS is 5 days; or
 - (iii) a Group Insolvency Default which occurs prior to the Date of Opening Completion, the Remedy Period to be specified by RMS is 5 days.
- (c) If RMS gives the Trustees a notice referred to in clause 31.2(a) (a **Remedy Notice**):
- (i) the relevant Trustee must comply, and must procure that each other member of the Group complies, with the Remedy Notice; and
 - (ii) unless urgent action is necessary or the relevant Event of Default is a failure to pay money:
 - (A) the Trustees must give RMS a program and plan (a **Remedy Plan**) to Remedy the Event of Default in accordance with the terms of the Remedy Notice;
 - (B) RMS must consult with the Trustees in good faith to develop and settle that Remedy Plan; and
 - (C) the relevant Trustee must thereafter comply, and must procure that each other member of the Group complies, with that Remedy Plan.
- (d) Not used.
- (e) If, at any time (even if a Trustee has previously given RMS a notice under clause 31.2(e)(i)), a Trustee considers, in good faith, that a Remedy Period is not reasonable:
- (i) a Trustee must immediately give RMS written notice of that fact, including details of its reasons and extension to the Remedy Period which it believes (acting reasonably) is required to Remedy the Event of Default; and
 - (ii) subject to this clause 31.2(e), RMS must, as soon as practicable after receiving a notice under clause 31.2(e)(i), review the Remedy Period.
- (f) If a Trustee has given a notice to RMS under clause 31.2(e)(i) and:
- (i) the Group or members of the Group are diligently pursuing the Remedy of the Event of Default, including by complying with a Remedy Plan; and
 - (ii) if the Event of Default the subject of the Remedy Notice occurred after the Date of Opening Completion, the Motorway is open to the public to the extent that it is safe to do so (unless permitted otherwise in accordance with clause 19.2),
- the relevant Remedy Period will be extended by such period as is, in the opinion of RMS (acting reasonably), required to Remedy the Event of Default as notified by RMS to the Trustees in writing.
- (g) If a Trustee considers in good faith that a Remedy Period extended by RMS pursuant to clause 31.2(f) is not reasonable, it may refer the matter for resolution in accordance with the Dispute Resolution Procedure.

31.3 **Not Used**

31.4 **Not Used**

31.5 **Not Used**

31.6 **Termination by RMS**

(a) If an Event of Default is not Remedied within the Remedy Period (as extended if at all in accordance with clause 31.2(f) or clause 31.2(g)) or if at any time during the relevant Remedy Period (as extended if at all in accordance with clause 31.2(f) or clause 31.2(g)):

(i) the Group or members of the Group are not diligently pursuing a Remedy of the Event of Default, including by complying with the Remedy Plan; or

(ii) the Motorway is not open to the public to the extent that it is safe to do so (unless permitted otherwise in accordance with clause 19.2),

RMS may give the Trustees 20 Business Days' prior written notice of its intention to terminate this deed. During this 20 Business Day period the Trustees will have a right to Remedy, or procure the Remedy of, the Event of Default.

(b) If at the expiration of the 20 Business Day period following the written notice under clause 31.6(a), the Event of Default has not been Remedied by the Trustees, RMS may subject to the Financiers Tripartite Deed thereafter terminate this deed by, and with effect from, written notice to the Trustees.

(c) Upon termination of this deed (other than termination under clauses 6, 31.7, 31.7A, 31.8, 31.9 or 31.10(c)(i)), RMS will not be liable to pay any compensation or other moneys to the Trustees by reason of that termination (including, where RMS does not exercise the right to require novation of a Subcontract, any amounts payable by the Trustees to the relevant Subcontractor following termination of that Subcontract other than any entitlements which have accrued before the deed was terminated).

(d) The parties acknowledge and agree that RMS may terminate this deed under this clause 31 in circumstances where an Insolvency Event only relates to or involves one member of the Group and notwithstanding that the other members of the Group are not then in default or the subject of an Insolvency Event.

31.6A **Right to damages**

(a) Subject to clause 31.6(c), any termination of this deed under this clause 31 will not in any way prejudice any party's rights to claim and recover damages for any breach of contract by any other party.

(b) Any termination of this deed by RMS under this clause 31 (other than clauses 31.7, 31.7A or 31.9) will entitle RMS to recover all Loss that RMS may suffer or incur arising out of or in any way in connection with the termination of this deed.

31.7 **Termination for Final Determination**

(a) Notwithstanding any other provision of this deed, if a court makes a Final Determination and RMS fails to procure that the effect of the Final Determination is overcome within 20 months of a Trustee giving written notification to RMS of the Final Determination, RMS may in its absolute discretion terminate this deed at any time after that 20 month period by giving a notice to that effect to the Trustees, in which case clause 31.11 will apply.

- (b) RMS acknowledges and agrees that a Trustee will not be in breach of this deed to the extent the Trustee is prevented from undertaking the Project in accordance with this deed as a consequence of a Final Determination.

31.7A Termination for Native Title Claim

If the Trustees are prevented from carrying out the Asset Trustee's Activities or the Project Trustee's Activities for a continuous period of more than 6 months as a result of a direction, order or requirement referred to in clause 11.9(a), RMS may in its absolute discretion terminate this deed at any time after that 6 month period by giving a notice to that effect to the Trustees, in which case clause 31.11 will apply.

31.8 Termination by a Trustee

Subject to clause 31.10, a Trustee may terminate this deed by giving RMS 30 Business Days' prior written notice if:

- (a) the NSW Government enacts legislation (including any rules, regulations or by-laws under that legislation) which prohibits or has the effect of prohibiting a member of the Group from undertaking the Project substantially in accordance with the Project Documents;
- (b) an Authority resumes any part of the Motorway Stratum and as a result any member of the Group is prevented from undertaking the Project substantially in accordance with the Project Documents;
- (c) RMS breaches clause 11.1 and such breach:
 - (i) prevents any member of the Group from undertaking the Project substantially in accordance with the Project Documents; and
 - (ii) is not remedied (or its effects overcome) within 12 months after written notice from a Trustee to RMS specifying the breach;
- (d) a court makes a Final Determination other than as a result of:
 - (i) a Trustee's failure to comply with its obligations under a Project Document;
 - (ii) a breach by a Trustee of its warranties under a Project Document;
 - (iii) a wrongful act or omission of a Trustee or its Related Parties; or
 - (iv) a failure by a Trustee or any of its Related Parties to comply with any Law,and RMS fails to procure that the effect of the Final Determination is overcome within 20 months of a Trustee giving written notification to RMS of such Final Determination;
- (e) a Trustee is prevented from carrying out the Asset Trustee's Activities or the Project Trustee's Activities (as relevant) for a continuous period of more than 6 months as a result of a direction, order or requirement referred to in clause 11.9(a); or
- (f) RMS breaches clause 7.8(b) and such breach is not remedied (or its effects overcome) within 90 days after written notice from a Trustee to RMS specifying the breach,

in which case clause 31.11 will apply. If an event referred to in clause 31.8(c)(i) occurs, then in respect of the 12 month period referred to in clause 31.8(c)(ii), RMS must pay to

the Asset Trustee in respect of that period monthly in arrears an amount (including costs, Losses or expenses) sufficient to place members of the Group as a whole in the net (including after Tax) position they would have been in had the event referred to in clause 31.8(c) not occurred.

31.9 **Termination for Uninsurable Force Majeure Event**

Notwithstanding any other provision of this deed, if an Uninsurable Force Majeure Event exists, or the consequences of the Uninsurable Force Majeure Event exist, for a continuous period of more than 12 months any party may in its absolute discretion terminate this deed at any time after that 12 month period by giving a notice to that effect to the other party, after which this deed will terminate and clause 31.11 will apply.

31.10 **Suspension of termination notice**

- (a) If a Trustee issues a notice of termination under clause 31.8, RMS may suspend that right to terminate by giving the Trustees written notice within 25 Business Days after receipt of a Trustee's notice.
- (b) RMS's suspension of that right to terminate expires:
 - (i) upon notice to that effect from RMS;
 - (ii) 12 months after the date of a Trustee's notice under clause 31.8; or
 - (iii) when the relevant event is remedied by RMS or no longer exists, whichever is earlier.
- (c) If RMS's suspension of that right to terminate expires:
 - (i) under clause 31.10(b)(i) or 31.10(b)(ii), this deed automatically terminates under clause 31.8 on the date RMS's suspension of a Trustee's right to terminate expires; or
 - (ii) under clause 31.10(b)(iii), this deed continues in force.
- (d) The Trustees must continue to perform its obligations under this deed while its right to terminate is suspended if:
 - (i) it is lawfully able to do so; and
 - (ii) it is practicable to do so.
- (e) If RMS suspends a Trustee's right to terminate under clause 31.10(a), to the extent a Trustee is unable to continue to perform its obligations under this deed, RMS must pay that Trustee in respect of the period of suspension monthly in arrears any additional amounts (including costs, Losses or expenses) sufficient to pay the members of the Group as a whole in the net (including after Tax) position they would have been in had the event on the basis of which the notice under clause 31.8 was issued not occurred.

31.11 **Termination payments**

- (a) Without prejudice to clause 31.6A, if this deed is terminated under clause 31.7 in respect of a Final Determination which is not a result of:
 - (i) the Trustee's failure to comply with its obligations under a Project Document;

- (ii) a breach by the Trustees of its warranties under a Project Document;
- (iii) a wrongful act or omission of the Trustees or its Related Parties; or
- (iv) a failure by the Trustees or any of their Related Parties to comply with any Law,

RMS must within 30 Business Days after the date of termination:

- (v) pay the Early Termination Amount to the Trustees; and
 - (vi) release the Security Bond.
- (b) Without prejudice to clause 31.6A, if this deed is terminated under clauses 31.7A or 31.8, RMS must within 30 Business Days after the date of termination:
- (i) pay the Early Termination Amount to the Asset Trustee; and
 - (ii) release the Security Bond.
- (c) Without prejudice to clause 31.6A, if this deed is terminated under clause 31.9, RMS must within 30 Business Days after the date of termination:
- (i) pay the Uninsurable FM Termination Amount to the Asset Trustee; and
 - (ii) release the Security Bond.
- (d) Without prejudice to clause 31.6A, if this deed is terminated under clauses 6.9(a) or 6.11(g), RMS must within 30 Business Days after the date of termination:
- (i) pay the Planning Termination Sum to the Asset Trustee; and
 - (ii) release the Security Bond.
- (e) RMS must take all reasonable steps to mitigate any Loss RMS might suffer or incur, arising out of or in connection with the termination of this deed.

31.12 Termination of M5 Leases

- (a) Notwithstanding the provisions of the M5 Leases as to the term of the M5 Leases, the Asset Trustee acknowledges and agrees that each tenancy created by the M5 Leases will automatically and simultaneously be determined upon the termination of this deed without the necessity of notice and all estates and interests derived or dependent upon the M5 Leases will be determined for all time with effect from the date this deed is terminated.
- (b) The parties expressly acknowledge and agree that, upon the termination of this deed in accordance with this deed:
- (i) the M5 Leases are intended to and will expire by effluxion of time despite any Law;
 - (ii) the non-exclusive licence to use the Licensed Maintenance Areas granted under Schedule 2 of the M5 Leases will automatically and simultaneously be determined; and
 - (iii) the Trustees will not, and will not be entitled to, bring an action against RMS for relief against forfeiture (whether pursuant to section 130 of the *Conveyancing Act 1919* (NSW) or otherwise) of the M5 Leases.

32. **DISPUTE RESOLUTION**

Any dispute or difference arising out of, relating to, or in connection with this deed or the conduct of the parties in relation to this deed, or its subject matter (including any question regarding the existence, validity or termination of this deed) (**Dispute**), must be resolved in accordance with the Dispute Resolution Procedure.

33. **FORCE MAJEURE**

33.1 **Force Majeure notice**

- (a) If a Trustee alleges or wishes to claim that Force Majeure has occurred a Trustee must give RMS prompt written notice of the Force Majeure once it becomes aware of the same and the obligations affected together with full particulars of all relevant matters including:
- (i) details of the Force Majeure;
 - (ii) details of the obligations affected;
 - (iii) details of the action that the Trustee has taken and/or proposes to take to remedy the situation;
 - (iv) an estimate of the time during which the Trustee will be unable to carry out its obligations due to the Force Majeure;
 - (v) an estimate of the costs that the Trustee will incur to remedy the situation; and
 - (vi) details of all insurance moneys upon which the Trustee will be able to rely in making good damage caused by the Force Majeure.
- (b) After giving notice under clause 33.1(a) the Trustee must continue to provide to RMS all relevant information pertaining to the Force Majeure.

33.2 **Meeting**

The parties must meet within 5 Business Days of service of a notice of a Force Majeure event to determine the estimated length of time for which the Force Majeure will continue.

33.3 **Suspension of obligations**

- (a) Subject to clause 33.3(f), if a Force Majeure occurs each of the Trustee's obligations under this deed (other than its obligations under clause 16.2 and 33) which are affected by the Force Majeure will be suspended but only to the extent and for so long as such obligations are affected by the Force Majeure.
- (b) If a Force Majeure occurs and a notice under clause 33.1(a) is issued, no party will be in default of its obligations under this deed in so far as the failure or delay in the observance or performance of those obligations by that party is caused by the Force Majeure specified in the notice under clause 33.1(a).
- (c) A Trustee must notify RMS immediately after it ceases to be prevented or delayed from performing its obligations as a result of a Force Majeure event.
- (d) RMS will not be obliged to provide any financial relief to the Trustees during the period of suspension.

- (e) Upon the Trustees becoming able to recommence performing its obligations which were suspended under clause 33.3(a), the Trustees must recommence the performance of those obligations.
- (f) Clause 33.3(a) will only apply to suspend a Trustee's obligation under clause 19.2 to keep all traffic lanes of the Motorway open where the occurrence of the Force Majeure event prevents the safe passage of vehicles.

33.4 **Duty to remedy Force Majeure**

Each Trustee must remedy and Mitigate the effects of a Force Majeure promptly in accordance with clause 26.9.

34. **TERMINATION OR EXPIRATION**

34.1 **Trustees' obligations upon termination or expiration**

- (a) On and from the Expiry Date:
 - (i) RMS may require a novation of any one or more of:
 - (A) if this deed is terminated prior to the Date of Opening Completion, the New M5 Main Works D&C Deed; or
 - (B) if this deed is terminated after the Date of Opening Completion:
 - (aa) the O&M Deed; and
 - (bb) any other Subcontract agreed between RMS and the Trustees (acting reasonably);
 - (ii) the Trustees must:
 - (A) execute, and must procure that each member of the Group executes, all documentation required to effect a transfer to RMS of its interests in the Project;
 - (B) hand over, and must procure each member of the Group hands over, books of account and all other records relating to the Project;
 - (C) hand over the Contract Documentation and Deliverables;
 - (D) procure the assignment of the Trustee's rights under the insurance policies maintained by the Trustees under clause 26 (other than any professional indemnity insurance policy);
 - (E) hand over any other documentation relating to the Project within the custody or control of the Trustees or its Subcontractors;
 - (F) if this deed is terminated prior to the Date of Opening Completion, do all other acts and things to enable RMS or any person engaged by RMS to complete the construction of the Project Works and the Temporary Works; and
 - (G) do all other acts and things to enable RMS or any person engaged by RMS to operate, maintain and repair the Motorway; and
 - (iii) the Trustees must peaceably surrender and yield up to RMS, the Construction Site, any Extra Land and any other land upon which the Asset

Trustee's Activities or the Project Trustee's Activities are being carried out (including any right, title or interest in them).

- (b) The Trustees acknowledge that nothing in this clause 34 obliges RMS to require or consent to the novation of any Subcontract to RMS.
- (c) The Trustees, for the purposes of executing any document or doing any other thing reasonably required for the purposes of or to give effect to clause 34.1(a), irrevocably appoint RMS as their attorney as from the date of termination with full power and authority to execute any such document and do any such other thing on behalf of the Trustees, if the Trustees fail to execute such document or do such other thing within 5 Business Days of being requested in writing to do so by RMS.

34.2 **Expiration of the Term**

Subject to the other provisions of this deed, on the last day of the Term, the Trustees acknowledge and agree that they must:

- (a) peaceably surrender and yield up to RMS, the Motorway and the Motorway Stratum (including any right, title or interest in them):
 - (i) in respect of the M5 East Motorway, in a condition at least equal to that set out in the M5 East Motorway Agreed Condition Specification;
 - (ii) in respect of the M5 West Motorway, in a condition at least equal to that set out in the M5 West Motorway Agreed Condition Specification; and
 - (iii) in respect of the New M5 Motorway, in a fully functional condition which complies with the SWTC and the O&M Manuals;
- (b) deliver to RMS:
 - (i) the then current versions of the O&M Manuals;
 - (ii) all furniture, fittings, plant and equipment required to operate, maintain and repair the Motorway; and
 - (iii) the then current Contract Documentation and Materials, Licensed Software and Procured Third Party Software (including software, Source Code and object code) to the extent held by the Trustees;
- (c) subject to the Financiers Tripartite Deed, pay to RMS any insurance proceeds from any insurances for reinstatement or replacement of the Project Works, the Third Party Works or the Motorway (as applicable) to the extent not already reinstated or replaced and assign to RMS any rights available to the Trustees under those insurances; and
- (d) do all other reasonable acts and things to enable RMS to operate the Motorway at a level at least equal to that in effect immediately before the termination of this deed with minimum disruption to its use as a toll road.

34.3 **Final Handover**

- (a) The parties must, if required by RMS, carry out joint inspections of the Motorway at a mutually convenient time:
 - (i) 3 years prior to the Expiry Date; and
 - (ii) 18 months prior to the Expiry Date.

- (b) Following each inspection under clause 34.3(a), the parties will seek to reach agreement on:
- (i) the maintenance and repair works required to achieve Final Handover which are in addition to the maintenance or repair works scheduled to be carried out by the Project Trustee between the date of the inspection and the Expiry Date as part of the O&M Work;
 - (ii) a programme for the carrying out of those works by the Project Trustee; and
 - (iii) an estimate of the cost of carrying out those works.

If the parties fail to reach agreement on any of the matters referred to in this clause 34.3(b) within 20 Business Days after the date of the relevant joint inspection then RMS may refer the matters in dispute for resolution in accordance with the Dispute Resolution Procedure.

- (c) The Project Trustee must carry out the works agreed or determined under clause 34.3(b) in accordance with the programme agreed or determined pursuant to clause 34.3(b) and:

- (i) must either:
 - (A) progressively deposit into an account opened by RMS in RMS's name with an authorised deposit-taking institution (within the meaning of the *Banking Act 1959* (Cth)) (the **Escrow Account**) 40% of all revenue collected by the Toll Collection System during the last 3 years or 18 months of the Term (as the case may be) until such time as the balance of the Escrow Account equals or exceeds 40% of the total estimated cost of the works (as agreed or determined pursuant to clause 34.3(b)); or
 - (B) provide to RMS an unconditional undertaking which complies with the requirements of clause 10 for an amount equal to 40% of the estimated cost of the works (as agreed or determined pursuant to clause 34.3(b)),

as security for the performance of such works and the Project Trustee's other obligations under this clause 34.3.

- (d) Subject to its rights to have recourse to the monies held in the Escrow Account, RMS must pay the balance held in the Escrow Account to the Project Trustee within 20 Business Days after the Date of Final Handover.

- (e) As conditions precedent to Final Handover:

- (i) in respect of the M5 East Motorway, it must be in a condition at least equal to that set out in the M5 East Motorway Agreed Condition Specification;
- (ii) in respect of the M5 West Motorway, it must be in a condition at least equal to that set out in the M5 West Motorway Agreed Condition Specification;
- (iii) in respect of the New M5 Motorway, it must be in a condition at least equal to that set out in the New M5 Motorway Agreed Condition Specification;
- (iv) there must be:
 - (A) no immediate repair work required to any part of the New M5 Motorway; and

- (B) otherwise no Defects in the New M5 Motorway;
 - (v) the Project Trustee must transfer ownership to RMS or its nominee of all plant and equipment owned by the Project Trustee or in respect of which it has an option to acquire title and required for the O&M Work; and
 - (vi) the Project Trustee must supply to RMS all spare parts and special tools necessary for the continued operation, maintenance and repair of the Motorway after the expiry of the Term for a period of 12 months.
- (f) During the final 3 months of the Term, the Project Trustee must train RMS (or other) personnel as nominated by RMS in all aspects of the operation, maintenance and repair of the Motorway to a level of competency that will allow those personnel to manage, operate, maintain and repair the Motorway so that the obligations specified in clause 19.1 can be fulfilled after the expiry of the Term.
- (g) It is a condition precedent to Final Handover that the training referred to in clause 34.3(f) be completed to the reasonable satisfaction of RMS.
- (h) For a period of 12 months after the expiry of the Term, the Project Trustee must ensure that it has competent and experienced personnel available to consult with RMS on any aspect of the operation, maintenance and repair of the Motorway where required by RMS.
- (i) Within 60 Business Days after the Expiry Date, RMS will determine whether:
- (i) the M5 East Motorway will be in a condition at least equal to that set out in the M5 East Motorway Agreed Condition Specification;
 - (ii) the M5 West Motorway will be in a condition at least equal to that set out in the M5 West Motorway Agreed Condition Specification; and
 - (iii) the New M5 Motorway will be in a condition at least equal to that set out in the New M5 Motorway Agreed Condition Specification,
- as at the Expiry Date, using methodology for the determination which is consistent with relevant industry practice at the time which may include using:
- (iv) any technology used at the time for the purpose of making such determinations; or
 - (v) records kept by the Project Trustee during the Term as required by the SWTC.
- (j) If RMS believes that:
- (i) the M5 East Motorway will not be in a condition at least equal to that set out in the M5 East Motorway Agreed Condition Specification;
 - (ii) the M5 West Motorway will not be in a condition at least equal to that set out in the M5 West Motorway Agreed Condition Specification; and
 - (iii) the New M5 Motorway will not be in a condition at least equal to that set out in the New M5 Motorway Agreed Condition Specification,
- as at the Expiry Date, then RMS may give notice to this effect to the Project Trustee specifying:

- (iv) the extent to which it believes:
 - (A) the M5 East Motorway will not be in a condition at least equal to that set out in the M5 East Motorway Agreed Condition Specification;
 - (B) the M5 West Motorway will not be in a condition at least equal to that set out in the M5 West Motorway Agreed Condition Specification; and
 - (C) the New M5 Motorway will not be in a condition at least equal to that set out in the New M5 Motorway Agreed Condition Specification,
 as at the Expiry Date; and
- (v) the cost of the measures necessary to ensure that:
 - (A) the M5 East Motorway will be in a condition at least equal to that set out in the M5 East Motorway Agreed Condition Specification;
 - (B) the M5 West Motorway will be in a condition at least equal to that set out in the M5 West Motorway Agreed Condition Specification; and
 - (C) the New M5 Motorway will be in a condition at least equal to that set out in the New M5 Motorway Agreed Condition Specification,
 as at the Expiry Date.
- (k) The Project Trustee may within:
 - (i) a reasonable time after receipt of RMS's notice under clause 34.3(j); or
 - (ii) in any event, 60 Business Days after receipt of RMS's notice under clause 34.3(j),
 carry out all necessary work to ensure that:
 - (iii) the M5 East Motorway will be in a condition at least equal to that set out in the M5 East Motorway Agreed Condition Specification;
 - (iv) the M5 West Motorway will be in a condition at least equal to that set out in the M5 West Motorway Agreed Condition Specification; and
 - (v) the New M5 Motorway will be in a condition at least equal to that set out in the New M5 Motorway Agreed Condition Specification,
 as at the Expiry Date:
 - (vi) within and at such time as may be required by RMS;
 - (vii) in accordance with the requirements of any relevant Authority;
 - (viii) so as to minimise the impact on the use of the Motorway; and
 - (ix) in a manner which causes as little inconvenience as possible to:
 - (A) users of the Motorway;
 - (B) users of any Utility Service or access; and
 - (C) the adjacent community.

- (l) If the Project Trustee does not carry out the work referred to in clause 34.3(k) within the time specified, subject to clause 34.3(n), the Project Trustee must pay RMS (without limiting the provisions of clause 17) the cost determined by RMS under clause 34.3(j)(v) as a debt due and payable by the Project Trustee to RMS.
- (m) Compliance by the Project Trustee with clauses 34.3(k) and 34.3(l) is a condition precedent to Final Handover.
- (n) Nothing in clause 34.3(l) will limit RMS's rights against the Project Trustee, whether under this deed or otherwise according to law in respect of any Defect.
- (o) When the Trustees consider they have achieved Final Handover, the Trustees must notify RMS in writing.
- (p) Within 5 Business Days after receipt of a notice under clause 34.3(a), RMS must notify the Trustees in writing:
 - (i) if RMS believes that Final Handover has been achieved, of the date on which RMS believes the Trustees achieved Final Handover; or
 - (ii) if RMS believes that Final Handover has not been achieved, the reasons why it believes Final Handover has not been achieved.

34.4 **Effect of notice of Final Handover**

A notice issued under clause 34.3(p)(i) will not:

- (a) constitute approval by RMS of the Trustee's performance of its obligations under this deed;
- (b) be taken as an admission or evidence that the Motorway complies with this deed; or
- (c) prejudice any rights or powers of RMS.

34.5 **Design Life**

- (a) The Asset Trustee waives any and all rights it may have under sections 14 and 16 of the *Limitation Act 1969* (NSW) and section 109ZK of the EP&A Act in respect of the design lives of the asset components referred to in section 5.2 of Part A of the SWTC where those design lives are for periods longer than those provided for in those Acts.
- (b) If the waiver referred to in clause 34.5(a) is held to be without effect or otherwise unenforceable, or if it is severed from this deed, the Asset Trustee must indemnify RMS and keep RMS indemnified at all times from and against all Loss that RMS may suffer or incur arising out of or in connection with RMS's loss of the benefit of the waiver.
- (c) The indemnity in clause 34.5(b) is to continue and remain in full force and effect until the expiration of the last of the design lives referred to in section 5.2 of Part A of the SWTC.
- (d) The parties agree that any action by RMS on the indemnity in clause 34.5(b) is not a "building action" for the purposes of section 109ZI of the EP&A Act.
- (e) Nothing in this clause 34.5 limits the operation of any other indemnity in this deed.

- (f) Other than as provided for in clause 34.5(a), the Asset Trustee does not waive any rights it may have under the *Limitation Act 1969* (NSW) or section 109ZK of the EP&A Act.
- (g) Notwithstanding anything to the contrary in this deed but except in respect of the indemnity in clause 34.5(b) and subject to clause 26.11(c), the last date upon which RMS's cause of action or Claim may accrue in respect of:
 - (i) each indemnity in this deed; or
 - (ii) any other cause of action or Claim that RMS may have against the Trustees in respect of this deed,

is the last day of the Term to expire for the purposes of sections 14 and 16 of the *Limitation Act 1969* (NSW) and RMS will have no right to make a demand on any indemnity in this deed, or otherwise bring an action or Claim that arises from or in connection with this deed, after 12 years after the Term.

- (h) The provisions of this clause 34 are subject to clause 26.11(c).

35. REPRESENTATIONS, WARRANTIES AND COVENANTS

35.1 Representations and warranties by the Asset Trustee

The Asset Trustee in its capacity as trustee of the Asset Trust makes the following continuing representations and warranties for the benefit of RMS:

- (a) it has in full force and effect all authorisations necessary to enter into and perform its obligations under each Project Document to which it is expressed to be a party;
- (b) it has power to enter into and perform its obligations under each Project Document to which it is expressed to be a party, to carry out the transactions which those documents contemplate will be carried out by it and to carry on its business and to charge the property of the Asset Trust as provided in the RMS Security. There is no restriction on or condition of doing so under the terms of the Asset Trust Deed and the entry into each such document is a proper exercise of power under the terms of the Asset Trust Deed;
- (c) its obligations under each Project Document to which it is expressed to be a party are valid and binding and are enforceable against it and in accordance with their respective terms subject to the availability of equitable remedies and, to the extent applicable, laws relating to the enforcement of creditors' rights;
- (d) the Asset Trust has been validly created and is in existence at the date of this deed;
- (e) the Asset Trustee has been validly appointed as trustee of the Asset Trust and is presently the sole trustee of the Asset Trust;
- (f) the Asset Trust is solely constituted by the Asset Trust Deed, a true copy of which has been provided to RMS prior to the date of this deed;
- (g) the Asset Trust Deed is not void, voidable or otherwise unenforceable;
- (h) no action has been taken or is proposed to terminate the Asset Trust or to vest the assets of the Asset Trust in any person;
- (i) no action has been taken or proposed to remove it as trustee of the Asset Trust;

- (j) the Asset Trustee has not done, or failed to do, any act whereby any assets of the Asset Trust have been acquired by any other person, no assets of the Asset Trust are presently registered in the name of any other person, and no person other than the beneficiaries previously notified to RMS has acquired any right of any kind whether vested or contingent in any asset of the Asset Trust other than through their ownership of units in the Asset Trust;
- (k) it is to the commercial benefit of the Asset Trust that the Asset Trustee:
 - (i) enters into the Project Documents to which it is expressed to be a party in its capacity, inter alia, as trustee of the Asset Trust; and
 - (ii) charges the property of the Asset Trust as provided in the RMS Security;
- (l) the Asset Trustee has valid rights of indemnity and exoneration against the assets of the Asset Trust, which rights are available for satisfaction of all liabilities and other obligations incurred by the Asset Trustee under the Project Documents to which it is expressed to be a party;
- (m) there is no subsisting circumstance or other thing which has or could have the effect of prejudicing or diminishing the Asset Trustee's right of indemnity and exoneration against the assets of the Asset Trust in any way and without limiting the generality of the foregoing, the Asset Trustee has not released, disposed of or charged such rights;
- (n) the rights of any beneficiaries relating to, and their interests in, the Asset Trust property are subject to the prior rights and interests of the Asset Trustee in the Asset Trust property pursuant to its right of indemnity and exoneration to which RMS may from time to time be subrogated in accordance with the RMS Security;
- (o) the Trustee has complied with its obligations and duties under the Asset Trust Deed and at Law. No one has alleged to the Asset Trustee that it has not so complied;
- (p) it is not in default of its material obligations under any RMS Project Document;
- (q) it is not involved in, and does not conduct, any business other than the business related to the Project and will not do so without the prior written approval of RMS;
- (r) except as contemplated by the Financiers Tripartite Deed, its obligations under the RMS Security will rank ahead of, and its obligations under this deed and each Project Document to which it is expressed to be a party (other than the RMS Security) will rank at least equally with, all its other unsecured indebtedness, other than indebtedness preferred by law;
- (s) the execution, delivery and performance of each Project Document to which it is expressed to be a party and the transactions under each of them do not:
 - (i) violate the Asset Trust Deed or any law, regulation, treaty, judgment, ruling, order or decree of any court or official directive which is binding on it;
 - (ii) violate any other document or agreement to which it is a party or which is binding on it or any of the assets of the Asset Trust; or
 - (iii) cause a limitation on its powers or the powers of its directors or other officers to be exceeded;
- (t) it does not have immunity from the jurisdiction of a court or from legal process (whether through service of notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise);

- (u) no litigation (which has not been disclosed to RMS in writing prior to the date of this deed), arbitration, tax claim, dispute or administrative or other proceeding has been commenced or, to its knowledge, threatened against it in its capacity as trustee of the Asset Trust which is likely to have a material adverse effect upon the assets of the Asset Trust, its ability as trustee of the Asset Trust to perform its financial or other obligations under any Project Document to which it is expressed to be a party or its trusteeship of the Asset Trust; and
- (v) except as contemplated under a Project Document or in connection with a transaction which is contemplated by a Project Document, it will not trade or incur any Liabilities or carry on any business or enter into any document or agreement other than the Project Documents without RMS's prior written approval.

35.1A Representations and warranties by the Project Trustee

The Project Trustee in its capacity as trustee of the Project Trust makes the following continuing representations and warranties for the benefit of RMS:

- (a) it has in full force and effect all authorisations necessary to enter into and perform its obligations under each Project Document to which it is expressed to be a party;
- (b) it has power to enter into and perform its obligations under each Project Document to which it is expressed to be a party, to carry out the transactions which those documents contemplate will be carried out by it and to carry on its business and to charge the property of the Project Trust as provided in the RMS Security. There is no restriction on or condition of doing so under the terms of the Project Trust Deed and the entry into each such document is a proper exercise of power under the terms of the Project Trust Deed;
- (c) its obligations under each Project Document to which it is expressed to be a party are valid and binding and are enforceable against it and in accordance with their respective terms subject to the availability of equitable remedies and, to the extent applicable, laws relating to the enforcement of creditors' rights;
- (d) the Project Trust has been validly created and is in existence at the date of this deed;
- (e) the Project Trustee has been validly appointed as Trustee of the Project Trust and is presently the sole trustee of the Project Trust;
- (f) the Project Trust is solely constituted by the Project Trust Deed, a true copy of which has been provided to RMS prior to the date of this deed;
- (g) the Project Trust Deed is not void, voidable or otherwise unenforceable;
- (h) no action has been taken or is proposed to terminate the Project Trust or to vest the assets of the Project Trust in any person;
- (i) no action has been taken or proposed to remove it as trustee of the Project Trust;
- (j) the Project Trustee has not done, or failed to do, any act whereby any assets of the Project Trust have been acquired by any other person, no assets of the Project Trust are presently registered in the name of any other person, and no person other than the beneficiaries previously notified to RMS has acquired any right of any kind whether vested or contingent in any asset of the Project Trust other than through their ownership of units in the Project Trust;
- (k) it is to the commercial benefit of the Project Trust that the Project Trustee:

- (i) enters into the Project Documents to which it is expressed to be a party in its capacity, inter alia, as trustee of the Project Trust; and
- (ii) charges the property of the Project Trust as provided in the RMS Security;
- (l) the Project Trustee has valid rights of indemnity and exoneration against the assets of the Project Trust, which rights are available for satisfaction of all liabilities and other obligations incurred by the Project Trustee under the Project Documents to which it is expressed to be a party;
- (m) there is no subsisting circumstance or other thing which has or could have the effect of prejudicing or diminishing the Project Trustee's right of indemnity and exoneration against the assets of the Project Trust in any way and without limiting the generality of the foregoing, the Project Trustee has not released, disposed of or charged such rights;
- (n) the rights of any beneficiaries relating to, and their interests in, the Project Trust property are subject to the prior rights and interests of the Project Trustee in the Project Trust property pursuant to its right of indemnity and exoneration to which RMS may from time to time be subrogated in accordance with the RMS Security;
- (o) the Project Trustee has complied with its obligations and duties under the Project Trust Deed and at Law. No one has alleged to the Project Trustee that it has not so complied;
- (p) it is not in default of its material obligations under any RMS Project Document;
- (q) it is not involved in, and does not conduct, any business other than the business related to the Project and will not do so without the prior written approval of RMS;
- (r) except as contemplated by the Financiers Tripartite Deed its obligations under the RMS Security will rank ahead of, and its obligations under this deed and each Project Document to which it is expressed to be a party (other than the RMS Security) will rank at least equally with, all its other unsecured indebtedness, other than indebtedness preferred by law;
- (s) the execution, delivery and performance of each Project Document to which it is expressed to be a party and the transactions under each of them do not:
 - (i) violate the Project Trust Deed or any law, regulation, treaty, judgment, ruling, order or decree of any court or official directive which is binding on it;
 - (ii) violate any other document or agreement to which it is a party or which is binding on it or any of the assets of the Project Trust; or
 - (iii) cause a limitation on its powers or the powers of its directors or other officers to be exceeded;
- (t) it does not have immunity from the jurisdiction of a court or from legal process (whether through service of notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise);
- (u) no litigation (which has not been disclosed to RMS in writing prior to the date of this deed), arbitration, tax claim, dispute or administrative or other proceeding has been commenced or, to its knowledge, threatened against it in its capacity as trustee of the Project Trust which is likely to have a material adverse effect upon the assets of the Project Trust, its ability as trustee of the Project Trust to perform

its financial or other obligations under any Project Document to which it is expressed to be a party or its trusteeship of the Project Trust; and

- (v) except as contemplated under a Project Document or in connection with a transaction which is contemplated by a Project Document, it will not trade or incur any Liabilities or carry on any business or enter into any document or agreement other than the Project Documents without RMS's prior written approval.

35.1B Covenants by Trustee

Each Trustee will:

- (a) immediately notify RMS in writing if it ceases to be the trustee of the Asset Trust or Project Trust (as applicable) and procure that any new trustee executes in favour of RMS any documents, guarantees and Encumbrances (as defined in the RMS Security) which RMS requires, provided that these are not any more onerous than those required or obtained by, under or in relation to the Project Documents to which the Trustee is expressed to be a party;
- (b) notify RMS immediately in writing if the Asset Trust or Project Trust (as applicable) is determined or for any reason ceases to exist, or if the Trustee is required or directed by any of the beneficiaries of the Asset Trust or Project Trust (as applicable) to do any act or thing in relation to the Asset Trust or Project Trust (as applicable) or trust funds of the Asset Trust or Project Trust (as applicable);
- (c) procure that no distribution of any of the capital of the Asset Trust or Project Trust (as applicable) is made where expressly prohibited under the Debt Financing Documents;
- (d) not without the prior written consent of RMS and until the satisfaction of all the Secured Obligations (as defined in the RMS Security), exercise in its own favour personally any right of indemnification, reimbursements, recoupment, lien or charge to which it might be entitled personally against any beneficiary or against or in respect of money or other assets forming part of the Asset Trust or Project Trust (as applicable);
- (e) not cause or permit any Asset Trust or Project Trust (as applicable) property to be mixed with any other property;
- (f) not default in the performance of its obligations as trustee of the Asset Trust or Project Trust (as applicable) (whether imposed under the Asset Trust Deed or the Project Trust Deed (as applicable) or at Law);
- (g) ensure that no waiver, revocation, amendment or variation of the Asset Trust Deed or the Project Trust Deed (as applicable) is made, whether formally or by conduct (other than in accordance with the terms of the Asset Trust Deed or the Project Trust Deed (as applicable));
- (h) not do anything (or permit anything to be done) which:
 - (i) in relation to the Asset Trustee, restricts or limits or may restrict or limit the Asset Trustee's ability to observe its obligations under the Debt Financing Documents;
 - (ii) effects or facilitates or may effect or facilitate:
 - (A) the termination of the Asset Trust or the Project Trust (as applicable) or the termination, rescission or revocation of the Asset Trust Deed or the Project Trust Deed (as applicable);

- (B) the resettlement of any assets of the Project Trust or the Asset Trust (as applicable); or
 - (C) the resignation, retirement, removal or replacement of the Asset Trustee as trustee of the Asset Trust, or the Project Trustee as trustee of the Project Trust (as applicable) or the appointment of an additional trustee of the Asset Trust or the Project Trust (as applicable); or
 - (D) could determine, alter, shorten or fix the vesting date of the Asset Trust or the Project Trust; and
- (i) not release, dispose of or otherwise prejudice:
- (i) its rights of indemnity against the Asset Trust or Project Trust (as applicable) property or any right of indemnity against the beneficiaries of the Asset Trust or Project Trust (as applicable);
 - (ii) its rights of exoneration; or
 - (iii) its equitable lien over the Asset Trust or Project Trust (as applicable) property;
- and the Trustees shall at RMS's request:
- (iv) exercise its indemnity against the Asset Trust or Project Trust (as applicable), and its rights of exoneration in respect of and equitable lien over the Asset Trust or Project Trust (as applicable) property and any indemnity against the beneficiaries of the Asset Trust or Project Trust (as applicable) in relation to the Secured Money (as defined in the RMS Security); and
 - (v) assign to RMS those indemnities, that right of exoneration and that equitable lien and otherwise facilitate the subrogation of RMS to those indemnities and that equitable lien in relation to the Secured Money (as defined in the RMS Security);
- (j) not consent to or register the transfer of any units in the Asset Trust or Project Trust (as applicable) or cancel, repurchase or redeem any units in the Asset Trust or Project Trust (as applicable) if to do so would breach clause 37.2 or 37.3 in respect of the Asset Trust or Project Trust (as applicable).

35.2 **Representations and warranties by RMS**

RMS makes the following continuing representations and warranties for the benefit of the Trustees:

- (a) it is a statutory body validly constituted and existing under the *Transport Administration Act 1988* (NSW);
- (b) it has in full force and effect all authorisations necessary under its constituent legislation to enter into and perform its obligations under each Project Document to which it is expressed to be a party;
- (c) it is legally entitled and has all statutory power to enter into and perform its obligations under each Project Document to which it is expressed to be a party, to carry out the transactions contemplated by those documents and the entry into of each such document is a proper exercise of power;

- (d) its obligations under each Project Document to which it is expressed to be a party are valid and binding and are enforceable against it in accordance with their respective terms subject to the availability of equitable remedies and, to the extent applicable, laws relating to the enforcement of creditors' rights; and
- (e) the execution, delivery and performance of each Project Document to which it is expressed to be a party and the transactions under each of them does not violate any law to which RMS is subject.

36. **AMENDMENTS TO OTHER PROJECT DOCUMENTS**

36.1 **Variations to this deed**

Subject to clause 14.2, this deed may only be varied by a deed executed by or on behalf of both RMS and the Trustees.

36.2 **Amendments to other Project Documents**

- (a) Subject to clause 36.3, a Trustee must not at any time after the execution of this deed either:
 - (i) make any modification, variation or amendment of a material nature to, or terminate or surrender; or
 - (ii) permit the novation, assignment or substitution of any counterparty's right, obligation or interest in,

any one or more of the Project Documents (other than the M5 Leases) to which it is a party (**Amendment**), other than:
 - (iii) a modification, variation or amendment of a material nature to; or termination or surrender of; or
 - (iv) novation, assignment or substitution of any counterparty's right, obligation or interest in,

the Debt Financing Documents made or done to give effect to a No Consent Refinancing.
- (b) In the event that a Trustee desires an Amendment it must submit to RMS a written request seeking RMS's consent. The request must set out:
 - (i) the Amendment and the relevant reasons therefor;
 - (ii) the response or anticipated response of any other party to the Project Documents regarding the Amendment;
 - (iii) the response or anticipated response of any assignee of the Project Documents to the Amendment; and
 - (iv) copies of any documents relevant to that Trustee's request.
- (c) RMS must advise the relevant Trustee, within 30 Business Days after receiving the relevant Trustee's written request under clause 36.2(b), that:
 - (i) it consents to the Amendment;
 - (ii) the Amendment is unacceptable to it and the reasons why the Amendment is unacceptable; or

- (iii) it requires additional information from a Trustee regarding the Amendment, in which event:
 - (A) the Trustee must provide the additional information sought by RMS within a further period of 10 Business Days; and
 - (B) this clause 36.2(c) will reapply as if the additional information were the written request under clause 36.2(b).

36.3 Amendments to Equity Documents after Completion

- (a) RMS must not unreasonably withhold or delay its consent under clause 36.2 to an Amendment to an Equity Document after the Date of Completion which does not result in RMS's position under any of the Project Documents being materially worse than it would have been had the relevant Equity document not been amended.
- (b) RMS consents to the Trustee increasing the amount under the SMC Unitshareholder Loan Agreement up to the amount set out in the Model Output Schedule.

36A DEBT FINANCING AND REFINANCING

36A.1 Financing

The Asset Trustee and the Project Trustee must not, and the Asset Trustee must ensure that the Borrower does not:

- (a) incur any Financial Indebtedness or enter into any financing agreements (including in respect of present or contingent indebtedness, deferred purchase or leasing arrangements or similar obligations); or
- (b) undertake a Refinancing,
other than:
 - (c) in accordance with the Debt Financing Documents;
 - (d) a Refinance in accordance with this clause 36A; or
 - (e) an Approved Financing Transaction.

36A.2 Refinancing

- (a) The parties agree that the Asset Trustee, the Project Trustee or the Borrower may at any time, undertake a Refinancing, provided that:
 - (i) the Refinancing is a No Consent Refinancing; or
 - (ii) the Refinancing is a Consent Refinancing and RMS has consented under clause 36A.7; or
 - (iii) the Refinancing is a Rescue Refinancing,and provided that the Asset Trustee and the Project Trustee comply with their obligations under this clause 36A.
- (b) The parties acknowledge and agree that:
 - (i) any Upfront Costs may be capitalised and added to the amount of Project Debt upon any Refinancing to the extent that the aggregate of such costs

capitalised under this clause for all Refinancings does not exceed the Maximum Upfront Costs Cap; and

- (ii) pursuant to any Refinancing, the Asset Trustee, the Project Trustee or the Borrower may raise any form of financial accommodation including, without limitation, by way of the issuance of bonds, notes or other instruments in the domestic or international capital markets (whether denominated in either Australian dollars or foreign currencies) or by way of bank debt or a combination of the foregoing other than Exotic Swaps or Accreting Instruments.

36A.3 **Financiers Tripartite Deed**

The Asset Trustee and the Project Trustee must not, and the Asset Trustee must ensure that the Borrower does not, execute any Debt Financing Documents unless, at the same time as the Debt Financing Documents are executed:

- (a) in the case of any subsequent Refinancing, any new Debt Financiers are bound by the Financiers Tripartite Deed then in effect (through their Security Trustee or other Representative being an existing party to that document) or become party thereto (either directly or through their Security Trustee or other Representative becoming a party to that document) in the manner specified in Financiers Tripartite Deed; and
- (b) to the extent required, any retiring Debt Financier not represented by a Security Trustee or other Representative, has executed any documents reasonably requested by RMS to terminate its rights under the Financiers Tripartite Deed.

36A.4 **Refinancing - notice and details**

- (a) The Asset Trustee or the Project Trustee must (or the Asset Trustee must cause the Borrower to) promptly, and in any event:
 - (i) in relation to a Consent Refinancing, no later than 90 days prior to the Proposed Refinancing Date for the proposed Consent Refinancing;
 - (ii) in relation to a No Consent Refinancing, no later than 45 days prior to the Proposed Refinancing Date for the proposed No Consent Refinancing; or
 - (iii) in relation to a Rescue Refinancing, as soon as it becomes aware of a proposed Rescue Refinancing but no later than 10 Business Days prior to the Proposed Refinancing Date for the proposed Rescue Refinancing,provide RMS with full details of the proposed Refinancing, including:
 - (iv) a copy of the then current Base Case Financial Model as adjusted in accordance with clause 36A.11 for the proposed Refinancing (the **Refinancing Model**);
 - (v) all material information in relation to the proposed Refinancing, including the nature of the financial accommodation to be raised, the proposed terms and conditions of the Refinancing and any proposed derivative transactions;
 - (vi) the aggregate Upfront Costs incurred to date for all Refinancings (including the proposed Refinancing) in nominal terms and as a percentage of the Maximum Upfront Costs Cap; and
 - (vii) whether the Asset Trustee, the Project Trustee or Borrower (as applicable) considers that the Refinancing is a Consent Refinancing, a No Consent

Refinancing or a Rescue Refinancing and, if the Asset Trustee, the Project Trustee or the Borrower (as applicable) considers that it is a:

- (A) No Consent Refinancing, full details of the reasons why it considers that the requirements of clause 36A.5 have been satisfied; or
 - (B) Rescue Refinancing, full details of the reasons why it considers that the Rescue Refinancing is permitted by clause 5.3(b) of the Financiers Tripartite Deed.
- (b) RMS may, within 10 Business Days after receiving details of the proposed Refinancing referred to in clause 36A.4(a), request from the Asset Trustee, the Project Trustee or the Borrower any further information which RMS reasonably requires from the Asset Trustee, the Project Trustee or Borrower (as applicable) regarding the proposed Refinancing. If such further information is available to the Asset Trustee, the Project Trustee or Borrower (as applicable), the Asset Trustee or the Project Trustee must, or the Asset Trustee must cause the Borrower to, provide it to RMS as soon as reasonably practicable but no later than 5 Business Days after RMS's request.
- (c) Within 20 Business Days (or 10 Business Days in respect of a Rescue Refinancing) after the later of RMS receiving details of the proposed Refinancing referred to in clause 36A.4(a) or receipt by RMS of the further information requested by it under clause 36A.4(b) (such period being the **RMS Response Period**), RMS must confirm in writing to the Asset Trustee, the Project Trustee or the Borrower (as applicable) whether the proposed Refinancing is or is not a No Consent Refinancing or a Rescue Refinancing (as applicable).
- (d) If RMS does not respond within the RMS Response Period, RMS will be deemed to have confirmed that the Refinancing is a No Consent Refinancing (or a Rescue Refinancing (as applicable)).
- (e) If RMS confirms in writing, or is deemed to have confirmed under this clause, that the proposed Refinancing is a No Consent Refinancing or Rescue Refinancing (as applicable), the Asset Trustee, the Project Trustee or Borrower (as applicable) may proceed with that Refinancing.

36A.5 **No Consent Refinancing**

Subject to the Asset Trustee, the Project Trustee or the Borrower having provided the information as required by clause 36A.4 and RMS having confirmed in writing to the Asset Trustee, the Project Trustee or the Borrower (or being deemed to have given such confirmation) under clause 36A.4(c) that a proposed Refinancing is a No Consent Refinancing, RMS acknowledges and agrees that the Asset Trustee, the Project Trustee or the Borrower may (as applicable) enter into a Refinancing without any consent from RMS if the Refinancing:

- (a) will be effected on an arm's length basis;
- (b) will not have the effect of deferring the amount or timing of amortisation of the Project Debt as against the Debt Profile;
- (c) does not constitute or involve the entry by the Asset Trustee, the Project Trustee or the Borrower into an Exotic Swap or an Accreting Instrument;
- (d) will not result in an increase of the principal amount of Project Debt (including as a result of the inclusion in Project Debt of swap break costs incurred in relation to or arising from that Refinancing) other than by an amount equal to any Upfront Costs associated with the Refinancing to the extent permitted to be capitalised under

clause 36A.2(b)(i) that are forecast in the then current Base Case Financial Model to be incurred in the period up to 12 months after the date of the proposed Refinancing;

- (e) will not result in the ICR being less than 2.0:1;
- (f) will not result in any DSCR being less than 2.0:1;
- (g) is not an amendment, restatement, replacement, waiver or consent to cure any actual event of default or review event under any Debt Financing Document; and
- (h) is not the first Refinancing after a Rescue Refinancing.

36A.6 Subordinated Debt Refinancing

The parties acknowledge that the Asset Trustee, the Project Trustee or the Borrower may seek to undertake a Refinancing of the Subordinated Debt Facility. Any Refinancing of the Subordinated Debt Facility may be a No Consent Refinancing if it satisfies the requirements 36A.5.

36A.7 Consent Refinancing

- (a) The Asset Trustee, and the Project Trustee must not, and the Asset Trustee must not allow the Borrower to, enter into any Refinancing, other than a No Consent Refinancing or a Rescue Refinancing, without obtaining the prior written consent of RMS in accordance with this clause 36A.7 which may be given or withheld in its absolute discretion.
- (b) RMS will not be required to consider any request for its consent under this clause 36A.7 more often than 2 years after the date of financial close of the last Consent Refinancing.
- (c) The granting of any consent under this clause 36A.7 by RMS shall be without prejudice to RMS's right to any RMS Refinancing Share under clause 36A.8.

36A.8 Refinancing Gain sharing

- (a) For each proposed Refinancing (except a Rescue Refinancing) the Refinancing Gain must be calculated by the Asset Trustee in accordance with this clause 36A.8 and clause 36A.11.
- (b) For the purposes of this deed, Refinancing Gain will be calculated pursuant to clause 36A.8(c) below on the basis that the relevant gain is only in respect of the impact of the Refinancing on Distributions which are attributable to the incurrence of the incremental principal amount of, or delayed amortisation of, Project Debt the subject of the Refinancing or which occurs as a result of the Refinancing.
- (c) For the purposes of this clause, a **Refinancing Gain** occurs when the value calculated in accordance with the below formula of A - B exceeds zero, where:

A = the net present value of the post-vehicle tax, pre-investor tax Distributions forecast to be made from the Proposed Refinancing Date until the end of the Term as set out in the Refinancing Model Outputs Schedule prepared after the Base Case Financial Model has been updated in accordance with clause 36A.11(a)(i), (iii), (iv), (v) and (vi); and

B = the net present value of the post-vehicle tax, pre-investor tax Distributions forecast to be made from the Proposed Refinancing Date until the end of the Term as set out in the Refinancing Model Outputs Schedule prepared after

the Base Case Financial Model has been updated in accordance with clause 36A.11(a)(i).

- (d) In calculating the Refinancing Gain:
 - (i) the values of A and B will be expressed as an aggregate amount as at the Proposed Refinancing Date and will be calculated using the Projected Equity Return; and
 - (ii) otherwise than as otherwise agreed under clause 36A.11(a)(vi), it will be assumed that the terms of the Refinancing will only apply for the actual tenor of that Refinancing and not the balance of the Term.
- (e) Subject to clause 36A.8(f) RMS will be entitled to receive a payment, or a series of payments agreed in accordance with clause 36A.8(f) below, that will result in RMS receiving 50% of any Refinancing Gain (the **RMS Refinancing Share**). It is acknowledged that if RMS and the Asset Trustee agree that the Refinancing Gain will be paid to RMS over time that the sum of the actual amounts paid to RMS may differ from the actual Refinancing Gain amount due to the time value of money.
- (f) Unless otherwise agreed by RMS, the amount of any RMS Refinancing Share will be a debt due from the Asset Trustee to RMS, payable in the amounts and at the times agreed between RMS and the Asset Trustee.
- (g) If the parties, after negotiating in good faith for a period of 15 Business Days (or such longer period as the parties may agree) with a view to agreeing any RMS Refinancing Share, cannot reach agreement on the RMS Refinancing Share then any party may refer the matter to determination by an independent expert under the Dispute Resolution Procedure.

36A.9 **Refinancing cost**

The Asset Trustee must pay (or procure the Borrower to pay) to RMS its reasonable costs incurred in relation to considering a proposed Refinancing or consenting to a Refinancing.

36A.10 **Copies of Debt Financing Documents**

The Asset Trustee must (or must procure the Borrower to) deliver to RMS's Representative a certified complete copy of each agreement entered into by the Borrower in respect of and including each amendment to, or waiver, variation or change of any provision of, the Debt Financing Documents, in each case within 15 Business Days after its execution.

36A.11 **Preparation of the Refinancing Model**

- (a) To prepare the Refinancing Model the Asset Trustee must ensure that only the following adjustments are made to the Base Case Financial Model in the following order:
 - (i) Debt Profile should be updated to reflect the actual amount of Project Debt outstanding on the day prior to the Proposed Refinancing Date;
 - (ii) for each proposed Refinancing limb B of the definition of Refinancing Gain in clause 36A.8(c) shall be calculated and recorded in the Refinancing Model Outputs Schedule;
 - (iii) forecast Project Debt, fees and margins for the period of the Refinancing will then be updated to reflect the proposed Debt Financing Documents for the Refinancing. No adjustment will be made to the Base Case Financial Model

- for any change in base rates applicable to the Project Debt or to the forecast base rate, fees and margins for the period after the term of the Project Debt the subject of the Refinancing;
- (iv) the Debt Profile after the Refinancing (including the forecast amortisation profile of Project Debt balances for the remainder of the Term following the period of the Refinancing) will be updated;
 - (v) actual Upfront Costs will be updated to reflect the proposed Debt Financing Documents for the Refinancing;
 - (vi) further required adjustments (if any) as otherwise agreed between RMS and the Asset Trustee;
 - (vii) for each proposed Refinancing limb A of the definition of Refinancing Gain in clause 36A.8(c) shall be calculated and recorded in the Refinancing Model Outputs Schedule; and
 - (viii) the DSCR and ICR calculations required under clauses 36A.5(e) and 36A.5(f), shall be calculated and recorded in the Refinancing Model Outputs Schedule.
- (b) In preparing the Refinancing Model, the Asset Trustee must also ensure that the Refinancing Model:
- (i) outlines the basis for any changes to assumptions used in the Refinancing Model;
 - (ii) outlines the Proposed Refinancing Date;
 - (iii) contains full details of the principal amount of any Outstanding Project Debt that will be outstanding immediately prior to, and proposed to be outstanding immediately after, the proposed Refinancing; and
 - (iv) does not contain any other adjustments unless otherwise agreed between RMS and the Asset Trustee.
- (c) No later than 10 Business Days after financial close of a Refinancing, the Asset Trustee must provide RMS with a final Refinancing Model updated to show the actual outcomes of the implementation of that Refinancing (including the financial impact of material changes to the Borrower's, the Asset Trustee's or the Project Trustee's obligations to the Debt Financiers) in a format that meets the requirements of this clause 36A.11.
- (d) The parties acknowledge and agree that the final Refinancing Model agreed under this clause in connection with a Consent Refinancing that has been approved by RMS will become the Base Case Financial Model (until that model is further revised or updated in accordance with this deed).
- (e) The Asset Trustee must ensure that the Refinancing Model Outputs Schedule records in clearly identifiable form all information which this deed provides will be identified in the Refinancing Model Outputs Schedule.

37. **ASSIGNMENT**

37.1 **Entitlement to assign**

- (a) Subject to the terms of the Financiers Tripartite Deed, neither of the Trustees may sell, transfer, assign, mortgage, charge or otherwise dispose of, deal with, or encumber their interest in:
 - (i) the Motorway;
 - (ii) the Cash Manager; or
 - (iii) any of the Project Documents,without the prior written consent of RMS.
- (b) In granting its consent rights under clause 37.1(a):
 - (i) prior to Opening Completion, RMS may withhold its consent in its absolute discretion; or
 - (ii) after Opening Completion, RMS must not unreasonably withhold its consent.
- (c) RMS may sell, transfer or assign or otherwise dispose of its interest in the Project Documents without the prior written consent of the Trustees provided either:
 - (i) the transferee is supported by a guarantee from the Crown in right of the State of New South Wales on terms no less favourable than those contained in the PAFA Act Guarantee; or
 - (ii) RMS is assigning, transferring, sub-participating or otherwise dealing with all or any part of its rights and benefits under this deed or any Project Document in relation to its entitlement to any rent under the M5 Leases.
- (d) The parties acknowledge that neither of the Trustees may deal with their interests in the Cash Manager other than in accordance with the Road Operators Co-ordination Agreement.

37.2 **Change of Control prior to Opening Completion**

- (a) Subject to clause 37.4, the Trustees undertake to RMS that the direct legal and beneficial owners of a Group Member (each a **Project Entity** and together the **Project Entities**) will remain unchanged until Opening Completion.
- (b) Subject to clauses 37.2(c) and 37.4, the Trustees must not permit:
 - (i) any Change of Control of any Project Entity; or
 - (ii) a person:
 - (A) who is not an Ultimate Unitholder of a Project Entity, or
 - (B) who is an Ultimate Unitholder of a Project Entity but which is a managed (and not ultimately owned) entity which does not at the date of this deed or following any event which is approved by RMS under this clause 37, have an economic interest in the Securities in or of a Project Entity,

to acquire any Securities in or an economic interest in Securities in any Project Entity (other an Ultimate Unitholder),

prior to Opening Completion without the prior written consent of RMS (which may not be unreasonably withheld).

- (c) RMS will be deemed to be acting reasonably under clause 37.2(b) if it withholds its consent where RMS is of the reasonable opinion that:
 - (i) the Trustees have not provided RMS with full details of the proposed change to, or dealing in, Securities in a Project Entity and any further information reasonably requested by RMS; or
 - (ii) except where clause 37.4 applies, the person referred to in clause 37.2(b)(ii):
 - (A) is not in compliance with applicable Australian anti-money laundering laws and anti-terrorism laws; and
 - (B) does not demonstrate to the reasonable satisfaction of RMS that it is both a fit and proper person to be an investor in the Project and is of sufficient financial standing to meet its, and to put the relevant Project Entity in funds to meet its, obligations in relation to the Project.

37.3 **Change of Control after Opening Completion**

For the purposes of clause 37.1, any Change of Control of a Project Entity arising after Opening Completion will be deemed to be an assignment by the Asset Trustee or Project Trustee of its interest in this deed and the other Project Documents and such change will be subject to the terms and conditions of clause 37.1.

37.4 **Initial SMC selldown**

- (a) This clause 37.4 only applies until completion of the First Trustee Change of Control.
- (b) Clause 37.2(a) will not apply to any change in the direct legal or beneficial ownership of a Project Entity if the change does not cause a Change of Control of that Project Entity.
- (c) RMS's consent will not be required to the acquisition by any person of any Securities or economic interest in Securities in any Holding Trust or Holding Company of the Project Entity, so long as the change does not cause a Change of Control of that Holding Trust or Holding Company.
- (d) If the Project Trustee or the Asset Trustee requests RMS's consent to a Change of Control of a Project Entity, then the procedure in clauses 37.4(e) to 37.4(g) will apply.

For the avoidance of doubt, the reference to a Change of Control in this clause 37.4(d) includes a Change of Control that results in a change in ownership referred to in clause 37.2(a), or the acquisition of Securities or other economic interests referred to in clause 37.2(b)(ii).

- (e) RMS will advise the Project Trustee or the Asset Trustee (as relevant) within 15 Business Days whether:
 - (i) it consents to the Change of Control;

- (ii) it does not consent to the Change of Control, and the reasons why not; or
 - (iii) acting reasonably, it requires further information to consider the request, in which case this clause 37.4(e) will apply again to the request once the Project Trustee or the Asset Trustee (as relevant) provides the further information.
- (f) If RMS fails to respond for any reason within the period specified in clause 37.4(e), then the Project Trustee or the Asset Trustee (as relevant) may send RMS a reminder notice. If RMS does not respond to the reminder notice within 5 Business Days, RMS will be deemed to have given its consent to the requested Change of Control.
- (g) Subject to clause 37.4(h), RMS may only withhold its consent to a Change of Control requested under clause 37.4(d) if:
- (i) SMC has not provided evidence that it has the required approvals from its unitholders to the sale;
 - (ii) a proposed new Equity Investor or Equity Investors (or any direct or indirect Holding Company or holding trust of a new Equity Investor or Equity Investors) is not solvent;
 - (iii) a person referred to in clause 37.2(b)(ii) is not in compliance with applicable anti-money laundering laws and anti-terrorism laws; or
 - (iv) the proposed Change of Control:
 - (A) would materially adversely affect the ability or capability of a Project Entity to carry out its obligations in accordance with any Project Document; or
 - (B) would result in a Project Entity being Controlled by an entity that:
 - (aa) would have a material adverse effect on the Project; or
 - (bb) would materially increase RMS's risks or liabilities under the Project Deed.
- (h) Not used.
- (i) Notwithstanding any failure of RMS to respond to a notice under clause 37.4(d), RMS will not be deemed to have consented to a Change of Control if:
- (i) a proposed new Equity Investor or Equity Investors (or any direct or indirect Holding Company or holding trust of a proposed new Equity Investor or Equity Investors) is not solvent; or
 - (ii) the proposed new Equity Investor or Equity Investors (or any direct or indirect Holding Company or holding trust of a proposed new Equity Investor or Equity Investors) is not in compliance with applicable anti-money laundering laws and anti-terrorism laws.

38. **EXPENSES AND STAMP DUTIES**

38.1 **Expenses**

Each party must bear its own costs, including professional costs and disbursements, associated with the preparation and execution of this deed and any subsequent consent, agreement, approval or waiver hereunder or amendment thereto.

38.2 **Stamp duties**

As between the parties, the Asset Trustee must pay all stamp, registration and similar taxes including fines and penalties payable to or required to be paid by any appropriate Authority or determined to be payable in connection with the execution, delivery, performance or enforcement of this deed or any payment receipt or other transaction contemplated by them.

39. **NOTIFICATION OF CLAIMS**

39.1 **Notice of Change**

(a) If a Trustee believes that any Direction of RMS's Representative, other than the issuing of a Change Order, constitutes or involves a Change it must, if it wishes to make a Claim against RMS arising out of, or in any way in connection with, the Direction:

(i) within 5 Business Days after receiving written notice of the Direction and before commencing work on the subject matter of the Direction or otherwise complying with the Direction, give notice to RMS's Representative that sets out:

- (A) that it considers the Direction constitutes or involves a Change;
- (B) details of the relevant Direction; and
- (C) details of why it considers the Direction constitutes or involves a Change; and

(ii) within 30 Business Days after giving the notice under clause 39.1(a)(i) or such longer period as RMS's Representative may direct, submit a written Claim to RMS's Representative which includes detailed particulars of:

- (A) why the Trustee believes the Direction constitutes or involves a Change;
- (B) the details specified in section 1.2 of the Change Procedure;
- (C) the Direction, including the date or dates of the Direction and any related event, circumstance, act, omission, fact, matter or thing upon which the Claim is based;
- (D) the provisions of this deed or other legal basis upon which the Claim is based; and
- (E) the amount claimed and how it has been calculated,

failing which the Trustee will not be entitled to make any Claim against RMS arising out of or in connection with RMS's Representative's Direction.

- (b) Despite the fact that the Trustee considers that a Direction by RMS's Representative constitutes or involves a Change, the Trustees must continue to carry out the Asset Trustee's Activities and the Project Trustee's Activities in accordance with this deed, including any work connected with the Direction of RMS's Representative in respect of which notice has been given under clause 39.1(a)(i).
- (c) If a Trustee issues a notice under clause 39.1(a)(i) or a Claim under clause 39.1(a)(ii), RMS may:
 - (i) confirm that the Direction constitutes or involves a Change, or entitles the Trustee to make a Claim, by the giving of a notice under this clause 39.1(c)(i), in which case the Trustee must comply with the Direction;
 - (ii) deny that the Direction constitutes or involves a Change, or entitles the Trustee to make a Claim, by the giving of a notice under this clause 39.1(c)(ii), in which case the Trustee:
 - (A) may within 10 Business Days after the receipt of the notice issue a notice of dispute under the Dispute Resolution Procedure; and
 - (B) unless otherwise directed by RMS's Representative, must comply with the Direction irrespective of any Claim or Dispute in relation to the Direction or any part of it; or
 - (iii) withdraw the Direction by giving a notice under this clause 39.1(c)(iii).
- (d) If within 10 Business Days after first receipt of the Claim under clause 39.1(a)(ii), RMS's Representative has not taken any action under clause 39.1(c), RMS's Representative will be deemed to have given a notice under clause 39.1(c)(ii).

39.2 **Notice of other Claims**

- (a) If a Trustee wishes to make a Claim against RMS in respect of any Direction of RMS or RMS's Representative or other event, circumstance, act, omission, fact, matter or thing (including a breach of this deed by RMS) under, arising out of, or in any way in connection with, this deed or the Asset Trustee's Activities or the Project Trustee's Activities, including anything in respect of which:
 - (i) the Trustee is otherwise given an express entitlement under this deed; or
 - (ii) this deed expressly provides that an amount is to be paid to the Trustee,
 the Trustee must give RMS's Representative the notice required by clause 39.3(a) and a Claim in accordance with clause 39.3(b).
- (b) Clause 39.2(a) does not apply to any Claim made by the Trustee pursuant to clause 23A.

39.3 **Prescribed notices**

- (a) Any written notice referred to in clause 39.2 must:
 - (i) be provided not later than 25 Business Days after the later of:
 - (A) the first occurrence of; or
 - (B) when a Trustee first became aware of, or ought reasonably to have first become aware of,

the Direction, event, circumstance, act, omission, fact, matter or thing which gave rise to the alleged entitlement; and

(ii) expressly specify:

(A) that the Trustee proposes to make a Claim; and

(B) the Direction, event, circumstance, act, omission, fact, matter, or thing, which gave rise to the alleged entitlement in the Claim.

(b) Any written Claim referred to in clause 39.2 must:

(i) be provided not later than 20 Business Days after giving the written notice under clause 39.3(a); and

(ii) include:

(A) detailed particulars, including the date or dates, of the Direction, event, circumstance, act, omission, fact, matter or thing upon which the Claim is based;

(B) the legal basis for the Claim, whether based on a term of this deed or otherwise, and if based on a term of this deed, clearly identifying the specific term;

(C) the facts relied upon in support of the Claim in sufficient detail to permit verification; and

(D) details of the amount claimed and how it has been calculated.

39.4 **Continuing events**

If the Direction, event, circumstance, act, omission, fact, matter or thing upon which the Claim referred to in clause 39.2 is based, is continuing, or if the consequences of the Direction, event, circumstance, act, omission, fact matter or thing are continuing, the Trustee must continue to give the information required by clause 39.3(b) every 35 Business Days after the written Claim under clause 39.3(b) was submitted or given, until after the Direction, event, circumstance, act, omission, fact, matter or thing upon which the Claim is based has, or the consequences thereof have, ceased.

39.5 **Bar**

If a Trustee fails to comply with clauses 11.10, 13.4, 14, 16.9, 25.2, 31.8, 33.1, or this clause 39:

(a) RMS will not be liable upon any Claim (insofar as is permitted by Law) by the relevant Trustee; and

(b) the relevant Trustee will be barred from making any Claim against RMS,

arising out of or in any way in connection with the relevant Direction, event, circumstance, act, omission, fact, matter or thing (as the case may be) to which those clauses apply.

39.6 **Other provisions unaffected**

Nothing in clauses 39.1 to 39.5 will limit the operation or effect of any other provision of this deed which requires the Trustees to give notice to RMS's Representative in order to preserve an entitlement to make a Claim against RMS.

39.7 **Payments by RMS**

Without limiting any other provision of this clause 39 or clause 24.2:

- (a) if a Trustee wishes to make a Claim against RMS for any amount under any Project Document (including a Claim for Change Costs, Trustee's Delay Costs or Trustee's Revenue Loss), that Trustee must provide RMS with a statement or invoice in respect of the amount claimed in a form satisfactory to RMS (acting reasonably); and
- (b) RMS will not be obliged to pay any amount claimed by a Trustee under any Project Document if that Trustee has not provided RMS with a statement or invoice in respect of that amount in accordance with clause 39.7(a).

40. **NSW CODE OF PRACTICE**

40.1 **NSW Code and NSW Guidelines**

In addition to terms defined in this deed, terms used in this clause 40 have the same meaning as is attributed to them in the NSW Guidelines. The NSW Code and NSW Guidelines are available at www.industrialrelations.nsw.gov.au.

40.2 **Primary Obligation**

- (a) The Asset Trustee must, in carrying out the Asset Trustee's Activities:
 - (i) assume sole responsibility for and manage all aspects of industrial relations for the Asset Trustee's Activities;
 - (ii) keep RMS's Representative fully and properly informed of industrial relations problems or issues which affect or are likely to affect the carrying out of the Asset Trustee's Activities; and
 - (iii) comply with the Construction Plan.
- (b) The Asset Trustee must at all times comply with, and meet, any obligations imposed by, the NSW Code and NSW Guidelines.
- (c) The Asset Trustee must notify the Construction Compliance Unit (**CCU**) and RMS of any possible non-compliance with the NSW Code and NSW Guidelines and of remedial action taken, within 24 hours of becoming aware of the possible non-compliance.
- (d) Where the Asset Trustee engages a Subcontractor, the Asset Trustee must ensure that the contract with the Subcontractor imposes on the Subcontractor equivalent obligations to those in this clause 40, including that the Subcontractor must at all times comply with, and meet any obligations imposed by, the NSW Code and the NSW Guidelines.
- (e) The Asset Trustee must not appoint or engage another party in relation to the Asset Trustee's Activities where that appointment or engagement would breach a sanction imposed on the other party in relation to the NSW Code or NSW Guidelines.

40.3 **Access and information**

- (a) The Asset Trustee must maintain adequate records of compliance with the NSW Code and NSW Guidelines by it, its Subcontractors and related entities.

- (b) The Asset Trustee must allow, and take reasonable steps to facilitate, authorised personnel (including personnel of the CCU) to:
 - (i) enter and have access to sites and premises controlled by the Asset Trustee, including the Construction Site;
 - (ii) inspect any work, material, machinery, appliance, article or facility;
 - (iii) access information and documents;
 - (iv) inspect and copy any record relevant to the Project;
 - (v) have access to personnel; and
 - (vi) interview any person,

as is necessary for the authorised personnel to monitor and investigate compliance with the NSW Code and NSW Guidelines by the Asset Trustee, their respective Subcontractors and related entities.
- (c) The Asset Trustee and its related entities must agree to, and comply with, any request from authorised personnel (including personnel of the CCU) for the production of specified documents by a certain date, whether in person, by post or electronic means.

40.4 **Sanctions**

- (a) The Asset Trustee warrants that at the time of entering into this deed, neither it, nor any of its related entities, are subject to a sanction in connection with the NSW Code or NSW Guidelines that would have precluded it from responding to a procurement process for work to which the NSW Code and NSW Guidelines apply.
- (b) If the Asset Trustee does not comply with, or fails to meet any obligation imposed by, the NSW Code or NSW Guidelines, a sanction may be imposed against the Asset Trustee in connection with the NSW Code or NSW Guidelines.
- (c) Where a sanction is imposed:
 - (i) it is without prejudice to any rights that would otherwise accrue to the parties; and
 - (ii) the State of NSW (through its agencies, Ministers and the CCU) is entitled to:
 - (A) record and disclose details of non-compliance with the NSW Code or NSW Guidelines and the sanction; and
 - (B) take them into account in the evaluation of future procurement processes and responses that may be submitted by the Asset Trustee, or its related entities, in respect of work to which the NSW Code and NSW Guidelines apply.

40.5 **Compliance**

- (a) The Asset Trustee bears the cost of ensuring its compliance with the NSW Code and NSW Guidelines, including in respect of any positive steps it is obliged to take to meet its obligations under the NSW Guidelines. The Asset Trustee is not entitled to make, and RMS and the State of NSW will not be liable upon, any Claim against

RMS or the State of NSW arising out of or in any way in connection with the Asset Trustee's compliance with the NSW Code and the NSW Guidelines.

- (b) Compliance with the NSW Code and NSW Guidelines does not relieve the Asset Trustee from responsibility to perform the Asset Trustee's Activities or any other obligation under this deed, or from liability for any Defect in the Project Works or the Temporary Works or from any other legal liability, whether or not arising from its compliance with the NSW Code and NSW Guidelines.
- (c) Where a change to this deed, the Project Works or the Temporary Works is proposed, and that change may, or may be likely to, affect compliance with the NSW Code and NSW Guidelines, the Asset Trustee must immediately notify RMS (or nominee) of the change, or likely change and specify:
 - (i) the circumstances of the proposed change;
 - (ii) the extent to which compliance with the NSW Code and NSW Guidelines will be, or is likely to be, affected by the change; and
 - (iii) what steps the Asset Trustee proposes to take to Mitigate any adverse impact of the change (including any amendments it proposes to a workplace relations management plan or work health and safety management plan).

RMS will direct the Asset Trustee as to the course it must adopt within 10 Business Days of receiving notice.

41. **BUILDING CODE**

- (a) The Asset Trustee must comply with the Building Code. Copies of the Building Code are available at www.comlaw.gov.au.
- (b) Compliance with the Building Code will not relieve the Asset Trustee from responsibility to perform this deed, or the Asset Trustee from liability for any defect in the works arising from compliance with the Building Code.
- (c) Where a change in this deed is proposed and that change would affect compliance with the Building Code, the Asset Trustee must submit a report to the Commonwealth specifying the extent to which the compliance by the Asset Trustee with the Building Code will be affected.
- (d) The Asset Trustee must maintain adequate records of the compliance with the Building Code by:
 - (i) the Asset Trustee;
 - (ii) the subcontractors of the Asset Trustee;
 - (iii) the consultants of the Asset Trustee; and
 - (iv) the Related Entities of the Asset Trustee (as that term is used in section 8 of the Building Code).
- (e) If the Asset Trustee does not comply with the requirements of the Building Code in the performance of this deed such that a sanction is applied by the Minister for Employment and Workplace Relations, the Code Monitoring Group or the Commonwealth, without prejudice to any rights that would otherwise accrue, those parties will be entitled to record that non-compliance and take it, or require it to be taken, into account in the evaluation of any future tenders that may be lodged by

the Asset Trustee or a related entity in respect of work funded by the Commonwealth or its agencies.

- (f) While acknowledging that value for money is the core principle underpinning decisions on Government procurement, when assessing tenders, the Asset Trustee may give preference to Subcontractors and consultants that have a demonstrated commitment to:
 - (i) adding and/or retaining trainees and apprentices;
 - (ii) increasing the participation of women in all aspects of the industry; or
 - (iii) promoting employment and training opportunities for Indigenous Australians in regions where significant indigenous populations exist.
- (g) The Asset Trustee must not appoint a Subcontractor or consultant in relation to the Project where:
 - (i) the appointment would breach a sanction imposed by the Minister for Employment and Workplace Relations; or
 - (ii) the Subcontractor or consultant has had an adverse court or tribunal decision (not including decisions under appeal) for a breach of workplace relations law, work health and safety law, or workers' compensation law and the Subcontractor or consultant has not fully complied, or is not fully complying, with the order.
- (h) The Asset Trustee agrees to require that it and its Subcontractors or consultants and related entities provide the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Fair Work Building Industry Inspectorate, with access to:
 - (i) inspect any work, material, machinery, appliance, article or facility;
 - (ii) inspect and copy any record relevant to the Project the subject of this deed; and
 - (iii) interview any person,as is necessary to demonstrate its compliance with the Building Code.
- (i) Additionally, the Asset Trustee agrees that the Asset Trustee and its related entities will agree to a request from the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Fair Work Building Industry Inspectorate, to produce a specified document within a specified period, in person, by fax or by post.
- (j) The Asset Trustee must ensure that all of its Subcontracts with Subcontractors carrying out work or providing services on the Construction Site impose obligations on those Subcontractors equivalent to the obligations under this clause 41.
- (k) The Asset Trustee must:
 - (i) not engage a Builder who will carry out Building Work if the builder is not accredited under the WHS Accreditation Scheme; and
 - (ii) must ensure that any Builder it engages, complies with all of the requirements of, and maintains accreditation under, the WHS Accreditation

Scheme while building work (as defined in section 5 of the *Fair Work (Building Industry) Act 2012* (Cth)) is carried out.

42. **NOTICES**

42.1 **How to give a notice**

A notice or consent under this deed (**Notice**):

- (a) given before the date agreed between the parties in accordance with in clause 42.2(b)(ii) is only effective if it is:
 - (i) in writing, signed by or on behalf of the person giving it;
 - (ii) addressed to the person to whom it is to be given; and
 - (iii) either:
 - (A) delivered or sent by pre-paid mail (by airmail, if the addressee is overseas) to that person's address;
 - (B) sent by fax to that person's fax number and the machine from which it is sent produces a report that states that it was sent in full; or
 - (C) subject to clause 42.1(c), sent by email in the form of a .pdf file of a letter (with or without attachments) to that person's email address;
- (b) given on and from the date agreed between the parties in accordance with clause 42.2(b)(ii) is only effective if it is:
 - (i) subject to clause 42.1(c), sent through the PDCS in accordance with the requirements set out in clause 42.7;
 - (ii) in writing, signed by or on behalf of the person giving it;
 - (iii) addressed to the person to whom it is to be given; and
 - (iv) in circumstances where the PDCS is temporarily disabled or not operating, issued in accordance with clause 42.1(c); and
- (c) in the case of Notices which have been sent in accordance with clause 42.1(a)(iii)(C) or 42.1(b) under clauses 5, 6.2, 6.9, 6.11(g), 7.5, 10.4, 11.8, 11.9, 13.4, 14, 16.6, 16.7, 16.9, 23A, 25.1 25.2, 26, 31, 32, 33, 36, 36A, 37.2 or 37.3, in addition to the Notice sent pursuant to clause 42.1(a)(iii)(C) or 42.1(b), a copy of the Notice must also be printed and delivered or posted to the person's address or sent to the person's facsimile number in accordance with clauses 42.1(a)(iii)(A) or 42.1(a)(iii)(B).

42.2 **PDCS**

- (a) The parties may agree that a PDCS will be used for giving Notices under or in connection with this deed.
- (b) If the parties agree that a PDCS will be used in accordance with clause 42.2(a):
 - (i) the parties must agree the commencement date for use of the PDCS; and

- (ii) each party must:
 - (A) ensure that it has internet access which is sufficient to facilitate use of the full functionality of the PDCS;
 - (B) ensure that relevant personnel log on and use the PDCS and check whether Notices have been received on each Business Day;
 - (C) at all times, ensure that it has access to personnel trained in the use of the PDCS so as to be able to view, receive and submit communications (including Notices) using the PDCS; and
 - (D) as soon as practicable, at the first available opportunity following any period of time during which the PDCS is temporarily disabled or not operating, send all communications which have been issued pursuant to clause 42.1(b)(iv) to RMS's Representative through the PDCS.
- (c) No party has any liability to the other for any losses a party may suffer or incur arising out of or in connection with its access to or use of the PDCS or any failure of the PDCS, and the Trustees will not be entitled to make, and RMS will not be liable upon, any Claim against RMS arising out of or in connection with a Trustee's access to or use of the PDCS or any failure of the PDCS.

42.3 **Effectiveness of notices**

- (a) A Notice referred to in clause 42.1(c) will not be effective unless it is delivered in accordance with clause 42.1(a)(iii)(A) or clause 42.1(a)(iii)(B).
- (b) A Notice issued pursuant to clause 42.1(a)(iii)(C) and a Notice issued pursuant to clause 42.1(a)(iii)(A) or clause 42.1(a)(iii)(B) must be identical, and in the event that they are not identical, neither Notice will constitute a valid Notice.

42.4 **When a notice is given**

A Notice that complies with this clause 42 is regarded as given and received:

- (a) if it is delivered or sent by fax:
 - (i) by 5.00 pm (local time in the place of receipt) on a Business Day - on that day; or
 - (ii) after 5.00 pm (local time in the place of receipt) on a Business Day, or on a day that is not a Business Day - on the next Business Day;
- (b) if it is sent by mail:
 - (i) within Australia – 2 Business Days after posting; or
 - (ii) to or from a place outside Australia – 5 Business Days after posting;
- (c) subject to clause 42.1(c), if it is sent by email:
 - (i) by 5:00pm (local time in the place of receipt) on a Business Day - at the time in the place to which it is sent equivalent to the time shown on the automatic receipt notification received by the party (as applicable) sending the email from the recipient; or
 - (ii) after 5:00pm (local time in the place of receipt) on a Business Day, or a day that is not a Business Day - on the Business Day following the date on which

it is sent equivalent to the date shown on the automatic receipt notification received by the party (as applicable) sending the email from the recipient; and

- (d) subject to clause 42.4(e), if it is sent through the PDCS, at the time recorded on the PDCS as being the time at which the Notice was sent, unless that delivery is made on a non-Business Day, or after 5.00pm on a Business Day, when that communication will be deemed to be received at 9.00am on the next Business Day; and
- (e) where clause 42.1(a)(iii)(C) applies, the relevant Notice will be taken to have been received on the later of:
 - (i) the date determined in accordance with clause 42.4(c); and
 - (ii) the date determined in accordance with clause 42.4(a) or 42.4(b) (as the case may be).

42.5 **Address for notices**

A person's address, email address and fax number are those set out below, or as the person notifies the sender:

RMS

Address: 101 Miller Street
North Sydney NSW 2060

Email address: [REDACTED]

Attention: General Manager, Motorway Projects

Fax number: 02 8588 4171

The Asset Trustee

Address: Level 18, 101 Miller Street
North Sydney NSW 2060

Email address: [REDACTED]

Attention: Project Director M5 Corridor

Fax number: To be provided by the Asset Trustee after the date of this deed.

The Project Trustee

Address: Level 18, 101 Miller Street
North Sydney NSW 2060

Email address: [REDACTED]

Attention: Project Director M5 Corridor

Fax number: To be provided by the Project Trustee after the date of this deed

42.6 **Communications by email**

With respect to communications sent by email:

- (a) only the letter in .pdf format attached to the email and, subject to clause 42.6(b), any attachments to such letter which are referred to in the letter, will form part of the communication under this clause 42. Any text in the body of the email or the subject line will not form part of the communication;

- (b) an attachment to an email referred to in clause 42.1(a)(iii)(C) or 42.6(a) will only form part of a communication under this clause 42 if it is in .pdf, .jpeg, .xls, .doc, .vsd, .mpp, .mdb, .xer or .ppt format, or such other format as may be agreed between the parties from time to time; and
- (c) the parties agree, with respect to any communications under or in connection with this deed:
 - (i) to ensure that their respective firewall and/or mail server (as applicable):
 - (A) allows messages of up to 20 MB (or such greater size as may be agreed between the parties from time to time) to be received;
 - (B) not used; and
 - (C) automatically sends a receipt notification to the sender upon receipt of a message; and
 - (ii) to use reasonable endeavours to ensure that their respective systems automatically send a notification message to each of the sender and the recipient when a message is received by the recipient's domain but cannot or will not be delivered to the recipient.

42.7 **Communications by the PDCS**

With respect to Notices sent through the PDCS:

- (a) only the text in any Notice, or subject to clause 42.7(b), any attachments to such Notice which are referred to in the Notice, will form part of the Notice. Any text in the subject line will not form part of the Notice; and
- (b) an attachment to a Notice will only form part of a Notice if it is uploaded to the PDCS in:
 - (i) .pdf format;
 - (ii) a format compatible with Microsoft Office; or
 - (iii) such other format as may be agreed between the parties in writing from time to time.

43. **GENERAL**

43.1 **Governing Law and Jurisdiction**

- (a) This deed is governed by and must be construed according to the law applying in New South Wales.
- (b) Each party irrevocably:
 - (i) submits to the non-exclusive jurisdiction of the courts of New South Wales and the courts competent to determine appeals from those courts, with respect to any action or proceedings which may be brought at any time relating in any way to this deed; and
 - (ii) waives any objection it may now or in the future have to the venue of any action or proceedings, and any claim it may now or in the future have that

any action or proceedings have been brought in an inconvenient forum, if that venue falls within clause 43.1(b)(i).

43.2 **Cost**

A party which has an obligation to do anything under this deed must perform that obligation at its cost, unless expressly provided for otherwise.

43.3 **Taxes**

Subject to clause 24.1 and 38.2 and without limiting clause 7.1, the Trustees must pay all Taxes which may be payable in respect of the Asset Trustee's Activities or the Project Trustee's Activities, including any customs duty, tariffs and primage applicable to imported materials (including Materials) or Construction Plant.

43.4 **Indemnity**

Subject to clauses 26.11(c) and 34.5(g):

- (a) each indemnity in this deed is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this deed;
- (b) it is not necessary for a party to incur expense or make any payment before enforcing a right of indemnity conferred by this deed;
- (c) a party must pay on demand any amount it must pay under an indemnity in this deed; and
- (d) each party must take reasonable steps to mitigate any Loss suffered by it which is the subject of an indemnity given in its favour.

43.5 **Vienna Convention**

The United Nations Convention on Contracts for the International Sale of Goods does not apply to this deed.

43.6 **Non reliance**

Without limiting clauses 11.6 and 11.7, the Trustees:

- (a) each warrant that it did not in any way rely upon any information, representation, statement or documentation (other than this deed) made by or provided to that Trustee by RMS or anyone on behalf of RMS for the purposes of entering into this deed;
- (b) each warrant that it enters into this deed based on its own investigations, interpretations, deductions, information and determinations; and
- (c) acknowledges that it is aware that RMS has entered into this deed relying upon the warranties in clauses 43.6(a) and 43.6(b).

43.7 **Entire agreement**

To the extent permitted by Law, this deed and the other Project Documents:

- (a) embody the entire understanding of the parties and constitute the entire terms agreed upon between the parties; and

- (b) supersede any prior written or other agreement of the parties,
in relation to the subject matter of this deed.

43.8 **Counterparts**

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

43.9 **Unlimited discretion**

- (a) Except as expressly otherwise provided in this deed (including in clause 43.9(c)), no procedural or substantive limitation or requirement (including any which may otherwise be implied by Law) is intended to be imposed upon the manner in which RMS or RMS's Representative may exercise any discretion, power or entitlement conferred by this deed.
- (b) Without limiting clause 43.9(a):
 - (i) except as expressly provided in this deed (including in clause 43.9(c)), neither RMS nor RMS's Representative will be:
 - (A) constrained in the manner in which it exercises; or
 - (B) under any obligation to exercise,

any discretion, power or entitlement conferred by this deed because of the operation of any legal doctrine which in any way limits or otherwise affects the construction or effect of express words used in the provision of this deed which confers the discretion, power or entitlement;
 - (ii) any approval or consent referred to in, or required under, this deed from RMS or RMS's Representative may be given or withheld, or may be given subject to any conditions, as RMS or RMS's Representative (in their absolute discretion) thinks fit, unless this deed expressly provides otherwise;
 - (iii) a Direction (including an absolute or sole discretion) or power of RMS's Representative is validly and properly exercised or made for the purposes of this deed if exercised or made (or if it is not exercised or made) by RMS's Representative whether it is exercised or made:
 - (A) independently;
 - (B) after consultation with RMS and its advisers; or
 - (C) as directed by RMS;
 - (iv) any control or influence exercised by RMS over RMS's Representative does not:
 - (A) affect the valid and proper exercise of any power or Direction (including an absolute or sole discretion) by RMS's Representative; or
 - (B) entitle the Trustees to make any Claim against RMS's Representative or RMS, or to challenge the effect or validity of the Direction (including an absolute or sole discretion) or power; and

- (v) subject to any express provision in this deed to the contrary, a provision of this deed which says that RMS or RMS's Representative "may" do or not do something is not to be construed as imposing an obligation on RMS or RMS's Representative to do or not do that thing.
- (c) Nothing in this clause 43.9 will prevent the implication of a term into this deed where the implication of the term is required to ensure that this deed (or a part of this deed) is not void or voidable due to uncertainty or any other legal principle.

43.10 Not used

43.11 No agency, partnership, joint venture or other fiduciary relationship

Nothing in this deed or any other Project Document to which RMS or the Trustees are expressed to be parties will be construed or interpreted as:

- (a) conferring a right in favour of either RMS or the Trustees to enter into any commitment on behalf of the other or otherwise to act as the other's agent; or
- (b) creating a partnership, joint venture or fiduciary relationship between RMS and the Trustees.

43.12 Waiver

- (a) Failure to exercise or enforce or a delay in exercising or enforcing or the partial exercise or enforcement of any right, power or remedy provided by Law or under this deed by any party to this deed will not in any way preclude, or operate as a waiver of, any exercise or enforcement, or further exercise or enforcement of that or any other right, power or remedy provided by Law or under this deed.
- (b) Any waiver or consent given by a party under this deed will only be effective and binding on the other party if it is given or confirmed in writing by that party.
- (c) No waiver by a party of:
 - (i) a breach of any term of this deed; or
 - (ii) any other failure by the other party to comply with a requirement of this deed, including any requirement to give any notice which it is required to give in order to preserve its entitlement to make any Claim,

will operate as a waiver of:

- (iii) another breach of that term or of a breach of any other term of this deed; or
- (iv) another failure to comply with that requirement or of a failure to comply with any other requirement of this deed.

43.12A Set Off

Without limiting RMS's rights at law or equity to set off, RMS may set-off or deduct from any monies due from RMS to the Trustees any debt or other moneys due from the Trustees to RMS relating to the Project (whether under the Project Documents (other than the Tolling Services Agreement or Schedule 38 of this deed) or otherwise at law) where prior written notice of such debt or moneys due has been given.

43.13 **Further acts and documents**

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

43.14 **Provisions limiting or excluding liability**

Any provision of this deed which seeks to limit or exclude a liability of RMS or the Trustees, is to be construed as doing so only to the extent permitted by Law.

43.15 **Survival of certain provisions**

Without limiting clause 43.4(a):

- (a) any provisions of this deed which are expressed to or by implication from its nature is intended to survive termination (including without limitation, clauses 26.11(c), 27.3, 34.5(e) 34.5(g) and 43.4) (together the **Surviving Clauses**) will survive rescission, novation, termination or expiration of this deed;
- (b) if this deed is rescinded or terminated, no party will be liable to any other party except:
 - (i) under the Surviving Clauses; or
 - (ii) in respect of any breach of this deed occurring before such rescission or termination;
- (c) no right or obligation of any party will merge on completion of any transaction under this deed, and all rights and obligations under this deed survive the execution and delivery of any transfer or other document which implements any transaction under this deed; and
- (d) 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.

43.16 **PPS Act**

The Trustees acknowledge and agree that:

- (a) if and to the extent that RMS at any time forms a belief on reasonable grounds that RMS is, or will become, a secured party arising out of or in connection with this deed, or any transaction contemplated by this deed, RMS may at the Asset Trustee's expense take all steps that RMS considers advisable to:
 - (i) perfect, protect, record, register, amend or remove the registration of, RMS's Security Interest in any relevant personal property that is the subject of this Security Interest ("relevant personal property"); and
 - (ii) better secure RMS's position in respect of the relevant personal property under the PPS Act;
- (b) it will do all things reasonably necessary to assist RMS to take the steps described in clause 43.16(a);
- (c) it irrevocably and unconditionally waives its right to receive any verification statement in respect of any financing statement or financing change statement relating to any Security Interests of RMS in the relevant personal property;

- (d) if, and only if, RMS is or becomes a secured party in relation to relevant personal property, and to the extent only that Chapter 4 of the PPS Act would otherwise apply to an enforcement of a Security Interest in relevant personal property, the Trustees and RMS agree that, pursuant to section 115 of the PPS Act, the following provisions of the PPS Act do not apply in relation to those Security Interests to the extent, if any, mentioned in section 115, section 117, section 118, section 120, subsection 121(4), section 125, section 129, section 130, subsection 132(3)(d), subsection 132(4), section 142, and section 143;
- (e) subject to section 275(7) of the PPS Act, it will not disclose the contents of this deed, the amount or performance obligation secured by RMS's Security Interest in relevant personal property and the other information mentioned in section 275(1) of the PPS Act pursuant to section 275(4) of the PPS Act;
- (f) it must immediately notify RMS if the Trustees become aware of any person other than RMS taking steps to register, or registering, a financing statement in relation to relevant personal property; and
- (g) it must arrange for the removal or cessation of any registration of any Security Interest that affects the priority of RMS's interest in relevant personal property.

For the purposes of this clause 43.16, "registration", "secured party", "verification statement", "financing statement", "personal property" and "financing change statement" each have the meaning given to those terms in the PPS Act.

43.17 **Ring Fencing**

- (a) Subject to clause 43.17(d), the Trustees must not (and must procure that the Holding Trusts do not) without RMS's consent enter into any transactions or arrangements, which includes any amendment, variation or waiver of a provision under any transaction or arrangement, with any Associate of an Ultimate Unitholder (**Associate Entity**) which are:
 - (i) not on an arm's length and commercial basis; or
 - (ii) unnecessary for, or of a scale and nature beyond that required for, the efficient and effective carrying out of the obligations of the Trustees under the Project Documents,

provided that whether a particular transaction or arrangement is on an arm's length and commercial basis must be determined objectively having regard to:

 - (iii) whether the Trustees or the Holding Trusts would have entered into the transaction or arrangement if they were:
 - (A) unrelated to the Associate Entity;
 - (B) free from undue influence or pressure by the Associate Entity;
 - (C) through their relevant decision-makers, sufficiently knowledgeable about the circumstances of the transaction or arrangement, sufficiently experienced in business and sufficiently well advised to be able to form a sound judgment as to what is in their interests; and
 - (D) concerned only to achieve the best available commercial result for themselves in all of the circumstances;
 - (iv) whether the Trustees or the Holding Trusts acted with the interests of any Associate Entity in mind;

- (v) whether the Trustees or the Holding Trusts on the one hand and the Associate Entity on the other hand dealt with each other as arm's length parties would normally do, so that the outcome of their dealing is a matter of real bargaining; and
 - (vi) whether the transaction or arrangement represents an equivalent or better commercial outcome for the Trustees or the Holding Trusts than would be available from an entity other than the Associate Entity.
- (b) The Trustees must bear RMS's reasonable costs and expenses (including legal costs and expenses) of and incidental to:
- (i) any enquiries which RMS may make for the purposes of determining whether to consent to the transaction or arrangement the subject of a request for consent under clause 43.17(a); and
 - (ii) the preparation, negotiation and execution of any documentation required to give effect to such transaction or arrangement, and any stamp duty or similar charges in relation to such documentation.
- (c) The Trustees must include with its annual reporting provided under clause 20.1(h)(i) and its half-yearly financial report provided under clause 20.1(h)(ii), a report describing all transactions or arrangements entered into by the Trustees or the Holding Trusts with an Associate Entity in the immediately prior six month reporting period, including, as a minimum, the following details:
- (i) a statement as to whether or not the Trustees consider the transactions or arrangements required consent from RMS under clause 43.17(a);
 - (ii) information as to the procurement process (if any) followed in respect of the relevant transaction or arrangement;
 - (iii) the nature of the work or services to be provided under each relevant transaction or arrangement and the fees paid or other consideration provided in respect of each transaction or arrangement in the reporting period; and
 - (iv) such other details and information regarding the relevant transactions or arrangements as may reasonably be requested by RMS.
- (d) If an emergency situation occurs in connection with the Motorway and a transaction or arrangement (within the meaning of clause 43.17(a)) with an Associate Entity is urgently required to:
- (i) provide access to emergency services or emergency traffic control;
 - (ii) prevent any occurrence that is likely to cause damage to the Motorway or compromise the safety of any person; or
 - (iii) address significant unforeseen congestion on the Motorway,

and there is not already a transaction or arrangement (within the meaning of clause 43.17(a)) in place in accordance with the Project Documents to respond to or remedy such an emergency situation, then the Trustees and/or the Holding Trusts may without RMS's consent enter into the relevant transaction or arrangement for a period not exceeding 24 hours duration after the time that the relevant emergency situation commences, provided that the Trustees must:

- (iv) immediately notify RMS of the relevant transaction or arrangement and the emergency situation to which it relates and provide such details and information regarding the relevant transaction or arrangement as may reasonably be requested by RMS;
 - (v) as soon as reasonably practicable after entering into the relevant transaction or arrangement and in any event no later than 7 days after the commencement of the relevant emergency situation, demonstrate to the reasonable satisfaction of RMS that the relevant transaction or arrangement:
 - (A) was the best commercial outcome available in the circumstances;
 - (B) does not result in a lesser commercial outcome for the Trustees than would be available from an entity other than the Associate Entity;
 - (C) was free from undue influence or pressure by the Associate Entity and was not entered into with the interests of the Associate Entity in mind; and
 - (D) was necessary for, and was not of a scale or nature beyond what was required to respond to or remedy the relevant emergency situation;
 - (vi) as soon as reasonably practicable after entering into the relevant transaction or arrangement and in any event no later than 7 days after the commencement of the relevant emergency situation, provide such details, documents and information in connection with the relevant transaction or arrangement as may reasonably be requested by RMS including, without limitation:
 - (A) information and records of the Trustees and the Holding Trusts in connection with all procurement processes relating to the relevant transaction or arrangement; and
 - (B) the steps taken by the Trustees and the Holding Trusts to ensure that there are appropriate processes in place to respond to or remedy any continuation or recurrence of the emergency situation;
 - (vii) at the end of the quarter in which the relevant transaction or arrangement was entered into, provide a written report to RMS setting out the aggregate expenditure, commitment or forgiveness required or provided under the relevant transaction or arrangement; and
 - (viii) ensure that the aggregate expenditure, commitment or forgiveness required or provided under the relevant transaction or arrangement is reported in the next occurring half-yearly financial reports for the Trustees.
- (e) The reference to variation in clause 43.17(a) includes a variation to or under a transaction or arrangement and including a variation, expansion or contraction of the scope of services and any instruction for the performance of any additional services whether contemplated under the transaction or arrangement or not.

43.18 **Exclusion of proportionate liability scheme**

To the extent permitted by Law, Part 4 of the *Civil Liability Act 2002* (NSW) (and any equivalent statutory provision in any other state or territory) is excluded in relation to all and any rights, obligations or Liabilities of any party under this deed whether such rights, obligations or Liabilities are sought to be enforced in contract, tort or otherwise.

Without limiting the above, the rights, obligations and Liabilities of the parties under this deed with respect to proportionate liability are as specified in this deed and not otherwise, whether such rights, obligations or Liabilities are sought to be enforced by a claim in contract, in tort or otherwise.

43.19 **Trustees not to apply proportionate liability scheme**

To the extent permitted by Law:

- (a) the Trustees must not seek to apply the provisions of Part 4 of the *Civil Liability Act 2002* (NSW) in relation to any claim by RMS against the Trustees (whether in contract, tort or otherwise); and
- (b) if any of the provisions of Part 4 of the *Civil Liability Act 2002* (NSW) are applied to any claim by RMS against the Trustees (whether in contract, tort or otherwise), the Trustees will indemnify RMS against any Loss which RMS is not able to recover from the Trustees because of the operation of Part 4 of the *Civil Liability Act 2002* (NSW).

43.20 **Subcontracts**

The Trustees must:

- (a) in each Subcontract into which it enters for the carrying out of the Asset Trustee's Activities and the Project Trustee's Activities, include a term that (to the extent permitted by Law) excludes the application of Part 4 of the *Civil Liability Act 2002* (NSW) in relation to all and any rights, obligations or Liabilities of any party under or in any way in connection with each Subcontract whether such rights, obligations or Liabilities are sought to be enforced by a claim in contract, tort or otherwise;
- (b) require each Subcontractor to include, in any further contract that it enters into with a third party for the carrying out of design activities in connection with the Asset Trustee's Activities and the Project Trustee's Activities, a term that (to the extent permitted by Law) excludes the application of Part 4 of the *Civil Liability Act 2002* (NSW) in relation to all and any rights, obligations or Liabilities of any party under or in any way in connection with each further agreement whether such rights, obligations or Liabilities are sought to be enforced by a claim in contract, tort or otherwise; and
- (c) require each Subcontractor to use reasonable endeavours to include in any further contract that it enters into with a third party for the carrying out of the Asset Trustee's Activities and the Project Trustee's Activities that is not covered by clause 43.20(b), a term that (to the extent permitted by Law) excludes the application of Part 4 of the *Civil Liability Act 2002* (NSW) in relation to all and any rights, obligations or Liabilities of any party under or in any way in connection with each further agreement whether such rights, obligations or Liabilities are sought to be enforced by a claim in contract, tort or otherwise.

43.21 **Moratorium legislation**

Unless application is mandatory by Law, any present or future Law will not apply to this deed so as to abrogate or otherwise prejudicially affect any rights, powers, remedies or discretions given or accruing to RMS.

43.22 **Interest**

If a party does not pay any money payable by it to any other party under this deed by the due date, the first mentioned party must pay interest on that amount on demand by the other party or parties. Interest is:

- (a) payable from the due date until payment is made by the first mentioned party before and, as an additional and independent obligation, after any judgment or other thing into which the liability to pay the money payable becomes merged;
- (b) calculated on daily balances at the rate of BBSY +2% per annum; and
- (c) capitalised monthly.

43.23 **Approvals not to affect obligations**

The giving of any approval or the making of any direction or appointment or the exercise of any authority or discretion or the exercise, giving or making of any other matter or thing of any nature hereunder by RMS will not, except where this deed expressly provides to the contrary, relieve the Trustees from their obligations under this deed.

EXECUTED as a deed.

The Seal of Roads and Maritime Services was affixed to this document in the presence of the Chief Executive or member of staff authorised in that behalf by the Chief Executive pursuant to section 109 of the *Transport Administration Act 1988* (NSW):

Signatory Name

EXECUTED by **WCX M5 PT PTY LTD (ACN 608 798 465)** in its personal capacity and in its capacity as trustee of the **WCX M5 PROJECT TRUST (ABN 73 899 615 977)** in accordance with section 127(1) of the *Corporations Act 2001* (Cth):

Signature of director

Signature of director/secretary

Name

Name

EXECUTED by **WCX M5 AT PTY LTD (ABN 608 798 081)** in its personal capacity and in its capacity as trustee of the **WCX M5 ASSET TRUST (ABN 23 365 031 283)** in accordance with section 127(1) of the *Corporations Act 2001* (Cth):

Signature of director

Signature of director/secretary

Name

Name