

Project Agreement

relating to

the Pūhoi to Warkworth PPP Project

**The New Zealand Transport Agency, a crown entity established on
1 August 2008 by section 93 of the Land Transport Management
Act 2003**

the Transport Agency

and

NX2 LP

Contractor

Date 2 November 2016

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This **Project Agreement** is made on 2 November 2016

between (1) **The New Zealand Transport Agency, a crown entity established on 1 August 2008 by section 93 of the Land Transport Management Act 2003 (the Transport Agency)**

and (2) **NX2 LP (Contractor)**

Introduction

- A. The Transport Agency invited tenderers to bid to undertake the Project on behalf of the Transport Agency.
- B. The Contractor is the successful tenderer.
- C. The Contractor will:
 - (i) obtain finance for the Project;
 - (ii) design and construct the P2Wk Project for the Transport Agency; and
 - (iii) provide the AMM Services,
 on the terms and conditions of this Agreement.
- D. The Transport Agency will make payments to the Contractor in consideration of the Contractor undertaking the Project on the terms and conditions set out in this Agreement.

It is agreed

Part 1 – Definitions and Interpretation

1. Definitions

1.1 General Definitions

In this Agreement, unless the context otherwise requires, the following terms have the following meanings:

Abandons means having ceased to carry out all Works Provisioning contemplated by the Construction Programme at the P2Wk Project Site for 20 consecutive Business Days or for 60 Business Days (whether consecutive or not) in any rolling 12 month period between Financial Close and Works Completion, excluding in either case absences contemplated by the then-applicable Construction Programme or any Prevention Plan or Rectification Programme accepted by the Transport Agency under this Agreement or the Financier Direct Deed;

Accelerated Dispute Panel is described in clause 89.1 (Accelerated Dispute Panel);

Accelerated Dispute Resolution Procedures means the procedures established under Part 21 (Dispute Resolution) to hear and resolve Disputes;

Acceptance Criteria means, in relation to any Completion:

- (a) the criteria specified in each Completion Plan as Finalised under the Review Procedures; and
- (b) the criteria specified in Schedule 10 (Completion Requirements);

Accidental Discovery Protocol has the meaning given to that term in Schedule 22 (Hōkai Nuku);

Actual Termination Date means:

- (a) if a Termination Notice is issued and the Security Trustee serves a Step-in Notice (as defined in the Financier Direct Deed) prior to the Termination Date specified in that Termination Notice, the date of termination of this Agreement under clause 73.5(c)(ii); or
- (b) in all other cases, the Termination Date;

Additional Disengagement Services means any services comparable to any part of the AMM Services provided or to be provided by the Contractor after the Actual Termination Date, as requested by the Transport Agency in the Disengagement Services Notice;

Additional Land means those parcels of land identified as such on the P2Wk Site Plans;

Additional Payments means any payment that the Transport Agency is required to make to the Contractor under this Agreement, other than the AMM Early Services Fee and the Quarterly Unitary Payment;

Additional Rescue Refinancing Amount means, on the first Drawdown Date for each Rescue Refinancing, the amount by which aggregate Senior Debt (including amounts drawn by or available to the Contractor which are attributable to that Rescue Refinancing) exceeds the Core Senior Debt Cap prior to the implementation of that Rescue Refinancing;

Adjoining Property means any land and/or property adjoining or in the vicinity of the P2Wk Project Site and each and every part thereof including all roads, footpaths, walls, fences, buildings and other erections and all conduits, pipes, ducts, water courses, wires, cables, meters, switches, channels, flues and all other conducting media appliances and other apparatus on, under or within such land and/or property;

Affiliate means:

- (a) a person that is a "related company" of any relevant person; or
- (b) any other person that Controls, or is Controlled by, any relevant person;

Agent means, as at the Execution Date, ANZ Bank New Zealand Limited in its capacity as facility agent for the Senior Lenders under the Financing Agreements, and includes any successor to, or replacement of, the Agent;

Agreement is described in clause 3.1 (Scope of Agreement);

AMM Early Fee Option means the option to pay the AMM Early Services Fee that may be exercised by the Transport Agency in accordance with clause 49A.3 (AMM Early Fee Update Option);

AMM Early Services Date means the later of the date three months prior to the Planned Service Commencement Date and the date 1 Business Day after the issue of the Works Completion Certificate;

AMM Early Services Fee means the fee calculated in accordance with paragraph 1 and 2 of Schedule 14 (Payment Mechanism);

AMM KPI has the meaning given to that term in Schedule 13 (Performance Regime);

AMM Month means any calendar month or part thereof from (and including) the AMM Early Services Date to (but excluding) the Planned Service Commencement Date;

AMM Services means each and all of the services described in Schedule 12 (Service Requirements) to be provided in accordance with the Service Requirements;

AMM Sub-contract means the agreement entered into between the Contractor and the person or persons for the time being appointed by the Contractor to provide all or any substantial part of the AMM Services;

AMM Sub-contractor means each person engaged by the Contractor under an AMM Sub-contract, being at the Execution Date P2W Services Limited;

Ancillary Documents:

- (a) means the agreements to which the Contractor or Contractor Entities are party to for the performance of the Contractor's obligations under this Agreement but to which the Transport Agency is not a party, being those agreements identified as such in Part 1 (Overview of Project Documents and Ancillary Documents) of Schedule 3 (Project and Ancillary Documents);
- (b) includes any document or agreement entered into for the purpose of supplementing, amending, replacing or novating any of those listed documents that the Transport Agency has agreed (in writing) to be an Ancillary Document; and
- (c) does not include the Financing Agreements;

Annual Audit Plan means the plan of that name prepared by the Contractor as part of the Quality Assurance Management Plan in accordance with clause 19.1 (Quality Assurance System), clause 29.2(a)(ii), clause 31 (Maintenance of Services Documentation) and Part 2 (Services Documentation) of Schedule 9 (Operative Documents) that has been Finalised under the Review Procedures;

Annual Work Plan means the plan of that name prepared by the Contractor as part of the Maintenance Management Plan in accordance with clause 29.2(a)(ii), clause 31 (Maintenance of Services Documentation) and Part 2 (Services Documentation) of Schedule 9 (Operative Documents) that has been Finalised under the Review Procedures;

Anticipated Service Commencement Date means the date on which the Contractor considers (acting reasonably) that it will achieve Service Commencement;

Arms' Length Terms includes (without limiting the ordinary meaning of that term) relationships, dealings and transactions that:

- (a) do not include elements that parties in their respective positions would usually omit; or
 - (b) do not omit elements that parties in their respective positions would usually include,
- if the parties are:

- (c) connected or related only by the transaction or dealing in question;
- (d) acting independently; and
- (e) each acting in their own respective best interests;

Asset Condition Register means the spreadsheet set out in Appendix C (Asset Condition Register) to Schedule 12 (Services Requirements);

Asset Condition Survey means each survey of the physical assets comprising the P2Wk Project undertaken in order to ascertain whether the Contractor has complied with its obligations in relation to the maintenance and replacement of all assets comprising the P2Wk Project;

Asset Deterioration Models means the asset deterioration models developed by the Contractor in accordance with Part 2 (Services Documentation) of Schedule 9 (Operative Documents) and Schedule 12 (Service Requirements);

Asset Register means the register of that name prepared by the Contractor as part of the Contract Plan, in accordance with clause 29.2(a)(ii), clause 31 (Maintenance of Services Documentation) and Part 2 (Services Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Asset Survey means each:

- (a) Pavement Condition Assessment Survey;
- (b) KiwiRAP Survey;
- (c) Road Safety Audit; or
- (d) Asset Condition Survey,

undertaken in accordance with clause 33 (Asset Surveys) in order to ascertain whether the Contractor has complied with its obligations in relation to the condition, maintenance and replacement of all assets comprising the P2Wk Project;

ATOC means the Auckland Traffic Operations Centre;

Austroroads means the Association of Australian and New Zealand Road Transport and Traffic Authorities applicable guides (as at 23 March 2016);

Availability Criteria is defined in Schedule 13 (Performance Regime);

Background IP is defined in clause 57.1(a);

Base Agreement means this document comprising clauses 1 to 100 (inclusive);

Base Case means the financial model agreed between the parties prior to the Execution Date (as updated in accordance with the Financial Close Adjustment Protocol with effect from Financial Close and from time to time in accordance with the terms of this Agreement) for the purpose of, amongst other things, calculating the Unitary Charge;

Base Case Update Option means the option to update the Base Case that may be exercised by the Transport Agency in accordance with clause 49A.4 (Base Case Update Option);

Base Costs means the actual costs properly and reasonably incurred, or to be incurred, by the Contractor and any Sub-contractor (as applicable) as the result of any Change or (where applicable) any Compensation Extension Event or Compensation Intervening Event, excluding any Margin;

Base Interest Amount has the meaning given to that term in paragraph 6 (Base Interest Amount) of Schedule 14 (Payment Mechanism);

Base Senior Debt Termination Amount is defined in Schedule 18 (Calculation of Compensation on Termination);

Bridge means a Structure designed to carry a road or a path over an obstacle by spanning it;

Bridge Manual means the NZTA Bridge Manual SP/M/022 third edition, Amendment 1 (as at 23 March 2016);

Business Day means a day other than a Saturday or Sunday or a public holiday in New Zealand;

Business Interruption Policies means the Contract Works Insurance (Advance Loss of Profits) Policy and/or the Consequential Loss (Business Interruption) Insurance Policy, and **Business Interruption Policy** means either of them;

Capital Expenditure means any expenditure treated as capital expenditure in accordance with GAAP from time to time;

Certificate of Currency means a certificate issued by or on behalf of a Reputable Insurer:

- (a) evidencing that the Insurance Policy to which it relates is in place and the period of cover;
- (b) stipulating the type of Insurance Policy and the major inclusions and exclusions; and
- (c) including such additional information as the Transport Agency may reasonably request;

Change means:

- (a) any change made or proposed to be made in connection with:
 - (i) this Agreement or the Services or the P2Wk Project (including a MLR Change); or
 - (ii) anything the subject of this Agreement or that is used or supplied for the purposes of the Services or the P2Wk Project,

that the Transport Agency considers (on reasonable grounds) to be in furtherance of one or more of the Objectives; and

- (b) (where the context permits) any Change in Law;

Change Compensation Principles means the principles set out in Schedule 17 (Change Compensation Principles);

Change in Costs means, in respect of any Relevant Event, any Compensation Extension Event or any Compensation Intervening Event, the direct effect of that event (whether of a

one-off or recurring nature, and whether positive or negative) on the actual or anticipated costs, Losses of the Contractor and/or any Major Sub-contractor (without double counting), in each case calculated in accordance with the Change Compensation Principles;

Change in Law means the coming into effect after the Execution Date of:

- (a) any Law (including a Law that repeals or amends an existing Law), other than any Law that was:
 - (i) published on or before the Execution Date in a bill or draft bill, as part of a government consultation paper or in a draft statutory instrument; and
 - (ii) as at the Execution Date, publicly available and included substantially the same content as the Law eventuating after the Execution Date; or
- (b) any applicable judgment of a relevant court of law that changes or creates a binding precedent,

but does not include a change in Law that was not in force at the Execution Date that:

- (c) was contained or referred to in the Tendering Information or any Project Documents with substantially the same content as the change eventuating after the Execution Date;
- (d) a party experienced and competent in the provision of the Services would have reasonably foreseen or anticipated prior to the Execution Date;
- (e) is a change in the way a Law applies or is interpreted as a result of a court decision other than as described in paragraph (b); or
- (f) comprises or results in a change to a Consent, except to the extent the same comprises a change to which clause 48.6 (Change in Consents) applies;

Change Notice means a notice that initiates a Change, the form of which is set out in Schedule 16 (Change Notice);

Change of Ownership means:

- (a) any sale, transfer or disposal of any legal, beneficial or equitable interest in any or all of the Partnership Interests or the shares (as applicable) in the Contractor and/or a Contractor Entity;
- (b) any change in Control in respect of the Contractor and/or a Contractor Entity;
- (c) any sale, transfer or disposal of any legal, beneficial or equitable interest in any or all of the Partnership Debt advanced or made available to the Contractor and/or HoldCo LP; and/or
- (d) any other arrangements that have, or may have, or that result in the same effect as those described in any of paragraphs (a), (b) and (c);

Change Proposal means, in relation to a Change and a Change Notice, the information contained in or referenced in sections 2 and 3 of that Change Notice;

Charge has the meaning given to that term in Schedule 13 (Performance Regime);

Charge Event has the meaning given to that term in Schedule 13 (Performance Regime);

Claim includes any claim, proceeding, action, demand or suit (including by way of contribution or indemnity) at Law or in equity including for payment of money (including damages) or for an extension of time or relief from the performance of obligations, including by statute (to the extent permitted by Law), in tort for negligence or otherwise, including negligent misrepresentation or for strict liability or for restitution;

Clean-up Notice means a notice or direction given under Law that requires the person to whom it is issued to take action to remediate Contamination including:

- (a) an enforcement order under section 314 of the Resource Management Act 1991; and
- (b) an abatement notice under section 322 of the Resource Management Act 1991,

but only to the extent that it requires the person to whom it is issued to do anything to remedy that Contamination;

Close-out means, in respect of a Close-out Deliverable, the stage at which the Close-out Certificate has been issued by the Independent Reviewer to the Contractor;

Close-out Certificate means, in respect of a Close-out Deliverable, the notice which the Independent Reviewer issues to the Contractor under clause 29.7 (Close-Out) in respect of that Close-out Deliverable;

Close-out Deliverable means each element or component of the P2Wk Project or associated land and infrastructure identified in the Close-out Plan as being subject to the Close-out;

Close-out Plan means the plan of that name prepared by the Contractor as part of the Works Project Management Plan in accordance with clause 26 (Planning and mobilisation), clause 29.2(a)(i) (Preparation for Completion) and Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Close-out Sub-Programme means the sub-programme of that name prepared by the Contractor as part of the Construction Programme in accordance with Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Close-out Tests means those tests described as such in Schedule 10 (Completion Requirements) (and any additional tests and re-run tests requested by the Independent Reviewer in accordance with this Agreement) to be successfully carried out prior to the issue of each Close-out Certificate;

Code of Practice for Temporary Traffic Management or COPTTM means the Transport Agency Code of Practice for Temporary Traffic Management, as set out in Part 8 of the Traffic Control Devices Manual, provided that for the purposes of Designation Condition D22 references to COPTTM will be to the version that applies at the time any applicable SSTMP is prepared);

Compensation Adjustment is defined in Schedule 18 (Calculation of Compensation on Termination);

Compensation Date is defined in Schedule 18 (Calculation of Compensation on Termination);

Compensation Extension Event means:

- (a) a Māori Claim;

- (b) a Find;
- (c) an exercise by the Transport Agency of its Step-in Rights, where those Step-in Rights are exercised other than as a result of a breach by the Contractor of its obligations under this Agreement;
- (d) any breach by the Transport Agency of any of its obligations under a Project Document, other than a failure on the part of the Transport Agency to pay any monies that are then due and payable to the Contractor pursuant (and subject) to the terms of that Project Document;
- (e) any failure by the Transport Agency to:
 - (i) acquire possession of, and grant the Contractor access to:
 - (A) the Initial Site on Financial Close; and/or
 - (B) any parcel of Deferred Acquisition Land on or prior to its Deferred Acquisition Date,
 until Service Commencement; or
 - (ii) obtain any MLR Consent by the date three years after Financial Close;
- (f) any legal proceeding (whether judicial review or otherwise) relating, in substance, to the P2Wk Designation or MLR Consents , but excluding:
 - (i) any prosecution or enforcement in respect of the P2Wk Designation or the MLR Consents arising from, or alleged to arise from, any act or omission of the Contractor;
 - (ii) any proceeding to the extent arising from:
 - (A) the Contractor's non-compliance with its obligations under this Agreement, including without limitation its obligations under Schedule 6 (Resource Management Act Requirements); or
 - (B) changes or proposed changes to the P2Wk Designation (other than to the extent required solely for the purposes of the MLR Infrastructure) instigated by the Contractor or otherwise required to facilitate the Contractor's delivery of the P2Wk Project; or
- (g) a Substantial Destruction Event;

Compensation Intervening Event means:

- (a) a Māori Claim;
- (b) a Find;
- (c) an exercise by the Transport Agency of its Step-in Rights, where those Step-in Rights are exercised other than as a result of a breach by the Contractor of its obligations under this Agreement;
- (d) any breach by the Transport Agency of any of its obligations under a Project Document, other than a failure on the part of the Transport Agency to pay any monies

that are then due and payable to the Contractor pursuant (and subject) to the terms of that Project Document;

- (e) at any time prior to the completion of Close-out Test 2 in accordance with this Agreement, any failure by the Transport Agency to acquire possession of, and grant the Contractor access to, any parcel of the P2Wk Project Site;
- (f) a Natural Disaster Event;
- (g) any legal proceeding (whether judicial review or otherwise) relating, in substance, to the P2Wk Designation, but excluding:
 - (i) any prosecution or enforcement in respect of the P2Wk Designation arising from, or alleged to arise from, any act or omission of the Contractor;
 - (ii) any proceeding to the extent arising from:
 - (A) the Contractor's non-compliance with its obligations under this Agreement, including without limitation its obligations under Schedule 6 (Resource Management Act Requirements); or
 - (B) changes or proposed changes to the P2Wk Designation instigated by the Contractor or otherwise required to facilitate the Contractor's delivery of the P2Wk Project; or
- (h) a Substantial Destruction Event;

Compensation Sum is defined in Schedule 18 (Calculation of Compensation on Termination);

Completion means Works Completion and Close-out;

Completion Plan means, as the context requires, either or both of the Works Completion Plan and the Close-out Plan;

Completion Sub-Programme means the sub-programme of that name prepared by the Contractor as part of the Construction Programme in accordance with Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Compliance Certificate means a certificate in the form set out in Appendix A to Schedule 21 (Reporting);

Conditions Precedent means the conditions specified in Schedule 1 (Conditions Precedent);

Conditions Precedent Deadline means 2.00pm on the date 20 Business Days after the Execution Date;

Confidential Information means:

- (a) all information and trade secrets already communicated or subsequently communicated under or in connection with this Agreement or with respect to the Services or otherwise with respect to the subject matter of this Agreement including (without limitation) any information obtained:
 - (i) in the course of negotiations leading to the conclusion of this Agreement; or

- (ii) in the performance of this Agreement;
- (b) any information about the business or property of a person including (without limitation) any information:
 - (i) relating to the financial position of that person;
 - (ii) concerning that person's suppliers and customers or its agents or brokers;
 - (iii) relating to that person's internal management, structure, personnel or strategies; or
 - (iv) comprising the terms of this Agreement (other than to the extent those terms have previously been disclosed by or with the consent of the Transport Agency under clause 56 (Confidential Information)); and
- (c) all information in respect of any materials in which any person has Intellectual Property rights in accordance with the terms of this Agreement;

Confirmed Change means:

- (a) a Change confirmed by the Transport Agency under clause 44.1 (Confirmation of Change); and
- (b) includes, where the context requires, any amendment or variation agreement entered into between the Transport Agency and the Contractor setting out the terms and conditions of a Confirmed Change;

Consent means:

- (a) any consent, authorisation, permit, registration, filing, agreement, notarisation, certificate, licence, approval, or exemption from, by or with, a Governmental Entity, judicial body or stock exchange that is required to enable the Contractor to observe, comply with or perform any of its obligations under this Agreement (and includes consents required to comply with Laws or as a result of the rights or discretions of any third party);
- (b) in relation to any act, matter or thing that will be prohibited or restricted in whole or in part if a Governmental Entity, judicial body or stock exchange intervenes or acts in any way within a specified period after lodgement, filing, registration or notification of such act, matter or thing, the expiry of such period without such intervention or action; and
- (c) includes the Transport Agency Consents and Contractor Consents;

Consent Conditions means any condition imposed in relation to the P2Wk Designation or any other Consent, as amended from time to time;

Consequential Loss (Business Interruption) Insurance Policy means the insurance policy of that name referred to and described in Part 1 (Required Insurances) of Schedule 15 (Insurance);

Construction Environmental Management Plan or CEMP means the plan of that name required by Resource Consent Condition RC10, prepared by the Contractor as part of the Works Project Management Plan in accordance with clause 26 (Planning and mobilisation) and Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Construction Health and Safety Plan means the plan of that name prepared by the Contractor as part of the Works Project Management Plan in accordance with clause 26 (Planning and mobilisation) and Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Construction Management Plan means the plan of that name prepared by the Contractor as part of the Works Project Management Plan, based on the Contractor's Proposal, in accordance with clause 26 (Planning and mobilisation), and Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Construction Programme means the programme of that name prepared by the Contractor:

- (a) based on the draft provided as part of the Contractor's Proposal;
- (b) in accordance with clause 26 (Planning and mobilisation) and Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents); and
- (c) that has been Finalised under the Review Procedures;

Construction Stakeholder and Communications Plan means the plan of that name prepared by the Contractor in accordance with clause 26 (Planning and Mobilisation) and Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents) and that has been finalised under the Review Procedures;

Construction sub-contract means the agreement between the Contractor and the person or persons for the time being appointed by the Contractor:

- (a) to undertake Works Provisioning for the purposes of this Agreement; or
- (b) to undertake a Material Change in relation to the P2Wk Project;

Construction Sub-contractor means each person engaged by the Contractor under a Construction sub-contract, being at the Execution Date the unincorporated joint venture between The Fletcher Construction Company Limited and Acciona Infrastructure New Zealand Limited;

Construction Sub-Programme means the sub-programme of that name prepared by the Contractor as part of the Construction Programme in accordance with Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Construction Traffic Management Plan or CTMP means the plan of that name required by Designation Condition D18, prepared by the Contractor in accordance with clause 26 (Planning and mobilisation) and Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents) and that has been finalised under the Review Procedures;

Construction Works has the meaning given to that term in the RMA Conditions;

Contamination means the presence on, in, over or under land (including both surface and ground water) of a substance at a concentration above the concentration at which the substance is normally or naturally present on, in, over or under that land (including both surface and ground water) or land or waters in the same locality, being a presence that presents a risk of harm to human health or any other feature of the Environment, but excludes (for the purposes of Part 11 (Events)) any Find;

Contract Plan means the plan of that name prepared by the Contractor in accordance with clause 29.2(a)(ii), clause 31 (Maintenance of Services Documentation) and Part 2 (Services Documentation) of Schedule 9 (Operative Documents), including:

- (a) the Asset Register and Asset Condition Register;
- (b) the Maintenance Management Plan;
- (c) the Forward Works Plan;
- (d) the Lane Closure Protocols; and
- (e) the P2Wk Project Operations Plan;

and that has been Finalised under the Review Procedures;

Contract Quarter means any Quarter in a Contract Year provided that:

- (a) the first Contract Quarter shall commence on the Service Commencement Date and end on the last day of the Quarter in which the Service Commencement Date occurs; and
- (b) the last Contract Quarter shall begin on the first day of the Quarter in which the last day of the Contract Term occurs and end on the last day of the Contract Term,

and Contract Quarter excludes any period during which the AMM Early Services Fee is payable;

Contract Term means the period from and including the date of Financial Close to the Expiry Date, or if this Agreement ends earlier, to the Actual Termination Date;

Contract Works Insurance (Material Damage) Policy means the insurance policy of that name referred to and described in Part 1 (Required Insurances) of Schedule 15 (Insurance);

Contract Works Insurance (Advance Loss of Profits) Policy means the insurance policy of that name referred to and described in Part 1 (Required Insurances) of Schedule 15 (Insurance);

Contract Year means:

- (a) the period commencing on the Service Commencement Date and ending on the next 31 December;
- (b) each subsequent 12 calendar month period during the Contract Term; and
- (c) the period from the end of the last full Contract Year to the last day of the Contract Term;

Contractor Background IP means Background IP that is owned by the Contractor, or Contractor Personnel or by a licensor of the Contractor or Contractor Personnel;

Contractor Consents means all Consents necessary to enable the Contractor to perform its obligations under this Agreement, excluding the Transport Agency Consents but including:

- (a) the Outline Plan;
- (b) the P2Wk Designation;

- (c) Designation 404;
- (d) the Resource Consents;
- (e) from the date at which they are obtained by the Transport Agency, the MLR Consents; and
- (f) any other Consents obtained by the Contractor to further assist its construction or operational activities in relation to the P2Wk Project;

Contractor Default means an Immediate Termination Event or a Remediable Contractor Default;

Contractor Entity means each of the General Partners and HoldCo LP and **Contractor Entities** means all of them;

Contractor General Partner means NX2 GP Limited;

Contractor Partnership Agreement means the limited partnership agreement relating to the Contractor dated on or about the date of this Agreement, made between Contractor General Partner and HoldCo LP;

Contractor Personnel means any:

- (a) Contractor Related Person; or
- (b) Officer, employee or agent of, or contractor to, the Contractor or a Contractor Related Person,

and includes the Independent Reviewer but only to the extent that it is providing any Additional Services (as defined in the Independent Reviewer Agreement) requested by the Contractor under the Independent Reviewer Agreement;

Contractor Related Person means any:

- (a) Contractor Entity;
- (b) Affiliate of the Contractor; or
- (c) Sub-contractor,

and includes the Independent Reviewer but only to the extent that it is providing any Additional Services (as defined in the Independent Reviewer Agreement) requested by the Contractor under the Independent Reviewer Agreement;

Contractor's Proposal means the proposal of the Contractor dated 23 March 2016 as submitted in response to the Transport Agency's request for proposal with respect to the Project;

Contractor's Representative means the person for the time being appointed by the Contractor as its representative under clause 15.2 (Service management) and Part 2 (Parties' Representatives) of Schedule 7 (Governance and Service Management);

Control means, in relation to a body corporate (of any kind):

- (a) where that body corporate is a company, having control or influence of, or having the capacity to control or influence, the composition of the board as defined in section 7 of the Companies Act 1993;
- (b) where that body corporate is a limited partnership, having control or influence of, or having the capacity to control or influence, the general partner(s) of that limited partnership;
- (c) being in a position to cast, or control the casting of, more than 20 per cent of the:
 - (i) maximum number of votes that may be cast at a general meeting of the shareholders or partners; or
 - (ii) voting rights (however described) attributable to the shareholding or Partnership Interests; or
- (d) having a relevant interest (as defined in as defined in sections 235 to 238 of the Financial Markets Conduct Act 2013) in more than 20 per cent of the voting securities,

of that body corporate (whether alone or together with any Affiliate);

Controller means, in relation to a Change of Ownership (as the context may require), the person or body corporate that is then exercising Control or the person or body corporate to whom Control is intended to pass;

Controller Breach means any sale, transfer or disposal of any direct legal, beneficial or equitable interest in any or all of the shares in a General Partner, or any or all of the Partnership Interests in the Contractor or HoldCo LP in breach of clause 91 (Change of Ownership), and in the case of HoldCo LP, that HoldCo LP fails to cure within 20 Business Days after it became aware of any such sale, transfer or disposal;

Controller and Auditor-General and Auditor-General means the Controller and Auditor-General appointed pursuant to section 7 of the Public Audit Act 2001;

Core Disengagement Services means those services to be provided by the Contractor under and in accordance with clauses 84 (Initiation of disengagement) and 85 (Contractor's disengagement obligations) and Schedule 19 (Disengagement) but excludes Additional Disengagement Services;

Core Refinancing means a Refinancing that meets the Core Refinancing Conditions;

Core Refinancing Conditions means the conditions set out in clause 52.4(b);

Core Senior Debt means, as at any date and without double counting, the aggregate of all Senior Debt comprising:

- (a) Senior Debt incurred by way of Senior Financing Agreements in place at Financial Close;
- (b) Senior Debt incurred by way of all Permitted Refinancings (excluding any Additional Rescue Refinancing Amounts and any Permitted Hedging); and
- (c) Senior Debt incurred by way of all General Refinancings,

and excludes, for the avoidance of doubt, any Senior Debt incurred by the Contractor without obtaining the prior written consent or deemed consent (as applicable) of the Transport Agency under this Agreement;

Core Senior Debt Cap means, as at the date immediately prior to the first Drawdown Date of any Core Refinancing, a maximum principal amount (at any time during its scheduled term) of up to the aggregate of Modelled Senior Debt and the Modelled Senior Debt Cap;

Coronial Finding means the certificate and/or reasons given by a coroner, following a coronial inquiry, under section 94 of the Coroners Act 2006;

CPI means the "all groups" consumer price index for the time being as published by Statistics New Zealand or any successor or replacement index to CPI as nominated by Statistics New Zealand for the time being;

Cultural Condition means:

- (a) all those RMA Conditions that include a reference to the "Iwi Advisor"; and
- (b) all those RMA Conditions specified as Cultural Conditions in Appendix A (Annotated RMA Conditions) to Schedule 6 (Resource Management Act Requirements);

Cultural, Heritage and Archaeology Management Plan means the plan of that name required by Designation Condition D65:

- (a) prepared by the Transport Agency in accordance with Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents); and
- (b) to be maintained by the Contractor in accordance with clause 26 (Planning and Mobilisation);

Culvert means one or more adjacent pipes or enclosed channels for conveying surface water or a stream below formation level;

Cumulative Capital Expenditure means the aggregate of:

- (a) all Capital Expenditure that has been incurred as a result of:
 - (i) any Specific Change in Law of the type specified in paragraph (b) of the definition of that term; and
 - (ii) each General Change in Law that has come into effect since the Service Commencement Date; and
- (b) the amount of Capital Expenditure that is agreed, or determined to be required, as a result of a General Change in Law or as a result of a Specific Change in Law of the type specified in paragraph (b) of the definition of that term;

D&C Personnel means:

- (a) the Construction Sub-contractor and the Officers, employees or agents of, or contractors to the Construction Sub-contractor; and
- (b) excludes any person who is or would be Contractor Personnel, at the relevant time, in a capacity other than as described in paragraph (a) of this definition;

Debt Contract Quarter (n) means each quarterly period commencing on the 28th day of a month and ending on the 27th day of the third subsequent month, except:

- (a) in respect of the first Debt Contract Quarter, the period commencing on the Service Commencement Date and ending on the 27th day of the second month after the end of the first Contract Quarter; and
- (b) in respect of the final Debt Contract Quarter, which shall end on the 27th day of the month of the last month in which the final maturity date in respect of the Senior Debt occurs that commences no later than 12 months prior to the end of the Operating Term,

provided that, in all circumstances, where the end date of a Debt Contract Quarter is not a Business Day, the end date will be the next Business Day and the following Debt Contract Quarter (if any) will commence on the immediately following day;

Deductions has the meaning given to that term in Schedule 13 (Performance Regime);

Deed of Indemnity means the deed of indemnity dated on or about the date of this Agreement between the Crown and the Transport Agency;

Default Interest is defined in Schedule 18 (Calculation of Compensation on Termination);

Defect means:

- (a) any aspect of the design or construction of the P2Wk Project which is not in accordance with the requirements of this Agreement; or
- (b) any defect, non-compliance of any part of the P2Wk Project with the requirements of this Agreement, shrinkage, fault or omission in the P2Wk Project (but in each case excludes any normal shrinkage of materials unless that shrinkage should have been accommodated for in accordance with Good Industry Practice);

Deferred Acquisition Date means, in respect of each parcel of Deferred Acquisition Land, the final date for acquisition of that parcel of land as set out in Appendix A (Deferred Acquisition Land) to Schedule 5 (Property);

Deferred Acquisition Land means the interests in land specified in Appendix A (Deferred Acquisition Land) to Schedule 5 (Property) and (except in respect of the properties set out in Appendix I (Tenancies and Grazing Licences) to Schedule 5 (Property)) identified as such on the P2Wk Site Plans that are yet to be acquired as at the Execution Date, subject to:

- (a) the Disclosed Title Matters; and
- (b) the Deferred Acquisition Land Assumptions;

Deferred Acquisition Land Assumptions means the assumptions listed in Appendix AA (Deferred Acquisition Land Assumptions) to Schedule 5 (Property) relating to interests to apply to Deferred Acquisition Land and other land as listed in Appendix A (Deferred Acquisition Land) to Schedule 5;

Delegation Instrument (Contractual Close) means the instrument of delegation of roading functions and powers to the Contractor pursuant to section 61 of the LTMA, the form of which is attached as Schedule 23 (Delegation Instrument);

Delegations Instruments means:

- (a) the Delegation Instrument (Contractual Close); and

- (b) any other instrument of delegation of roading functions and powers to the Contractor pursuant to section 61 of the LTMA that is issued by the Transport Agency in a response to a Delegation Notification or otherwise;

Delegation Notification has the meaning given to it in clause 7.8(a);

Design and Construction Payment means a payment of the amount specified in cell "J42" of the Base Case sheet entitled "Summary" as at Financial Close, to be made by the Transport Agency to the Contractor on the Service Commencement Date, representing the agreed design and construction costs of the P2Wk Project (excluding Fitout) which includes an allocation of the Contractor's debt funding costs, as incurred or deemed incurred during or prior to the Works Provisioning phase;

Design Development means that phase of Works Provisioning described in clause 27 (Design and Design Development) as forming part of the Construction Programme;

Design Development Plan means the plan for Design Development prepared by the Contractor as part of the Works Project Management Plan, based on the Contractor's Proposal, in accordance with clause 26 (Planning and mobilisation) and Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Design Documentation means all design documentation (including drawings, design reports, inspection and test plans, commissioning test plans, QA plans and sub-plans, specifications, models, samples and calculations) in computer readable and human readable form necessary for the Contractor to complete all or any part of the P2Wk Project;

Designation 401 means designation 401 to the Auckland District Plan: Operative Rodney Section (motorway and limited access highway and associated interchange structures), being the same as designation D6761 to the Auckland Unitary Plan (State Highway 1 - Silverdale to Puhoi), including as altered from time to time in accordance with the provisions of the Resource Management Act 1991 and/or the Local Government (Auckland Transitional Provisions) Act 2010; excluding those parts of this designation that are outside the P2Wk Project Site;

Designation 404 means designation 404 to the Auckland District Plan: Operative Rodney Section (State Highway 1), being the same as designation D6763 to the Auckland Unitary Plan (6763 State Highway 1 - Puhoi to Topuni), including as altered from time to time in accordance with the provisions of the Resource Management Act 1991 and/or the Local Government (Auckland Transitional Provisions) Act 2010; excluding those parts of this designation that are outside the P2Wk Project Site;

Designation 408 means designation 408 to the Auckland District Plan: Operative Rodney Section (The construction, operation and maintenance of a State highway (Ara Tūhono – Pūhoi to Wellsford Road of National Significance: Pūhoi to Warkworth Section)), being the same as designation D6769 to the Auckland Unitary Plan (The construction, operation and maintenance of a State highway (Ara Tūhono - Pūhoi to Wellsford Road of National Significance: Pūhoi to Warkworth Section)), including as altered from time to time in accordance with the provisions of the Resource Management Act 1991 and/or the Local Government (Auckland Transitional Provisions) Act 2010;

Designation Conditions means the conditions imposed on the P2Wk Designation, including the more specific requirements that apply to Designation 408 recorded in "Column B" of the Annotated RMA Conditions, included in Appendix A to Schedule 6 (Resource Management Act Requirements);

Developed IP is defined in clause 57.1(b);

Disclosed Title Matters means the matters set out in Part 3 (Disclosed Title Matters) of Schedule 5 (Property);

Disengagement Deliverables mean the assets, Fitout, Fixtures, records, information, data and other tangible or intangible deliverables specified in the Disengagement Plan as being deliverable to the Transport Agency on or prior to the expiry of the Disengagement Period in accordance with the Disengagement Plan;

Disengagement Period is the period calculated in accordance with clause 84.2 (Disengagement Period);

Disengagement Plan means the disengagement plan prepared by the Contractor in accordance with Part 20 (Hand back and disengagement), Schedule 9 (Operative Documents) and Schedule 19 (Disengagement) and that has been Finalised under the Review Procedures;

Disengagement Services means Core Disengagement Services and/or Additional Disengagement Services (as applicable);

Disengagement Services Notice has the meaning given to it in clause 84.1 (Disengagement Services Notice);

Dispute has the meaning given to it in clause 87.1 (Notice of Dispute);

Dispute Resolution Procedures means the procedures for hearing and resolving Disputes as set out in Part 21 (Dispute Resolution);

Disputed Amount has the meaning given to it in clause 49.5 (Disputed Amounts);

Disputes Panel means the panel established under clause 88 (Disputes Panel) to hear and resolve Disputes, other than those Disputes that, under clause 87.4(c), are to be directly referred for resolution under the Accelerated Dispute Resolution Procedures;

Distribution means, whether in cash or in kind, any:

- (a) dividend or other distribution (as that term is defined in section 2 of the Companies Act 1993 and/or section 39 of the Limited Partnerships Act) by the Contractor in respect of share capital or Partnership Interests;
- (b) reduction of capital or Partnership Interest, redemption or purchase of shares or Partnership Interests, or any other reorganisation or variation to share capital or Partnership Interests;
- (c) payment under the Subordinated Financing Agreements (whether of principal, interest, breakage costs or otherwise); or
- (d) payment, loan, contractual arrangement or transfer of assets or rights or any other benefit from the Contractor to a Partner or a Shareholder;

Dollars means New Zealand dollars or any other currency that is for the time being the lawful currency of New Zealand;

Drawdown Date means the date on which any Core Senior Debt is advanced or re-advanced to the Contractor on completion of any General Refinancing or Permitted Refinancing;

Emergency Procedures and Preparedness Plan means the plan of that name prepared by the Contractor as part of the P2Wk Project Operations Plan in accordance with clause

29.2(a)(ii), clause 31 (Maintenance of Services Documentation) and Part 2 (Services Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Emergency Services has the meaning given to it in the Civil Defence Emergency Management Act 2002;

Enabling Works Plan means the plan of that name prepared by the Contractor in accordance with clause 26 (Planning and mobilisation) and Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents) and that has been approved by the Transport Agency in accordance with Schedule 9;

Environment includes all aspects of the surroundings of human beings including:

- (a) the physical characteristics of those surroundings such as land, water and the atmosphere;
- (b) the biological characteristics of those surroundings such as animals, plants and other forms of life; and
- (c) the aesthetic characteristics of those surroundings such as their appearance, sounds, smells, tastes and textures;

Environmental Management Plans means the plans of that name to be prepared in accordance with Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents) and finalised in accordance with the method specified in Schedule 9;

Environmental and Social Management Plan means the plan of that name prepared by the Contractor as part of the P2Wk Project Operations Plan in accordance with clause 29.2(a)(ii), clause 31 (Maintenance of Services Documentation) and Part 2 (Services Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Equity IRR means the projected blended rate of return for the investors in the Contractor over the Contract Term, having regard at the relevant time to Distributions made and projected to be made as identified in the percentage amount specified in cell "V48" in the Base Case sheet entitled "Summary" when used in reference to nominal cash-flows or the percentage amount specified in cell "W48" in the Base Case sheet entitled "Summary" when used in reference to real cash-flows;

Event means any of an:

- (a) Extension Event;
- (b) Intervening Event; and
- (c) Uninsurable Event;

Execution Date means the date this Agreement is signed by both parties;

Exempt Refinancing means a Refinancing that constitutes:

- (a) a change in taxation or accounting treatment;
- (b) the exercise of rights, waivers, consents and similar actions that relate to day-to-day administrative and/or supervisory matters;

- (c) the exercise of rights, waivers, consents and similar actions that are in respect of:
 - (i) conditions precedent;
 - (ii) a breach of representations and warranties or undertakings, or a default or review event triggered by a breach of representations, warranties or undertakings (or to cure, prevent, avoid, remedy or mitigate the effects of any such thing);
 - (iii) movement of monies between, or application of monies from, the Project Accounts in accordance with the terms of the Senior Financing Agreements, or any change to any cash sweep or lock-up provisions (other than to the Lock-up DSCR);
 - (iv) late or non-provision of information, notices, consents or licences;
 - (v) amendments to sub-contracts to which a Sub-contractor is party for the purposes of this Agreement;
 - (vi) approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Senior Financing Agreements);
 - (vii) restrictions imposed by the Senior Lenders on the dates on which the Senior Debt can be advanced to, drawn down, or withdrawn by the Contractor under the Senior Financing Agreements which are imposed as a result of any failure by the Contractor to ensure that the construction work is performed in accordance with the agreed construction programme and budget;
 - (viii) changes to milestones for drawdown or withdrawal set out in the Senior Financing Agreements and which are imposed as a result of any failure by the Contractor to ensure that construction work is performed in accordance with the agreed construction programme and budget;
 - (ix) failure by the Contractor to obtain any consent from statutory bodies required by the Senior Financing Agreements; or
 - (x) voting by the Senior Lenders and the voting arrangements between the Senior Lenders in respect of the levels of approval required by them under the Senior Financing Agreements;
- (d) any amendment, variation or supplement of any agreement approved by the Transport Agency as part of any Qualifying Change or Qualifying Change in Law under this Agreement;
- (e) any sale of shares in a General Partner by HoldCo General Partner or the Shareholders or securitisation of the existing rights and/or interests attaching to shares in a General Partner, or any sale of Partnership Interests in the Contractor or HoldCo LP by any Partner or securitisation of the existing rights and/or interests attaching to Partnership Interests in the Contractor or HoldCo LP;
- (f) any sale or transfer of a Subordinated Lender's existing rights and/or interests under the Subordinated Financing Agreements or securitisation of a Subordinated Lender's existing rights and/or interests under the Subordinated Financing Agreements;
- (g) any Qualifying Bank Transaction;

- (h) voluntary and mandatory prepayments contemplated by the Senior Financing Agreements; or
- (i) conversion of the construction facility to the term facility under the Senior Financing Agreements;

Exempt Refinancing Conditions means the conditions set out in clause 52.7 (Exempt Refinancing Conditions);

Exit Survey means each survey of the P2Wk Project to be undertaken under clause 80 (Exit Survey);

Expiry Date means 25 years:

- (a) where the AMM Early Fee Option applies, from the later of the Service Commencement Date and the Planned Service Commencement Date; and
- (b) where the AMM Early Fee Option does not apply, from the Service Commencement Date;

Extension Event means any:

- (a) Compensation Extension Event;
- (b) Uninsurable Event;
- (c) Force Majeure Event;
- (d) Unforeseeable Contamination;
- (e) blockade or embargo that directly affects the P2Wk Project Site; and
- (f) without limiting limb (c) of this definition, any event or occurrence giving rise to actual physical loss, destruction of or damage to the P2Wk Project from any cause and to which the Contractor is entitled to recourse under the Contract Works Insurance (Material Damage) Policy (excluding, for the avoidance of doubt, any event or occurrence to the extent recourse to the Contract Works Insurance (Material Damage) Policy is not available due to the operation of any deductible on that insurance);

External Infrastructure means infrastructure services which are external to but are to be provided to the P2Wk Project Site and which are used in common with other users, including roads, footpaths, transport facilities and services and includes Utilities Infrastructure;

Extra Land is defined in clause 22.1(f);

Fatality has the meaning given to that term in Schedule 13 (Performance Regime);

Fatality / Serious Injury Report means any report required to be given by the Contractor to the Transport Agency in accordance with paragraph 10 (Road Crash Report) of Schedule 21 (Reporting);

Final Design Documentation means each set of Design Documentation marked as "for construction" and that is to be used in the construction of the relevant section of the P2Wk Project, as finalised in accordance with clause 27 (Design and Design Development);

Finalised is defined in paragraph 4 (Effect of review) of Schedule 8 (Review Procedures);

Financial Close means the later of the dates on which:

- (a) all the Conditions Precedent are satisfied or waived, as set out in a notice given by the Transport Agency under clause 10.4 (Conditions Precedent); and
- (b) the Swaps to be entered into in accordance with the Financial Close Adjustment Protocol are priced, set and incorporated in the Base Case;

Financial Close Adjustment Protocol means the financial close adjustment protocol in the form agreed between the parties (each acting reasonably) prior to Financial Close;

Financial Records is defined in clause 18.2 (Financial Records);

Financier Direct Deed means the deed so named and made between, amongst others, the Transport Agency, the Contractor and the party named therein as the Agent (for the Senior Lenders) in substantially the form of Annexure 1 to Schedule 3 (Project and Ancillary Documents);

Financing Agreements means all or any of the agreements or instruments entered into or to be entered into by the Contractor (or a Contractor Entity) relating to the financing of the Project (including the Initial Financing Agreements and any agreements or instruments to be entered into by the Contractor (or a Contractor Entity) relating to the re-scheduling of their indebtedness or any Refinancing);

Financing Default means any event of default (however described) in respect of the Contractor under the Senior Financing Agreements;

Find means all or any materials or objects of any kind (including wildlife) found at or on the P2Wk Project Site or Other Land (as applicable) that are or appear to be fossils, antiquities, protected New Zealand objects under the Protected Objects Act 1975, protected wildlife under the Wildlife Act 1953, or other objects or materials having scientific, geological or historic value as well as human remains or ordnance;

Fit for the Intended Purposes means, in respect of all or any part of the P2Wk Project as from the Service Commencement Date, that the P2Wk Project:

- (a) meets the Works Requirements (as may be amended as a result of any Confirmed Change);
- (b) is capable of enabling the Contractor to provide the AMM Services:
 - (i) in accordance with the Service Requirements; and
 - (ii) so that the Availability Criteria can be achieved and maintained,

in each case to the standards required under this Agreement at the relevant time;

Fitout means all alterations and additions, fittings and partitioning, service facilities, plant and machinery, furnishings, light fittings, and equipment, made to or installed in the facilities comprising the P2Wk Project by the Contractor, but excludes Fixtures;

Fixtures means those buildings, including component parts of buildings, other structures and improvements and other property that are or have become attached or affixed to the P2Wk Project Site and would at Law, at the relevant time, comprise a 'fixture' and, for the avoidance of doubt, for the purposes of this Agreement includes a road;

Floating Rate Commencement Date means 29 August 2023;

Force Majeure Event means any:

- (a) cyclone, tornado, earthquake, natural disaster, tsunami, flood or volcanic eruption, landslide or mudslide;
- (b) civil riot, civil rebellion, revolution, terrorism, military usurped power, act of sabotage or act of a public enemy and war (declared or undeclared) or other like hostilities;
- (c) epidemics or pandemics to the extent that the Contractor or its Sub-contractors, cannot, in compliance with Law, access the P2Wk Project Site or deliver the Services;
- (d) "terrorist act" as defined in section 5 of the Terrorism Suppression Act 2002;
- (e) ionising radiation, Contamination by radioactivity, nuclear, chemical or biological Contamination not caused or contributed to by the Contractor or any Contractor Related Person; and/or
- (f) explosion or fire caused by an event referred to in paragraph (a) or (b), not caused or contributed to by the Contractor or any Contractor Personnel, where the Contractor can demonstrate that all reasonable preventative measures were taken (having regard to the nature of the P2Wk Project Site and the P2Wk Project) to minimise the cause and effect of the explosion or fire on the performance of its obligations under this Agreement,

but excludes any Natural Disaster Event occurring on or after the Service Commencement Date;

Forward Works Plan means the plan of that name prepared by the Contractor as part of the Contract Plan in accordance with clause 29.2(a)(ii), clause 31 (Maintenance of Services Documentation) and Part 2 (Services Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

GAAP has the meaning given to the term "generally accepted accounting practice" in section 8 of the Financial Reporting Act 2013;

General Breach means any failure by the Contractor to comply with its obligations under this Agreement which failure is not:

- (a) in relation to, or analogous to, compliance with the KPIs;
- (b) in relation to, or analogous to, any Unavailability Event;
- (c) a Charge Event nor in relation to, or analogous to, a Charge Event; or
- (d) in relation to, or giving rise to a deduction or liquidated damages in respect of Snagging Defects or failing to meet the Planned Service Commencement Date or any Planned Close-out Date,

which is notified by the Transport Agency to the Contractor under clause 75.3 (Notice of General Breach);

General Change in Law means a Change in Law that is not a Specific Change in Law;

General Change in Law Contractor's Share means the proportion of the costs arising from Cumulative Capital Expenditure and/or Qualifying Opex to be borne by the Contractor, as set out in the following table:

Cumulative Capital Expenditure	Contractor's Share (Cumulative Capital Expenditure)	Qualifying Opex	Contractor's Share (Qualifying Opex)
█	█	█	█
█	█	█	█
█	█	█	█

General Partner means each of Contractor General Partner and HoldCo General Partner and **General Partners** means both of them;

General Refinancing means any Refinancing that is neither a Permitted Refinancing nor an Exempt Refinancing;

General Refinancing Conditions means the conditions set out in clause 52.2 (General Refinancing conditions);

Geotechnical Elements means those components of the P2Wk Project that consist of or contain soil, rock or other geological material, whether engineered (e.g., stabilised soil or soil mixed materials) or in a natural state, including geotechnical aspects of all structures and any embankments or cuttings (e.g. earth slopes, fills, retaining walls, mechanically stabilised earth slopes or walls, soil nails, ground anchors, substance drainage, ground improvement, foundations for structures, ground treatment) but not including processed rock bound within concrete or other solid mass;

Good Industry Practice means that degree of skill, care, prudence and foresight and operating practice that would reasonably and ordinarily be expected of a skilled and competent supplier of services engaged in the same type of undertaking as that of the Contractor and/or any Sub-contractor under the same or similar circumstances as those contemplated by this Agreement;

Governmental Entity means any government, or any governmental or semi-governmental entity, person or authority, body politic (but excluding any political party), government department, local government authority or statutory authority in New Zealand and includes (unless the context otherwise requires) the Transport Agency;

Group means either the Project Governance Group or the Relationship Management Group (as applicable);

GST means tax chargeable under the GST Act;

GST Act means the Goods and Services Tax Act 1985;

GRPA means the Government Rooding Powers Act 1989;

Hand Back Requirements means those requirements for hand back of the P2Wk Project that are set out in Schedule 12 (Service Requirements) and any requirements established in accordance with the Maintenance Management Plan;

Handover Package means the package of that name prepared by the Contractor as part of the Contract Plan in accordance with Part 20 (Hand back and disengagement) and Part 2 (Services Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Hazardous Substance means any substance that would or may reasonably be expected to cause damage or injury to any person, property or the Environment;

Health and Safety Management Plan means the plan of that name prepared by the Contractor as part of the P2Wk Project Operations Plan in accordance with clause 17.3 (Health and safety obligations), clause 29.2(a)(ii), clause 31 (Maintenance of Services Documentation) and Part 2 (Services Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Hedge Counterparty means a person providing interest rate Swaps or equivalent hedging products to the Contractor under the Senior Financing Agreements from time to time;

High Productivity Motor Vehicle or HPMV means a high productivity motor vehicle, as detailed in Land Transport Rule: Vehicle Dimensions and Mass Amendment 2010 to the Vehicle Dimensions and Mass Rule 2002;

Hōkai Nuku means the authorised representative of Ngāti Manuhiri, Ngāti Mauku/Ngāti Kauae, Ngāti Rango and Ngāti Whātua;

Hōkai Nuku Partnership Plan means the plan of that name to be prepared by the Contractor in accordance with clause 3 of Schedule 22 (Hōkai Nuku);

HoldCo General Partner means NX2 Hold GP Limited;

HoldCo LP means NX2 Hold LP;

HoldCo Limited Partner means, as at the date of this Agreement, each of the Accident Compensation Corporation, Public Infrastructure Partners II LP, FBII (Puhoi) Limited and P2W Investment Limited, and includes each person which accedes to the HoldCo Partnership Agreement as a limited partner from time to time but excludes any such person with effect from the date on which it ceases to be a limited partner in accordance with the terms of the HoldCo Partnership Agreement and **HoldCo Limited Partners** means all of them;

HoldCo Partnership Agreement means the limited partnership agreement relating to HoldCo LP dated on or about the date of this Agreement, made between HoldCo General Partner and the HoldCo Limited Partners;

HSE Legislation means all statutes, regulations and other subordinate legislation in force, or that comes into force, in New Zealand while this Agreement remains current in respect of health and safety in employment (including the Health and Safety at Work Act 2015 and all regulations made under that Act);

Immediate Termination Event is defined in clause 75.2(a);

Incident means any event that:

- (a) poses an immediate or potential threat to the safety of Users or Contractor Personnel;
- (b) prevents the P2Wk Project or any part of it from being available to Users for the safe, continuous and efficient passage of vehicles; or
- (c) requires an urgent response;

- (i) to protect or repair the P2Wk Project, other property or the public;
- (ii) to provide access to Emergency Services or traffic management; or
- (iii) to prevent any occurrence which could cause damage to the P2Wk Project, other property or personal injury to the public or compromise the safety of any person or property,

and includes Special Events and Severe Weather Events, each as defined in Schedule 12 (Service Requirements);

Incident Report means any report required to be given by the Contractor to the Transport Agency in accordance with paragraph 8 (Incident Report) of Schedule 21 (Reporting);

Indemnified Party means each of the Transport Agency, Transport Agency Related Persons and Transport Agency Personnel, excluding the Independent Reviewer;

Independent Expert means a person appointed for the time being under clause 89 (Accelerated Dispute Resolution Procedures), who has suitable expertise and experience required to determine a Dispute having regard to the nature of the Dispute;

Independent Reviewer means the person referenced in clause 25.5 (Independent Reviewer), who will be appointed jointly by the Transport Agency and the Contractor to act as an independent certifier under the Independent Reviewer Agreement;

Independent Reviewer Agreement means the agreement under which the Independent Reviewer is appointed by the Transport Agency and the Contractor, on terms that are the same or substantially similar to the form of agreement set out in Annexure 3 (Independent Reviewer Agreement) to Schedule 3 (Project and Ancillary Documents);

Indexed is defined in clause 3.5 (Indexation and replacement of indices);

Industrial Special Risks (Material Damage) Policy means the insurance policy of that name referred to and described in Part 1 (Required Insurances) of Schedule 15 (Insurance);

Industrial Waste means any waste arising from commercial, industrial or trade activities and any waste containing substances or materials which are potentially harmful to any person, property or the Environment;

Initial Financing Agreements means the Financing Agreements put in place on or prior to Financial Close as described in Schedule 4 (Financing), copies of which have been initialled by the parties for the purposes of identification;

Initial Fixtures is defined in clause 11.2(a);

Initial Site means the interests in land identified as such on the P2Wk Site Plans, subject to:

- (a) the Disclosed Title Matters; and
- (b) the Third Party Property Agreements,

but excludes the properties listed in Appendix I (Tenancies and Grazing Licences) to Schedule 5 (Property);

Inspection and Test Plan means the plan of that name prepared by the Contractor as part of the Works Project Management Plan in accordance with clause 26 (Planning and mobilisation) and Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Insolvency Event means, in relation to a person, any of the following events:

- (a) the presentation of an application for liquidation of that person that is not discharged within 30 days of its filing or which is not demonstrated to the Transport Agency prior to the expiry of that 30 day period as being an application that is frivolous, vexatious or relates to a liability that has been paid in full by the Contractor;
- (b) entering into, or issuing any formal proposal or resolution to enter into, any compromise or scheme of arrangement with all or some of that person's creditors, except as part of a solvent reconstruction or amalgamation previously approved by the Transport Agency in writing;
- (c) the appointment of a liquidator, receiver, statutory manager, administrator or similar official to that person;
- (d) the suspension or threatened suspension by that person of the payment of that person's debts generally;
- (e) the cessation by that person of its business in New Zealand;
- (f) the enforcement of any security against the whole or a substantial part of that person's assets;
- (g) in relation to a limited partnership, a terminating event has occurred (as set out in section 86 of the Limited Partnerships Act); or
- (h) any other insolvency event or proceedings analogous to any of the foregoing occurring in any relevant jurisdiction;

Insurance Policy means any policy or contract for insurance that is required to be procured and maintained under clause 70.2 (Specified insurances) or clause 70.3 (Other insurances);

Intellectual Property means patents, registered designs, petty patents, utility models, trade marks (including logos and trade dress), domain names, copyright, circuit layouts, rights in computer software and databases, rights in inventions, know how and business process and methods, (in each case) whether registered or unregistered (including applications for the grant of any of the foregoing) and all rights or forms of protection that are capable of intellectual property protection under Law;

Intellectual Property Claim means any third party actions, Claims and/or demands made against an Indemnified Party that possession or utilisation by an Indemnified Party of the Contractor Background IP or the Developed IP infringes the Intellectual Property rights of any third party;

Intellectual Property Materials means any software, firmware, documented methodology or process, documentation or other material whatsoever (including any reports, specification, plans, business rules or requirements, user manuals, user guides, operations manuals, training materials and instructions) in either or both human readable or computer readable form which wholly or partly embody or contain Intellectual Property;

Interface Agreement means the interface agreement entered into between the Contractor, the Construction Sub-contractor and the AMM Sub-contractor dated on or about the date of this Agreement;

Intervening Event means:

- (a) any Compensation Intervening Event;

- (b) any Uninsurable Event;
- (c) any Force Majeure Event;
- (d) any Unforeseeable Contamination;
- (e) without limiting limb (c) of this definition, any insured event or occurrence giving rise to physical loss, destruction of or damage to the P2Wk Project from any cause excluding, for the avoidance of doubt, any event or occurrence to the extent recourse to insurance is not available due to the operation of any deductible on that insurance;
- (f) one or more Utility Services not being available (either at all or in the necessary quantity or quality of service) for use for its generally intended purposes for any reason occurring upstream from the point of connection of the relevant Utility Service to the P2Wk Project Site other than to the extent arising from:
 - (i) an act, omission or lack of diligence of the Contractor or any Contractor Personnel; and/or
 - (ii) a dispute between the Contractor or relevant Major Sub-contractor and the relevant Utility Service Provider regardless of how or why that dispute is initiated or by whom; and/or
- (g) any blockade or embargo that directly affects the P2Wk Project Site;

ITS means intelligent transport systems;

Iwi Advisor means any person or persons appointed by Hōkai Nuku as Iwi Advisor in accordance with RMA Conditions D7 and RC5;

Joint Insurance Account means the bank account to be held and operated in accordance with clause 72.2(b) in the name of the Contractor, having account number [REDACTED] and held with ANZ Bank New Zealand Limited;

Key Performance Indicator or **KPI** means each of the key performance indicators set out in the KPI Table and the AMM KPI, and reference to a KPI by number is reference to the corresponding row of the KPI Table;

Key Road Controlling Authorities Communications Plan means the plan of that name prepared by the Contractor in accordance with clause 29.2(a)(ii), clause 31 (Maintenance of Services Documentation) and Part 2 (Services Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

KiwiRAP means the New Zealand Road Assessment Programme;

KiwiRAP Survey means the inspection carried out under KiwiRAP to determine road protection scores in respect of each section of the State Highway network;

KPI Breach means any failure to comply with a Key Performance Indicator;

KPI Deductions means Deductions imposed as a result of any KPI Breach in accordance with paragraph 10 (KPI Deductions) of Schedule 13 (Performance Regime);

KPI Table means Table 2 as set out in Appendix 1 (Key Performance Indicators) to Schedule 13 (Performance Regime);

Lane has the meaning given to that term in Schedule 13 (Performance Regime);

Lane Closure Protocols has the meaning given to that term in Schedule 13 (Performance Regime);

Last Service Commencement Date means 27 April 2023 (as may be postponed in accordance with clause 35 (Extension Events));

Laws means those principles of New Zealand law established by the courts, statutes, regulations, ordinances, by-laws and any other subordinate forms of rule making of government, any local authority, the Transport Agency or any other Governmental Entity as well as any Consents (and any conditions or requirements under them);

Legal Proceedings is defined in clause 55.3(f);

Level 1 SFP means, at any time, but subject to adjustment in accordance with paragraph 16 (Allocation and consequences of Service Failure Points) of Schedule 13 (Performance Regime), the Contractor has incurred 175 or more SFPs, in aggregate, in respect of the previous four or less Quarters;

Level 2 SFP means, at any time, but subject to adjustment in accordance with paragraph 16 (Allocation and consequences of Service Failure Points) of Schedule 13 (Performance Regime), the Contractor has incurred 500 or more SFPs, in aggregate, in respect of the previous four or less Quarters;

Level 3 SFP means, at any time, but subject to adjustment in accordance with paragraph 16 (Allocation and consequences of Service Failure Points) of Schedule 13 (Performance Regime), the Contractor has incurred 5,000 or more SFPs, in aggregate, in respect of the previous four or less Quarters;

Level 4 SFP means, at any time, but subject to adjustment in accordance with paragraph 16 (Allocation and consequences of Service Failure Points) of Schedule 13 (Performance Regime), the Contractor has incurred 15,000 or more SFPs, in aggregate, in respect of the previous four or less Quarters;

Level of Service or LOS has the meaning given to that term in the Highway Capacity Manual (2010), published by the Transportation Research Board, and reference to a level of service between A and F will be interpreted in accordance with that manual;

Liability includes any debt, obligation, cost (including legal costs, deductibles or increased premia), expense, loss, damage, compensation, charge or liability of any kind, actual, prospective or contingent and whether or not currently ascertainable and whether arising under or for breach of contract, in tort (including negligence), restitution, under statute (including, to the extent permitted by Law, statutory fines, penalties and criminal liability) or otherwise at Law or in equity;

Limited Partner means, as at the date of this Agreement, each of the HoldCo Limited Partners and HoldCo LP and **Limited Partners** means all of them;

Limited Partnership Certificate means a certificate in the form set out in Annexure A to Schedule 1 (Conditions Precedent);

Limited Partnerships Act means the Limited Partnerships Act 2008;

Local Authority has the meaning given to it in the Local Government Act 2002;

Location Supplement has the meaning given to it in Schedule 13 (Performance Regime);

Lock-in Period means the period starting from the Execution Date and ending 12 months after the Service Commencement Date;

Lock-up DSCR means, in respect of any applicable Refinancing, the level of the debt service coverage ratio (however expressed) in the Senior Financing Agreements to apply from the date of that Refinancing until the scheduled maturity date of that Refinancing that would, if reached, prevent the Contractor from making Distributions from cash available after debt service (however expressed) for any period of time;

Losses means all damages, losses, Liabilities, costs, expenses (including legal expenses on a solicitor/client basis and other professional charges and expenses) and charges whether arising under statute, contract or at common law, or in connection with judgments, proceedings, internal costs or demands;

LTMA means the Land Transport Management Act 2003;

Maintenance Management Plan means the asset replacement, maintenance and refurbishment plan for the P2Wk Project prepared by the Contractor as part of the Contract Plan in accordance with clause 29.2(a)(ii), clause 31 (Maintenance of Services Documentation) and Part 2 (Services Documentation) of Schedule 9 (Operative Documents), including the Annual Work Plan and that has been Finalised under the Review Procedures;

Major sub-contract means each Construction sub-contract and each AMM Sub-contract;

Major Sub-contractor means each person who, at any time, is party to a Major sub-contract except the Contractor;

Major Sub-contractor Breach means a failure on the part of the Contractor to comply with the requirements of clause 16.1(i);

Major Sub-contractor's Direct Deed means each direct deed made between, amongst others, each Major Sub-contractor and the Transport Agency substantially in the form of deed set out in Annexure 2 (Major Sub-contractor's Direct Deed) to Schedule 3 (Project and Ancillary Documents);

Major Sub-contractor's Intellectual Property rights means those Intellectual Property rights for the time being vested in a Major Sub-contractor or by a licensor of that Major Sub-contractor;

Māori Claim means any claim made by Māori (whether an individual, hapū or iwi group or otherwise) under Te Ture Whenua Māori Act 1993, the Treaty of Waitangi, the Treaty of Waitangi (State Enterprises) Act 1988 or common or customary law, but not being:

- (a) a claim arising out of any wilful misconduct by the Contractor or any Contractor Personnel or any breach of their obligations under this Agreement; or
- (b) any claim in respect of a Find;

Margin means the fixed percentages that the Contractor or any Sub-contractor may charge in relation to a Change in accordance with the Change Compensation Principles to cover all offsite corporate overheads and profit (including the cost of the Contractor's project management services);

Margin Allowances means the margin allowances specified in Appendix 1 (Margin Allowances) of Schedule 17 (Change Compensation Principles);

Material Adverse Effect means a material adverse effect on:

- (a) the ability of the Contractor to perform and observe its obligations under any Project Document;

- (b) the rights of the Transport Agency or any Transport Agency Related Person under any Project Document; or
- (c) the ability, cost or capacity of the Transport Agency or any Transport Agency Related Person to exercise its rights or perform its obligations under any Project Document;

Material Change means a Change that is not a Non-Material Change;

Minimum Projected DSCR means, in respect of any applicable Refinancing, the minimum projected debt service coverage ratio (however expressed) in the Base Case for the period to which the applicable Senior Financing Agreements apply as set out in the certificate provided by the Contractor to the Transport Agency under clause 51.3(a)(i);

MLR Change has the meaning given to that term in clause 17.4 (Consents);

MLR Consents means the approvals to be obtained by the Transport Agency for the design, construction and/or operation of the MLR Infrastructure in accordance with this Agreement;

MLR Infrastructure means the earthworks, drainage, utilities, pavements and traffic services that are to be designed and constructed to widen to four lanes the existing State highway 1 between:

- (a) the Northern Intersection (as defined in Schedule 13 (Performance Regime)) and the Matakana Link Road intersection;
- (b) the Matakana Link Road intersection and Hudson Road; and
- (c) its connection to the existing Hudson Road signalised intersection;

MLR Infrastructure Baseline means the MLR Infrastructure design as described in drawing DG-CE-0021;

Modelled Senior Debt means, as at any date, the principal amount (including capitalised interest, fees and costs, if applicable) specified in cells "J54:GT54" of the Base Case sheet entitled "Returnables" in its form as at Financial Close in respect of that date;

Modelled Senior Debt Cap means, as at any date, an amount equal to ■ per cent of the Modelled Senior Debt as at that date;

Moneys Owning means all moneys that the Contractor, alone or together with any other person, at any time becomes actually liable to pay to, or for the account of, the Transport Agency (alone or together with any other person) on any account whatsoever under or in relation to any Project Document (including by way of principal or interest, fees, costs, charges, expenses, indemnity or damages);

Moral Rights means the rights conferred on authors of copyright works under Part 4 of the Copyright Act 1994;

Motor Vehicle Insurance means the Motor Vehicle Insurance policy referred to and described in Sub-part 2 (Services Phase) of Part 1 (Required Insurances) of Schedule 15 (Insurance);

Manual of Traffic Signs and Markings or **MOTSAM** means the Transport Agency's Manual of Traffic Signs and Markings (as at 23 March 2016);

Natural Disaster Event means, following the Service Commencement Date, any:

- (a) earthquake;

- (b) volcanic eruption;
- (c) geothermal or hydrothermal activity;
- (d) tsunami including tidal flooding caused by tsunami; or
- (e) fire (including subterranean fire) caused by another Natural Disaster Event;

Natural Disaster Event Compensation means compensation for a Natural Disaster Event paid or payable by the Transport Agency under clause 36 (Intervening Events);

Natural Disaster Event Cost Cap means \$50,000,000 (indexed) in respect of any Natural Disaster Event or series of related Natural Disaster Events occurring over a consecutive 72 hour period;

Natural Disaster Event Time Cap means 12 months from the date of the relevant Natural Disaster Event or, where applicable, from the date of the first in any series of related Natural Disaster Events occurring over a consecutive 72 hour period;

Neighbour Agreements has the meaning given to that term in Schedule 5 (Property);

Net Present Value of the Distributions means the discounted values, calculated as of the estimated date of the Refinancing of each of the relevant projected Distributions, in each case discounted using the Threshold Equity IRR;

New Contract is defined in Schedule 18 (Calculation of Compensation on Termination);

New Contractor means the person who has entered or who will enter into the New Contract with the Transport Agency;

New Zealand Building Code or **NZBC** means the New Zealand Building Code, as set out in Schedule 1 to the Building Regulations 1992;

Non-Material Change means a Change after the Service Commencement Date that, if implemented, will not:

- (a) result in any change to the Unitary Charge;
- (b) change any risk or Liability of the Transport Agency; or
- (c) increase the likelihood of the Contractor failing to meet the Transport Agency's Requirements or materially and adversely affect the Contractor's ability to perform its obligations under this Agreement;

Notice of Dispute is defined in clause 87.1 (Notice of Dispute);

Objectives means:

- (a) to provide improved access between Pūhoi and Warkworth, and by extension between Auckland and Northland and relevant points between;
- (b) to assist in enabling wider national economic development by providing a cost-optimised route that better provides for the through movement of freight and people and improved connections to regional freight hubs;
- (c) to achieve a value for money solution for the Transport Agency and its customers; and

- (d) to enable the delivery of the Transport Agency's key required outcomes for the P2Wk Project, which are the achievement of:
 - (i) high and sustained safety (ongoing reduction in deaths and serious injuries) and continuous safety improvements;
 - (ii) predictable journeys for all customers, including for freight;
 - (iii) protection of the Transport Agency's reputation through high and sustained customer satisfaction and strong and sustained stakeholder relationships, including through amenity and environmental outcomes; and
 - (iv) provision to the Transport Agency of a high quality, whole of life asset outcome;

Officer means a person who (in relation to an entity):

- (a) is a director of that entity;
- (b) makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of that entity;
- (c) has the capacity to affect significantly the entity's financial standing; or
- (d) in accordance with whose instructions or wishes the directors of the entity are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the entity);

Open Book Basis includes (without limiting the natural meaning of that term) but subject at all times to applicable legal professional privilege (if any):

- (a) the provision of all information reasonably required in order to be able to assess direct and actual costs, Losses and Margins (where payable) whether that information is held by the Contractor or a Contractor Related Person;
- (b) the provision of a full breakdown of all relevant preliminaries, labour, equipment, materials, sub-contract costs and Margins in a clear and transparent manner; and
- (c) the conduct by or on behalf of the Transport Agency of such audits and inspections of the Financial Records of the Contractor or a Contractor Related Person in order to enable the Transport Agency to verify the Contractor's compliance with any "open-book" requirements specified in this Agreement;

Operating Term means the period starting on the Service Commencement Date and ending on the last day of the Contract Term;

Operative Documents means the Works Provisioning Documentation and the Services Documentation, and includes any other documentation agreed by the Transport Agency and the Contractor to comprise Operative Documents;

Other Land means the land identified as 'VMS Sites' and sites of other ITS equipment in accordance with Part 5 of Schedule 5 (Property);

Outline Plan means each outline plan, within the meaning of section 176A of the Resource Management Act 1991, to be submitted by the Contractor to Auckland Council in respect of the P2Wk Project, and includes any changes to the Outline Plans made by the Contractor in response to a request for changes by Auckland Council pursuant to section 176A of the Resource Management Act 1991;

Outstanding Work means any work required, as identified in an Asset Survey or an Exit Survey, to return the P2Wk Project to the then-applicable Required Standard or, where applicable, to meet the Hand Back Requirements;

Pā Management Plan means the plan of that name required by Designation Condition 77, prepared by the Transport Agency in accordance with Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents);

Parent Company Guarantee means, in respect of each Major Sub-contractor, a duly executed guarantee from the ultimate parent company of that Major Sub-contractor (unless otherwise agreed in writing by the Transport Agency), in favour of (amongst others) the Contractor, in relation to the Major Sub-contractor's obligations under the relevant Major sub-contract, with the approved guarantors being, as at the date of Financial Close, Fletcher Building Limited and ACCIONA Infraestructuras S.A. in respect of the Construction Sub-contractor and Fletcher Building Limited and ACCIONA Infraestructuras S.A. in respect of the AMM Sub-contractor;

Partner means the each General Partner and each Limited Partner and **Partners** means all of them;

Partnership Debt means any loan, convertible note, debt security or other instrument treated as debt in accordance with GAAP advanced, made or to be made available by a Limited Partner (or by a person under the Control of a Limited Partner's holding company (within the meaning of section 5 of the Companies Act 1993) or if the Limited Partner is a limited partnership itself, by a person under the Control of such Limited Partner's limited partners) to the Contractor or HoldCo LP;

Partnership Interest means those interests set out in section 38(1) of the Limited Partnerships Act;

Pavement Condition Assessment Survey means a survey carried out to assess road condition, including in relation to skid resistance, texture, roughness, rutting, deflections, geometry (gradient, crossfall and curvature), centreline GPS coordinates, pavement marking and raised pavement markers);

Payment Period means:

- (a) in respect of the AMM Early Services Fee, each AMM Month;
- (b) in respect of any other amounts, each Contract Quarter;

Permitted Hedging means the entry into Swaps that meet the Permitted Hedging Conditions;

Permitted Hedging Conditions means the conditions set out in clause 52.5 (Permitted Hedging Conditions);

Permitted Refinancing means a Refinancing that meets the applicable Permitted Refinancing Conditions;

Permitted Refinancing Conditions means:

- (a) in the case of a Refinancing that is proposed to be a Core Refinancing, the Core Refinancing Conditions;
- (b) in the case of a Refinancing that is proposed to be a Permitted Hedging, the Permitted Hedging Conditions; and

- (c) in the case of a Refinancing that is proposed to be a Rescue Refinancing, the Rescue Refinancing Conditions;

Permitted Security Interest means:

- (a) a Security Interest arising solely by operation of Law and in the ordinary course of business of the Contractor (including for securing payment of Tax) provided the Contractor is not in payment default to the holder of that Security Interest;
- (b) any Security Interest that is created or provided for by a lease for a term of more than one year (as defined in the Personal Property Securities Act 1999) in respect of which the Contractor is the lessee and that does not secure payment or performance of an obligation; or
- (c) any Security Interest created by a Senior Financing Agreement specified in Schedule 4 (Financing) or to which the Transport Agency has given its prior written consent under clause 52 (Refinancing – Transport Agency consent);

Persistent General Breach means, on any date, that in the 12 months immediately preceding that date:

- (a) 8 or more General Breaches have occurred and remain unremedied to the Transport Agency's reasonable satisfaction; and/or
- (b) 16 or more General Breaches have occurred and have been remedied to the Transport Agency's reasonable satisfaction;

Physical Damage Policies means the Contract Works (Material Damage) Policy and/or the Industrial Special Risks (Material Damage) Policy, and **Physical Damage Policy** means either of them;

Planned Close-out Date means, in respect of each Close-out Deliverable, the date referred to as its Planned Close-out Date in the Close-out Plan;

Planned Service Commencement Date means 28 October 2021 (as may be postponed in accordance with clause 35 (Extension Events));

Post Termination Date Service Amount is defined in Schedule 18 (Calculation of Compensation on Termination);

PPP means the New Zealand Government's public private partnership initiative;

Pre-approved Lender List means the list of persons appended as Schedule 1 (Pre-approved Lender List) to the Financier Direct Deed as at the Execution Date and as may be updated in accordance with its terms from time to time;

Pre-Construction Stakeholder and Communications Plan means the plan of that name prepared by the Contractor in accordance with clause 26 (Planning and mobilisation) and Part 1 (Works Provisioning Documentation of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Preliminary Design Documentation means the Design Documentation forming part of the Contractor's Proposal;

Pre-Refinancing Equity IRR means the Equity IRR calculated immediately prior to a Refinancing;

Prescribed Rate means, as at any date, two per cent above the 90 day bank bill bid settlement rate displayed on page BKBM (or its successor page) of the Reuters Monitor Screen at 10.45 am on that date;

Prevention Plan is defined in clause 75.4(c);

Principal Adjustment Amount means any amount established, for the purposes of paragraph 6 (Base Interest Amount) of Schedule 14 (Payment Mechanism) in accordance with clause 53.4 (Establishment of Principal Adjustment Amount);

Probity Event means:

- (a) offering, giving or agreeing to give to any employee or agent of, or contractor to, the Transport Agency or any other Governmental Entity any gift or consideration of any kind as an inducement or reward:
 - (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other contract with the Transport Agency or another Governmental Entity; or
 - (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other contract with the Transport Agency or another Governmental Entity;
- (b) entering into this Agreement or any other contract with the Transport Agency or another Governmental Entity in connection with which commission has been paid or has been agreed to be paid by the Contractor or on its behalf, or to its knowledge, unless before the relevant contract is entered into particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to the Transport Agency;
- (c) committing any offence under any Laws creating offences in respect of fraudulent acts, in respect of fraudulent acts in relation to this Agreement or any other contract with the Transport Agency or another Governmental Entity;
- (d) defrauding or attempting to defraud or conspiring to defraud the Transport Agency or another Governmental Entity; or
- (e) an event, matter or thing for which the Contractor or Contractor Personnel is responsible (but excluding the D&C Personnel after the second anniversary of the Service Commencement Date) (other than an event, matter or thing for which there is another express remedy under this Agreement) that:
 - (i) constitutes a conflict of interest that is or is likely to have a material adverse effect on the ability of the Contractor to perform its obligations under this Agreement or on the rights of the Transport Agency or any Transport Agency Related Person under any Project Document; or
 - (ii) is or is likely to have a material adverse effect on:
 - (A) the reputation or credibility of the Transport Agency or another Governmental Entity; or
 - (B) the public interest (having regard to the policy objectives of the Transport Agency) and public confidence in the P2Wk Project;

Probity Investigation means such probity and criminal investigations as more particularly described in clause 21.4 (Probity Investigations) to report on the character, honesty and

integrity of any person as are required by Law or by the Transport Agency from time to time, to ensure that a person is fit and proper for its proposed or continued involvement in the Project;

Professional Advisor means any accounting, legal, insurance, engineering or technical services professional advisor;

Project means the Pūhoi to Warkworth PPP project, to be undertaken by the Contractor at the request of the Transport Agency in accordance with the Project Documents;

Project Accounts means the accounts referred to in and required to be established under the Financing Agreements;

Project Documents means those agreements listed as "Project Documents" in Part 1 (Overview of Project Documents and Ancillary Documents) of Schedule 3 (Project and Ancillary Documents) and includes any document or agreement entered into for the purpose of supplementing, amending, replacing or novating any of those listed documents that the parties have agreed (in writing) to be a Project Document;

Project Governance Group means the project governance group referred to in clause 15.1 (Governance), the composition, functions and processes of which are described in Schedule 7 (Governance and Service Management);

Project Stakeholder and Communications Plan means:

- (a) the Pre-Construction Stakeholder and Communications Plan;
- (b) the Construction Stakeholder and Communications Plan; and
- (c) the Services Stakeholder and Communication Plan;

Protected Disclosures Act means the Protected Disclosures Act 2000;

Public and Products Liability Insurance means the Public and Products Liability Insurance policy referred to and described in Sub-part 2 (Services Phase) of Part 1 (Required Insurances) of Schedule 15 (Insurance);

Public Records Act means the Public Records Act 2005, and includes any standards issued by the Chief Archivist (as defined in the Public Records Act) under section 27 of the Public Records Act, as amended under section 27(1)(b) of the Public Records Act, but only to the extent that:

- (a) the Chief Archivist has stated that compliance with those standards is mandatory; and
- (b) such standards have not been revoked;

P2Wk Construction Lease means the agreement to lease set out in clause 22.1(a)(i);

P2Wk Construction Lease Terms means the terms and conditions of lease described in Part 2 (P2Wk Construction Lease Terms) of Schedule 5 (Property);

P2Wk Designation means:

- (a) Designation 408; and
- (b) Designation 401;

P2Wk Main Alignment means the main carriageway within the P2Wk Operating Site between Pūhoi and Warkworth:

- (a) to be designed, constructed, financed, operated and/or maintained by the Contractor in accordance with the Project Documents; and
- (b) to form, following Works Completion, part of State highway 1;

P2Wk Operating Site means:

- (a) the site identified as such on the P2Wk Site Plans; and
- (b) following such identification, the site identified in accordance with paragraph 14 (Identification of P2Wk Operating Site and Surplus Land) of Schedule 5 (Property);

P2Wk Project means all of the earthworks, roading, culverts, bridges, structures, signage, signals, cabling, and other infrastructure located or to be located on the P2Wk Project Site, that together or separately are to be designed, constructed, financed, operated and/or maintained by the Contractor in accordance with the terms of this Agreement, including:

- (a) the entire physical infrastructure on the P2Wk Project Site including the P2Wk Main Alignment;
- (b) the grounds, planting, fences and structures situated within the P2Wk Project Site or which the Contractor is otherwise required to maintain under this Agreement;
- (c) all Fixtures and Fitout;
- (d) all plant and equipment that is to be exclusively used in or as part of the P2Wk Project following Service Commencement;
- (e) all areas of land, foundations, buttresses and other infrastructure supporting or required for the support of any other element of the P2Wk Project; and
- (f) all Changes made to the P2Wk Project under Part 12 (Changes);

P2Wk Project Lease means a deed of lease in substantially the form set out in Annexure 4 (P2Wk Project Lease) to Schedule 3 (Project and Ancillary Documents) over the P2Wk Operating Site;

P2Wk Project Operations Plan means the plan of that name prepared by the Contractor as part of the Contract Plan in accordance with clause 29.2(a)(ii), clause 31 (Maintenance of Services Documentation) and Part 2 (Services Documentation) of Schedule 9 (Operative Documents), including:

- (a) the Emergency Procedures and Preparedness Plan;
- (b) the Environmental and Social Management Plan;
- (c) the Quality Assurance Management Plan;
- (d) the Risk Management Plan; and
- (e) the Health and Safety Management Plan,

and that has been Finalised under the Review Procedures;

P2Wk Project Site:

- (a) means, on and from Financial Close, the Initial Site;
- (b) includes, from the date on which the Transport Agency notifies the Contractor that the relevant interests in such land have been acquired, the Deferred Acquisition Land and the Additional Land;
- (c) includes the P2Wk Operating Site;
- (d) includes, from the date that the Transport Agency agrees that Additional Mitigation Land (as defined in Schedule 5 (Property)) may be used by the Contractor in accordance with clause 20.2 of Schedule 5, such Additional Mitigation Land; and
- (e) excludes, from the date on which it is Returned, any Returned Land;

P2Wk Residual Site means, at any time after Service Commencement, the P2Wk Project Site excluding the P2Wk Operating Site;

P2Wk Site Plans means the plans attached as Appendix B (P2Wk Site Plans) of Schedule 5 (Property);

P2Wk Roads means the P2Wk Main Alignment, the Ramps, and any other roads within the P2Wk Operating Site for which the Contractor is responsible under this Agreement;

Qualifying Bank Transaction means:

- (a) the syndication or grant by a Senior Lender of any rights of participation, or the disposition by a Senior Lender of any of its rights, interests or obligations in respect of the Financing Agreements;
- (b) the grant by a Senior Lender of any other form of benefit or interest in either the Financing Agreements or the revenues or assets of the Contractor or a Contractor Entity, whether by way of security or otherwise; or
- (c) the transfer or assignment by the Agent of its role as agent or by the Security Trustee of its role as security trustee for the Senior Lenders under the Financing Agreements,

in each case to or in favour of:
- (d) a Qualifying Lender; or
- (e) any other institution in respect of which the prior written consent of the Transport Agency has been given;

Qualifying Change means a Change in respect of which a Change Notice has been served:

- (a) on the Transport Agency by the Contractor, which Change Notice has been confirmed by the Transport Agency under clause 44.1 (Confirmation of Change); or
- (b) on the Contractor by the Transport Agency:
 - (i) where the Transport Agency has confirmed that it is funding all or the remaining part of the Capital Expenditure; and
 - (ii) which Change Notice has been confirmed by the Transport Agency under clause 44.1 (Confirmation of Change),

and in respect of which, any documents or amendments to the Project Documents that are required in order to give effect to that Change have been signed by the parties and have become unconditional in all respects;

Qualifying Change in Law means a Change in Law that is:

- (a) a Specific Change in Law; or
- (b) a General Change in Law that comes into effect after the Service Commencement Date and involves Capital Expenditure;

Qualifying Lender means:

- (a) any Senior Lender or Affiliate of a Senior Lender (including, for the purposes of paragraphs (a) and (b) of the definition of Qualifying Bank Transaction, any securitisation vehicle of a Senior Lender where the Senior Lender remains the lender of record);
- (b) at any time, any person included on the Pre-approved Lender List at that time;
- (c) any bank registered and regulated under the laws of an OECD member country and having a long term issuer credit rating of at least BBB+ from Standard & Poor's Rating Services or Baa1 from Moody's Investor Services (or any equivalent credit rating from any other ratings agency consented to by the Transport Agency); or
- (d) any financial institution or superannuation fund organised under the laws of, or regulated in, an OECD member country and having a long term issuer rating of at least BBB+ from Standard & Poor's Rating Services or Baa1 from Moody's Investor Services (or any equivalent credit rating from any other ratings agency consented to by the Transport Agency), not being a financial institution (or any Affiliate of or fund controlled by a financial institution) that solely or predominantly invests in distressed debt assets;

Qualifying Opex means any increase in operating expenditure (being any expenditure to be treated as operating expenditure in accordance with GAAP from time to time) that has been incurred as a result of Cumulative Capital Expenditure;

Qualifying Refinancing means any Refinancing that will give rise to a Refinancing Gain, but excludes any Exempt Refinancing and any Rescue Refinancing;

Quality Assurance Management Plan means the plan of that name prepared by the Contractor as part of the P2Wk Project Operations Plan in accordance with clause 19.1 (Quality Assurance System), clause 29.2(a)(ii), clause 31 (Maintenance of Services Documentation) and Part 2 (Services Documentation) of Schedule 9 (Operative Documents), including the Annual Audit Plan, and that has been Finalised under the Review Procedures;

Quality Assurance System means that system for quality assurance to be developed by the Contractor under clause 19.1 (Quality Assurance System);

Quarter means, in respect of each calendar year, the three calendar month periods commencing on 1 January, 1 April, 1 July and 1 October in that calendar year;

Quarterly Maintenance Schedule means the schedule of that name prepared by the Contractor in accordance with clause 29.2(a)(ii), clause 31 (Maintenance of Services Documentation) and Part 2 (Services Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Quarterly Unitary Charge means the Quarterly amount calculated in accordance with paragraph 2 of Schedule 14 (Payment Mechanism);

Quarterly Unitary Payment means the Quarterly payment calculated in accordance with paragraph 1 of Schedule 14 (Payment Mechanism);

Ramp means a ramp forming part of the P2Wk Roads and connecting the P2Wk Main Alignment to adjoining State highways or Local Roads;

Rates means all rates (as defined in the Local Government (Rating) Act 2002) payable to a Local Authority in respect of the P2Wk Project Site and any fees imposed by a Governmental Entity in relation to the connection or provision of infrastructure to the P2Wk Project Site;

Records means the Service Records and the Financial Records;

Recovery Event means:

- (a) any event occurring after Works Completion causing physical loss, damage to or destruction of any part of the P2Wk Project; and/or
- (b) an Incident;

Rectification Programme is defined in clause 75.4(b)(i);

Refinancing means:

- (a) any amendment, variation, novation, supplement or replacement of or entry into any Senior Financing Agreement;
- (b) the exercise of any right, or the grant of any waiver or consent under any Senior Financing Agreement;
- (c) the entry into or breakage of any Swap (other than the entry into any Swap on or prior to Financial Close);
- (d) the disposition of any rights or interests in, or the creation of any rights of participation in, or in respect of, the Senior Financing Agreements or the creation or granting of any other form of benefit or interest in either the Senior Financing Agreements or the contracts, revenues or assets of the Contractor whether by way of security or otherwise; or
- (e) any other arrangement put in place by the Contractor or another person which has an effect which is similar to any of paragraphs (a) to (d) above;

Refinancing Breach means a failure by the Contractor

- (a) to obtain the prior consent of the Transport Agency to a Refinancing (other than an Exempt Refinancing) in accordance with this Agreement; or
- (b) to account to the Transport Agency for its required share of any Refinancing Gain in accordance with this Agreement;

Refinancing Gain means any Refinancing Gain (Lump Sum) and/or any Refinancing Gain (Quarterly);

Refinancing Gain (Lump Sum) means an amount equal to the greater of zero and $(A - B) - C$, where:

- A** = the Net Present Value of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing and using the Base Case as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made over the remaining term of the Agreement following the Refinancing;
- B** = the Net Present Value of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Base Case as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made over the remaining term of the Agreement following the Refinancing; and
- C** = any adjustment required to raise the Pre-Refinancing Equity IRR to the Threshold Equity IRR;

Refinancing Gain (Quarterly) means, where the Refinancing Gain (Lump Sum) for the applicable Refinancing is an amount greater than zero, in respect of any Contract Quarter (n), an amount equal to $(D_n - E_n) - F_n$, where:

- D_n** = the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing and using the Base Case as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made for Contract Quarter (n) following the Refinancing;
- E_n** = the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Base Case as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made for Contract Quarter (n) following the Refinancing; and
- F_n** = any adjustment equal to the greater of $(D_n - E_n)$ and zero required for Contract Quarter (n) to raise the Pre-Refinancing Equity IRR to the Threshold Equity IRR;

Reinstatement Plan is defined in clause 72.3;

Reinstatement Works is defined in clause 72.3(a);

Relationship Management Group means the relationship management group referred to in clause 15.1 (Governance), the composition, functions and processes of which are described in Schedule 7 (Governance and Service Management);

Relevant Event means:

- (a) any Confirmed Change;
- (b) any Qualifying Change in Law;
- (c) any Refinancing (other than an Exempt Refinancing);
- (d) any exercise by the Transport Agency of its Step-in Rights under clause 67.3 (Step-in – no Contractor breach) that affects the carrying out of any Services;
- (e) any requirement of the Transport Agency for additional insurances under clause 70.3(a);
- (f) any exercise of the Base Case Update Option; or

- (g) any other matter as a result of which there may be an adjustment to the Unitary Charge, in accordance with clause 5 (Base Case and Base Case adjustments);

Relevant Incident is defined in clause 72.3(a);

Relevant Index means CPI, except where and to the extent that any reference to indexation in this Agreement expressly refers to an alternative index, in which case it means that alternative index;

Relevant Insurances means the policies referred to and described in Sub-part 2 (Services Phase) of Part 1 (Required Insurances) of Schedule 15 (Insurance);

Relevant Payment Date is defined in clause 49.3(b);

Relevant Proceeds is defined in clause 72.3(c)(iv);

Relevant Service Commencement Date means:

- (a) as at any date on or prior to the Planned Service Commencement Date, the Planned Service Commencement Date; or
- (b) as at any date after the Planned Service Commencement Date, the Last Service Commencement Date;

Relevant Works is defined in clause 72.1;

Remediable Contractor Default is defined in clause 75.2(b);

Rental Prepayment means payment of the amount specified in cell "J57" of the Base Case sheet entitled "Returnables" as at Financial Close, to be made by the Contractor to the Transport Agency on the Service Commencement Date, representing the rental to be paid under the P2Wk Project Lease from its commencement until the earlier of the Actual Termination Date and the Expiry Date;

Reports means the reports the Contractor is required to prepare and make available to the Transport Agency under the terms of this Agreement, which include those reports specified in Schedule 21 (Reporting);

Reputable Insurer means:

- (a) an insurer licensed by the Reserve Bank of New Zealand under the Insurance (Prudential Supervision) Act 2010 and complying with the conditions (if any) of such licence and with a Reputable Insurer Rating; or
- (b) if an insurer is not "carrying on insurance business in New Zealand" (as defined in section 8 of the Insurance (Prudential Supervision) Act 2010), a financially sound and reputable insurer with a Reputable Insurer Rating; or
- (c) any other financially sound and reputable insurer approved in writing by the Transport Agency (such approval not to be unreasonably withheld);

Reputable Insurer Rating means a financial strength rating (or equivalent) of no less than:

- (a) A- from Standard & Poor's, a division of the McGraw-Hill Companies, or the successor to its ratings business; and/or
- (b) A- from A.M. Best Company, Inc, or the successor to its ratings business;

Required Insurance means an insurance that is required by the terms of this Agreement as set out in Part 1 (Required Insurances) of Schedule 15 (Insurance);

Required Standard means:

- (a) in relation to a Pavement Condition Assessment Survey, the required standard of pavement condition as specified in Schedule 12 (Service Requirements);
- (b) in relation to a KiwiRAP Survey, the required star rating of the P2Wk Main Alignment as specified in Schedule 12 (Service Requirements);
- (c) in relation to a Road Safety Audit, the standard required in order for the Contractor to comply with its obligations under this Agreement; and
- (d) in relation to an Asset Condition Survey or an Exit Survey, the required standard for the relevant element of the P2Wk Project, at the relevant time, as specified in:
 - (i) the Asset Condition Register;
 - (ii) the Forward Works Plan;
 - (iii) the Maintenance Management Plan;
 - (iv) Schedule 12 (Service Requirements); or
 - (v) Schedule 19 (Disengagement);

Rescue Refinancing means a Refinancing that meets the Rescue Refinancing Conditions;

Rescue Refinancing Conditions means the conditions set out in clause 52.6(b);

Resource Consents means resource consents 33/003 to 33/017, granted to the Transport Agency by a Board of Inquiry in the *Final Report and Decision for the Ara Tūhono - Pūhoi to Wellsford Road of National Significance: Pūhoi to Warkworth Section* (September 2014), included as changed from time to time in accordance with the provisions of the Resource Management Act 1991;

Resource Consent Conditions means the conditions imposed on the Resource Consents, including the more specific requirements recorded in "Column B" of the Annotated RMA Conditions included in Appendix A to Schedule 6 (Resource Management Act Requirements);

Retention Fund Account is defined in clause 81.1 (Notification);

Returnable Schedule means the schedule of the Base Case entitled the "Returnable Schedule";

Returned Land means any land comprising part of the P2Wk Residual Site:

- (a) that has been identified as a dwelling to be returned to the Transport Agency under Part 2 (P2Wk Construction Lease terms) of Schedule 5 (Property) or as Surplus Land to be surrendered to the Transport Agency under Part 4 (P2Wk Operating Site and Return of Surplus Land) of Schedule 5 (Property); and
- (b) that has received a Close-out Certificate,

and **Returned** has a corresponding meaning;

Review Procedures means the procedures by which Reviewable Documents are reviewed by the Transport Agency as described in Schedule 8 (Review Procedures) and includes, where Reviewable Documents previously Finalised are amended or updated, the procedures for reviewing, amending and updating such documents;

Reviewable Design Material means the Design Documentation listed in Exhibit 1 (Reviewable Design Material) to Schedule 8 (Review Procedures);

Reviewable Document means any Operative Document specified in Schedule 9 (Operative Documents) as being prepared, finalised or updated pursuant to the Review Procedures, any Reviewable Design Material and any replacement Major sub-contract, together with such other documentation that the parties agree in writing should be a Reviewable Document;

Risk Management Plan means the plan of that name prepared by the Contractor as part of the P2Wk Project Operations Plan in accordance with clause 29.2(a)(ii), clause 31 (Maintenance of Services Documentation) and Part 2 (Services Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

RMA Conditions means the Designation Conditions and Resource Consent Conditions;

Road Safety Audit means any road safety audit undertaken in accordance with the Road Safety Audit Procedures in respect of any element of the P2Wk Project;

Road Safety Audit Procedures means the Transport Agency "Road Safety Audit Procedures for Projects - Guidelines", interim release dated May 2013;

Road Safety Audit Team means the road safety audit team notified by the Transport Agency to the Contractor from time to time under clause 17.5 (Road Safety Audit);

Safe System means the Safe System approach contained in the "Safer Journeys" New Zealand's Road Safety Strategy 2010 – 2020;

Scheduled Maintenance is defined in clause 32.1 (Scheduled Maintenance);

Schedules means the schedules to the Base Agreement;

Security Interest includes:

- (a) a security interest within the meaning ascribed to that term under section 17 of the Personal Property Securities Act 1999; and
- (b) a mortgage, charge or security interest over the Contractor's rights under the P2Wk Project Lease;

Security Trustee means the security trustee appointed by the Senior Lenders being, as at the Execution Date, ANZ Bank New Zealand Limited;

Segment means any combination of Lane(s), Ramp(s) and Shoulder(s), and **Segments** means any combination of the same;

Senior Debt means the financial accommodation provided by the Senior Lenders from time to time under the Senior Financing Agreements;

Senior Financing Agreements means those Financing Agreements specified as such in Schedule 4 (Financing) and any amendments to or replacements of any Senior Financing Agreements that relate to Refinancings for which the prior approval of the Transport Agency has been obtained under this Agreement;

Senior Lender means a person providing financial accommodation to the Contractor under the Senior Financing Agreements from time to time and includes, as applicable, any Hedge Counterparty;

Serious Injury has the meaning given to that term in Schedule 13 (Performance Regime);

Service Commencement Date means the later of:

- (a) the day 1 Business Day after issue of the Works Completion Certificate; and
- (b) the day on which the AMM Services actually commence,

and **Service Commencement** shall have a corresponding meaning;

Service Failure Points or **SFP** means service failure points attributed to the Contractor in accordance with Schedule 13 (Performance Regime);

Service Records is defined in clause 18.1 (Service Records);

Service Requirements means those requirements of the Transport Agency as varied in accordance with Part 12 (Changes) or otherwise under the terms of this Agreement that set out the Transport Agency's minimum requirements for the provision of the AMM Services, the initial Service Requirements being set out in Schedule 12 (Service Requirements);

Services means Works Provisioning and the AMM Services;

Services Documentation means, in relation to the P2Wk Project and the AMM Services:

- (a) the Contract Plan;
- (b) the Location Supplement;
- (c) the Handover Package;
- (d) the Disengagement Plan;
- (e) the Services Stakeholder and Communications Plan; and
- (f) the Key Road Controlling Authorities Communications Plan;

Services Stakeholder and Communications Plan means the plan of that name prepared by the Contractor in accordance with clause 29.2(a)(ii), clause 31 (Maintenance of Services Documentation) and Part 2 (Services Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Shared Operating Insurances means the Industrial Special Risks (Material Damage) Policy, the Consequential Loss (Business Interruption) Insurance Policy, the Public and Products Liability Insurance and Motor Vehicle Insurance policies each as described in Sub-part 2 (Services Phase) of Part 1 (Required Insurances) of Schedule 15 (Insurance);

Shareholder means any person from time to time holding share capital in HoldCo General Partner;

Shoulder has the meaning given to that term in Schedule 13 (Performance Regime);

Site Specific Traffic Management Plans or SSTMPs mean the plans of that name required by Designation Conditions D20 and D23, prepared by the Contractor in accordance with clause 26 (Planning and mobilisation) and Part 1 (Works Provisioning Documentation of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Significant Material Change means a Material Change that is likely to require additional Capital Expenditure above \$20 million or is likely to impact the Unitary Charge in excess of five per cent, and includes any Change proposed to design and/or construct the Warkworth to Wellsford Interchange;

Site Access Protocols means:

- (a) the protocols for accessing the P2Wk Project Site prior to Works Completion as set out in Appendix C (Site Access Protocols – Prior to Works Completion) to Schedule 5 (Property); and
- (b) the protocols for accessing the P2Wk Project Site following Works Completion as set out in Appendix D (Site Access Protocols – Following Works Completion) to Schedule 5 (Property);

Site Conditions means any physical conditions on, under, or over the surface, or in the vicinity of the P2Wk Project Site and (as applicable) any Extra Land, including:

- (a) ground water, ground water hydrology, the existence of any wells and the effects of any de-watering;
- (b) physical and structural conditions above, on and below the ground including any partially completed structures or in ground works;
- (c) pastures, grasses or other vegetation;
- (d) topography, ground surface and sub-surface conditions and geology including rock or other materials;
- (e) availability and condition of roads and all other means of access and rights required to access that land from a public way and all Utility Services (including drainage) servicing, or required to service, that land;
- (f) climatic and weather conditions, rain, surface water run-off and drainage, water seepage, wind, wind-blown dust and sand seasons, mud and other effects of climatic and weather conditions;
- (g) all existing improvements, Finds, installations, systems and services on, above or below the surface of that land and any particular heritage or other significance attaching to them, and the location of all facilities with which the systems and services are connected;
- (h) any Contamination; and
- (i) all other physical conditions and characteristics of that land above, on or below the surface that may affect the performance by the Contractor of its obligations under this Agreement;

Snagging Defect means a minor or cosmetic Defect that:

- (a) does not adversely affect the operability or usability of the relevant area; and
- (b) does not constitute a health and safety hazard for any User;

Specific Change in Law means any Change in Law which:

- (a) expressly and exclusively applies to:
 - (i) the Project;
 - (ii) the P2Wk Project or the P2Wk Project Site;
 - (iii) the Contractor or a Major Sub-contractor, but only in its capacity as contractor to the Transport Agency or to the Contractor (as applicable) in order to implement and undertake the Project; or
 - (iv) the Contractor and other persons that are undertaking projects under the policies of the New Zealand Treasury or any replacement or substitute policies of the New Zealand Government relating to PPPs for the provision of public infrastructure for any Governmental Entity, in each case only as it applies to them in that capacity; or
- (b) expressly applies to:
 - (i) the standards applicable to;
 - (ii) the use of;
 - (iii) the operations of; or
 - (iv) the maintenance of,
 roading infrastructure in New Zealand;

Specific Change in Law Contractor's Share means, in respect of:

- (a) any Specific Change in Law of the type referred to in paragraph (a) of the definition of Specific Change in Law, zero; or
- (b) any Specific Change in Law of the type referred to in paragraph (b) of the definition of Specific Change in Law, the proportions of the net capital and operating consequences (if a positive number) arising from that Specific Change in Law, as set out in the following table:

Net capital consequences	Contractor's Share (Net capital consequences)	Net operating consequences	Contractor's Share (Net operating consequences)
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Staged Upgrade Change means a Change to wholly or substantially implement the works set out in the Staged Upgrade Change Baseline, triggered by the Transport Agency under clause 40.5 (Staged Upgrade Change);

Staged Upgrade Change Baseline means the compact disc entitled 'Staged Upgrade Change Baseline' initialled by the parties at or before Financial Close for identification purposes;

Standby Letter of Credit means a letter of credit or bank guarantee on terms that are (in form and substance) satisfactory to the Transport Agency, and that:

- (a) is unconditional, irrevocable and payable on demand;
- (b) is issued by a financial institution that is the holder of a current banking licence issued by the Reserve Bank of New Zealand and that as at the date of issue has a credit rating of at least A- (issued by Standard and Poor's), or the equivalent credit rating issued by another generally recognised international credit rating agency; and
- (c) specifies a location within New Zealand where demand may be given and payment will be made, without further confirmation from the issuer;

Start Date means the date on which Works Provisioning is to commence in accordance with the Construction Programme;

Step-in Period means, in relation to any exercise of the Transport Agency's Step-in Rights under Part 17 (Transport Agency Step-in), the period commencing on the date on which the Transport Agency first exercises its Step-in Rights and ending on the Step-out Date;

Step-in Rights means those rights of the Transport Agency to step-in under Part 17 (Transport Agency Step-in);

Step-out Date means the date specified as such in a notice given by the Transport Agency under clause 68.1 (Cessation);

Structure means, when used in Schedule 10 (Completion Requirements) or Schedule 11 (Works Requirements):

- (a) Bridges;
- (b) subways;
- (c) retaining walls;
- (d) Culverts;
- (e) buildings;
- (f) noise walls; and
- (g) fords,

and including anything else captured by the Bridge Manual, but excluding any Utilities Infrastructure;

Sub-contractor:

- (a) means any person engaged by the Contractor from time to time as may be permitted by this Agreement to procure the provision of the Services (or any of them) and includes each Major Sub-contractor; and
- (b) includes (unless otherwise specified in this Agreement) any other person that is engaged (at any tier) to act as a sub-contractor for the purposes of this Agreement;

Sub-contractor Breakage Costs means Losses that have been or will be reasonably and properly incurred by the Contractor to a Sub-contractor as a direct result of the termination of this Agreement, but only to the extent that:

- (a) the Losses are incurred in connection with the Project and in respect of the Services, including:
 - (i) any materials or goods ordered or sub-contracts placed that cannot be cancelled without such Losses being incurred;
 - (ii) any expenditure incurred in anticipation of the provision of Services in the future;
 - (iii) the cost of demobilisation including the cost of any relocation of equipment used in connection with the Project; and
 - (iv) redundancy payment liability incurred by a Sub-contractor; and
- (b) the Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms,

Subordinated Financing Agreements means those Financing Agreements specified as such in Schedule 4 (Financing) as may be amended, substituted or replaced from time to time in accordance with this Agreement;

Subordinated Lender means a person providing finance to the Contractor under the Subordinated Financing Agreements from time to time;

Substantial Destruction Event means one or more events that:

- (a) cause physical loss or destruction of, or damage to, the P2Wk Project with an estimated repair and/or reinstatement cost in excess of:
 - (i) the sum insured under the applicable Physical Damage Policy;
 - (ii) the Natural Disaster Event Cost Cap; or
 - (iii) (where clause 71.2 (Consequences of being unable to agree) applies), the amount the Transport Agency is liable to pay under that clause; or
- (b) prevent the Contractor from carrying out its obligations under this Agreement and continues to subsist following the expiry of:
 - (i) the period of indemnity under the applicable Business Interruption Policy;
 - (ii) the Natural Disaster Event Time Cap; or
 - (iii) (where clause 71.2 (Consequences of being unable to agree) applies), the period of relief the Transport Agency is liable to provide under that clause,

and includes any event to which clause 71.3(c) (Terrorist Risk) applies;

Surplus Land means the land identified in accordance with paragraph 14 (Identification of P2Wk Operating Site and Surplus Land) of Part 4 (P2Wk Operating Site and Return of Surplus Land) of Schedule 5 (Property);

Swap means an interest rate swap or other equivalent or comparable transaction entered into by the Contractor and any Hedge Counterparty;

Swap Breakage Costs means costs payable by a Hedge Counterparty to the Contractor or by the Contractor to a Hedge Counterparty (as applicable) on the close-out or termination of a Swap entered into in respect of Core Senior Debt;

Tax means any present or future tax, levy, impost, deduction, charge, duty or withholding of any nature (other than GST) which is levied or imposed by a Governmental Entity, together with interest, penalties, charges, fees, or other amounts (if any) imposed or made on or in respect of the above and **Taxation** will be construed accordingly;

Temporary Repair means a temporary repair on the P2Wk Main Alignment carried out prior to the receipt of notice under clause 32.2(a), or that is reasonably required in response to an Incident following receipt of notice under clause 32.2(a);

Tendering Information means the invitation for expressions of interest and the request for proposals documentation issued by the Transport Agency in respect of the Project, and includes all other written information, including responses to questions, provided by the Transport Agency to the Contractor or to all respondents in connection with the same;

Termination Date means the date specified as such in a Termination Notice, in accordance with clause 73.5 (Termination Date);

Termination Event is defined in clause 73.4 (Termination);

Termination Notice means a notice of termination issued in accordance with this Agreement following the occurrence of a Termination Event;

Terrorist Risk means any loss or damage to the P2Wk Project:

- (a) prior to Works Completion, excluded from the operation of the Contract Works Insurance (Material Damage Policy) and the Contract Works Insurance (Advance Loss of Profits Policy) by way of the terrorism general exclusion; or
- (b) on or after Works Completion, excluded from the operation of the Industrial Special Risks (Material Damage) Policy and the Industrial Consequential Loss (Business Interruption) Insurance Policy by way of the terrorism general exclusion;

Third Party Claim is defined in clause 59.1 (Notice);

Third Party Interface Protocols means the third party interface protocols set out in Annexure 5 to Schedule 3 (Project and Ancillary Documents);

Third Party Property Agreements means each agreement specified in Appendix E (Third Party Property Agreements) of Schedule 5 (Property) and each property agreement in relation to Deferred Acquisition Land as and from when entered into;

Threshold Equity IRR is the percentage amount specified in cell "J60" of the Base Case sheet entitled "Returnables" as at Financial Close;

Traffic Control Devices Manual or the **TCD Manual** means the Transport Agency Traffic Control Devices Manual (as at 23 March 2016);

Traffic Monitoring Method means the Transport Agency's Traffic Monitoring for State Highways SM052 (version 1.2 dated November 2011);

Transfer Date is defined in clause 11.2(a);

Transport Agency Background IP means Background IP that is owned by the Transport Agency or a Transport Agency Related Person or by a licensor of the Transport Agency or a Transport Agency Related Person;

Transport Agency Consent means:

- (a) until the date they are obtained by the Transport Agency, the MLR Consents; and
- (b) any other Consent that the Transport Agency agrees to seek or obtain after Financial Close, to the extent specified as a Transport Agency Consent by notice in writing by the Transport Agency's Representative to the Contractor;

Transport Agency Information means any information disclosed or made available to the Contractor, a Partner, the Shareholders or their advisers by or on behalf of the Transport Agency about or relating to the Project, including any of the Tendering Information and any report provided by the Transport Agency to the Contractor with respect to the P2Wk Project Site;

Transport Agency Personnel means:

- (a) any employee of the Transport Agency, contractor to (excluding the Contractor and any of its sub-contractors), or agent of, the Transport Agency or a Transport Agency Related Person, including employees of the Treasury, Inland Revenue, the Department of Prime Minister and Cabinet and the State Services Commission;
- (b) the Auditor General, the Deputy Auditor General and any employee of, or contractor to, the Office of the Auditor General or the Audit Office; and
- (c) any Minister of the New Zealand Government to whom the Chief Executive of the Transport Agency or the Treasury report and any staff working in that Minister's office;

Transport Agency Related Person means any Governmental Entity other than the Transport Agency, where and to the extent that entity provides services on or in relation to the P2Wk Project;

Transport Agency's Representative means the person for the time being appointed by the Transport Agency as its representative under clause 15.2 (Service management) and Part 2 (Parties' Representatives) of Schedule 7 (Governance and Service Management);

Transport Agency's Requirements means the Works Requirements set out in Schedule 11 (Works Requirements) and the Service Requirements set out in Schedule 12 (Service Requirements);

Trigger Movement Caps has the meaning given to that term in Schedule 13 (Performance Regime);

Unavailability Deductions means deductions imposed as a result of any Unavailability Event in accordance with Part 4 (Unavailability and Deductions) of Schedule 13 (Performance Regime);

Unavailability Event has the meaning given to that term in Schedule 13 (Performance Regime);

Unforeseeable Contamination means Contamination that subsists on the P2Wk Project Site or Other Land (as applicable) as at the Execution Date that would not reasonably have been foreseen by the Contractor at the Execution Date if the Contractor had:

- (a) examined all information made available in writing by the Transport Agency to the Contractor for the purpose of this Agreement;
- (b) examined all information relevant to the risks, contingencies and other circumstances having an effect on its rights and obligations under this Agreement obtainable by the making of reasonable enquiries;
- (c) undertaken all detailed inspections and surveys of the P2Wk Project Site or Other Land (as applicable) and its surroundings that would reasonably be expected to be undertaken by a skilled, qualified and experienced contractor given the same level of access to the P2Wk Project Site or Other Land (as applicable) as that given to the Contractor; and
- (d) acted at all times in respect of the inspection and survey of the P2Wk Project Site or Other Land (as applicable) in accordance with Good Industry Practice,

Uninsurable

- (a) means, in relation to a risk, either that:
 - (i) insurance is not available to the Contractor in respect of the Project in the worldwide insurance market with Reputable Insurers of good standing in respect of that risk;
 - (ii) terms and conditions on which insurance is available to the Contractor in respect of the Project in the worldwide insurance market (with Reputable Insurers of good standing in respect of that risk) are not fit for the intended purpose of that insurance; or
 - (iii) the insurance premium payable for insuring that risk is at such a level that the risk is not generally being insured against in the worldwide insurance market with Reputable Insurers of good standing by contractors in New Zealand or Australia; and
- (b) excludes any risk categorised as a Natural Disaster Event;

Uninsurable Event means:

- (a) a Force Majeure Event that is, at the time of its occurrence, Uninsurable; or
- (b) a Substantial Destruction Event;

Unitary Charge means the fee payable by the Transport Agency during the Operating Term in consideration of the obligations performed by the Contractor under this Agreement, as set out in the Base Case and as calculated and subject to adjustment in accordance with Schedule 14 (Payment Mechanism);

Unsuitable Third Party means any person:

- (a) whose activities are, in the reasonable opinion of the Transport Agency, incompatible with any operations or activities carried out by the Transport Agency for the purposes

contemplated by this Agreement or any other of the Transport Agency's legal duties or other functions; and/or

- (b) who is, in the reasonable opinion of the Transport Agency, inappropriate because of specific information received by the Transport Agency from the Serious Fraud Office, the police or other applicable law enforcement agency about the unsuitability of that person to act in relation to the Project,

provided that for the purposes of clause 51 (Refinancing – general provisions), an Unsuitable Third Party does not include a Qualifying Lender, or any other person undertaking a Refinancing, who has been approved by the Transport Agency for the purposes of that clause;

Urban and Landscape Design Framework or ULDF means the framework of that name required by Designation Condition D27, prepared by the Transport Agency in accordance with Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents);

Urban and Landscape and Design Sector Plans or ULDSPs means the plans of that name required by Designation Conditions D33 and D38, prepared by the Contractor in accordance with clause 26 (Planning and mobilisation) and Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Use is defined in clause 57.1(c);

User means:

- (a) the Transport Agency or any Transport Agency Related Person;
- (b) any employees, contractors, sub-contractors and consultants of the Transport Agency, or any Transport Agency Related Persons; and
- (c) following the Service Commencement Date, all persons entitled to access and/or use the relevant elements of the P2Wk Project (including, in the case of the P2Wk Roads, members of the general public);

User Satisfaction Survey means the user satisfaction survey to be conducted by the Contractor in accordance with the Services and Stakeholder Communications Plan;

Utilities Infrastructure means all infrastructure, plant and equipment required or used for delivering Utility Services, owned or controlled by a Utility Service Provider;

Utility Service means any utility service delivered in relation to the P2Wk Project including water, electricity, gas, telephone, drainage, sewage, all communications services and waste collection services;

Utility Service Provider means each provider of a Utility Service;

Vegetation means the semi-natural, improved, semi-improved and landscaped areas within the P2Wk Operating Site, including the verge, any cultural heritage assets, any hard landscaping assets, any vegetation planted in the stormwater treatment ponds and any planting established in accordance with the applicable ULDSP;

VMS means variable message signage;

VMS Sites means the location of the VMS as shown on the Final Design Documentation;

Warkworth to Wellsford Interchange means any interchange connecting the proposed Warkworth to Wellsford State Highway with the P2Wk Main Alignment;

Warning Notice means a notice issued or to be issued by the Transport Agency under clause 75.4 (Warning Notice);

Works Completion means that the Works Completion Certificate has been issued by the Independent Reviewer;

Works Completion Certificate means the certificate issued to the Contractor and the Transport Agency by the Independent Reviewer under clause 29.3(k) signifying that Works Completion has occurred;

Works Completion Plan means the plan of that name prepared by the Contractor as part of the Works Project Management Plan in accordance with clause 26 (Planning and mobilisation), clause 29.2(a)(i) and Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents) and that has been Finalised under the Review Procedures;

Works Completion Tests means those tests described as such in Schedule 10 (Completion Requirements) (and any additional tests and re-run tests requested by the Independent Reviewer in accordance with this Agreement) to be successfully carried out prior to the issue of the Works Completion Certificate;

Works Infrastructure means all infrastructure, plant, equipment and works incorporated within the P2Wk Project Site required to connect to and/or to use External Infrastructure, Utility Services or the P2Wk Project;

Works Project Management Plan means the plan of that name prepared by the Contractor:

- (a) in accordance with clause 26 (Planning and mobilisation) and Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents);
- (b) based on the draft project plan set out in the Contractor's Proposal;
- (c) including the Design Development Plan, the Construction Management Plan, the Construction Health and Safety Plan, the Inspection and Test Plan, the Works Completion Plan and the Close-out Plan; and
- (d) Finalised under the Review Procedures;

Works Provisioning means all those things necessary to complete and commission the P2Wk Project in accordance with the Works Requirements and all works required for the provision of the AMM Services in accordance with the Service Requirements;

Works Provisioning Documentation means the programmes, plans and documentation as set out in Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents), including:

- (a) the Works Project Management Plan;
- (b) the Construction Programme;
- (c) the Completion Plans;
- (d) the Disengagement Plan;
- (e) the Environmental Management Plans; and

- (f) the Pre-Construction Stakeholder and Communication Plan and Construction Stakeholder and Communication Plan; and

Works Requirements means those requirements of the Transport Agency as varied in accordance with Part 12 (Changes) or otherwise under the terms of this Agreement, that set out the Transport Agency's minimum design, construction and technical requirements for the P2Wk Project and the Transport Agency's requirements for Works Provisioning, the initial Works Requirements being set out in Schedule 11 (Works Requirements).

1.2 Statutory references

In this Agreement, unless the context otherwise requires:

- (a) the following terms have the meanings given to them in the LTMA:
 - (i) State highway;
 - (ii) public road controlling authority; and
 - (iii) road controlling authority; and
- (b) the following terms have the meanings given to them in the GRPA:
 - (i) motorway; and
 - (ii) local road.

2. Interpretation of Agreement

In this Agreement, unless the context otherwise requires:

- (a) a reference to a clause, a paragraph, a part, a schedule, an exhibit, an annexure or an appendix is a reference to a clause, paragraph or part of, or a schedule, exhibit, annexure or appendix to this Agreement;
- (b) a gender includes each other gender;
- (c) the singular includes the plural and vice versa;
- (d) a reference to a person includes:
 - (i) a partnership (including a limited partnership) and also a body of persons, whether corporate or unincorporated; and
 - (ii) reference to its respective successors in title and permitted assigns;
- (e) a reference to documentation includes:
 - (i) a reference to that document as varied, supplemented, novated or substituted from time to time; and
 - (ii) a reference to that documentation in any form, whether paper based or in electronic form encoded on or as part of any form of media;
- (f) a reference to any document, manual, standard or guideline (except the RMA Conditions) in Schedule 11 (Works Requirements) or Schedule 12 (Service

Requirements) refers to the version of that document, manual, standard or guideline as at 23 March 2016, unless such Schedule refers to that document, manual, standard or guideline as at a specific date;

- (g) a reference to materials means a reference to materials of any kind whether in the form of documentation, software, hardware, componentry or otherwise;
- (h) any agreement not to do a thing also constitutes an agreement not to suffer or permit or cause that thing to be done;
- (i) any reference to a consent requires the prior written consent of the party required to give that consent;
- (j) whenever the words "includes" or "including" are used in this Agreement, they are deemed to be followed by the words "without limitation";
- (k) a reference to any legislation includes a modification of that legislation or legislation enacted in substitution for that legislation and a regulation, order-in-council and other instrument from time to time issued or made under that legislation;
- (l) headings and the table of contents are included for the purpose of ease of reference only and are not to have any effect on construction and interpretation;
- (m) the "Introduction" forms part of this Agreement;
- (n) a reference to days, other than Business Days, is a reference to any calendar day of the year;
- (o) a reference to currency is a reference to New Zealand currency;
- (p) if an obligation falls to be performed or a right is to be exercised on or by a day that is not a Business Day then, unless otherwise specified, that obligation is due to be performed or that right may be exercised on the Business Day next following that day;
- (q) none of the terms nor any of the parts of this Agreement are to be construed against a party, by reason of the fact that a term or a part was first proposed or was drafted by that party;
- (r) a reference to a "related company" is to a related company as defined in section 2(3) of the Companies Act 1993, as if each reference to "company" within the definition was to any body corporate;
- (s) a party who has an obligation is to perform that obligation at its own cost, unless a term of this Agreement expressly provides otherwise; and
- (t) a reference to a consent or approval includes a deemed consent or approval (in each case to the extent that a Project Document contemplates a consent or approval being deemed to be given on the expiry of a time period or otherwise).

Part 2 – Project Documents

3. Agreement

3.1 Scope of Agreement

This Agreement comprises the following documents, each of which is deemed to form, and to be read and construed as part of, this Agreement:

- (a) the Base Agreement;
- (b) the Schedules; and
- (c) subject to clause 3.2, each Operative Document.

3.2 Status of Operative Documents

- (a) The Contractor is bound to comply with, and must perform all of its obligations under, the Operative Documents.
- (b) Each Operative Document must be submitted for review under the Review Procedures, unless otherwise specified in this Agreement. The Transport Agency may review an Operative Document under the Review Procedures, but incurs no liability and assumes no responsibility for failing or declining to do so.
- (c) The Contractor acknowledges and agrees that any obligations imposed or purported to be imposed on the Transport Agency or a Transport Agency Related Person in the Operative Documents are not legally binding on the Transport Agency or that Transport Agency Related Person unless a corresponding obligation is expressly agreed to in writing by the Transport Agency or that Transport Agency Related Person, which agreement expressly refers to the terms of this clause 3.2.

3.3 Precedence of documents

- (a) Where there is an ambiguity, inconsistency or conflict of obligations between the documents that comprise this Agreement, the following order of precedence will apply:
 - (i) the Base Agreement;
 - (ii) the Schedules (other than Schedule 11 (Works Requirements) and Schedule 12 (Service Requirements));
 - (iii) Schedule 12 (Service Requirements);
 - (iv) Schedule 11 (Works Requirements); and
 - (v) the Operative Documents.
- (b) Subject to clause 3.3(c), where there is an ambiguity, inconsistency or conflict of obligations within each of the documents or categories of documents identified in clause 3.3(a), then the obligation to which the Contractor is subject is that determined by the Transport Agency to be the most beneficial to the Transport Agency, even where the cost of performing that obligation is higher.

- (c) Where there is an ambiguity, inconsistency or conflict of obligations between this Agreement and any of the other Project Documents, the following order of precedence will apply:
 - (i) the Financier Direct Deed;
 - (ii) this Agreement; and
 - (iii) the remaining Project Documents.
- (d) Except as otherwise expressed in this Agreement, any specific terms and conditions will prevail over any general terms and conditions.

3.4 Approvals, consents and similar actions

Neither the giving of any approval or consent, the review of any document or failure to do so, any course of action (or any failure or ongoing failure to act), or the Transport Agency's knowledge of any course of action (or failure to act) or the provisions of any agreement or document shall (unless otherwise expressly stated in this Agreement):

- (a) relieve the Contractor of any of its obligations under the Project Documents;
- (b) relieve the Contractor of any duty it may have under this Agreement to ensure the correctness, accuracy or suitability of the matter or thing that is the subject of the approval, consent, review or knowledge; or
- (c) exclude or limit the Transport Agency's rights and remedies under this Agreement.

3.5 Indexation and replacement of indices

- (a) In this Agreement, except where otherwise provided, references to amounts expressed to be "Indexed" are references to such amounts at the price reference date prices multiplied by:

$$\frac{I_1}{I_2}$$

where I_1 is the value of the Relevant Index most recently published prior to the relevant calculation date, and I_2 is the value of the Relevant Index on Financial Close.

- (b) If there is a material change in the nature or basis of any Relevant Index, or if any Relevant Index is discontinued, the parties shall agree on an alternative index that as closely replicates the Relevant Index as is possible, and such consequential changes shall be made to the calculations provided for in this Agreement as are necessary to ensure that all figures, payments or calculations to be adjusted with reference to a Relevant Index under this Agreement shall be adjusted in a manner as similar as possible to the manner in which such figures, payments or calculations would have been undertaken as if such change had not occurred. Any Dispute regarding changes to the calculations may be referred by either party to the Dispute Resolution Procedures.

4. Other Project documentation

4.1 Ancillary Documents and Financing Agreements

- (a) The Contractor has provided to the Transport Agency copies of the Ancillary Documents executed on or before the Execution Date and the Initial Financing Agreements.
- (b) Without prejudice to the provisions of clause 4.1(c), clause 4.1(e) and clause 4.1(f), if for any reason and at any time (including but not limited to a Refinancing):
 - (i) an amendment is made to, or a waiver is given under any Ancillary Document or Financing Agreement;
 - (ii) the Contractor enters into a new Ancillary Document or Financing Agreement (or any agreement that affects the interpretation or application of any Ancillary Document or Financing Agreement); or
 - (iii) an existing Ancillary Document or Financing Agreement is terminated,

the Contractor shall deliver to the Transport Agency a conformed copy of each such amendment, waiver, agreement or evidence of termination within five Business Days after the date of its execution or creation (as applicable), certified as a true copy by an Officer of the Contractor.
- (c) The Contractor shall perform its obligations under, and observe all of the provisions of the Ancillary Documents so as to avoid termination of the Ancillary Documents for the Contractor's default (however described). Without prejudice to the foregoing, the Contractor shall not:
 - (i) terminate or agree to the termination of all or part of any Ancillary Document;
 - (ii) make or agree to any material variation of any Ancillary Document;
 - (iii) in any material respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect), or cause or procure that others in any material respect depart from their obligations (or waive or allow to lapse any rights they may have in a material respect), under any Ancillary Document; or
 - (iv) enter into (or permit the entry into by any other person of) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Ancillary Document,

unless:

 - (v) it is satisfied on reasonable grounds that the proposed action, waiver or allowance would not have a Material Adverse Effect; and
 - (vi) in the case of the termination or agreement to the termination of all or part of any Ancillary Document, the Contractor has complied with, and is not in breach of, clause 4.1(e), clause 16 (Sub-contractors), clause 90 (Assignment) and clause 91 (Change of Ownership).
- (d) Subject to clauses 4.1(f), 51 (Refinancing – general provisions) and 52 (Refinancing – Transport Agency consent) the Contractor shall be free to enter into, terminate, waive or amend its rights and generally deal with its Financing Agreements on such terms and conditions as it sees fit.

- (e) No entry into or termination of, amendment, waiver or exercise of a right under any Ancillary Document:
 - (i) is permitted if the effect of the same would be reasonably expected to have a Material Adverse Effect; or
 - (ii) shall have the effect of increasing the Transport Agency's liabilities on early termination of this Agreement unless the Contractor has obtained the prior written consent of the Transport Agency to such increased liability.
- (f) No entry into a Financing Agreement may be made until:
 - (i) the Transport Agency has provided its prior written consent to the form of the Financing Agreement or the relevant Refinancing (as applicable) where the Contractor is required to seek the same in accordance with clauses 51 (Refinancing – general provisions) and 52 (Refinancing – Transport Agency consent);
 - (ii) where required by the Transport Agency, the new financiers (if any) have executed a deed with the Transport Agency substantially in the form of the Financier Direct Deed; and
 - (iii) the existing financiers have executed any document reasonably requested by the Transport Agency to amend or terminate (as applicable) their rights under the then-current Financier Direct Deed.

4.2 Parent Company Guarantees – mandatory terms

- (a) Each Parent Company Guarantee must:
 - (i) express that, where and for so long as the Transport Agency is exercising its step-in rights under the applicable Major Sub-contractor's Direct Deed:
 - (A) the Transport Agency will be entitled to exercise the rights of the Contractor under that Parent Company Guarantee; and
 - (B) the Transport Agency exercising the rights of the Contractor under that Parent Company Guarantee will in no way prejudice or limit the guarantor's liability under that Parent Company Guarantee;
 - (ii) express that no amendment will be made to that Parent Company Guarantee, and the guarantor will not be released from liability under that Parent Company Guarantee, without the Transport Agency's prior written consent;
 - (iii) entitle the Transport Agency to enforce its rights under this clause 4.2 under the Contracts (Privity) Act 1982 (or, where that Parent Company Guarantee is not governed by New Zealand law, under any equivalent legislation); and
 - (iv) not contain any provisions inconsistent with the requirements of this clause 4.2.
- (b) The Contractor will not, without the Transport Agency's prior written consent:
 - (i) assign, novate or otherwise deal with its rights and obligations under the Parent Company Guarantees; and
 - (ii) provide its consent to the guarantor under the Parent Company Guarantees, assigning, novating, replacing or otherwise dealing with the guarantor's rights and obligations under the Parent Company Guarantees.

4.3 Major Sub-contractor's Direct Deed

The Contractor shall not engage any new Major Sub-contractor in connection with the Project (nor accept any services from such Sub-contractor) unless:

- (a) the Contractor has complied with clause 16 (Sub-contractors); and
- (b) that new Major Sub-contractor has provided, in a form acceptable to the Transport Agency:
 - (i) a duly executed Major Sub-contractor's Direct Deed for execution by the Transport Agency; and
 - (ii) a certified copy of a Parent Company Guarantee.

5. Base Case and Base Case adjustments

5.1 Information to be included in Base Case

- (a) The Base Case must be in computer spreadsheet form and shall show or permit derivation of the Contractor's:
 - (i) cash flows including all expenditure, revenues, financing and Taxation of the Project; and
 - (ii) profit and loss and balance sheets throughout the Contract Term.
- (b) The Base Case must include details of all assumptions, calculations and methodology used together with any other documentation necessary to fully operate the model.
- (c) The Transport Agency shall keep a copy of the Base Case in safe custody. If, at any time, there is any dispute as to the then-current version of the Base Case, the copy held by the Transport Agency shall prevail.

5.2 Updating Base Case

- (a) The Base Case will be adjusted, on Financial Close, in accordance with the Financial Close Adjustment Protocol.
- (b) Whenever a Relevant Event occurs, the financial consequence shall (save where otherwise provided in this Agreement or where the parties mutually agree otherwise) be determined in accordance with this clause 5 and with the prior written approval of the Transport Agency (such approval not to be unreasonably withheld or delayed).
- (c) Where for the purposes of this clause 5 the Base Case is to be adjusted by reference to a Relevant Event, this shall be carried out to reflect the cumulative impact of any prior Relevant Event on the version of the Base Case applicable immediately prior to the relevant adjustment and to reflect the impact of the Relevant Event in respect of which such adjustment is being undertaken.
- (d) In assessing adjustments to be made to the Base Case arising from any Relevant Event, the Contractor must:
 - (i) only take into account any Change in Costs arising from the Relevant Event;

- (ii) not take into account risks which the Contractor bears under the provisions of this Agreement (following its amendment, if required, to reflect the impact of the Relevant Event); and
 - (iii) not, where the Relevant Event is a Refinancing, alter or seek to alter any component of the Unitary Charge as a result of that Refinancing.
- (e) The Transport Agency shall not be required (and the Contractor shall not be entitled) to take into account the financial impact of the Relevant Event on those risks that the Contractor bears under the provisions of this Agreement (as amended, where applicable, to take account of the Relevant Event) including (to the extent so borne by the Contractor under this Agreement) changes in Taxation rates, Relevant Indices and the impact of Deductions.

5.3 Application to Base Case

Where either party is entitled to payment of any sum under this Agreement, the assessment of which properly requires adjustment to the Base Case (with the exception of payment of the Transport Agency's refinancing share to which clause 53 (Refinancing Gain and Base Interest Amount) shall apply), the adjustment to the Unitary Charge due shall be that required to ensure that, by reference to the Base Case adjusted under this clause 5, the Contractor is left in a no better and no worse position than under the version of the Base Case applicable immediately prior to the relevant adjustment, and shall be ascertained by determining the adjustment to the Unitary Charge required to maintain the financial position of the Contractor with that in which it would have been under the version of the Base Case applicable immediately prior to the relevant adjustment.

5.4 Replacement of Base Case

Any Base Case produced following adjustments in accordance with this clause 5 shall, when it is audited and approved by the Transport Agency (such approval not to be unreasonably withheld or delayed), become the Base Case for the purposes of this Agreement until its further amendment in accordance with this Agreement.

5.5 Amendments to logic and/or formulae

- (a) Where it is necessary to amend the logic or formulae incorporated in the Base Case to permit adjustments to be made, this shall be done to as limited an extent necessary.
- (b) Where any amendment is made to the logic or formulae incorporated in the Base Case, the Base Case shall first be run as at the date immediately prior to amendment to determine the minimum debt service cover ratio and loan life cover ratios. The logic or formulae in the Base Case will be amended by the minimum amount that nonetheless ensures that those minimum debt service cover ratio and loan life cover ratios are maintained at no lower or no higher levels than immediately post the amendment, and the difference in the real pre-tax Equity IRR after and immediately prior to amendment does not differ by more than five basis points (0.05%) as shown in the resulting figure.

5.6 No better and no worse

Any reference in this Agreement to "no better and no worse" or to leaving a party to this Agreement in a "no better and no worse position" shall be construed by reference to such party's:

- (a) rights, duties and liabilities (including the timing of any payments made or Losses to be incurred) under, or arising pursuant to, performance of:

- (i) this Agreement (in the case of the Transport Agency); and
 - (ii) this Agreement, the Financing Agreements and the Major sub-contracts (in the case of the Contractor); and
 - (b) ability to perform its obligations and exercise its rights under:
 - (i) this Agreement (in the case of the Transport Agency); and
 - (ii) this Agreement, the Financing Agreements and the Major sub-contracts (in the case of the Contractor),
- so as to ensure that:
- (c) the Contractor is left in a position that is no better and no worse in relation to the minimum debt service cover ratio and loan life cover ratio by reference to the version of the Base Case applicable immediately prior to the Relevant Event;
 - (d) the difference in the real pre-tax Equity IRR after and immediately prior to the Relevant Event does not differ by more than five basis points (0.05%) as shown in the resulting figure; and
 - (e) the ability of the Contractor to comply with this Agreement, the Financing Agreements and the Major sub-contracts or the Transport Agency to comply with this Agreement is not adversely affected or improved as a consequence of the Relevant Event,

provided that this clause 5.6 will be conclusively deemed to have been complied with with effect from the time at which any replacement Base Case is approved by the Transport Agency under clause 5.4.

5.7 Copies of revised Base Case

Following any change to the Base Case under the provisions of this clause 5, the Contractor shall promptly deliver a copy of the revised Base Case to the Transport Agency in the same form as is established at the Execution Date or in such other form as may be agreed between the parties. The revised Base Case must include details of all assumptions, calculations and methodology used together with any other documentation necessary to fully operate the model.

5.8 Provision of information and inputs

The Contractor is required to provide promptly all data, inputs and other information in relation to the Base Case, and any revised Base Case, that the Transport Agency may request from time to time.

Part 3 – Participants and Nature of Parties' Obligations

6. Participants

6.1 Transport Agency

The Transport Agency is party to this Agreement and is the Governmental Entity for whose benefit the P2Wk Project and the Services are to be provided.

6.2 Contractor

The Contractor is party to this Agreement and is a limited partnership created for the purposes of providing the Services to the Transport Agency.

6.3 Transport Agency's Representative

The Transport Agency's Representative is the person from time to time appointed by the Transport Agency to act as its representative, as between the Transport Agency and the Contractor, on the terms and conditions set out in this Agreement.

6.4 Contractor's Representative

The Contractor's Representative is the person from time to time appointed by the Contractor to act as its representative, as between the Contractor and the Transport Agency, on the terms and conditions set out in this Agreement.

6.5 Major Sub-contractors

The Major Sub-contractors have been, or will be, engaged by the Contractor to undertake all or part of the Services on its behalf.

6.6 Independent Reviewer

The Independent Reviewer is appointed jointly by the Transport Agency and the Contractor to provide them with specified services in connection with this Agreement.

6.7 Independent Expert

Each Independent Expert is or will be appointed jointly by the Transport Agency and the Contractor to resolve Disputes in accordance with clause 89 (Accelerated Dispute Resolution Procedures).

6.8 Senior Lenders

The Senior Lenders are to provide Senior Debt financing to the Contractor in connection with its provision of the Services.

6.9 Contractor General Partner

Contractor General Partner is the company which, as at the Execution Date, is the general partner of the Contractor.

6.10 **HoldCo LP**

HoldCo LP is the limited partnership which, as at the Execution Date, is the limited partner of the Contractor.

6.11 **HoldCo General Partner**

HoldCo General Partner is the company which, as at the Execution Date, is the general partner of HoldCo LP and holds all of the shares in Contractor General Partner.

6.12 **HoldCo Limited Partners**

HoldCo Limited Partners are the entities that, as at the Execution Date, are the limited partners of the HoldCo LP.

6.13 **Shareholders**

The Shareholders are the persons who hold shares in HoldCo General Partner from time to time.

6.14 **General**

This clause 6 is intended to provide a general description of the persons involved in the Project and is not intended to be an aid to interpretation or to otherwise have contractual effect.

7. **Contractor and Transport Agency**

7.1 **No agency**

The relationship of the Contractor to the Transport Agency is that of an independent contractor to its customer. Nothing in any Project Document will constitute either party as the partner, agent, fiduciary, trustee, employee or Officer of, or as a joint venturer with, the other party.

7.2 **No authority**

The Contractor acknowledges that it does not have the authority to enter into contracts or incur debts on behalf of the Transport Agency. Neither party will make any contrary representation to any other person.

7.3 **Mutual obligations**

Each party agrees:

- (a) promptly to advise the other party on becoming aware of any material breach by it of its obligations under this Agreement;
- (b) subject to clause 8 (Nature of Transport Agency's obligations), to take reasonable care not to do anything, or omit to do anything, that would cause the other party to be in breach of applicable Laws;
- (c) to consult with the other party as soon as practicable (subject, in the case of the Transport Agency, to duties of confidentiality, including to Ministers, to which it is

bound or customarily complies) as to any event that may materially affect the performance of its obligations under this Agreement; and

- (d) that in fulfilling its obligations under this Agreement it will co-operate, at its own expense, (but without being compelled to incur material expenditure) with the other party to achieve the Objectives, purposes and intent of this Agreement,

and neither party shall be under any obligation to perform any of the other party's obligations under this Agreement.

7.4 Allocation of risk

Whenever the Contractor is obliged or required to do or undertake anything under a Project Document, then that obligation or requirement is at the risk, cost and expense of the Contractor, unless that Project Document expressly provides otherwise.

7.5 Employees, agents, contractors and Sub-contractors

- (a) Except where otherwise expressly provided:
 - (i) any act or omission or the misconduct of any employee, contractor, sub-contractor or agent of the Contractor, in the course of the performance of or the express or implied scope of the Contractor's obligations, employment, agency or engagement, is deemed to be the act, omission or misconduct of the Contractor;
 - (ii) any act or omission or the misconduct of any employee, contractor (excluding for the avoidance of doubt the Contractor and any of its subcontractors of any tier), sub-contractor or agent of the Transport Agency, in the course of the performance of or the express or implied scope of its contractual obligations, employment, agency or engagement, is deemed to be the act, omission or misconduct of the Transport Agency; and
 - (iii) the Independent Reviewer shall not be regarded as the contractor of either the Contractor or the Transport Agency for the purposes of this clause 7.5(a).
- (b) Without limitation to its actual knowledge, the Contractor shall, for the purposes of this Agreement (other than for the purposes of construing whether a matter is within the knowledge of an Officer of the Contractor or the Sub-contractor for the purposes of clause 75.6(a)(ii)), be deemed to have such knowledge of any fact or circumstance in respect of the Project as:
 - (i) is held by any Contractor Personnel; or
 - (ii) ought reasonably to be held by any Contractor Personnel as a result of that person's involvement in the provision of any aspect of the Services.

7.6 Transport Agency's obligation to Contractor

Subject to the exercise by the Transport Agency of its rights in accordance with and to the extent permitted under the Project Documents and without limiting the obligations of the Contractor under the Project Documents, the Transport Agency agrees that it shall not, and shall procure that any third party engaged by or on behalf of the Transport Agency under clause 14.4 (Co-ordination with other contractors) shall not, prevent or materially hinder or disrupt the Contractor in the implementation of the Project, or adversely affect or prejudice the Contractor's performance of the Services, in accordance with the Project Documents. For the avoidance of doubt, this clause 7.6 will not apply to any action taken or decision

made by the Transport Agency or any other person in accordance with the Lane Closure Protocols.

7.7 Delegation of roading functions and powers

- (a) Pursuant to section 61 of the LTMA, the Transport Agency will delegate to the Contractor (and permit further delegation by the Contractor to the subcontractors) the statutory powers set out in the Delegation Instrument (Contractual Close) by signing the Delegation Instrument (Contractual Close). The parties acknowledge that the Transport Agency has obtained consent from the Minister of Transport to such delegation.
- (b) The parties agree that the Delegation Instruments do not:
 - (i) limit the rights or obligations of the Transport Agency or the Contractor under the Project Documents;
 - (ii) prejudice the Contractor's ability to claim against the Indemnified Parties under the terms of the Project Documents or at Law; or
 - (iii) increase the obligations of the Contractor under the Project Documents, other than to the extent required in order for the Contractor to exercise the relevant statutory function or power.

7.8 Additional provisions in relation to delegations

- (a) If, at any time, the Contractor reasonably believes that it requires statutory functions or powers in addition to those specified in the Delegation Instruments to enable it to provide the Services in accordance with this Agreement, it will notify the Transport Agency of the same (a **Delegation Notification**).
- (b) The Transport Agency will review any Delegation Notification and will notify the Contractor of whether it agrees that any additional statutory functions or powers are required and, if so, how it proposes to address the perceived issue, including by:
 - (i) seeking the delegation of a function or power to address the relevant issue;
 - (ii) allowing the Contractor to exercise additional statutory functions and powers, subject to any conditions and restrictions imposed by the Transport Agency, as the agent of or otherwise on behalf of the Transport Agency; and/or
 - (iii) a Transport Agency initiated Change, modifying or excluding the affected element of the Services.
- (c) The process set out in clause 7.8(b) will also apply where the delegation of a statutory power or function specified in the Delegation Instruments is revoked or amended.
- (d) In establishing a process to address any Delegation Notification or the revocation or amendment of any statutory delegation, the Transport Agency will, subject to clause 7.8(e), take such steps as are required to ensure that the Contractor is placed in a 'no better and no worse' position as it was prior to the Delegation Notification or the revocation or amendment of the statutory delegation, as the case may be.
- (e) For the purposes of this clause 7.8 the Contractor will be deemed to be in a no better and no worse position, without limitation, if:
 - (i) the Transport Agency authorises the Contractor to exercise the relevant statutory function or power on its behalf as its agent or otherwise;

- (ii) the Transport Agency procures the delegation of a statutory function or power in favour of the Contractor to address the issue described in the Delegation Notification; or
 - (iii) the Contractor does not require the relevant statutory function or power to enable it to provide the Services in accordance with this Agreement.
- (f) From the time at which the Contractor issues a Delegation Notification, or a statutory delegation is revoked or amended, until the time at which the same is addressed by the Transport Agency in accordance with clauses 7.8(b) to 7.8(e), the Transport Agency will not assert that the Contractor is in breach of this Agreement as a result of any notified deficiency in the then applicable statutory delegations.
- (g) If the Contractor exercises a function or power in the then applicable statutory delegation:
- (i) where the Transport Agency does not have such function or power due to the relevant part of the P2Wk Roads not being declared a motorway (in accordance with section 71 of the GRPA); or
 - (ii) between the time that the statutory delegation is revoked or amended and the time that the Contractor becomes aware of that revocation or amendment,

the Transport Agency will waive any right to claim against the Contractor for a breach of a statutory obligation.

8. Nature of Transport Agency's Obligations

8.1 Statutory functions

Nothing in or contemplated by any Project Document will be construed or interpreted as restricting or otherwise affecting the unfettered discretion of the Transport Agency or any other Governmental Entity to exercise any of its executive or statutory powers or functions under any Law, or to require the Transport Agency or any Governmental Entity to:

- (a) interfere with or influence the exercise of any statutory power or discretion by any person, including the Transport Agency or a Governmental Entity;
- (b) exercise a power or discretion in a manner that promotes the Objectives and expected outcomes of the Project Documents if the Transport Agency or the Governmental Entity regards that exercise as not in the public interest;
- (c) develop or implement new policy in a manner that is only consistent with the Objectives and expected outcomes of the Project Documents;
- (d) procure legislation in the future in a manner that is only consistent with the Objectives and expected outcomes of the Project Documents; or
- (e) act in any other way that the Transport Agency regards as not in the public interest.

8.2 Claims by Contractor

- (a) Anything that the Transport Agency or any Governmental Entity does or fails to do pursuant to its executive or statutory functions and powers will be deemed not to be or cause an act or omission by the Transport Agency under a Project Document and will not entitle the Contractor to make any Claim against the Transport Agency under a Project Document.

- (b) Notwithstanding clauses 8.1 and 8.2(a), the Transport Agency is not relieved from any Claim (including a claim under Part 11 (Events) of this Agreement) that the Contractor may have against the Transport Agency for its exercise (or failure to exercise) of its executive or statutory functions or powers under any Law in a manner contrary to an express obligation of the Transport Agency under a Project Document and the existence of such obligations, and the existence and amount of such Claim will be assessed in accordance with the terms of the relevant Project Document.

8.3 No obligation to influence

The parties expressly acknowledge and agree that the Transport Agency is not obliged, in performing any of the duties and obligations of the Transport Agency under the Project Documents, to exercise a power, function or duty that is granted to or within the responsibility of any other Governmental Entity, or to influence, over-ride or direct any Governmental Entity in the proper exercise and performance of its legal duties and functions.

8.4 Good faith

Nothing in any Project Document is to be construed as imposing any general duty of good faith on the Transport Agency to the Contractor or Contractor Personnel in relation to or arising out of the Project, other than to comply with the obligations (if any) expressly stated to be assumed by the Transport Agency under the Project Documents on a good faith basis.

9. Contractor's due diligence

9.1 Transport Agency Information

The Transport Agency makes no warranties nor gives any representations to the Contractor as to the accuracy, completeness or fitness for any purpose of any of the Transport Agency Information. The Contractor shall not in any way be relieved from any obligation under this Agreement nor shall it be entitled to claim against the Transport Agency or any Transport Agency Personnel on grounds that any information, whether obtained from the Transport Agency or otherwise (including information made available by the Transport Agency), is incorrect or insufficient. The Contractor shall make its own enquiries as to the accuracy and adequacy of that information.

9.2 Contractor to satisfy itself

- (a) The Contractor shall be deemed to have satisfied itself:
 - (i) as to the subject matter of this Agreement (including the Transport Agency Information) and the nature and extent of the risks assumed by it under this Agreement and is solely responsible for the consequences of any misunderstanding or misinterpretation of the requirements of this Agreement;
 - (ii) as to the quantity, quality, nature and extent of all resources (including human resources), materials (including Intellectual Property Materials) and facilities necessary to enable it to meet, to comply with and perform its obligations under this Agreement; and
 - (iii) that each Quarterly Unitary Charge provides it with sufficient allowance to enable the Contractor to undertake the Services, perform its other obligations and to manage the risks assumed by it under this Agreement.
- (b) The Contractor acknowledges and agrees that it:
 - (i) has gathered all information necessary to fully inform itself as to:

- (A) the nature of the work and materials necessary for the design and construction of the P2Wk Project and the provision of the AMM Services;
 - (B) the matters relating to the P2Wk Project Site referred to in clause 23.2 (Site Conditions);
 - (C) all regulatory requirements of the relevant Governmental Entities in relation to the P2Wk Project and the provision of the AMM Services generally;
 - (D) the adequacy, location and completeness of the External Infrastructure;
 - (E) the integration or compatibility of the Works Infrastructure with the External Infrastructure; and
 - (F) the performance of its obligations generally under this Agreement;
- (ii) has otherwise made its own independent assessment of, and has relied on its own enquiries, investigations, experience, skills and judgement in its entry into, and performance of this Agreement; and
 - (iii) has not relied on any representations made, or information provided to it, by the Transport Agency that has not been independently verified by the Contractor.

Part 4 – Commencement and duration

10. Contract Term

10.1 Commencement and duration

- (a) This Agreement and the rights and obligations of the parties to this Agreement take effect as set out in clause 10.2.
- (b) Except as stated in clause 10.3, this Agreement terminates on the earlier of:
 - (i) the Expiry Date; and
 - (ii) the Actual Termination Date.

10.2 Obligations in force from Execution Date and from Financial Close

- (a) Clause 10.3 and the following provisions of this Agreement take effect from the Execution Date:
 - (i) clauses 1 (Definitions) and 2 (Interpretation of Agreement);
 - (ii) clause 3 (Agreement);
 - (iii) clause 7.1 (No agency);
 - (iv) clause 7.2 (No authority);
 - (v) clause 8 (Nature of Transport Agency's Obligations);
 - (vi) clause 9 (Contractor's Due Diligence);
 - (vii) clause 10 (Contract Term);
 - (viii) clause 15.2 (Service management);
 - (ix) clause 21.4 (Probity Investigations);
 - (x) clause 27 (Design and Design Development);
 - (xi) clause 54 (Contractor warranties);
 - (xii) clause 55.1 (General undertakings);
 - (xiii) clause 56 (Confidential Information);
 - (xiv) clause 58 (Indemnities);
 - (xv) clause 59 (Conduct of Third Party indemnity Claims);
 - (xvi) Part 21 (Dispute Resolution);
 - (xvii) Part 22 (Miscellaneous Terms);

- (xviii) Schedule 1 (Conditions Precedent); and
- (xix) Schedule 4 (Financing).
- (b) Each provision of this Agreement not specified in clause 10.2(a) takes effect on and from Financial Close.

10.3 Continuing obligations

Except as otherwise expressly provided in this Agreement or as already taken into account in the calculation of any payment on termination under this Agreement:

- (a) expiry or termination of this Agreement shall be without prejudice to any accrued rights or obligations under this Agreement as at the date of termination; and
- (b) expiry or termination of this Agreement shall not affect the continuing rights and obligations of the Contractor and the Transport Agency under:
 - (i) this clause 10.3;
 - (ii) clause 18.4 (Retention of Records);
 - (iii) clause 56 (Confidential Information);
 - (iv) Part 19 (Termination);
 - (v) Part 20 (Hand back and disengagement) and Schedule 19 (Disengagement);
 - (vi) Part 21 (Dispute resolution); and
 - (vii) clause 100 (Governing law and jurisdiction),
 or under any other provision of this Agreement that:
 - (viii) relates to or is in connection with:
 - (A) the Transport Agency's rights to set-off and recover money;
 - (B) confidentiality;
 - (C) Intellectual Property;
 - (D) any indemnity, Standby Letter of Credit or other financial security given under this Agreement; or
 - (E) any right arising on termination;
 - (ix) is expressed to survive termination;
 - (x) is required to give effect to such termination or the consequences of such termination; or
 - (xi) by implication from its nature is intended to survive termination.

10.4 Conditions Precedent

- (a) The Contractor must procure that the Conditions Precedent (excluding Condition Precedent (l) (Deed of Indemnity) and Condition Precedent (m) (Delegation Instrument (Contractual Close))) are satisfied by the Conditions Precedent Deadline.
- (b) The Contractor must notify the Transport Agency promptly when each Condition Precedent has, in the Contractor's reasonable opinion, been satisfied.
- (c) The Transport Agency will notify the Contractor promptly of the date on which the Transport Agency is satisfied that all Conditions Precedent have either been satisfied or unconditionally waived by the Transport Agency.
- (d) If the Conditions Precedent are not met to the Transport Agency's satisfaction or waived by the Transport Agency (subject to any terms or conditions imposed by the Transport Agency) by the Conditions Precedent Deadline, then the Transport Agency may, at its option, terminate this Agreement. In such event no payment will be due by, nor will either party have any claim against the other under or in respect of this Agreement, save that clause 10.3 shall continue to apply and be binding on each of the parties.
- (e) Each of the Conditions Precedent is for the sole benefit of the Transport Agency and must be met to the Transport Agency's satisfaction. Conditions Precedent may only be waived in writing by the Transport Agency (in its absolute discretion). The Transport Agency agrees not to waive any Condition Precedent other than where it has received a written request to do so from the Contractor.

Part 5 – Ownership and tenure

11. Construction of Facilities for Transport Agency

11.1 Ownership of P2Wk Project

- (a) The P2Wk Project shall be designed and constructed by the Contractor under and in accordance with this Agreement on behalf of the Transport Agency.
- (b) Subject to the rights of the Contractor set out in this Part 5, the Transport Agency will at all times before and after the Service Commencement Date own the P2Wk Project and the P2Wk Project Site (excluding the Fitout, to which clause 11.2(e) applies).

11.2 Ownership of Fixtures and Fitout

- (a) Any Fixtures supplied by the Contractor prior to the commencement of the term of the P2Wk Project Lease (**Initial Fixtures**) will remain the property, and in the ownership, of the Contractor (notwithstanding any affixing to the P2Wk Project Site) until the earlier of:
 - (i) the date of payment in full of the Design and Construction Payment; and
 - (ii) the date of payment in full of the Compensation Sum,
 (such date being the **Transfer Date**).
- (b) The Transport Agency acknowledges and agrees that the Contractor shall, until the Transfer Date, have the right (in addition and without prejudice to its other rights and remedies under the Project Documents, including the rights of access set out in Part 7 (Access to P2Wk Project Site and Other Land)) to enter and re-enter on to the P2Wk Project Site and remove and repossess the Initial Fixtures, but only if and to the extent the Transport Agency fails to pay in full:
 - (i) the Design and Construction Payment in accordance with clauses 12.3 (Payments on Service Commencement Date) and 12.4 (Set off); or
 - (ii) the Compensation Sum in accordance with clause 79.1 (Payment of Compensation Sum),
 in each case within five Business Days after the due date for payment of such amount under this Agreement.
- (c) Upon the Transfer Date, the Contractor shall immediately transfer to the Transport Agency its ownership of the Initial Fixtures together with all associated rights in and to the Initial Fixtures and the P2Wk Project Site reserved under clause 11.2(b). The Initial Fixtures will automatically vest in the Transport Agency on the Transfer Date, by operation of this clause, without the need for any additional action by any person.
- (d) The expenditure incurred by or for the Contractor in connection with the Initial Fixtures will be included in the Design and Construction Payment.
- (e) Any Fitout on the P2Wk Project Site will belong to the Contractor until the earlier of the Actual Termination Date and the Expiry Date. On such date, the Fitout will (if elected by the Transport Agency at its discretion with such election to be made in writing) be transferred by the Contractor to the Transport Agency, for no additional consideration, as part of the Disengagement Deliverables in accordance with clause 85 (Contractor's

Disengagement Obligations), the terms of Schedule 19 (Disengagement) and the requirements of the Disengagement Plan.

- (f) Any Fixtures in respect of which the Contractor has incurred expenditure after the commencement of the P2Wk Project Lease will be owned by the Transport Agency.
- (g) On the earlier of the Expiry Date and the Actual Termination Date, any Fixtures:
 - (i) to the extent ownership is vested in the Contractor, will (if elected by the Transport Agency at its discretion with such election to be made in writing) be transferred by the Contractor to the Transport Agency; or
 - (ii) to the extent ownership is vested in the Transport Agency, will be handed back by the Contractor to the Transport Agency,

for no additional consideration, as part of the Disengagement Deliverables in accordance with clause 85 (Contractor's Disengagement Obligations), the terms of Schedule 19 (Disengagement) and the requirements of the Disengagement Plan.

12. P2Wk Project Lease and payments on Service Commencement Date

12.1 Prior to Service Commencement Date

The Contractor will, prior to the Service Commencement Date, have the rights to access the P2Wk Project Site set out in Part 7 (Access to Site and Site Issues).

12.2 Entry into P2Wk Project Lease

- (a) On or prior to the Service Commencement Date, the parties must enter into the P2Wk Project Lease. The P2Wk Project Lease will have a term commencing at 9.00am on the Service Commencement Date and terminating on the earlier of the Actual Termination Date and the Expiry Date.
- (b) If the Contractor requires registration of the P2Wk Project Lease under the Land Transfer Act 1952 or pursuant to section 64 of the LTMA, the Transport Agency will:
 - (i) if and to the extent required to facilitate registration of the P2Wk Project Lease, request that the Minister of Transport requests the Registrar-General of Land to register the P2Wk Project Lease under section 64 of the Land Transport Management Act 2003;
 - (ii) otherwise provide reasonable assistance to the Contractor, on request, in connection with the Contractor's registration of the P2Wk Project Lease; and
 - (iii) as soon as reasonably practicable after the date of the legal survey of the P2Wk Operating Site pursuant to paragraph 15 (Legal Survey) of Schedule 5, lodge a request with the Minister for Land Information to do all things necessary to enable registration of the P2Wk Project Lease, which may include requesting that the Minister declare the P2Wk Operating Site to be a road or set apart for use in connection with a road in accordance with the Public Works Act 1981.

12.3 Payments on Service Commencement Date

On the Service Commencement Date, immediately on commencement of the P2Wk Project Lease:

- (a) the Transport Agency must pay the Design and Construction Payment to the Contractor in consideration of the completion of the P2Wk Project and the transfer of the rights set out in clause 11.2(c) (Ownership of Fixtures and Fitout); and
- (b) the Contractor must pay the Rental Prepayment to the Transport Agency, representing the rental to be prepaid under the P2Wk Project Lease,

with the payments to be made in accordance with clause 12.4.

12.4 Set off

- (a) The Transport Agency's obligation to pay the Design and Construction Payment to the Contractor and the Contractor's obligation to pay the Rental Prepayment to the Transport Agency:
 - (i) will arise at the same time; and
 - (ii) will be set off against each other immediately on the obligations arising, with the set-off to be recorded in a written notice given by the Transport Agency to the Contractor.
- (b) GST payable as between the parties in respect of the Rental Prepayment and the Design and Construction Payment will be addressed in accordance with clauses 50.2 (Zero rating of P2Wk Project Lease) and 50.3 (Design and Construction Payment – GST).

12.5 Financial arrangements rules

For the purposes of the financial arrangements rules in the Income Tax Act 2007, the parties agree that:

- (a) they are independent parties dealing at arm's length with each other in relation to the Project;
- (b) the Rental Prepayment is the lowest price the parties would have agreed for the rental of the P2Wk Project for the term of the P2Wk Project Lease, on the date of this Agreement, if payment had been required in full at the time the first right in the P2Wk Project Lease passes from the Transport Agency to the Contractor;
- (c) the Design and Construction Payment includes capitalised interest to the extent that it exceeds the agreed design and construction costs (which by definition exclude Fitout and debt funding costs);
- (d) the Rental Prepayment is the value of the rental under the P2Wk Project Lease and therefore does not include any capitalised interest; and
- (e) in the case of the Contractor only, it will compute its taxable income for the relevant period on the basis that the total consideration includes capitalised interest as set out in clause 12.5(c) and it will file its Tax returns accordingly.

Part 6 – General terms relating to Services

13. Objectives

13.1 Purpose

The Services are to be provided for the purpose of meeting the Objectives. The rights and obligations of the parties under or in relation to this Agreement are to be interpreted to give effect to these Objectives.

13.2 Effect

Clause 13.1 is not to be interpreted as expanding or extending the Transport Agency's Requirements or any express provision of this Agreement.

14. Services

14.1 Core Services

The Contractor must provide:

- (a) Works Provisioning; and
- (b) the AMM Services,

in each case in accordance with and on the terms and conditions of this Agreement.

14.2 Other Services

The Contractor must:

- (a) deliver the P2Wk Project to the Transport Agency at the end of the Contract Term and provide the Disengagement Services (if so required by the Transport Agency) in accordance with the terms of Part 20 (Hand back and disengagement); and
- (b) otherwise perform all obligations that by the terms of this Agreement the Contractor is bound to perform.

14.3 Service delivery

The Contractor must deliver the Services in accordance with the terms of this Agreement with due care, skill and diligence and by the use of techniques, methodologies, processes and materials that accord with Good Industry Practice, to the extent that Good Industry Practice requires more stringent or additional standards than those imposed on the Contractor under this Agreement.

14.4 Co-ordination with other contractors

Where the Transport Agency engages a third party to provide works and/or services on the P2Wk Project Site or, where permitted to under this Agreement, engages a third party to provide Services, then:

- (a) subject to clause 14.4(c), the Contractor (at its own cost) must co-operate with that third party supplier to enable that third party supplier to provide the relevant services

or Services (including in relation to the provision of reasonable access, assistance and information); and

- (b) the Contractor will enter into and comply with such co-ordination and interface agreements with third party suppliers as the Transport Agency or the Contractor may reasonably require, on terms that are consistent with:
 - (i) the Site Access Protocols; and
 - (ii) the Third Party Interface Protocols,
 and are otherwise satisfactory to the Transport Agency; and
- (c) the Transport Agency will be responsible for procuring that the third party suppliers enter into these agreements prior to such third party suppliers accessing the P2Wk Project Site.

15. Governance and service management

15.1 Governance

- (a) On or prior to Financial Close, the parties are to establish a Project Governance Group. The Project Governance Group will be a high level forum that will (among other things) review, discuss and manage the overall relationship between the parties.
- (b) On or prior to Financial Close, the parties are to establish a Relationship Management Group. The Relationship Management Group will be a forum that will (among other things) be responsible for overseeing the implementation and performance of this Agreement as well as implementing any strategies or innovations agreed on by the Project Governance Group.
- (c) The parties will procure that the Project Governance Group and the Relationship Management Group perform the functions assigned to each Group in accordance with the terms of Schedule 7 (Governance and Service Management).

15.2 Service management

- (a) The Transport Agency shall, from time to time, notify the Contractor in writing of the person it appoints as the Transport Agency's Representative.
- (b) The Contractor shall, from time to time, notify the Transport Agency in writing of the person it appoints as the Contractor's Representative.
- (c) The Transport Agency will ensure that it always has a person representing it as the Transport Agency's Representative as long as any obligations under this Agreement remain to be performed by the Contractor.
- (d) The Contractor will ensure that it always has a person representing it as the Contractor's Representative as long as any obligations under this Agreement remain to be performed by the Contractor.
- (e) The Transport Agency's Representative and the Contractor's Representative will each be delegated, by the Transport Agency and the Contractor respectively, the functions, powers and responsibilities assigned to them by the terms of Part 2 (Parties' Representatives) of Schedule 7 (Governance and Service Management) (as applicable).

- (f) The Contractor will ensure that the Contractor's Representative:
 - (i) has sufficient experience and skills to undertake the role;
 - (ii) is provided with all necessary information and documentation within its possession or control to enable the Contractor's Representative to fully and effectively perform their functions and responsibilities;
 - (iii) implements such internal procedures as are necessary to ensure that all material events relating to this Agreement are brought to the attention of the Contractor's Representative;
 - (iv) is present on the P2Wk Project Site at such times as are necessary to ensure that the Contractor is complying with its obligations under this Agreement; and
 - (v) is available as and when required within business hours and is at all reasonable times fully contactable by the Transport Agency's Representative, or their delegate.

16. Sub-contractors

16.1 General provisions

- (a) The Contractor must not sub-contract the whole or any part of the Services to any person except in accordance with this clause 16.
- (b) The Contractor is solely responsible for the selection of each Sub-contractor and must ensure, in each case, that each such Sub-contractor is creditworthy, qualified and has the relevant experience and expertise to perform the work it is required to carry out for the Contractor.
- (c) The Contractor must:
 - (i) comply with its obligations under all sub-contracts to which it is party;
 - (ii) monitor the performance by each Sub-contractor under:
 - (A) each sub-contract to which the Contractor is party; and
 - (B) any related direct deed to which the Contractor is party; and
 - (iii) ensure compliance by each Sub-contractor with those terms of this Agreement that are expressly stated to relate to Sub-contractors or sub-contracts.
- (d) Clause 4.1 (Ancillary Documents and Financing Agreements) applies in relation to each sub-contract to which the Contractor and a Major Sub-contractor is party.
- (e) The Contractor:
 - (i) is not relieved of any of its obligations and liabilities under this Agreement as a result of any subcontracting of its obligations and liabilities; and
 - (ii) remains responsible for all work carried out and materials used for the purposes of the Project and in the delivery of the Services.

- (f) The Contractor must ensure that any sub-contract it enters into with a Major Sub-contractor, unless otherwise agreed by the Transport Agency:
 - (i) is entered into, and continues to be, on Arms' Length Terms;
 - (ii) contains:
 - (A) acknowledgements and agreements in respect of Transport Agency Background IP on the same terms as the acknowledgements and agreements set out in clause 57.3 (Background IP);
 - (B) an assignment of rights in respect of the Major Sub-contractor's Intellectual Property rights on the same terms as the assignment from the Contractor to the Transport Agency under clause 57.4 (Developed IP); and
 - (C) a licence for the Transport Agency in respect of the Major Sub-contractor's Intellectual Property rights on the same terms as the licence the Transport Agency receives from the Contractor under clause 57.6 (Licensing of Contractor Background IP); and
 - (iii) includes, and continues to include:
 - (A) terms that the sub-contract may not be varied or cancelled so as to alter or extinguish the rights granted to the Transport Agency, except in accordance with that Major Sub-contractor's Direct Deed;
 - (B) a statement that the sub-contract as it relates to the requirements of this clause 16.1(f) is for the benefit of and enforceable by the Transport Agency under the Contracts (Privity) Act 1982;
 - (C) a requirement that either party to the sub-contract may release to the Transport Agency any of those parts of the sub-contract sufficient to demonstrate compliance with the terms of this clause 16.1(f); and
 - (D) terms that require the Major Sub-contractor to take all steps reasonably practicable to mitigate and minimise Sub-contractor Breakage Costs.
- (g) The Contractor must advise the Transport Agency of any early termination of a sub-contract promptly on its termination, or on becoming aware of its termination.
- (h) The Contractor may replace any Sub-contractor (other than a Major Sub-contractor) on giving prior written notice to the Transport Agency (provided that notice is not required where that Sub-contractor is engaged for the purposes of undertaking works with an aggregate capital value of less than \$10,000,000 (Indexed)).
- (i) The Contractor must not replace any Major Sub-contractor without the prior written consent of the Transport Agency.
- (j) The Contractor must:
 - (i) notify the Transport Agency in writing if it proposes to replace a Major Sub-contractor at any time during the Contract Term;
 - (ii) provide details to the Transport Agency of the identity of the proposed replacement Major Sub-contractor and the nature and scope of the services that the Contractor intends the replacement Major Sub-contractor to undertake;

- (iii) provide to the Transport Agency a copy of the proposed sub-contract to which the replacement Major Sub-contractor will be made party; and
- (iv) provide any more information about the proposed replacement Major Sub-contractor that the Transport Agency may reasonably require.
- (k) Following receipt of the notice referred to in clause 16.1(j), the Transport Agency (acting reasonably) will approve or reject the proposed replacement Major Sub-contractor within 20 Business Days of receipt of such notice.
- (l) If the Transport Agency approves the proposed replacement Major Sub-contractor it may do so on any conditions, including (if the Transport Agency so requires) the condition that the final form of the proposed sub-contract:
 - (i) complies with the requirements of clause 16.1(f); and
 - (ii) is not materially different from the form of sub-contract already made available to the Transport Agency under clause 16.1(j)(iii).
- (m) If the Transport Agency rejects the proposed replacement Major Sub-contractor, the Contractor must not enter into the replacement sub-contract with that proposed replacement Major Sub-contractor until the reasons for the Transport Agency's rejection have been addressed to the satisfaction of the Transport Agency.
- (n) Failure by the Transport Agency to approve or reject a replacement Major Sub-contractor within 20 Business Days under clause 16.1(k) constitutes deemed approval of the replacement Major Sub-contractor, and such deemed approval is subject to the conditions specified in clause 16.1(l).

16.2 Replacement Major Sub-contractor

With effect from the time the Transport Agency approves or is deemed to approve the appointment of a replacement Major Sub-contractor under clause 16.1(k) or 16.1(n) (as applicable) and any conditions to the appointment of that replacement Major Sub-contractor have been satisfied, for the purpose of clause 75 (Termination on Contractor Default) only:

- (a) Service Failure Points incurred through the performance of the terminated Major Sub-contractor prior to termination of its Major sub-contract;
- (b) any false, misleading or incorrect statement or representation made in any report or invoice by the terminated Major Sub-contractor prior to termination of its Major sub-contract; or
- (c) any General Breach committed by the Contractor due to the performance of the terminated Major Sub-contractor prior to termination of its Major sub-contract,

shall not be included for the purpose of assessing whether the Transport Agency has a right to issue the Contractor with a Warning Notice under clause 75.4(a).

17. Compliance obligations

17.1 Applicable Laws

- (a) The Contractor must:
 - (i) ensure that the Services (including the procurement and supply of any items or materials procured for the provision of the Services) are provided by it, its Major

Sub-contractors and its Contractor Personnel at all times in compliance with all Laws including without limitation, maintaining sufficient records, and providing reasonable assistance to the Transport Agency where requested, to enable the Transport Agency to meet the requirements of the Official Information Act 1982 and the Public Records Act in respect of the P2Wk Project; and

- (ii) not, by any act or omission:
 - (A) delay provision of any information that would cause the Transport Agency or any Transport Agency Personnel to be in breach of the Official Information Act 1982; or
 - (B) cause the Transport Agency or any Transport Agency Personnel to be in breach of any other Law.
- (b) Clause 17.1(a) is not to be read as limiting any other provision in this Agreement relating to compliance with any specific Laws.

17.2 Environmental obligations

- (a) The Contractor must at all times perform its obligations under this Agreement in an environmentally responsible manner.
- (b) The Contractor must:
 - (i) carry out and fulfil all the requirements of the Environmental Management Plans; and
 - (ii) without limiting clause 17.1, comply with all Laws relating to the Environment.

17.3 Health and safety obligations

The Contractor:

- (a) must strictly comply, and ensure that all Contractor Personnel strictly comply, with all HSE Legislation and do all things necessary and in a manner that ensures that the Contractor satisfies its obligations under all HSE Legislation;
- (b) accepts that it is responsible at all times from Financial Close until the Service Commencement Date for the control and management of the P2Wk Project Site for the purposes of providing the Services and discharging all duties imposed by HSE Legislation (including those imposed on the "principal");
- (c) must put in place a Construction Health and Safety Plan and a Health and Safety Management Plan in relation to the P2Wk Project Site that adequately addresses its obligations under this Agreement and under all HSE Legislation;
- (d) must comply, and must ensure that all Contractor Personnel comply, during the provision of the AMM Services, with all health and safety requirements at the P2Wk Project Site;
- (e) must ensure that all Contractor Personnel take all practicable steps to carry out the Services at all times in a way that does not cause detriment to the health and safety of any Users; and
- (f) without limiting the effect of any other indemnity in this Agreement, to the extent permitted by Law, indemnifies the Transport Agency and all Transport Agency Personnel, excluding the Independent Reviewer, against any Losses suffered or

Liabilities incurred by the Transport Agency or any Transport Agency Personnel that may arise as a result of any breach by the Contractor or any Contractor Personnel of HSE Legislation or this clause 17.3.

17.4 Consents

(a) The Contractor must:

- (i) obtain all Contractor Consents including entering into legal agreements necessary for the grant of such Consents;
- (ii) maintain, to the extent permitted by Law, all Contractor Consents, subject to the Transport Agency using all reasonable endeavours to assist the Contractor in maintaining those Consents where the Transport Agency is the named consent holder, or requiring authority, of a Contractor Consent;
- (iii) use its best endeavours to assist the Transport Agency to obtain all Transport Agency Consents;
- (iv) be responsible for implementing each Consent within the period of its validity in accordance with its terms and the relevant Laws;
- (v) supply free of charge to the Transport Agency a copy of any application for a Contractor Consent (with a copy of all accompanying drawings and other documents) and a copy of any such Consent obtained and any associated legal documentation;
- (vi) comply with the conditions attached to any Consents and any associated legal documentation, except in relation to those RMA Conditions that are specified as Transport Agency Responsibility in clause 2 of Schedule 6 (Resource Management Act Requirements);
- (vii) procure that no Consents or associated legal documentation are breached by it or any Contractor Personnel;
- (viii) comply with the requirements of any notice, order, declaration, decision or determination issued by a Governmental Entity or judicial body under the Resource Management Act 1991, Heritage New Zealand Pouhere Taonga Act 2014, Hazardous Substances and New Organisms Act 1996 or Wildlife Act 1953 relating to the Contractor's compliance with any Consent. Examples of such notices include any Clean-up Notice or any infringement notice, abatement notice, enforcement order, conviction, excessive noise direction, or compliance order, each as defined in the Resource Management Act 1991;
- (ix) preserve (and, if necessary, renew) each Consent and ensure that all Consents continue in full force and effect for such time as is necessary for the Contractor to carry out Works Provisioning and/or the AMM Services;
- (x) not without the Transport Agency's prior written consent (which consent shall not be unreasonably withheld or delayed) apply for, or agree to any change, relaxation or waiver of any Consent (whether obtained before or after the Service Commencement Date) or of any condition attached to it;
- (xi) unless otherwise agreed by the Transport Agency in writing, request in any application to a Local Authority for a Contractor Consent that is a resource consent under the Resource Management Act 1991, that the application be publicly notified in accordance with the provisions of the Resource Management Act 1991;

- (xii) unless otherwise agreed by the Transport Agency in writing, request in any application to a Local Authority for a change to a Contractor Consent that is a resource consent under the Resource Management Act 1991, that the application for a change be publicly notified in accordance with the provisions of the Resource Management Act 1991; and
 - (xiii) unless otherwise agreed by the Transport Agency in writing, ensure that any notice of requirement for an alteration to the P2Wk Designation, or to any of the Transport Agency's other designations, is publicly notified in accordance with the provisions of the Resource Management Act 1991.
- (b) Subject to the compliance by the Contractor with its obligations under clause 17.4(a), references in this Agreement to Consents shall be construed as referring to the Consents as from time to time expressly varied, relaxed or waived.
- (c) Without limiting the Contractor's other obligations under this Agreement, where any Consent is issued on conditions that would or could have a material adverse effect (or, in the case of an MLR Consent, an effect) on:
- (i) the design or quality of all or any part of the P2Wk Project, or the Contractor's ability to undertake Works Provisioning or to meet the Works Completion Tests; or
 - (ii) the ability of the Contractor to provide the AMM Services in accordance with the Service Requirements or its other obligations in accordance with this Agreement,

the Contractor must notify the Transport Agency that these conditions would or could have such an effect, together with providing the Contractor's proposals for satisfying these conditions in a manner that would not have such an effect, to the Transport Agency for review.

- (d) If the Transport Agency has no comments on the conditions notified to it by the Contractor under clause 17.4(c) and/or the Contractor's proposals in respect of such conditions, the Contractor must make any amendments to the Design Documentation and/or the P2Wk Project required to satisfy the conditions, but those amendments will not constitute a Transport Agency initiated Change or (except to the extent clause 48.6 (Change in Consents) applies) entitle the Contractor to make any other Claim against the Transport Agency except to the extent those amendments are a consequence of the issue of the MLR Consents requiring change to the design or construction of the MLR Infrastructure with reference to the MLR Infrastructure Baseline, in which case:
- (i) the Transport Agency must initiate a Change in respect of the same (**MLR Change**), either at its own initiation or on receipt of written notice from the Contractor requiring it to initiate a MLR Change; and
 - (ii) the obligation to initiate a MLR Change will apply where the relevant MLR Consent is issued on conditions that would not allow construction of the MLR Infrastructure in accordance with the MLR Infrastructure Baseline, regardless of whether or not the material adverse effect test in clause 17.4(c) would be met.
- (e) If the Transport Agency raises comments on the conditions notified to it by the Contractor under clause 17.4(c) and/or the Contractor's proposals in respect of such conditions, the Contractor will liaise (or in the case of a Transport Agency Consent, the Transport Agency and the Contractor will liaise) with the Governmental Entity issuing the Consent with a view to reaching agreement on the conditions of that Consent such that they will not have any of the material adverse effects described in

clause 17.4(c) and enable the Contractor to continue to meet its obligations under this Agreement.

- (f) Any amendments made to the Design Documentation or the P2Wk Project as a consequence of clause 17.4(c) will not (except to the extent they comprise a MLR Change) constitute a Transport Agency initiated Change or (except to the extent clause 48.6 (Change in Consents) applies) entitle the Contractor to make any other Claim against the Transport Agency.
- (g) The Transport Agency shall, subject to the Contractor's compliance with clause 17.4(a)(iii), use reasonable endeavours to obtain the Transport Agency Consents. The term "reasonable endeavours" as used in this clause 17.4(g) is not to be construed as obliging the Transport Agency to do anything that it is not obliged to do under clause 8.1 (Statutory functions).

17.5 Road Safety Audit

- (a) Where the Contractor is required to conduct a Road Safety Audit under this Agreement, it must engage the Road Safety Audit Team to conduct the Road Safety Audit in accordance with this clause 17.5.
- (b) The Transport Agency will notify the Contractor of the identity of the Road Safety Audit Team as at the Execution Date and where there is any change to its composition. The Transport Agency may, at any time and at its sole discretion, appoint or remove any member of the Road Safety Audit Team.
- (c) Each Road Safety Audit must be conducted in accordance with the Road Safety Audit Procedures.
- (d) Each of the Transport Agency and the Contractor may include an observer to the Road Safety Audit.
- (e) The Contractor must:
 - (i) provide all information and assistance reasonably required by the Road Safety Audit Team in the conduct of a Road Safety Audit;
 - (ii) as the designer (as described in the Road Safety Audit Procedures), respond to a Road Safety Audit report in accordance with the Road Safety Audit Procedures, which response must identify the Contractor's reasoning for agreeing with, or otherwise, the recommendations from the Road Safety Audit report; and
 - (iii) provide a copy of the Road Safety Audit report and the Contractor's response to the Road Safety Audit report to the Transport Agency.
- (f) Following receipt of a Road Safety Audit report and the Contractor's response to the Road Safety Audit report, the Transport Agency will issue a written response to the Contractor, including the Transport Agency's safety engineer's response (where provided) and client (as described in the Road Safety Audit Procedures) decision to the recommendations from the Road Safety Audit report.
- (g) The Contractor is solely responsible for the costs and expenses of conducting any Road Safety Audit (except to the extent the Transport Agency is obliged to meet the costs and expenses of any Road Safety Audit under clause 33.4 (Results of Asset Survey)). The Transport Agency may recover from the Contractor as Moneys Owed any costs incurred with respect to the conduct of any Road Safety Audit (including any invoices paid by the Transport Agency in respect of the Road Safety Audit Team).

- (h) If any Road Safety Audit conducted during the Operating Term shows that the Contractor has not complied with, or is not complying with, any of its obligations under this Agreement, then the Contractor must carry out, at its own cost, such work identified in the Road Safety Audit report required in order to comply with this Agreement as soon as reasonably practicable following the Road Safety Audit.
- (i) If the Contractor fails to carry out the work in accordance with clause 17.5(h), then:
 - (i) the Transport Agency may notify the Contractor of the work identified in the Road Safety Audit report required in order to comply with this Agreement, and specify a reasonable period within which the Contractor must carry out such work;
 - (ii) the Contractor must carry out, at its own cost, such work within the period specified; and
 - (iii) if the Contractor fails to complete such work within the period specified, the Transport Agency shall be entitled to undertake, or to procure the undertaking of, such work and to recover all costs incurred by it (including administration costs) in doing so from the Contractor by means of a deduction from the next payment or payments of the Quarterly Unitary Charge.
- (j) For the avoidance of doubt, otherwise than as required under this Agreement (including as required by this clause 17.5), the Contractor is not required to adopt any recommendation from a Road Safety Audit conducted during the Operating Term, and if the Transport Agency requires the Contractor to adopt any such recommendation, it will be dealt with under Part 12 (Changes) as a Change.

17.6 Notification

The Contractor must immediately notify the Transport Agency of any breach or likely breach or non-compliance or likely non-compliance with this clause 17.

18. Record keeping

18.1 Service Records

- (a) The Contractor must at all times, and in accordance with Good Industry Practice and any applicable Laws, maintain all information (in both hard and soft copy form) relating to the Services (**Service Records**) including information relating to the following:
 - (i) the actual progress of Works Provisioning against the Construction Programme;
 - (ii) the Contractor's performance monitoring;
 - (iii) all AMM Services carried out following the Service Commencement Date, including all information required to be maintained in accordance with Schedule 12 (Service Requirements);
 - (iv) all insurance claims;
 - (v) all incidents relating to health, safety and security that have occurred during the Contract Term; and
 - (vi) Hazardous Substances, Contamination and Industrial Waste.

- (b) The Transport Agency is entitled to disclose any of the Service Records to a potential New Contractor for any of the purposes relating to retendering for the Services.

18.2 Financial Records

- (a) The Contractor must at all times, and in accordance with Good Industry Practice, GAAP (as applicable) and any applicable Laws, maintain all financial information relating to the Project (**Financial Records**) including information relating to the following:
 - (i) administrative overheads;
 - (ii) payments made to or received from Sub-contractors by the Contractor;
 - (iii) capital and operating expenditure;
 - (iv) such other items as the Transport Agency may reasonably require from time to time to conduct costs audits for verification of expenditure for the purpose of this Agreement;
 - (v) copies of all written consents and approvals, or waivers or releases in respect of any breaches by the Contractor under the Financing Agreements; and
 - (vi) all reports, invoices and supporting documentation referred to in clause 49.2 (Report and invoice).
- (b) The Contractor shall, and shall procure that each Major Sub-contractor shall, at all times:
 - (i) maintain a full record of particulars of the costs of carrying out the Services with such cost detail broken down into the actual cost of providing each element of the Services; and
 - (ii) on a request by the Transport Agency, provide a written summary of any of the costs referred to in clause 18.2(b)(i), including (in the case of the Contractor only) details of any funds held by the Contractor specifically to cover such costs,

in each case in such form and detail as the Transport Agency may reasonably require to enable the Transport Agency to monitor the performance by the Contractor of its obligations under this Agreement.

18.3 Maintenance of Records

- (a) The Contractor shall ensure that the Records are kept up to date at all times.
- (b) The Contractor will:
 - (i) keep the Transport Agency fully informed as to the procedures in place for ensuring that all the Records are kept up to date at all times, and at the Transport Agency's request provide the Transport Agency with evidence that those Records are fully up to date;
 - (ii) hold all Records held in electronic form in a format that is, or in formats that are, compatible with the Transport Agency's computer systems for the time being, so as to enable the Transport Agency to exercise its rights of access under clause 18.5(a)(i);

- (iii) ensure that it and all of the Contractor Personnel maintain the Records to a standard and containing sufficient detail to allow an experienced provider of services the same or similar to those of the Services, to perform the Services or similar services if the Contractor ceases to do so in whole or in part; and
 - (iv) not hold or store any of the Records outside New Zealand without the prior written consent of the Transport Agency.
- (c) The Records must provide sufficient detail to enable the Transport Agency to reconcile the Records with:
 - (i) the contents of the Reports that the Contractor is required to provide to the Transport Agency under this Agreement; and
 - (ii) the invoices that the Contractor renders to the Transport Agency under clause 49.2 (Report and invoice).

18.4 Retention of Records

- (a) The Contractor shall retain all Records it is obliged to maintain under this Agreement for the whole of the Contract Term and for a period of six years after the Expiry Date or Actual Termination Date (as applicable).
- (b) The Contractor must not use any of the Records other than for the purposes contemplated by this Agreement.
- (c) The Contractor must ensure that it has and continues to have access to all Records at all times, that all Records are available in human readable form (as well as computer readable form, if relevant) and that the integrity of the Records is not at any time compromised.
- (d) The retention period specified in clause 18.4(a) applies to the primary source Records and to all Records held in electronic form.
- (e) The Contractor will, in addition to its obligations under clause 18.4(a), clause 18.4(b) and clause 18.4(c), observe and comply with the requirements of the Public Records Act as if the Records were public records (as defined in that Act).
- (f) If either party becomes aware or suspects that any unauthorised person has obtained or attempted to obtain access to the Records or any Confidential Information, or has attempted to use the Records or any Confidential Information for purposes not authorised or permitted by the terms of this Agreement, that party:
 - (i) will immediately notify the other party;
 - (ii) will take such steps as are available to it to identify those unauthorised persons; and
 - (iii) (after consultation with the other party) will make such changes to its operations at its own cost, with a view to prevent, as far as is practicable, the occurrence of the same or similar breaches of security in the future.

18.5 Access to and inspection of Records

- (a) The Transport Agency will have access to:
 - (i) all Records that are maintained by the Contractor;

- (ii) any other information relevant to the Contractor's performance and compliance with the terms of this Agreement; and
 - (iii) the Contractor's project office systems, to enable the Transport Agency to have electronic access to all Records held in electronic form.
- (b) The Contractor must provide such facilities as the Transport Agency may reasonably require for its representatives to visit any place where the Records are held, in order to inspect the Records.
 - (c) The Transport Agency may take copies of any Records during the course of any inspection.
 - (d) The Contractor will provide a report on all or any of the Records to the Transport Agency as and when requested by the Transport Agency.

19. Service assurance

19.1 Quality Assurance System

- (a) Prior to commencing the Works Provisioning, the Contractor must develop a Quality Assurance System to cover the execution of the Works Provisioning and, prior to the Service Commencement Date, a Quality Assurance System to cover the provision of the AMM Services.
- (b) The Quality Assurance System for:
 - (i) Works Provisioning must be developed and implemented in accordance with the Inspection and Test Plan, which forms part of the Works Project Management Plan; and
 - (ii) the AMM Services must be developed and implemented in accordance with the Quality Assurance Management Plan, which forms part of the P2Wk Project Operations Plan.
- (c) The Contractor:
 - (i) must implement and comply with the Quality Assurance System in executing the Works Provisioning and in providing the AMM Services;
 - (ii) must allow the Transport Agency access to the Quality Assurance System and the quality assurance systems of Major Sub-contractors so as to enable surveillance and auditing of compliance with the Quality Assurance System; and
 - (iii) will not be relieved from performing any of its obligations under this Agreement or from any of its liabilities whether under this Agreement or at Law as a result of the implementation of, and compliance with, the quality assurance requirements of this Agreement.
- (d) The Contractor must regularly update and maintain the Quality Assurance System throughout the Contract Term to the reasonable satisfaction of the Transport Agency.
- (e) The Quality Assurance System (together with the Works Quality Assurance Plan and the Quality Assurance Management Plan) and each update of the same must be submitted for review under the Review Procedures.

19.2 Access to premises

- (a) The Contractor shall, on reasonable notice and at reasonable times, provide the Transport Agency and the Independent Reviewer (and any person authorised by either) with access to any of the Contractor's premises used for providing the Services for the purposes set out in clause 19.2(b), clause 19.2(c) and clause 19.3. In exercising its rights under this clause 19.2, the Transport Agency will comply with any reasonable safety requirements of the Contractor when on the Contractor's premises so long as those safety procedures have been previously advised to the Transport Agency in writing or as part of a safety induction and so long as those safety procedures do not unreasonably compromise or limit the exercise by the Transport Agency of its rights under this Part 6.
- (b) The Transport Agency may enter the Contractor's premises:
 - (i) to appraise the Services;
 - (ii) to review, inspect and monitor work being done as part of any aspect of the Services;
 - (iii) subject to clauses 29.3 (Works Completion) and 29.7 (Close-out), to attend any test or investigation that is being carried out on those premises and to direct any testing on or in relation to any part of the Works Provisioning and/or in relation to the AMM Services;
 - (iv) to access the Records in accordance with clause 18.5 (Access to and inspection of Records);
 - (v) to check the Contractor's compliance with its obligations under this Agreement;
 - (vi) to undertake audits of any aspect of the Services; and
 - (vii) in connection with any matter that the Transport Agency deems relevant to the performance of the Services.
- (c) The Contractor shall procure that the Transport Agency or any representative or adviser of the Transport Agency shall have, at all reasonable times and on giving reasonable notice, the right to visit any property, site or workshop:
 - (i) where materials, plant or equipment are being manufactured, prepared or stored for use in the Project for the purposes of general inspection and of attending any test or investigation being carried out in respect of Works Provisioning and/or the provision of the AMM Services; or
 - (ii) used by the Contractor as training or workshop facilities and places where work is being prepared or materials are being obtained for the Project.
- (d) The Contractor shall provide the Transport Agency and any person authorised by the Transport Agency (or procure that the Transport Agency and any person authorised by the Transport Agency) is provided with such:
 - (i) information, explanations and documentation reasonably necessary or desirable; and
 - (ii) accommodation and facilities (including communication facilities) reasonably required,

to enable the Transport Agency to fully exercise its rights under clause 19.2(b) or clause 19.2(c).

- (e) The Transport Agency will bear the reasonable costs and expenses of any inspection or test conducted at its direction under this clause 19 unless the inspection or test reveals any Defect, in which case the Contractor must bear the costs and expenses of the inspection and testing.

19.3 Audits

- (a) The Transport Agency may initiate an audit of all or any of the items listed in clause 19.3(d) to verify the Contractor's compliance with and performance of its obligations under this Agreement and the likely capacity of the Contractor to continue to comply with its obligations under this Agreement.
- (b) The Transport Agency must:
 - (i) give the Contractor reasonable notice of when the audit is to be conducted;
 - (ii) give the Contractor an estimate of the audit's duration;
 - (iii) advise the Contractor of the individuals to whom the Transport Agency wishes to have access;
 - (iv) advise the Contractor of the identity of the person or persons who are to conduct the audit; and
 - (v) not initiate more than two audits under this clause 19.3 in each Contract Year, unless a Termination Event has occurred and is continuing.
- (c) The Contractor must:
 - (i) provide such information, explanations and documentation requested by the persons undertaking the audit for the Transport Agency that are relevant to the conduct of the audit;
 - (ii) arrange for those undertaking the audit on behalf of the Transport Agency to meet with the Contractor's internal quality assessors and external auditors if so required; and
 - (iii) make the Records available to those undertaking the audit on behalf of the Transport Agency.
- (d) An audit may include examination of:
 - (i) all aspects of the provision of the Services including the implementation of any Change;
 - (ii) the Base Case;
 - (iii) security and administration practices and facilities;
 - (iv) quality assurance practices;
 - (v) the Contractor's compliance with Schedule 12 (Service Requirements) and Schedule 14 (Payment Mechanism);

- (vi) statutory, regulatory and contractual compliance generally;
 - (vii) project management practices and documentation;
 - (viii) internal review and testing processes;
 - (ix) Sub-contractor arrangements;
 - (x) document management practices and version control;
 - (xi) record management practices;
 - (xii) the resources and technical infrastructures being utilised by the Contractor in its supply of the Services;
 - (xiii) business continuity, backup procedures and disaster recovery planning;
 - (xiv) application and operating systems and the use of tools and other third party materials; and
 - (xv) the Contractor's development, technical and operational processes and methodologies and all documentation associated with those processes and methodologies.
- (e) Upon the conclusion of any audit, the person that has undertaken the audit shall prepare a report and make that report available to the Transport Agency and the Contractor. The Transport Agency and the Contractor must review that report together as soon as practicable after it is issued. If that report reveals failure on the part of the Contractor to be in compliance with any of its obligations, the Contractor shall at its own cost promptly take such steps necessary to remedy or mitigate the effect of those failures. Where the audit reveals discrepancies, errors or omissions in the Base Case, the Contractor must take steps to promptly correct the Base Case accordingly.
- (f) If an audit establishes a discrepancy, error or omission in the Base Case or that the Contractor is in material breach of this Agreement, or has acted negligently or fraudulently in the performance of any of the Services, the Transport Agency's reasonable costs of performing the audit are to be borne by the Contractor. In all other cases the Contractor will not be liable for any costs incurred by the Transport Agency in performing the audit.
- (g) The Transport Agency shall ensure that any person appointed by it to conduct an audit under this clause 19.3 will agree to be bound by the Site Access Protocols and a confidentiality agreement on terms that are substantially similar to those set out in clause 56 (Confidential Information), prior to the commencement of that audit.

19.4 Controller and Auditor-General

The Controller and Auditor-General or any person appointed by the Controller and Auditor-General may examine all or any part of the Records for the purposes of the Public Audit Act 2001, and may require the Contractor and/or any Major Sub-contractor to provide oral and written explanations.

19.5 Compliance Certificate

The Contractor will procure that two of the Contractor General Partner's directors provide the Transport Agency with a written Compliance Certificate on behalf of the Contractor in substantially the form set out in Appendix A to Schedule 21 (Reporting), signed by each of

them on behalf of Contractor General Partner, within seven days of each anniversary of the Execution Date.

20. Monitoring of AMM Services

20.1 Contractor monitoring

The Contractor shall monitor its performance in the delivery of the AMM Services in accordance with the applicable provisions of the P2Wk Project Operations Plan.

20.2 Transport Agency monitoring

- (a) The Transport Agency may elect at any time to undertake its own performance monitoring of the AMM Services for any purpose, including to ensure that the AMM Services are being provided in accordance with this Agreement. This monitoring may include the undertaking of surveys of any part of the P2Wk Project.
- (b) The Contractor will use its best endeavours to assist the Transport Agency in any performance monitoring exercise under clause 20.2(a). The Transport Agency may notify the Contractor of the outcome of the performance monitoring exercise, and the Contractor shall have due regard to the Transport Agency's comments in relation to the ongoing provision of the AMM Services.
- (c) Without prejudice to the Transport Agency's other rights and remedies under this Agreement, where the Contractor has been found:
 - (i) to be misleading in the submission of reports or claims for payment under clause 49.2 (Report and invoice); or
 - (ii) to have submitted at least two erroneous reports required under this Agreement within a three month period,

the Transport Agency may, by notice to the Contractor, increase the level of:

- (iii) its monitoring of the Contractor; and/or
- (iv) the Contractor's monitoring of its own performance of its obligations under this Agreement,

in respect of the AMM Services the subject of such misleading or erroneous reporting until such time as the Contractor demonstrates to the reasonable satisfaction of the Transport Agency that it is capable of performing and will perform all of its obligations under this Agreement.

- (d) If the Transport Agency issues a notice under clause 20.2(c), the Contractor shall bear its own costs and indemnify and keep the Transport Agency indemnified at all times from and against all reasonable costs and expenses incurred by or on behalf of the Transport Agency in relation to such increased level of monitoring arising due to circumstances under clause 20.2(c).

21. Contractor Personnel and employees

21.1 Contractor Personnel

- (a) The Contractor must ensure that all Contractor Personnel performing obligations in respect of the Project:
 - (i) are suitably qualified and are of good character;
 - (ii) have the requisite skills, expertise, qualifications and experience;
 - (iii) carry out their respective duties with due care, skill and diligence; and
 - (iv) while on the P2Wk Project Site, act at all times in a manner compatible with any workplace policies of general application advised to the Contractor by the Transport Agency from time to time.
- (b) The Contractor acknowledges and agrees that the Transport Agency may conduct a Probity Investigation and other investigations in relation to any Contractor Personnel at any time during the Contract Term in accordance with clause 21.4. The Contractor must obtain all necessary consents for this purpose.

21.2 Conduct of staff

While engaged at the P2Wk Project Site, the Contractor shall, and shall procure that any Sub-contractor shall, comply with the Transport Agency's Requirements relating to the conduct and health and safety of staff and security arrangements. The Transport Agency (acting reasonably) may, where the Transport Agency has reasonable grounds for considering that the presence or conduct of an employee at any location relevant to the performance of the Services is undesirable, require the exclusion of the relevant employee from the relevant location.

21.3 Admission to P2Wk Project Site

- (a) The Transport Agency (acting reasonably) may refuse admission to the P2Wk Project Site of any Contractor Personnel if such Contractor Personnel do not meet the standards set out in clause 21.1 (Contractor Personnel).
- (b) If the Transport Agency refuses admission to the P2Wk Project Site of any Contractor Personnel, it shall give reasons for its decision at the same time that decision is communicated to the Contractor.

21.4 Probity Investigations

- (a) At any time the Transport Agency may conduct, or may require the Contractor to conduct, a Probity Investigation in respect of any key personnel. The Transport Agency will advise the Contractor in writing of those persons on whom the Transport Agency requires a Probity Investigation.
- (b) Key personnel comprise any Officer or employee of the Contractor or a Contractor Related Person that:
 - (i) has the ability to exercise influence or control in matters relating to the Project;
 - (ii) works in, or has access to, the P2Wk Project following the Service Commencement Date; or

- (iii) has access to information that is Confidential Information of the Transport Agency or a User.
- (c) The Transport Agency may require the Contractor to conduct probity and security investigations in addition to a Probity Investigation on key personnel or persons proposed to be key personnel.
- (d) The Contractor will advise the Transport Agency at least 15 Business Days prior to the proposed appointment of any key personnel.
- (e) The Contractor will procure the written consent to a Probity Investigation of all key personnel on whom the Transport Agency advises the Contractor it requires a Probity Investigation and any other probity and security investigations, and all consents and other information required by the Law and by the Transport Agency must be given to the Transport Agency.
- (f) The Transport Agency's determination as to whether a person is a fit and proper person to be involved in the Project will be advised to the Contractor by the Transport Agency:
 - (i) (where the Transport Agency does not require a Probity Investigation) 10 Business Days after being informed of the proposed appointment under clause 21.4(d); or
 - (ii) (in any other case) within 10 Business Days after being provided with the information referred to in clause 21.4(e).
- (g) The Contractor will not appoint, and will ensure no other person appoints, any person to a position that enables them to perform any key personnel function if the Transport Agency has not given approval (following any Probity Investigation and other investigations that the Transport Agency requires) to that person becoming key personnel.

21.5 Security clearance

- (a) If the Transport Agency, acting reasonably, decides that a security clearance is required in relation to any persons referred to in clause 21.4(b), then the Contractor must ensure that any such person, as may be requested by the Transport Agency from time to time throughout the Contract Term, undergoes a security clearance at any level under the Transport Agency's auspices.
- (b) If any of the persons referred to in clause 21.5(a) are requested to undergo a security clearance and do not undergo the requested security clearance, or do not meet the relevant clearance requirements, then the Contractor must not, except to the extent explicitly authorised by the Transport Agency, permit that person to perform any of the Services at the P2Wk Project Site, or to undertake any task for the purpose of this Agreement that requires access to the P2Wk Project Site.

21.6 Resources and training

The Contractor shall procure that:

- (a) there shall be at all times a sufficient number of staff (including all relevant grades of supervisory staff):
 - (i) engaged in the provision of the Services with the requisite level of skill and experience in order to enable the Contractor to comply with and perform its obligations under this Agreement; and

- (ii) to cover periods of holiday, sickness, other absences and anticipated and actual peaks in demand for the Services; and
- (b) all staff receive such training and supervision, at the Contractor's cost:
 - (i) as is necessary to ensure the proper performance of the Services under this Agreement;
 - (ii) to the standard appropriate for their particular positions; and
 - (iii) subject to Part 12 (Changes) (as applicable), to updated or modified standards as identified and notified to the Contractor from time to time.

21.7 Personnel policies and procedures

The Contractor shall establish and maintain, and procure that its Major Sub-contractors shall establish and maintain, personnel policies and procedures covering all relevant matters (including a code of conduct, discipline, employment relationship problems, equal opportunities, and health and safety (including in relation to drugs and alcohol)). The Contractor shall ensure that the terms and implementation of such policies and procedures comply with Laws, and Good Industry Practice, and that they are published in written form and that copies of them (and any revisions and amendments to them) are immediately issued to the Transport Agency.

21.8 Responsibility for staff costs

- (a) As between the Contractor and the Transport Agency, the Contractor shall be entirely responsible for all aspects, including costs, of the contracts of employment of its and its Sub-contractors' employees.
- (b) Except where otherwise specifically provided, the Contractor shall be liable for any costs and payment of redundancy awards to its employees, agents or representatives, including any costs and payment of redundancy awards to Contractor Personnel.

21.9 Protected Disclosures Act

The Contractor must:

- (a) comply with the requirements of section 11 of the Protected Disclosures Act, as though the Contractor were a public sector organisation within the meaning of that Act;
- (b) provide copies of the internal procedures required under clause 21.9(a) to the Transport Agency both before the Service Commencement Date and whenever they are changed; and
- (c) provide reporting in relation to complaints received under the Protected Disclosures Act, as required by clause 25.4 (Reporting).

21.10 Expenses incurred

The Contractor will pay to the Transport Agency all expenses reasonably incurred by the Transport Agency in carrying out any Probity Investigation under clause 21.4 if the results of that Probity Investigation reveal that a person involved or proposed to be involved in the Project may not be a fit and proper person to be involved in the Project. The Contractor will be responsible for all costs associated with security clearances under clause 21.5.

Part 7 – Access to P2Wk Project Site and Other Land

22. P2Wk Project Site

22.1 Contractor's rights over P2Wk Project Site

- (a) The Contractor's rights over the P2Wk Project Site are as follows:
 - (i) from Financial Close until the earlier of the Service Commencement Date and the Actual Termination Date, the Transport Agency agrees to lease and the Contractor accepts a lease of the P2Wk Project Site (subject to the Disclosed Title Matters) on the P2Wk Construction Lease Terms; and
 - (ii) from Service Commencement until the earlier of the Expiry Date and the Actual Termination Date, the Transport Agency hereby grants to the Contractor and Contractor Personnel:
 - (A) a non-exclusive licence to enter, occupy and remain on those parts of the P2Wk Residual Site to which the Contractor and/or any Contractor Personnel requires access, subject to any restrictions imposed under the Site Access Protocols; and
 - (B) such non-exclusive rights of access to and egress from the P2Wk Residual Site as are specified in the Site Access Protocols,

in each case for the purpose of achieving Close-out Deliverables and undertaking Close-out Tests and subject to the following provisions of this Part 7.
 - (iii) From Service Commencement until the earlier of the Expiry Date and the Actual Termination Date, the Contractor's rights of access to the P2Wk Operating Site will be as specified in the P2Wk Project Lease.
- (b) The rights conferred on the Contractor and Contractor Personnel under clause 22.1(a) are granted subject to:
 - (i) any valid restriction in the title to the relevant land; or
 - (ii) any other restriction disclosed in writing to the Contractor as part of the Disclosed Title Matters.
- (c) Without limiting the Contractor's other obligations under this Agreement, the Contractor and Contractor Personnel:
 - (i) must not cause any material disruption to the Transport Agency in the performance of the Transport Agency's legal duties or other functions, or any material disruption to the operations or activities carried out at Adjoining Property (except to the extent expressly set out in the Construction Programme, the Works Project Management Plan or in the Service Requirements); and
 - (ii) must, subject to clause 39.3 (Directions) comply with all directions of the Transport Agency where the Construction Programme would interfere with, impact on, or otherwise require access to the State highways network or any other Adjoining Property in which the Transport Agency has an interest.
- (d) The licence rights granted under clause 22.1(a)(ii):

- (i) are personal rights in contract;
 - (ii) do not create any estate or interest in any or all of the P2Wk Project Site;
 - (iii) do not create the relationship of landlord and tenant between the Contractor and the Transport Agency or any other Governmental Entity; and
 - (iv) to the extent they relate to the P2Wk Residual Site, will terminate, in respect of any Returned Land, from the time it is Returned.
- (e) Subject to this clause 22.1, but without prejudice to its rights under Part 11 (Events), the Contractor is responsible for gaining access to and egress from the P2Wk Project Site and is not entitled to make any Claim against the Transport Agency or any Governmental Entity in connection with access, or failure to obtain or delay in obtaining access to and egress from the P2Wk Project Site.
- (f) If at any time the Contractor requires access to, or occupation of any land that does not form part of the P2Wk Project Site (**Extra Land**) or any additional rights beyond those that the Contractor has in relation to any part of the P2Wk Project Site:
- (i) the responsibility and cost of securing or acquiring such access, occupation or rights shall be entirely the responsibility and at the sole risk of the Contractor; and
 - (ii) the Contractor's use and rehabilitation of any Extra Land must comply with any requirements of the owner, any head lessor, all Laws and all Consents affecting that land.
- (g) The Transport Agency will, on written request from the Contractor, use reasonable endeavours to acquire the Additional Land, at the Transport Agency's cost, with such Additional Land to form part of the P2Wk Project Site following its acquisition. The Contractor may, acting reasonably and taking into account the statutory timeframes applicable to the compulsory acquisition of land, nominate a date by which it requires access to the Additional Land. Notwithstanding anything else in this Agreement, any:
- (i) failure by or inability of the Transport Agency to acquire the Additional Land;
 - (ii) delay in the acquisition of the Additional Land (including delay beyond the date for acquisition nominated by the Contractor); and
 - (iii) any valid restriction in the title to the Additional Land,

will be at the sole risk of the Contractor. Without limitation, any costs or delay associated with re-designing and constructing any element of the P2Wk Project as a result of the Transport Agency's failure or inability to acquire the Additional Land will be at the risk of the Contractor and the Transport Agency will have no liability for the same.

22.2 Contractor's conduct on P2Wk Project Site

- (a) In carrying out the Services at the P2Wk Project Site, the Contractor must (and must procure that any Contractor Personnel must):
 - (i) not breach any of the terms of the Disclosed Title Matters applicable to the P2Wk Project Site;

- (ii) not act or omit to act in any way that shall give rise to a right for any person to obtain title to or any right or interest over the P2Wk Project Site or any part of it (save in accordance with the terms of this Agreement);
- (iii) comply with and observe all relevant Consents and Consent Conditions (including, without limitation, those applicable to the cut and fill, quarrying, and remediation of land areas) and all relevant planning restrictions;
- (iv) observe and comply with any third party rights (including public rights) that may exist from time to time in respect of land comprising and adjoining the P2Wk Project Site. To the extent that any such rights could not have been reasonably foreseen by the Contractor at the Execution Date, this will be dealt with as a Transport Agency-initiated Change under Part 12 (Changes) of this Agreement. For the purposes of this clause 22.2(a)(iv), a third party right (including public rights) that could not have been reasonably foreseen by the Contractor at the Execution Date is one that would not reasonably have been foreseen by the Contractor at the Execution Date if the Contractor had:
 - (A) examined all information made available in writing by the Transport Agency to the Contractor for the purpose of this Agreement;
 - (B) examined all information relevant to the risks, contingencies and other circumstances having an effect on its rights and obligations under this Agreement obtainable by the making of reasonable enquiries;
 - (C) undertaken all detailed inspections and surveys of the P2Wk Project Site and its surroundings that would reasonably be expected to be undertaken by a skilled, qualified and experienced contractor given the same level of access to the P2Wk Project Site as that given to the Contractor; and
 - (D) acted at all times in respect of the inspection and survey of the P2Wk Project Site in accordance with Good Industry Practice,
 and without limitation to the above does not include any third party right which is a Disclosed Title Matter;
- (v) comply with the terms of:
 - (A) Schedule 5 (Property);
 - (B) the P2Wk Construction Lease; and
 - (C) the P2Wk Project Lease;
- (vi) ensure that the Services are carried out in such a way as not to interfere with access to and use and occupation of public or private roads or footpaths by any person who is entitled to any such access, use or occupation other than to the extent that such interference is permitted under any applicable regional plan or Consent or under this Agreement;
- (vii) not use or occupy the P2Wk Project Site for any purpose other than for the purposes of the Project, or the performance of its obligations under this Agreement;
- (viii) not (except to the extent reasonably required for Works Provisioning as set out in the Construction Programme and/or in the Works Project Management Plan);

- (A) cause any damage to the P2Wk Project Site or any Utilities Infrastructure or any appurtenances, services, fittings, Fixtures or other items on the P2Wk Project Site;
- (B) cause any disruption to any Utility Services that has not been agreed with the supplier of those Utility Services and the owner of any equipment or structures used in the delivery of those Utility Services; or
- (C) dispose of any earth, clay, sand, gravel, chalk or other material from the P2Wk Project Site or permit or suffer the same to be removed other than in accordance with this Agreement and the Consent Conditions;
- (ix) at the Contractor's expense, transport all surplus materials arising from Works Provisioning and arrange for the recycling or tipping of the same at such places as may lawfully be used for recycling or tipping (as applicable);
- (x) not use the P2Wk Project Site so that:
 - (A) any Industrial Waste or Hazardous Substances are abandoned or dumped on the P2Wk Project Site and/or Adjoining Properties;
 - (B) any Industrial Waste or Hazardous Substances are handled in a manner that is likely to cause damage to the Environment; or
 - (C) except to the extent agreed by the Transport Agency in writing, any other substance is released, deposited or emanates from the P2Wk Project Site that results in Contamination affecting the P2Wk Project Site and/or Adjoining Properties;
- (xi) ensure that all of its vehicles leaving the P2Wk Project Site are adequately cleaned to prevent the deposit of waste materials and debris on the Adjoining Property and if any such material or debris is so deposited, the Contractor shall employ such measures as necessary to remove the material and debris and to clean and reinstate the Adjoining Property to the reasonable satisfaction of the owners or occupiers of the Adjoining Property;
- (xii) not permit or suffer the blockage of any rivers, ditches or Utilities Infrastructure by reason of anything done or omitted on the P2Wk Project Site by the Contractor or Contractor Personnel;
- (xiii) comply, at the Contractor's expense, with any legal, regulatory, or planning requirements so far as such requirements relate to, or affect the Services;
- (xiv) procure that those parts of the P2Wk Project Site that are from time to time occupied by the Contractor and/or Contractor Personnel for the purpose of carrying out the Services are, so far as practicable having regard to the nature of the Services, maintained in a clean, orderly, safe and secure state, and the working areas on the P2Wk Project Site are secure against trespassers and clean and tidy;
- (xv) prior to the Service Commencement Date, clear from the P2Wk Project Site to the reasonable satisfaction of the Transport Agency all temporary structures, rubbish and all building and surplus material and equipment of the Contractor or any Contractor Personnel and in default of that, the Transport Agency shall be entitled to employ an alternative contractor to clear them and shall be entitled to be reimbursed by the Contractor for any costs reasonably incurred in clearing or procuring the clearing of them;

- (xvi) not, without the prior written consent of the Transport Agency, erect any signage, advertising or temporary structure except (in the case of a temporary structure) site accommodation as contemplated by the Construction Programme; and
- (xvii) take all practicable steps in accordance with any Laws for ensuring that the health and safety of all:
 - (A) occupants and Users of the P2Wk Project Site;
 - (B) individuals invited on to the P2Wk Project Site; and
 - (C) occupants of Adjoining Properties,
 is not adversely impacted on by the Services.
- (b) To the extent permitted by Law the Contractor indemnifies the Transport Agency and each Transport Agency Related Person from and against all Losses and Liabilities suffered or incurred as a direct or indirect result of the Contractor breaching its obligations under this clause 22.2.
- (c) This clause 22.2 applies to the Contractor and any Contractor Personnel from Financial Close until the earlier of the Expiry Date or the Actual Termination Date, notwithstanding the Contractor's entry into the P2Wk Project Lease.

22.3 Other Land

The Contractor's rights over and obligations in respect of the Other Land are as set out in Part 5 (Other Land) of Schedule 5 (Property).

22.4 Compliance with Schedule 5

The Contractor must comply with its obligations under Schedule 5 (Property).

23. Conditions on P2Wk Project Site and Other Land

23.1 No reliance

The Contractor shall take the P2Wk Project Site, Other Land (as well as any Extra Land) in the state and condition that the Contractor finds it, and nothing in this Agreement or otherwise shall constitute or imply a warranty by or on the part of the Transport Agency as to:

- (a) the existence or non-existence of any Finds;
- (b) the existence or non-existence of Māori Claims in relation to the P2Wk Project Site or the Other Land, or affecting access or egress to the P2Wk Project Site or Other Land;
- (c) Site Conditions;
- (d) whether or not the P2Wk Project Site or any Other Land is or has been subject to Contamination; or
- (e) the fitness and suitability of the P2Wk Project Site, Other Land, any Extra Land, or any part thereof for the Services or for any other purpose.

23.2 Site Conditions

The Site Conditions shall be the sole responsibility of the Contractor and accordingly (but without prejudice to any other obligation of the Contractor under this Agreement) the Contractor shall be deemed to have:

- (a) carried out a ground physical and geophysical investigation and to have inspected and examined the P2Wk Project Site, Other Land, Extra Land and their surrounds and (as applicable) any existing structures or works on, over or under the P2Wk Project Site, Other Land or any Extra Land;
- (b) satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the form and nature of the P2Wk Project Site, Other Land or any Extra Land, the load bearing and other relevant properties of the P2Wk Project Site, Other Land or any Extra Land, the risk of injury or damage to property affecting the P2Wk Project Site, Other Land or any Extra Land, the nature of any materials (whether natural or otherwise) to be excavated and the nature of any design, works and materials necessary for Works Provisioning;
- (c) satisfied itself as to the adequacy of the means and rights of access to and through the P2Wk Project Site, Other Land or any Extra Land and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such as additional land or buildings outside the P2Wk Project Site);
- (d) satisfied itself as to the possibility of interference by persons of any description whatsoever (other than the Transport Agency or Transport Agency Personnel) with access to or use of, or rights in respect of, the P2Wk Project Site, Other Land or any Extra Land with particular regard to the owners of Adjoining Properties; and
- (e) satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to third parties.

23.3 No Claim

The Contractor accepts full responsibility for all matters referred to in clause 23.1 and clause 23.2 and the Contractor, subject to Part 11 (Events) and paragraph 6.1 (Dwellings within the P2Wk Project Site) of Schedule 5 (Property), shall not be entitled to make any Claim against the Transport Agency of any nature whatsoever on any grounds connected with the matters subject to such clauses, including the fact that incorrect or insufficient information on any matter relating to the P2Wk Project Site or Other Land was given to it by any person, including the Transport Agency and any Transport Agency Personnel, excluding the Independent Reviewer.

24. Finds, Contamination or Māori Claims

24.1 Discovery

Upon the discovery of a Find or Contamination on or in respect of the P2Wk Project Site or Other Land:

- (a) the Contractor shall immediately notify the Transport Agency of such discovery and shall specify its location;
- (b) the Contractor must provide all reasonable assistance requested of it in connection with dealing with the Find or Contamination;

- (c) the Contractor must at any time permit and allow the Transport Agency or any other person authorised by the Transport Agency for the purpose to view, examine and supervise any excavations on the P2Wk Project Site or Other Land;
- (d) without limiting the Contractor's other rights or obligations under this clause 24, but subject to Part 11 (Events), the Contractor must continue to carry out the Services in accordance with the terms of this Agreement; and
- (e) all costs or risks to which the parties are exposed in connection with the Find or Contamination are to be allocated by the parties in accordance with clause 24.5.

24.2 Finds

Upon the discovery of a Find on the P2Wk Project Site or Other Land:

- (a) that Find will, as between the Transport Agency and the Contractor, be the absolute property of the Transport Agency; and
- (b) the Contractor must (in addition to its obligations under clause 24.1):
 - (i) not disturb the Find and, if necessary, cease the Services to the extent that the carrying out of the Services would endanger the Find and/or the P2Wk Project Site or Other Land or prevent or impede excavation of the Find, pending receipt of instruction from the Transport Agency under clause 24.2(b)(v);
 - (ii) take all necessary steps to preserve the Find in the same position and condition in which it was found;
 - (iii) if the Find is or appears to be ordnance, immediately contact the police and then proceed promptly and diligently as directed by them;
 - (iv) comply with the Accidental Discovery Protocol; and
 - (v) promptly and diligently comply with any direction given by the Transport Agency specifying any other action (which may include a direction not to do something) the Transport Agency requires to be taken (or not taken) in relation to such Find.

24.3 Contamination

- (a) Upon the discovery of any Contamination on the P2Wk Project Site or Other Land, the Contractor must (in addition to its obligations under clause 24.1):
 - (i) clean up, or otherwise deal with any such Contamination:
 - (A) on, in, under, over or originating from, the P2Wk Project Site, Other Land or any other land used by or occupied by the Contractor or any Contractor Personnel in connection with the Project; and/or
 - (B) to the extent caused or contributed to by the Contractor or any Contractor Related Persons,

so that the Contractor is at all times in compliance with its obligations under this Agreement, all applicable Laws and all relevant Consents; and
 - (ii) comply (and ensure that all Contractor Personnel comply) with any Clean-up Notice relating to the Contamination:

- (A) on, in, under, over or originating from, the P2Wk Project Site, Other Land or any other land used by or occupied by the Contractor or any Contractor Personnel in connection with the Project; and/or
- (B) to the extent caused or contributed to by the Contractor or any Contractor Related Persons,

and each party must promptly provide the other party with a copy of any Clean-up Notice served on it, or that otherwise comes into its possession.

- (b) The obligations of the Contractor under clause 24.3(a) apply regardless of whether the applicable Law, the relevant Consents or the Clean-up Notice apply or are addressed to the Contractor, the Transport Agency or some other person and regardless of whether the Contamination occurred before or after Financial Close.
- (c) Subject to the terms of clause 24.3(a), the Contractor must promptly and diligently comply with any direction given by the Transport Agency specifying any other action (which may include a direction not to do something) the Transport Agency requires to be taken (or not taken) in relation to the Contamination, provided that the required action is no more onerous than the requirements of the relevant Clean-up Notice, applicable Laws and all relevant Consents.
- (d) Subject to their respective obligations under Laws, neither party will do anything with the intent (directly or indirectly) of causing or being likely to cause the service of a Clean-up Notice.

24.4 Māori Claim

Upon the Contractor becoming aware of any Māori Claim in respect of or in connection with the performance of its obligations under this Agreement, the Contractor shall immediately notify the Transport Agency of the same and:

- (a) the Contractor will not (except with the consent or at the direction of the Transport Agency or pursuant to the order of a Court or tribunal) take any action in respect of that Māori Claim;
- (b) the Contractor must promptly and diligently comply with any direction given by the Transport Agency to the Contractor (that is not inconsistent with an order of a Court or tribunal), specifying any other action (which may include a direction not to do something) the Transport Agency requires to be taken (or not taken) in relation to any Māori Claim; and
- (c) the Contractor will, if the claim comprises or includes a claim against the Contractor or any Contractor Personnel, and then only if requested by the Transport Agency:
 - (i) do all things reasonably required by the Transport Agency in negotiating, defending or otherwise taking action or proceedings in respect of that Māori Claim;
 - (ii) join in any proceedings with the Transport Agency or another Governmental Entity; and
 - (iii) permit the Transport Agency or another Governmental Entity to represent the Contractor and have exclusive conduct of any negotiations in relation to the Māori Claim,

and the Transport Agency will pay to the Contractor all costs and expenses reasonably incurred by the Contractor in complying with its obligations under this clause 24.4.

24.5 Allocation of risk

The responsibility for the cost of cleaning up or otherwise dealing with a Find, Contamination or Māori Claim and the relief from obligations to the extent that Find, Contamination or Māori Claim prevents or impedes the performance of the Services are allocated between the Transport Agency and the Contractor in accordance with Part 11 (Events). Except to the extent that a Find, Contamination or Māori Claim comprise an Event for which the Contractor is entitled to relief under Part 11 (Events), the Contractor will be solely responsible for the consequences of that event.

24.6 Indemnity

Subject to the extent expressly provided in Part 11 (Events), the Contractor indemnifies the Transport Agency and each Transport Agency Related Person from and against all Losses and Liabilities suffered or incurred as a direct or indirect result of the Contractor failing to comply with or perform its obligations under clause 24.1 to clause 24.4 (inclusive).

Part 8 – Works Provisioning

25. Overarching Terms

25.1 Works Provisioning generally

The Contractor must ensure that the P2Wk Project achieves Service Commencement by no later than the Planned Service Commencement Date. Without limiting the foregoing, the Contractor must carry out Works Provisioning to ensure the P2Wk Project:

- (a) is designed and built:
 - (i) so as to comply with the Works Requirements;
 - (ii) in accordance with the Works Project Management Plan;
 - (iii) in accordance with Good Industry Practice;
 - (iv) in accordance with all relevant Laws; and
 - (v) otherwise in accordance with the terms of this Agreement; and
- (b) meets the Availability Criteria as from the Service Commencement Date.

25.2 Works Requirements and Construction Programme

- (a) The P2Wk Project shall comply with the Works Requirements in all respects, except to the extent of any Confirmed Changes to the Works Requirements.
- (b) Works Provisioning must be performed in accordance with the Construction Programme.

25.3 Materials

- (a) Only new materials may be used in the construction, manufacture or maintenance of the P2Wk Project unless:
 - (i) specified in the Works Requirements; or
 - (ii) the Transport Agency otherwise agrees in writing.
- (b) Nothing in this clause 25.3 will prevent the use or re-use of spares or materials that have been temporarily removed from the P2Wk Project, provided always that all materials used or included in the construction, manufacture, or maintenance of the P2Wk Project are to be fit and proper for their intended use and purpose and selected in accordance with Good Industry Practice.

25.4 Reporting

- (a) During the course of Works Provisioning, the Contractor must submit:
 - (i) the reports required under Part 2 (Reporting Obligations - Contract Term) and Part 3 (Reporting Obligations - Works Provisioning) under Schedule 21 (Reporting);

- (ii) such other reports as may be required under Schedule 6 (Resource Management Act Requirements), Schedule 7 (Governance and Service Management) or Schedule 11 (Works Requirements); and
 - (iii) such additional reports and information relating to the Project as the Transport Agency may reasonably request.
- (b) The provision of reports, and any other information, by the Contractor to the Transport Agency about:
- (i) the P2Wk Project;
 - (ii) Works Provisioning; or
 - (iii) the Construction Programme,

does not relieve or affect the Contractor's obligations under this Agreement.

25.5 Independent Reviewer

The Independent Reviewer is appointed under the Independent Reviewer Agreement. The Independent Reviewer will be required:

- (a) to perform the powers, duties and functions it is required to discharge under the Independent Reviewer Agreement; and
- (b) to exercise those powers, duties and functions:
 - (i) honestly, impartially and reasonably for the benefit of both the Transport Agency and the Contractor; and
 - (ii) as an independent professional and not as an agent for the Transport Agency or the Contractor or of both of them.

25.6 Absences

The Contractor must immediately produce and send a written report addressed to the Transport Agency and the Independent Reviewer if construction of the P2Wk Project ceases for more than five consecutive Business Days (excluding absences contemplated by the then-applicable Construction Programme), setting out the reasons for the same and their anticipated impact on the then-applicable Construction Programme.

25.7 Monitoring

- (a) The parties agree that the Independent Reviewer will monitor actual progress of Works Provisioning against the requirements of the Construction Programme. Where the Independent Reviewer considers that actual progress is not accurately reflected in the Contractor's then-current Construction Programme, it shall notify both the Transport Agency and the Contractor of that view and the reasons why it considers it to be the case. Any certificate or notice provided by the Independent Reviewer under this clause 25.7 is binding on both parties.
- (b) The Transport Agency may at any time during Works Provisioning require the Independent Reviewer to review progress of the Works Provisioning to determine whether the status and progress of the Works Provisioning is likely to have a material adverse effect on the ability of the Contractor to achieve:

- (i) the Planned Service Commencement Date; or
 - (ii) if that date has passed, the Last Service Commencement Date.
- (c) If the Independent Reviewer, following a review under clause 25.7(b), is of the view that:
- (i) the Planned Service Commencement Date will not be achieved (which will be determined to be the case only if the Independent Reviewer is of the view that Works Completion cannot be achieved by the Planned Service Commencement Date); or
 - (ii) the Last Service Commencement Date will not be achieved (which will be determined to be the case only if the Independent Reviewer is, in conducting a review under clause 25.7(b)(ii) following the Planned Service Commencement Date, of the view that Works Completion cannot be achieved by the Last Service Commencement Date),

the Independent Reviewer must issue a notice to the Transport Agency and to the Contractor to this effect.

- (d) If the Independent Reviewer gives a notice under:
- (i) clause 25.7(c)(i), clause 25.8 will apply; or
 - (ii) clause 25.7(c)(ii):
 - (A) where the Contractor (acting reasonably) does not agree with the Independent Reviewer it may refer the Dispute for resolution under the Accelerated Dispute Resolution Procedures within five Business Days of receipt of a notice under clause 25.7(c)(ii); or
 - (B) where the Contractor does not refer the notice to dispute resolution in accordance with clause 25.7(d)(ii)(A) or it is determined in accordance with the Accelerated Dispute Resolution Procedure that the Independent Reviewer is correct, this will comprise an Immediate Termination Event under clause 75.2 (Contractor Default).
- (e) This clause 25.7 is not to be read as limiting:
- (i) in any way the right of the Transport Agency itself to carry out any review of the actual progress of Works Provisioning against the Construction Programme; and
 - (ii) any other monitoring rights the Transport Agency may have under this Agreement.
- (f) The Contractor must provide all assistance and information reasonably required by the Transport Agency or the Independent Reviewer (as applicable) for the purposes of this clause 25.7.

25.8 Delays

- (a) If the Contractor becomes aware, at any time, that:
- (i) the actual progress of Works Provisioning has or may become significantly delayed; or

(ii) there will or is likely to be a delay in the Works Provisioning such that:

- (A) the Start Date may be delayed; or
- (B) the Availability Criteria may not be met as at the Planned Service Commencement Date,

the Contractor must as soon as reasonably practicable and in any event within five Business Days of becoming aware of the delay (or of receiving a notice from the Independent Reviewer under clause 25.7(c)(i)) or (where the delay is caused by an Event) within the applicable time period specified under Part 11 (Events), submit to the Transport Agency a written notice to that effect:

- (C) specifying when the Contractor first became aware of the delay;
 - (D) specifying the reason for the delay;
 - (E) providing an estimate of the probable effect of the delay;
 - (F) specifying whether or not any of the Contractor's contingency plans (or any adaptation of the same) can be utilised to avoid or mitigate the delay;
 - (G) identifying any alternative strategies to avoid or mitigate the delay; and
 - (H) providing a revised Construction Programme showing the manner and the periods in which Works Provisioning is to be carried out to achieve the Planned Service Commencement Date (or if a delay is likely to the Planned Service Commencement Date, such later date by which Service Commencement can be practically achieved).
- (b) The Contractor will promptly supply to the Transport Agency such additional information relating to the delay or likely delay as the Transport Agency may reasonably request, including such additional ongoing monitoring and reporting as is required by the Transport Agency.
- (c) The Contractor shall do everything it can reasonably do within its power to avoid or mitigate any such delay or likely delay and its consequences.

25.9 Delays - liquidated damages

- (a) Where the Service Commencement Date does not occur on or prior to the Planned Service Commencement Date, liquidated damages shall be payable by the Contractor to the Transport Agency at the rate of \$[REDACTED] for each calendar day from (but excluding) the Planned Service Commencement Date until (but excluding) the Service Commencement Date. Liquidated damages shall not be payable under this clause 25.9 in respect of any full calendar day following the Planned Service Commencement Date in respect of which the Contractor is delayed in achieving Service Commencement as a result of an Extension Event occurring on or after the Planned Service Commencement Date in respect of which the Contractor has complied with clause 35.2 (Notices).
- (b) If the Transport Agency invoices the Contractor for an amount of liquidated damages under this clause 25.9 then the amounts specified in such invoice are payable within 20 Business Days after the date of the invoice. The Transport Agency shall not be entitled to issue more than one invoice in any month in respect of liquidated damages.
- (c) The parties agree that the liquidated damages payable by the Contractor under this clause 25.9 constitute a genuine pre-estimate of the Transport Agency's Losses for

the Service Commencement Date not occurring on or prior to the Planned Service Commencement Date. If the liquidated damages provided for in this clause 25.9 are held to be unenforceable and the Transport Agency is unable to recover payment under this clause 25.9, the Transport Agency will be entitled to claim general damages from the Contractor in respect of the Losses suffered by the Transport Agency as a result of the Service Commencement Date not occurring on or prior to the Planned Service Commencement Date.

- (d) The aggregate maximum amount recoverable by the Transport Agency under this clause 25.9 is \$ [REDACTED] (regardless of whether such amount is claimed by way of liquidated damages or general damages) plus any costs awarded by an Independent Expert under clause 89 (Accelerated Dispute Resolution Procedures) or by a Court in respect of any Claim or challenge raised by the Contractor that the liquidated damages payable under this clause 25.9 are unenforceable and/or a penalty.

26. Planning and mobilisation

26.1 Plans and Programmes

The Contractor must, within the timeframes specified in the draft Construction Programme, prepare and maintain:

- (a) the Works Project Management Plan, including:
 - (i) the Design Development Plan;
 - (ii) the Construction Management Plan;
 - (iii) the Construction Health and Safety Plan;
 - (iv) the Inspection and Test Plan;
 - (v) the Works Completion Plan; and
 - (vi) the Close-out Plan;
- (b) the Pre-Construction Stakeholder and Communication Plan;
- (c) the Construction Stakeholder and Communication Plan;
- (d) the Construction Programme, including:
 - (i) the RMA Consent sub-programme;
 - (ii) the design sub-programme;
 - (iii) the construction sub-programme;
 - (iv) the completion sub-programme; and
 - (v) the close-out sub-programme; and
- (e) all Environmental Management Plans specified as being prepared by the Contractor, in accordance with Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents).

26.2 Environmental Management Plans

For the avoidance of doubt, all Environmental Management Plans specified in Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents) as being prepared by the Transport Agency must be maintained by the Contractor in accordance with the requirements of Schedule 6 (Resource Management Act Requirements).

27. Design and Design Development

27.1 Design Development

- (a) The purpose of Design Development is to refine and finalise the Preliminary Design Documentation through the Design Development process, to ensure that the P2Wk Project is designed, built and meets the Availability Criteria in accordance with clause 25.1 (Works Provisioning generally) and the other terms of this Agreement.
- (b) The final output of Design Development is the Final Design Documentation, being the Design Documentation marked as being "for construction" and that is to be used in the construction of the P2Wk Project for the purpose of ensuring that the P2Wk Project is designed, built and meets the Availability Criteria in accordance with clause 25.1 (Works Provisioning generally) and the other terms of this Agreement. Subject to paragraph 4.5 of Schedule 8, the Contractor must only use the Final Design Documentation for the construction of the P2Wk Project.
- (c) The Design Development process must be conducted in accordance with the Design Development Plan and may include:
 - (i) meetings with relevant stakeholders nominated by the Transport Agency;
 - (ii) preparation of and consultation with relevant stakeholders on successive iterations of draft Design Documentation; and
 - (iii) Design Development presentations:
 - (A) to provide an understanding of the status of Design Development;
 - (B) to define key issues; and
 - (C) to provide an understanding of each element of the design before the finalisation of each stage of the Design Development process.
- (d) The Contractor must:
 - (i) submit the Reviewable Design Material prepared at the conclusion of each stage of Design Development for review under the Review Procedures;
 - (ii) subject to paragraph 4.5 of Schedule 8, not use any of the Reviewable Design Material for construction purposes unless it has been Finalised under the Review Procedures; and
 - (iii) not amend any of the Reviewable Design Material submitted for review under the Review Procedures under this clause 27.1(d) unless it submits the proposed amendments for review under the Review Procedures and the process in this clause 27.1(d) has been reapplied.
- (e) Neither the Final Design Documentation, nor any other product of the Design Development process, constitutes a Change unless the Contractor can demonstrate to

the Transport Agency that the documentation (or other product of the Design Development process) results in a Change to the Works Requirements.

- (f) The Contractor may not (despite clause 27.1(e)) make any claim for or in respect of a Change under clause 27.1(e) unless the Contractor has notified the Transport Agency in writing of the alleged Change prior to incorporating the same into any design material together with particulars of the alleged Change and the facts relied on to support the Contractor's claim in respect of the alleged Change.
- (g) Without limiting the Review Procedures, the Contractor must give the Transport Agency the opportunity to comment on and monitor all the design material (whether or not produced as part of Design Development).
- (h) Adequate provision in the Construction Programme must be made to accommodate the activities contemplated by this clause 27.1.
- (i) The Contractor must bear all of its costs arising out of or in connection with Design Development.

27.2 Final Design Documentation

- (a) Subject to paragraph 4.5 of Schedule 8, the Contractor must, prior to commencement of the Works Provisioning on the P2Wk Project Site, provide to the Transport Agency:
 - (i) following the conclusion of the Review Procedures for the Reviewable Design Material, true, complete and accurate copies of the Final Design Documentation derived from that Reviewable Design Material; and
 - (ii) true, complete and accurate copies of other items of Design Documentation that do not constitute Reviewable Design Material,
 that the Contractor intends to use in the construction of the P2Wk Project.
- (b) For the avoidance of doubt, Final Design Documentation status may be achieved on a staged basis in relation to defined sections of the P2Wk Project. The Contractor may begin a defined section of the P2Wk Project once all Design Documentation relating to that defined section has achieved Final Design Documentation status.
- (c) If the Final Design Documentation does not meet the requirements of clause 25.1 (Works Provisioning generally) or the other terms of this Agreement, the Contractor must at its own expense amend the Final Design Documentation and rectify the P2Wk Project or any part of the P2Wk Project affected.

28. Construction

28.1 Integration

- (a) The Contractor is and remains solely responsible for the Works Provisioning in accordance with this Agreement.
- (b) The Contractor's responsibility extends to (but is not limited to):
 - (i) construction and implementation of the P2Wk Project;
 - (ii) liaison with all relevant Governmental Entities and Utility Service Providers for the co-ordination and integration of the Works Infrastructure with the External Infrastructure;

- (iii) ensuring that all External Infrastructure is provided to the boundary of the P2Wk Project Site;
 - (iv) relocation (if required) and protection of all Utilities Infrastructure; and
 - (v) provision of all Utilities Services (and the Contractor will enter into such agreements with Utility Service Providers as are necessary for that purpose).
- (c) The Contractor is solely responsible for all costs, expenses and liabilities associated with the design and construction of the P2Wk Project, including all costs incurred by the Contractor in complying with clause 28.1(b).
 - (d) The Contractor indemnifies the Transport Agency and each Transport Agency Related Person in relation to any loss or damage relating to the External Infrastructure, the Utilities Infrastructure or any other infrastructure or services to the extent caused or contributed to by the Contractor or any Contractor Personnel.
 - (e) The Contractor may only enter into agreements for the supply of Utility Services in accordance with this clause 28.

28.2 Utilities

The Contractor shall be responsible for:

- (a) determining the location of, and the maintenance of access to, the Utility Services on the P2Wk Project Site;
- (b) making and relying on all necessary investigations and surveys as to the Utility Services on the P2Wk Project Site;
- (c) making provision for lawfully diverting, disconnecting or otherwise dealing as necessary with all Utilities Infrastructure on or adjacent to the P2Wk Project Site;
- (d) paying to all Utility Services Providers all costs and expenses incurred in diverting, disconnecting, connecting into or otherwise carrying out works in respect of the Utility Services;
- (e) at its own cost and in its own name, separately connecting to, and making payment for all Utility Services;
- (f) at its own cost and in its own name, procuring the provision of all Utility Services and entering into all agreements with the Utility Services Providers necessary for the performance of Works Provisioning;
- (g) the protection and maintenance of the Utilities Infrastructure at the P2Wk Project Site;
- (h) making good at its own cost any damage to any Utilities Infrastructure:
 - (i) on the P2Wk Project Site; or
 - (ii) outside the P2Wk Project Site where caused by an act or omission of the Contractor or any Contractor Personnel,

within a reasonable timeframe, to the Transport Agency's reasonable satisfaction; and

- (i) otherwise doing all that is required in relation to Utility Services as a result of the carrying out of Works Provisioning and/or the provision of the AMM Services.

Part 9 – Completion

29. Completion

29.1 Requirements for Completion and Service Commencement

Prior to the Service Commencement Date, the Contractor must achieve Works Completion.

29.2 Preparation for Completion

- (a) The Contractor must, within the timeframe specified in respect of each item in Schedule 9 (Operative Documents), prepare and deliver to the Transport Agency:
 - (i) the Completion Plans; and
 - (ii) the Services Documentation.
- (b) The Completion Plans:
 - (i) must be prepared by the Contractor in accordance with the requirements of Part 1 (Works Provisioning Documentation) of Schedule 9 (Operative Documents) and the other terms of this Agreement (as applicable); and
 - (ii) must be Finalised under the Review Procedures.
- (c) The Services Documentation:
 - (i) must be prepared by the Contractor in accordance with the requirements of Part 2 (Services Documentation) of Schedule 9 (Operative Documents) and the other terms of this Agreement (as applicable); and
 - (ii) must be Finalised under the Review Procedures.
- (d) If there is any inconsistency between the Services Documentation and Schedule 12 (Service Requirements), the provisions of Schedule 12 shall prevail.
- (e) Subject to paragraph 4.5 of Schedule 8, the Contractor must comply with the Completion Plans, but only once each such document has been Finalised under the Review Procedures. The Contractor must not initiate Works Completion until the Completion Plans have been Finalised under the Review Procedures.

29.3 Works Completion

- (a) The Works Completion Tests must be conducted by the Contractor in accordance with:
 - (i) the Works Completion Plan; and
 - (ii) the requirements of Schedule 10 (Completion Requirements) that relate to Works Completion,

and to the reasonable satisfaction of the Independent Reviewer.
- (b) The Contractor must give to the Transport Agency and to the Independent Reviewer separate written notices not less than:

- (i) 60 Business Days; and
 - (ii) 20 Business Days,
- prior to the date on which it expects (acting reasonably) to achieve Works Completion.
- (c) The Contractor will, except to the extent expressed to the contrary in Schedule 10 (Completion Requirements), give the Independent Reviewer and the Transport Agency not less than 10 Business Days' written notice of the day or days on which it proposes to conduct Works Completion Tests.
 - (d) The Transport Agency may, and the Independent Reviewer must (under the terms of the Independent Reviewer Agreement) attend and observe the Works Completion Tests and the Independent Reviewer may take samples, make measurements and otherwise carry out whatever tests or checks the Independent Reviewer may reasonably require in connection with the Works Completion Tests, provided that any such tests and checks are consistent with the Acceptance Criteria.
 - (e) The Contractor agrees that any participation or assistance given by Transport Agency Personnel (excluding the Independent Reviewer) in conducting a Works Completion Test (except to the extent set out in, or required under, Schedule 10 (Completion Requirements)) will be given at the absolute discretion of the Transport Agency and without any acceptance of liability or responsibility for any Claim in relation to that participation or assistance.
 - (f) When the Contractor considers that it has done everything necessary for the Independent Reviewer to issue the Works Completion Certificate, it will give to the Transport Agency and the Independent Reviewer the completion report, which must meet the requirements for that report as set out in the Works Completion Plan.
 - (g) Within five Business Days after receiving the report under clause 29.3(f), where it considers (acting reasonably) that any Works Completion Test has not been satisfied (disregarding any Snagging Defects), the Transport Agency may (but has no obligation to) issue a written representation to this effect to the Independent Reviewer and the Contractor and:
 - (i) the Contractor may (but has no obligation to) issue a submission to the Independent Reviewer and the Transport Agency in response to the Transport Agency's representation within five Business Days of receipt thereof; and
 - (ii) the Independent Reviewer must take into account any such representation and submission when carrying out its role under clause 29.3(h).
 - (h) Where the Independent Reviewer, following its receipt of the completion report from the Contractor under clause 29.3(f) and any representation and submission under clause 29.3(g):
 - (i) does not believe (acting reasonably) that the Works Completion Tests have been satisfied (disregarding any Snagging Defects) such that there is an outstanding issue (**Outstanding Issue**), then clause 29.3(i) will apply; or
 - (ii) considers (acting reasonably) that the Works Completion Tests have been satisfied (disregarding any Snagging Defects), then clause 29.3(k)(ii) or 29.3(k)(iii) (as applicable) will apply;
 - (i) Where the Independent Reviewer has identified an Outstanding Issue:
 - (i) the Independent Reviewer must, within 10 Business Days after receiving the report under clause 29.3(f):

- (A) notify the Contractor and the Transport Agency of any such Outstanding Issue (giving reasons); and
 - (B) consult with the Contractor and the Transport Agency in relation to the nature of any Outstanding Issue and the steps (including additional works) that it considers reasonably necessary to resolve that Outstanding Issue;
 - (ii) the Independent Reviewer may, within two Business Days following the consultation referred to in clause 29.3(i)(i)(B) above, request that the Contractor repeat any failed steps and/or conduct any additional tests (provided that this does not alter the Acceptance Criteria) as the Independent Reviewer reasonably considers necessary to resolve that Outstanding Issue; and
 - (iii) the Contractor will promptly repeat any such failed steps and conduct any such additional tests within the timeframes reasonably specified by the Independent Reviewer.
- (j) If, following completion of the process set out in clause 29.3(i), the Independent Reviewer determines (acting reasonably) that:
- (i) the Works Completion Tests have been satisfied (disregarding any Snagging Defects) then clause 29.3(k)(i) will apply; or
 - (ii) the Works Completion Tests have not been satisfied, then the Contractor will once again subject the P2Wk Project to the relevant processes described in clauses 29.3(a) and 29.3(d) to 29.3(i).
- (k) The Independent Reviewer will be required to issue the Works Completion Certificate to the Contractor and the Transport Agency:
- (i) within two Business Days after making its determination under clause 29.3(j)(i) that the Works Completion Tests have been satisfied (disregarding any Snagging Defects);
 - (ii) within seven Business Days after receiving the first or any subsequent report under clause 29.3(f), where:
 - (A) the Transport Agency has not made a submission to the Independent Reviewer under clause 29.3(g); and
 - (B) clause 29.3(h)(ii) applies; or
 - (iii) within 15 Business Days after receiving the first or any subsequent report under clause 29.3(f), where:
 - (A) the Transport Agency has made a submission to the Independent Reviewer under clause 29.3(g); and
 - (B) clause 29.3(h)(ii) applies.
- (l) The Works Completion Certificate must:
- (i) state that, in the reasonable opinion of the Independent Reviewer, the Contractor has satisfactorily completed the Works Completion Tests (subject to the existence of Defects that the Independent Reviewer, acting reasonably, considers are Snagging Defects);

- (ii) state the date on which Works Completion has been achieved; and
 - (iii) include or attach, where Snagging Defects exist, a full list of those Snagging Defects including reasonable particulars of the same.
- (m) The issue of a Works Completion Certificate by the Independent Reviewer is strictly for the purposes of enabling Service Commencement to occur and does not:
- (i) provide the Contractor with any grounds for relief from any of its obligations under this Agreement; or
 - (ii) limit or affect any of the Transport Agency's rights, or the Contractor's liability, whether under this Agreement or otherwise at Law and whether before or after Works Completion.

29.4 Snagging Defect rectification programme

The Contractor must, within five Business Days after the issue of the Works Completion Certificate (if that certificate includes a list of Snagging Defects determined by the Independent Reviewer), provide a written programme for the Independent Reviewer's approval for rectification of those Snagging Defects. The Independent Reviewer must promptly approve that programme or propose reasonable amendments to that programme. The Contractor must then rectify the Snagging Defects to the reasonable satisfaction of the Independent Reviewer in accordance with that programme and the requirements of this Agreement.

29.5 Snagging Defects

- (a) The Independent Reviewer must not withhold the issue of the Works Completion Certificate solely on the grounds of any Snagging Defects.
- (b) If the Works Completion Certificate is expressed to be subject to Snagging Defects, for each day on which the Contractor has failed to remedy all such Snagging Defects to the satisfaction of the Independent Reviewer (acting reasonably), the Transport Agency may recover from the Contractor as Moneys Owning:
 - (i) \$[REDACTED] for each day from (and including) the date 60 days after Works Completion until (but excluding) the date 120 days after Works Completion; and
 - (ii) \$[REDACTED] for each day from (and including) the date 120 days after Works Completion until (but excluding) the date on which all such Snagging Defects are remedied to the satisfaction of the Independent Reviewer (acting reasonably).

29.6 Documentation

- (a) On or before the Service Commencement Date, the Contractor must deliver to the Transport Agency all documents necessary to support and maintain the P2Wk Project in accordance with the Service Requirements and the other terms of this Agreement. These documents shall include:
 - (i) the documents set out in Part 1 (Works Completion) of Schedule 10 (Completion Requirements);
 - (ii) the documents set out in Part 2 (Services Documentation) of Schedule 9 (Operative Documents) (as applicable); and

- (iii) a list of all material Contractor Background IP, all Developed IP and all licences of third party intellectual property supplied or used by the Contractor including complete copies of the terms of those licences that in all cases conform (and do not conflict with) the relevant requirements of Part 15 (Confidentiality and Intellectual Property).
- (b) If the Transport Agency reasonably considers the documents provided by the Contractor under clause 29.6(a) to be inadequate, it shall notify the Contractor to this effect, specifying the amendments and new documents required. The Contractor must within 15 Business Days of that notification create and deliver any amended or new documents specified.

29.7 Close-Out

- (a) Close-out must be conducted by the Contractor in accordance with:
 - (i) the Close-out Plan; and
 - (ii) the requirements of Part 2 (Close-out) of Schedule 10 (Completion Requirements),
 and to the reasonable satisfaction of the:
 - (iii) in the case of Close-out Tests for which the Planned Close-out Date is on or before the date that is 12 months after the Service Commencement Date, Independent Reviewer; or
 - (iv) in the case of Close-out Tests for which the Planned Close-out Date is after the date that is 12 months after the Service Commencement Date (as ascertained by reference to Schedule 10 (Completion Requirements) (being, for the purposes of this clause the **Horizon Close-out Tests**)), the Transport Agency.

Close-out will be undertaken on a staged basis, with each Close-out Deliverable to achieve its Close-out Certificate on or prior to the Planned Close-out Date for that Close-out Deliverable. In every circumstance where the applicable Close-out Test is a Horizon Close-out Test:

 - (v) reference in any provision in the remainder of this clause 29.7 to "the Independent Reviewer" shall be read as reference instead to "the Transport Agency";
 - (vi) any obligation in this clause 29.7 that the Independent Reviewer would have owed to the Transport Agency but for the construction in clause 29.7(a)(v) shall no longer apply; and
 - (vii) the Transport Agency will act on an objective and impartial basis to the extent it undertakes or observes any Horizon Close-out Test.
- (b) The Contractor will give the Independent Reviewer and the Transport Agency not less than 10 Business Days' written notice of the day or days on which it proposes to conduct any Close-out Tests.
- (c) The Transport Agency may, and the Independent Reviewer must (under the terms of the Independent Reviewer Agreement) attend and observe the Close-out Tests on the basis set out in Schedule 10 (Completion Requirements) and the Independent Reviewer may take samples, make measurements and otherwise carry out whatever tests or checks are permitted or required by Schedule 10, in connection with the Close-out Tests.

- (d) The Contractor agrees that any participation or assistance given by Transport Agency Personnel, excluding the Independent Reviewer, in conducting a Close-out Test (except to the extent set out in, or required under, Schedule 10 (Completion Requirements)) will be given at the absolute discretion of the Transport Agency and without any acceptance of liability or responsibility for any Claim in relation to that participation or assistance.
- (e) When the Contractor considers that it has done everything necessary for the Independent Reviewer to issue the Close-out Certificate in respect of any Close-out Deliverable, it will give to the Transport Agency and the Independent Reviewer the close-out report, which must meet the requirements for that report as set out in the Close-out Plan.
- (f) Within five Business Days after receiving the report under clause 29.7(e), where it considers (acting reasonably) that any Close-out Test for the relevant Close-out Deliverable has not been satisfied, the Transport Agency may (but has no obligation to) issue a written representation to this effect to the Independent Reviewer and the Contractor and:
 - (i) the Contractor may (but has no obligation to) issue a submission to the Independent Reviewer and the Transport Agency in response to the Transport Agency's representation within five Business Days of receipt thereof; and
 - (ii) the Independent Reviewer must take into account any such representation and submission when carrying out its role under clause 29.7(g).
- (g) Where the Independent Reviewer, following its receipt of the close-out report from the Contractor under clause 29.7(e) and any representation and submission under clause 29.7(f):
 - (i) does not believe (acting reasonably) that the Close-out Tests for the Close-out Deliverable have been satisfied such that there is an outstanding issue (**Outstanding Issue**), then clause 29.7(h) will apply; or
 - (ii) considers (acting reasonably) that the Close-out Tests for the Close-out Deliverable have been satisfied then clause 29.7(j)(ii) or 29.7(j)(iii) (as applicable) will apply;
- (h) Where the Independent Reviewer has identified an Outstanding Issue:
 - (i) the Independent Reviewer must, within ten Business Days after receiving the report under clause 29.7(e):
 - (A) notify the Contractor and the Transport Agency of any such Outstanding Issue (giving reasons); and
 - (B) consult with the Contractor and the Transport Agency in relation to the nature of any Outstanding Issue and the steps (including additional works) that it considers reasonably necessary to resolve that Outstanding Issue;
 - (ii) the Independent Reviewer may, within two Business Days following the consultation referred to in clause 29.7(h)(i) above, request that the Contractor repeat any failed steps and/or conduct any additional tests permitted or required by Schedule 10 (provided that this does not alter the Acceptance Criteria) as the Independent Reviewer reasonably considers necessary to resolve that Outstanding Issue; and

- (iii) the Contractor will promptly repeat any such failed steps and conduct any such additional tests within the timeframes reasonably specified by the Independent Reviewer.
- (i) If, following completion of the process set out in clause 29.7(h), the Independent Reviewer determines (acting reasonably) that:
 - (i) the Close-out Tests have been satisfied in respect of the Close-out Deliverable then clause 29.7(j)(i) will apply; or
 - (ii) the Close-out Tests have not been satisfied, then the Contractor will once again subject the Close-out Deliverable to the relevant processes described in clauses 29.7(a) to 29.7(h).
- (j) The Independent Reviewer will be required to issue the Close-out Certificate to the Contractor and the Transport Agency:
 - (i) within two Business Days after making its determination under clause 29.7(i)(i) that the Completion Tests have been satisfied;
 - (ii) within seven Business Days after receiving the first or any subsequent report under clause 29.7(e), where:
 - (A) the Transport Agency has not made a submission to the Independent Reviewer under clause 29.7(f); and
 - (B) clause 29.7(g)(ii) applies; or
 - (iii) within 15 Business Days after receiving the first or any subsequent report under clause 29.7(e), where:
 - (A) the Transport Agency has made a submission to the Independent Reviewer under clause 29.7(f); and
 - (B) clause 29.7(g)(ii) applies.
- (k) Each Close-out Certificate must:
 - (i) state that, in the reasonable opinion of the Independent Reviewer, the Contractor has satisfactorily completed the Close-out Tests for the relevant Close-out Deliverable; and
 - (ii) state the date on which Close-out, for the relevant Close-out Deliverable, has been achieved.
- (l) The issue of a Close-out Certificate by the Independent Reviewer is strictly for the purposes of enabling Close-out to occur for the relevant Close-out Deliverable and does not:
 - (i) provide the Contractor with any grounds for relief from any of its obligations under this Agreement; or
 - (ii) limit or affect any of the Transport Agency's rights, or the Contractor's liability, whether under this Agreement or otherwise at Law and whether before or after Close-out.

29.8 Planned Close-out Dates

- (a) If the Close-out Certificate is not issued for any Close-out Deliverable on or before the Planned Close-out Date for that Close-out Deliverable (**Relevant Planned Close-out Date**), the Transport Agency may recover from the Contractor as Moneys Owning:
 - (i) \$ [REDACTED] for each day from (but excluding) any Relevant Planned Close-out Date until (but excluding) the day 60 days after that Relevant Planned Close-out Date; and
 - (ii) \$ [REDACTED] for each day from (and including) the day 60 days after that Relevant Planned Close-out Date until (but excluding) the date on which the Close-out Certificate is issued for the relevant Close-out Deliverable.
- (b) The maximum amount payable under this clause 29.8 per day is:
 - (i) \$ [REDACTED] for any day where one or more Close-out Deliverables have not received their Close-out Certificate within 59 days after the Relevant Planned Close-out Date; or
 - (ii) \$ [REDACTED] for any day where one or more Close-out Deliverables have not received their Close-out Certificate for 60 or more days after the Relevant Planned Close-out Date.

29.9 Deliberate breaches

Notwithstanding anything else in this Agreement if, at any time between the date one year prior to the Planned Service Commencement Date and the date of Works Completion, the Contractor or any Contractor Related Person deliberately breaches the Resource Management Act 1991, the P2Wk Designation or any RMA Condition in undertaking the Works Provisioning:

- (a) the Transport Agency may, by notice to the Contractor, state that a Dispute has arisen and refer such alleged deliberate breach to a Disputes Panel;
- (b) the Disputes Panel will be required to ascertain whether such a deliberate breach occurred and, if so, the number of days by which Works Provisioning was accelerated as a result of such deliberate breach (the **Deliberate Breach Period**), in comparison with the counterfactual of that deliberate breach not having occurred; and
- (c) the Transport Agency's obligation to pay the Quarterly Unitary Payment from the Service Commencement Date will not commence until the number of days equal to the Deliberate Breach Period after the Service Commencement Date, with the effect that the Contractor is not at any time entitled to receive any Quarterly Unitary Payment for the period equal to the Deliberate Breach Period.

For the purposes of this clause 29.9 a reference to **deliberate breach** refers to a conscious and deliberate act or omission by a person in the knowledge that the relevant act or omission would constitute a breach of the Resource Management Act 1991, the P2Wk Designation or any RMA Condition (as applicable).

Part 10 – AMM Services

30. Overarching Terms

30.1 General

- (a) The Contractor must ensure that the P2Wk Project meets the Availability Criteria and the AMM Services are provided from the Service Commencement Date.
- (b) The Contractor must carry out the AMM Services:
 - (i) in accordance with:
 - (A) the Service Requirements; and
 - (B) the Contract Plan;
 - (ii) so as to ensure that the P2Wk Project is and remains Fit for the Intended Purposes to the extent that such standard imposes more stringent or additional standards to those imposed under clause 30.1(b)(i);
 - (iii) in accordance with Good Industry Practice to the extent that such standard imposes more stringent or additional standards to those imposed under clauses 30.1(b)(i), and 30.1(b)(ii);
 - (iv) in accordance with all relevant Laws; and
 - (v) otherwise in accordance with the terms of this Agreement.
- (c) If there is any inconsistency between the Contract Plan and Schedule 12 (Service Requirements), the provisions of Schedule 12 shall prevail.

30.2 Co-ordination

- (a) The use of the P2Wk Project by any User will not limit or affect the Contractor's obligations to provide the AMM Services in accordance with this Agreement; and
- (b) the Contractor:
 - (i) must perform the AMM Services in accordance with the terms of this Agreement and in a manner that minimises disruption to the normal functioning of the P2Wk Project;
 - (ii) must take all steps that are necessary or otherwise reasonably required by the Transport Agency when scheduling and carrying out the AMM Services, to minimise disruption to any User; and
 - (iii) warrants that it has made a full allowance in the Unitary Charge to ensure the co-ordination of the provision of the AMM Services with the uninterrupted use of the P2Wk Project by the Users, in each case in accordance with this Agreement.

30.3 Reporting

- (a) As from the Service Commencement Date, the Contractor must submit:

- (i) the reports required under Part 2 (Reporting Obligations - Contract Term) and Part 4 (Reporting Obligations - AMM Services) under Schedule 21 (Reporting);
 - (ii) such other reports as may be required under Schedule 6 (Resource Management Act Requirements), Schedule 7 (Governance and Service Management) or Schedule 12 (Service Requirements); and
 - (iii) such additional reports and information relating to the Project as the Transport Agency may reasonably request.
- (b) The provision of reports by the Contractor to the Transport Agency and any other information provided by the Contractor to the Transport Agency about the AMM Services does not relieve or affect the Contractor's obligations under this Agreement.
- (c) The Contractor acknowledges that:
- (i) for the purposes of the Ombudsmen Act 1975 and the Official Information Act 1982, the P2Wk Project is to be treated as part of the Transport Agency; and
 - (ii) for the purposes of the Crown Entities Act 2004 and the Public Finance Act 1989, the Transport Agency will require information concerning the P2Wk Project in order to produce a statement of intent and an annual report,
- and the Contractor must provide any information required by the Transport Agency, within the timeframes required by the Transport Agency, to allow the Transport Agency to comply with those Acts.
- (d) The Contractor acknowledges and agrees that, where it is required to respond directly to any request for information in accordance with any Law, it shall provide a copy to the Transport Agency of its proposed response prior to issuing such response to the person requesting the information.

30.4 **Materials**

- (a) Only new materials may be used in the provision of the AMM Services, unless:
- (i) specified in the Service Requirements; or
 - (ii) the Transport Agency otherwise agrees in writing.
- (b) All materials used or included in the provision of the AMM Services must:
- (i) have a design life equal to or greater than the items being repaired or replaced, unless otherwise agreed by the Transport Agency in its absolute discretion; and
 - (ii) not materially increase any costs payable by the Transport Agency; and
 - (iii) be fit and proper for their intended use and purpose and selected in accordance with Good Industry Practice.

30.5 **Utilities**

- (a) The Contractor must from the Service Commencement Date:
- (i) to the extent reasonably practicable, ensure a continuous supply of all Utility Services to the P2Wk Project; and

- (ii) except to the extent entitled to relief under Part 11 (Events), ensure a continuous supply of all Utility Services within the P2Wk Project;

in order to meet the Service Requirements.
- (b) The Contractor must manage and maintain all Utility Services to meet the requirements of clause 30.5(a), including:
 - (i) securing and maintaining connections to all Utility Services of adequate capacity to supply the requirements of the P2Wk Project under all anticipated operating conditions;
 - (ii) ensuring the specifications with respect to supply of Utility Services are consistent with the requirements of the operations of the P2Wk Project;
 - (iii) liaising with Utility Service Providers to optimise the reliability of supply; and
 - (iv) identifying and implementing means to minimise the extent and duration of any disruption to Users by:
 - (A) the preparation and maintenance of contingency plans which may be reviewed by the Transport Agency under the Review Procedures on an annual basis; and
 - (B) to the extent reasonably practicable, the establishment and maintenance of arrangements to cater for the Contractor's utility requirements where Utility Service Provider connections are unable to meet the demand placed on them.

30.6 Defects

- (a) This clause 30.6 applies solely to Defects that occur, are identified and/or subsist following the Service Commencement Date, and is subject to clauses 29.4 (Snagging Defect Rectification Programme) and 29.5 (Snagging Defects).
- (b) The Contractor will rectify all Defects whether or not the subject of a notice under this clause 30.6.
- (c) If the Transport Agency identifies a Defect, then the Transport Agency may give a written notice to the Contractor specifying the Defect, requiring the Contractor to rectify the Defect and specifying a reasonable time within which this will occur.
- (d) If a notice is given under clause 30.6(c), the Contractor must rectify the Defect within the time specified in the Transport Agency's notice.
- (e) Neither the Transport Agency's rights, nor the Contractor's liability, whether under this Agreement or otherwise at Law in respect of Defects, will be affected or limited by:
 - (i) the rights conferred on the Transport Agency by this clause 30.6 or any other provision of this Agreement; or
 - (ii) the failure by the Transport Agency to exercise any such rights.

31. Maintenance of Services Documentation

The Contractor must prepare and maintain:

- (a) the Contract Plan, including:
 - (i) the Asset Register;
 - (ii) the Asset Condition Register;
 - (iii) the Maintenance Management Plan, including the Annual Work Plan and the Quarterly Maintenance Schedule;
 - (iv) the Forward Works Plan;
 - (v) the P2Wk Project Operations Plan, including:
 - (A) the Emergency Procedures and Preparedness Plan;
 - (B) the Environmental and Social Management Plan;
 - (C) the Quality Assurance Management Plan;
 - (D) the Health and Safety Management Plan; and
 - (E) the Risk Management Plan; and
 - (vi) the Lane Closure Protocols;
- (b) the Handover Package;
- (c) the Disengagement Plan;
- (d) the Key Road Controlling Authorities Communications Plan; and
- (e) the Services Stakeholder and Communications Plan,

in accordance with Part 2 (Services Documentation) of Schedule 9 (Operative Documents).

32. Maintenance of P2Wk Project

32.1 Scheduled Maintenance

From the Service Commencement Date, the Contractor must carry out scheduled maintenance by implementing those parts of the P2Wk Project Operations Plan, the Maintenance Management Plan, the Forward Works Plan, the Annual Work Plan and the then current Quarterly Maintenance Schedule concerned with scheduled maintenance in accordance with Schedule 12 (Service Requirements) and otherwise in accordance with the terms of this Agreement (**Scheduled Maintenance**).

32.2 Acceleration or deferral of Scheduled Maintenance

- (a) The Transport Agency may, at any time, require the Contractor to accelerate or defer any Scheduled Maintenance by giving (unless otherwise agreed) not less than 30 Business Days' written notice to the Contractor, which notice shall set out the time and/or periods at or during which the Transport Agency requires the Scheduled Maintenance to be performed.

- (b) The Contractor shall, within 20 Business Days of receiving such notice, notify the Transport Agency of:
 - (i) the amount of any additional reasonable costs which it will incur as a direct consequence of such acceleration or deferral (the **Estimated Increased Maintenance Costs**); and
 - (ii) the impact such acceleration or deferral will have on the ability of the Contractor to perform its obligations under this Agreement, including any Charges, Deductions or Service Failure Points likely to be incurred as a direct result of the deferral of such Scheduled Maintenance (with relief from Charges only to apply to the extent that it is determined under Schedule 13 (Performance Regime) that one or more Significant Causal Factors in respect of any applicable Road Crash were attributable to the acceleration or deferral),

together with such supporting evidence as the Transport Agency may reasonably require from the Contractor.
- (c) The Transport Agency shall, within a further period of five Business Days of receiving notice from the Contractor under clause 32.2(b), at its option, either confirm or withdraw its request to accelerate or defer the Scheduled Maintenance.
- (d) The Transport Agency shall reimburse the Contractor the direct and reasonable costs actually incurred by the Contractor as a consequence of such acceleration or deferral up to, but not exceeding, the amount of the Estimated Increased Maintenance Costs.
- (e) The Contractor will not be entitled to relief under this clause 32.2 where the Transport Agency requests the Contractor to reschedule its scheduled maintenance in order to comply with the Contractor's obligations in Schedule 12 (Service Requirements), whether such request is made in the context of the Review Procedures or otherwise.

32.3 **Unscheduled repairs or rectification works**

- (a) The Contractor must:
 - (i) promptly alert the Transport Agency as to repairs or rectification works that the Contractor considers need to be undertaken and that are not already part of Scheduled Maintenance;
 - (ii) co-ordinate with the Transport Agency as to the time at which and the manner in which such unscheduled repairs or rectification works should occur; and
 - (iii) undertake such unscheduled repairs or rectification works in accordance with the Maintenance Management Plan, the P2Wk Project Operations Plan and Schedule 12 (Service Requirements).
- (b) The Contractor will not be entitled to any additional payment from the Transport Agency, or relief from its other obligations under this Agreement, for any unscheduled repairs or rectification works undertaken under this clause 32.3.

33. **Asset Surveys**

33.1 **Asset Surveys**

The Transport Agency shall be entitled to carry out, or to procure an independent expert to carry out:

- (a) no more than twice annually, a Pavement Condition Assessment Survey;
- (b) no more than twice annually, a Road Safety Audit;
- (c) no more than once annually, a KiwiRAP Survey; and
- (d) no more than once annually, an Asset Condition Survey,

(each an **Asset Survey** and together the **Asset Surveys**) to assess whether the P2Wk Project has been and is being maintained and replaced by the Contractor in accordance with:

- (e) the Asset Condition Register;
- (f) the Forward Works Plan;
- (g) the Maintenance Management Plan;
- (h) Schedule 12 (Service Requirements); and
- (i) its other obligations under this Agreement.

33.2 Notification

The Transport Agency shall notify the Contractor in writing a minimum of 30 Business Days in advance of the date it wishes to carry out or procure the carrying out of each Asset Survey.

33.3 Parties' obligations

Where the Transport Agency carries out or procures the carrying out of an Asset Survey, the Transport Agency shall use its reasonable endeavours to minimise any disruption to the provision of the AMM Services by the Contractor. The Contractor shall (free of charge) afford the Transport Agency and any independent expert carrying out an Asset Survey any reasonable assistance required by that person during the carrying out of that Asset Survey.

33.4 Results of Asset Survey

If any Asset Survey shows that the Contractor has not complied with or is not complying with any of its obligations under the Maintenance Management Plan or this Agreement for the maintenance of the P2Wk Project to the Required Standard, then the Transport Agency will:

- (a) notify the Contractor of the Outstanding Work;
- (b) specify a reasonable period within which the Contractor must carry out such Outstanding Work; and
- (c) recover the cost of the applicable Asset Survey from the Contractor, as Moneys Owed,

provided that where an Asset Survey does not determine that the Contractor is required to carry out any Outstanding Work, the costs of that Asset Survey will be met by the Transport Agency.

33.5 Contractor must perform Outstanding Work

The Contractor shall carry out such Outstanding Work notified under clause 33.4 in order to reach the Required Standard within the period specified, and any costs it incurs in carrying out the Outstanding Work shall be at its own expense.

33.6 Failure to undertake Outstanding Work

If the Contractor fails to complete such Outstanding Work in order to reach the Required Standard within the period specified, the Transport Agency shall be entitled to undertake, or to procure the undertaking of, such Outstanding Work and to recover all costs incurred by it (including administration costs) in doing so from the Contractor by means of a deduction from the next payment or payments of the Quarterly Unitary Charge.

Part 11 – Events

34. Application

- (a) Clause 35 (Extension Events) applies from the date of Financial Close until (but excluding) the Service Commencement Date.
- (b) Clause 36 (Intervening Events) applies on and from the Service Commencement Date until the Expiry Date or the Actual Termination Date (as applicable).
- (c) Clause 37 (Uninsurable Events) applies only to Uninsurable Events.

35. Extension Events

35.1 Application for relief

If, and to the extent that, an Extension Event is (or would, if unremedied by the Contractor, be) the direct cause of:

- (a) any failure or likely failure by the Contractor to ensure that the Service Commencement Date occurs on or before the Relevant Service Commencement Date; and/or
- (b) in the case of a Compensation Extension Event only, the Contractor incurring any costs or revenue losses,

then the Contractor may apply to the Transport Agency for relief from the consequences of failing to comply with certain terms of this Agreement. Such relief is limited to that specified in clause 35.3 and is without prejudice to the Contractor's obligations under clause 38.4 (Duty to mitigate).

35.2 Notices

The Contractor must:

- (a) as soon as practicable, and in any event within 10 Business Days after it became aware that the Extension Event is likely:
 - (i) to adversely affect the ability of the Contractor to ensure that the Service Commencement Date occurs on or before the Relevant Service Commencement Date; and/or
 - (ii) in the case of a Compensation Extension Event only, to directly result in costs or revenue losses being incurred by the Contractor,

provide the Transport Agency and the Independent Reviewer with a notice of delay under clause 25.8 (Delays) (where a delay is being claimed) and (where applicable) notice of costs or revenue losses to be claimed), which notice must, in either case, also include:

- (iii) an express statement that the Contractor is claiming relief under this clause 35; and
- (iv) the basis on which such relief is being claimed;

- (b) within 15 Business Days after it became aware that the Extension Event is likely to adversely affect the ability of the Contractor to ensure that the Service Commencement Date occurs on or before the Relevant Service Commencement Date and/or in the case of a Compensation Extension Event only, to directly result in costs or revenue losses being incurred by the Contractor, demonstrate to the reasonable satisfaction of the Independent Reviewer who may consult with the Transport Agency in accordance with the Independent Reviewer Agreement:
 - (i) (in all cases) that an Extension Event has occurred;
 - (ii) (where an extension of time is or may be sought) that the Extension Event is (or would, if unremedied by the Contractor, be) the direct cause of any failure or likely failure by the Contractor to ensure that the Service Commencement Date occurs on or before the Relevant Service Commencement Date;
 - (iii) (where an extension of time is or may be sought) that the delay could not reasonably be expected to be avoided or mitigated by the Contractor acting in accordance with its obligations under clause 38.4 (Duty to mitigate);
 - (iv) (in all cases) that the Contractor is using its best endeavours to prevent or to minimise the impact of the Extension Event on its performance of its obligations under this Agreement; and
 - (v) (in the case of a Compensation Extension Event only) the estimated Change in Costs to be claimed and the proposed methodology by which that Change in Costs will be calculated, on an Open Book Basis; and
- (c) notify the Transport Agency and the Independent Reviewer if at any time the Contractor becomes aware of any additional information relating to the Extension Event or its consequences that is new or that renders information previously provided inaccurate or misleading.

35.3 Relief available

If the Contractor has complied with its obligations under clause 35.2, then subject to clause 38 (General Provisions Relating to Events):

- (a) the Relevant Service Commencement Date shall be postponed by such time as the Independent Reviewer considers reasonable to account for the Extension Event:
 - (i) taking into account the likely effect of the delay; but
 - (ii) disregarding any period for which the delay could reasonably be expected to have been avoided or mitigated by acting in accordance with Good Industry Practice,

and the Independent Reviewer shall notify each of the Transport Agency and the Contractor of the revised Relevant Service Commencement Date as soon as reasonably practicable;

- (b) where the Planned Service Commencement Date is postponed under clause 35.3(a), the Last Service Commencement Date will be postponed by the same number of days;
- (c) in the case of a Compensation Extension Event only, the Transport Agency shall compensate the Contractor for the Change in Costs actually incurred by the Contractor (calculated in accordance with the methodology proposed by the

Contractor under clause 35.2(b)(v) and supported by such evidence as shall be reasonably required by the Transport Agency) by way of an Additional Payment); and

- (d) as an alternative to the postponement of the Relevant Service Commencement Date under clause 35.3(a), the Transport Agency may request that the Contractor provides a fixed price representing the Change in Costs required to enable the Contractor to meet the then-current Relevant Service Commencement Date, on an Open Book Basis, despite the occurrence of the relevant Extension Event. The Contractor shall provide written notice setting out:
 - (i) the fixed price where it is possible to accelerate Works Provisioning to meet the then-current Relevant Service Commencement Date; or
 - (ii) that it will not, regardless of any reasonable efforts to accelerate the Construction Programme to address the impact of the relevant Extension Event, be possible to meet the then-current Relevant Service Commencement Date.

Following receipt of the relevant pricing information in clause 35.3(d)(i), the Transport Agency will elect at its discretion to either postpone the Relevant Service Commencement Date in accordance with clause 35.3(a), or to accept the Change in Costs proposed by the Contractor under this clause 35.3(d) and not postpone the Relevant Service Commencement Date. If the Transport Agency elects not to postpone the Relevant Service Commencement Date under this clause 35.3(d), it will pay the Change in Costs specified in the agreed proposal as an Additional Payment to the Contractor and no extension to the Relevant Service Commencement Date will be granted.

35.4 Disputes

If the parties cannot agree:

- (a) the extent of any extension, compensation or other relief;
- (b) that an Extension Event has occurred; or
- (c) that the Contractor is entitled to any extension, compensation or other relief under this clause 35,

the parties shall resolve the matter in accordance with the Accelerated Dispute Resolution Procedures.

36. Intervening Events

36.1 Application for relief

If, and to the extent that, an Intervening Event is (or would, if unremedied by the Contractor, be) the direct cause of any failure or likely failure by the Contractor to comply with its obligations under this Agreement on and from the Service Commencement Date, then the Contractor may apply to the Transport Agency for relief from the consequences of failing to comply with certain terms of this Agreement. Such relief is:

- (a) limited to that specified in clause 36.3; and
- (b) without prejudice to the Contractor's obligations under clause 38.4 (Duty to mitigate).

36.2 Notices

The Contractor must:

- (a) as soon as practicable, and in any event within 10 Business Days after it became aware that the Intervening Event is likely to:
 - (i) adversely affect the ability of the Contractor to comply with its obligations under this Agreement on and from the Service Commencement Date; and/or
 - (ii) in the case of a Compensation Intervening Event only, directly result in costs or revenue losses being incurred by the Contractor,

provide the Transport Agency with written notice of the same, which notice must also include:

 - (iii) an express statement that the Contractor is claiming relief under this clause 36; and
 - (iv) the basis on which such relief is being claimed;
- (b) within 15 Business Days after it became aware that the Intervening Event is likely to adversely affect the ability of the Contractor to comply with its obligations under this Agreement on and from the Service Commencement Date, demonstrate to the reasonable satisfaction of the Transport Agency:
 - (i) that an Intervening Event has occurred;
 - (ii) that the Intervening Event is (or would, if unremedied by the Contractor, be) the direct cause of any failure or likely failure by the Contractor to comply with its obligations under this Agreement, and the period of time for which this failure is likely to subsist;
 - (iii) that the failure or likely failure could not reasonably be expected to be avoided or mitigated by the Contractor acting in accordance with Good Industry Practice;
 - (iv) that the Contractor is using its best endeavours to prevent or to minimise the impact of the Intervening Event on its compliance with its obligations under this Agreement (including by putting in place temporary measures acceptable to the Transport Agency (acting reasonably) to enable the Contractor to comply with its obligations under this Agreement as far as that is reasonably practical at the relevant time); and
 - (v) in the case of a Compensation Intervening Event only, the estimated Change in Costs to be claimed and the proposed methodology by which that Change in Costs will be calculated, on an Open Book Basis; and
- (c) notify the Transport Agency if at any time the Contractor becomes aware of any additional information relating to the Intervening Event or its consequences that is new or that renders information previously provided inaccurate or misleading.

36.3 Relief available

If the Contractor has complied with its obligations under clause 36.2 then, subject to clause 38 (General Provisions Relating to Events):

- (a) to the extent that the Contractor has demonstrated to the Transport Agency (acting reasonably) that the Intervening Event prevents the Contractor from complying with

any of its obligations under this Agreement, the requirement to do so will be suspended, and relief from associated Charges, Deductions, Service Failure Points and liquidated damages (to the extent applicable) will be granted from the time of the Intervening Event until the time at which the Transport Agency determines (acting reasonably) that the Intervening Event or the consequences of the Intervening Event cease to prevent compliance with those obligations (the **period of suspension**) and any deadline by which any such obligation was required to be satisfied will be postponed by a period equivalent to the period of suspension;

- (b) notwithstanding that the Contractor's obligations to comply with this Agreement, to the extent affected by the Intervening Event, are suspended, the Transport Agency will continue to pay the Quarterly Unitary Payment in respect of any of the AMM Services affected by the Intervening Event for the period of suspension after deducting:
 - (i) amounts representing those costs of the Contractor that are not in fact being incurred by the Contractor during the period of suspension, because the obligation to provide those AMM Services has been suspended; and
 - (ii) the insurance proceeds paid (or that would have been payable had the Contractor complied with this Agreement and the Required Insurances) under the Consequential Loss (Business Interruption) Insurance or any other insurance in relation to revenue as a result of the Intervening Event;
- (c) if the Intervening Event is a Compensation Intervening Event, the Transport Agency will pay the Change in Costs of the Contractor arising as a direct result of the Compensation Intervening Event, provided that:
 - (i) the Contractor has complied, and continues to comply, with clause 36.2(b)(iv), including by minimising the impact of the Intervening Event on its costs resulting from the Event;
 - (ii) in respect of any Event to which paragraph (c) of the definition of Compensation Intervening Event applies, the Contractor has demonstrated to the Transport Agency's satisfaction (acting reasonably) that the Change in Costs claimed by the Contractor is not otherwise met by the Quarterly Unitary Charge payable by the Transport Agency in respect of the relevant Step-in Period;
 - (iii) where the Compensation Intervening Event is a Natural Disaster Event, clause 72 (Reinstatement) will apply to payment of the Natural Disaster Event Compensation and to the repair or reinstatement of the relevant damage; and
 - (iv) such payment will be made only to the extent such Change in Costs is not met (or would not have been met had the Contractor fully complied with its obligations under this Agreement) by the Required Insurances; and
- (d) during the period of suspension, the failure to perform the obligations of the Contractor that are so suspended will not be a breach of this Agreement by the Contractor.

36.4 Natural Disaster Events

- (a) Subject to clause 37 (Uninsurable Events) the Transport Agency's Liability in respect of any Natural Disaster Event is limited to the aggregate of:
 - (i) an amount equal to the then-applicable Natural Disaster Event Cash Cap; and
 - (ii) relief for a period equal to the Natural Disaster Event Time Cap.

- (b) If a Natural Disaster Event comprises a Substantial Destruction Event, clause 37 (Uninsurable Events) will apply and the Contractor may seek relief, where applicable, under this clause 36 for such Substantial Destruction Event.

36.5 **Rectification of damage**

The Contractor must rectify any damage which is consequent on the occurrence of any Event so that the Services can be provided in accordance with the requirements of this Agreement.

36.6 **Disputes**

If the parties cannot agree:

- (a) the extent of any compensation or other relief;
- (b) that an Intervening Event has occurred; or
- (c) that the Contractor is entitled to any compensation or other relief under this clause 36,

the parties shall resolve the matter in accordance with the Accelerated Dispute Resolution Procedures.

37. **Uninsurable Events**

37.1 **Application**

This clause 37 applies where an Event is also an Uninsurable Event.

37.2 **Obligations of the parties while Uninsurable Event continues**

If any of the Contractor's obligations under this Agreement are materially affected as a result of an Uninsurable Event, each party shall use its reasonable endeavours to agree such arrangements with the other party that are prudent in order to avoid or mitigate the effect of the Contractor's inability to perform the affected obligations.

37.3 **Unable to agree – right to terminate**

If no such terms under clause 37.2 are agreed on or before the date falling on the earlier of:

- (a) in the case of a Substantial Destruction Event within paragraph (a) of that definition 90 Business Days after the date on which the Transport Agency notifies the Contractor that, in its reasonable opinion, the relevant event comprises a Substantial Destruction Event;
- (b) in the case of a Substantial Destruction Event within paragraph (b) of that definition at any time following the expiry of:
 - (i) the period of indemnity under the relevant Business Interruption Policy; or
 - (ii) the Natural Disaster Event Time Cap; or
- (c) in the case of any other Uninsurable Event, 40 Business Days after the date of that Event,

and such Event is or the consequences of such Event are continuing then, subject to clause 37.4:

- (d) the Transport Agency may terminate this Agreement where clauses 37.3(a) or 37.3(b) applies; and
- (e) either party may terminate this Agreement where clause 37.3(c) applies,

in each case by giving a Termination Notice to the other party specifying the proposed Termination Date (the **Proposed Termination Date**).

37.4 Notice to continue

- (a) If the Contractor gives notice to the Transport Agency under clause 37.3(e) that it wishes to terminate this Agreement, then the Transport Agency has the option either to accept such notice or to respond in writing on or before the date falling 20 Business Days after the date of its receipt stating that it requires this Agreement to continue (a **continuation notice**).
- (b) If the Transport Agency serves a continuation notice on the Contractor, then:
 - (i) where:
 - (A) the Service Commencement Date has not occurred, the Transport Agency shall pay to the Contractor as an Additional Payment, for the period from the Proposed Termination Date until the earlier of the Service Commencement Date or termination of this Agreement, the aggregate of the following amounts:
 - (I) a sum equal to the debt service costs (including capitalised interest) under the Senior Financing Agreements;
 - (II) a sum equal to any other proven and reasonable unavoidable costs of the Contractor; and
 - (III) such additional sums (if any) as may be agreed between the Transport Agency and the Contractor (each acting reasonably) or otherwise determined under the Accelerated Dispute Resolution Procedures as being required to enable the Contractor to continue to perform its obligations under this Agreement, subject to any amendments agreed by the parties, on a 'no better and no worse' basis; or
 - (B) the Service Commencement Date has occurred, the Transport Agency shall pay to the Contractor the Quarterly Unitary Charge from the Proposed Termination Date, as if the Services were being fully provided, after deducting amounts representing those costs of the Contractor that are not actually being incurred by the Contractor because the Services are not being fully performed by the Contractor; and
 - (ii) this Agreement will not terminate until the Termination Date specified in a Termination Notice (if any) served on the Contractor by the Transport Agency under clause 37.4(b)(iii); and
 - (iii) within one year after the Proposed Termination Date, the Transport Agency must either:

- (A) issue a Change Notice specifying the basis on which it proposes that this Agreement will continue, in which case Part 12 (Changes) will apply and this Agreement will continue in accordance with its terms as amended following the applicable Confirmed Change; or
- (B) serve a Termination Notice as a result of the Uninsurable Event, in which case clause 78.1(c) (Compensation Provisions) will apply.
- (c) Unless the Transport Agency has given the Contractor a continuation notice, this Agreement will terminate on the Proposed Termination Date.

37.5 Relief for Substantial Destruction Events

Without prejudice to the Contractor's right to claim relief for an Event under this Part 11 (where applicable) the Contractor will only be entitled to relief for a Substantial Destruction Event where and to the extent relief is available under clause 35.3 (Relief available) or 36.3(a) (Relief available) and this clause 37:

- (a) in the case of a Substantial Destruction Event within the meaning of paragraph (a) of that definition, where and to the extent that:
 - (i) the Transport Agency has required the Contractor to rebuild or repair the Relevant Works following the Substantial Destruction Event, under clause 72 (Reinstatement);
 - (ii) the Contractor has claimed and received all proceeds to which it is entitled:
 - (A) under the applicable Physical Damage Policy; and
 - (B) as Natural Disaster Event Compensation,
 in respect of the relevant Event; and
 - (iii) the cost of rebuild or repair exceeds such proceeds; or
- (b) in the case of a Substantial Destruction Event within the meaning of paragraph (b) of that definition, where and to the extent that:
 - (i) the relevant Event continues to prevent the Contractor from carrying out its obligations under this Agreement;
 - (ii) either:
 - (A) the period of indemnity under the applicable Business Interruption Policy has expired; or
 - (B) the Natural Disaster Event Time Cap has been met; and
- (c) the Transport Agency has not given notice of termination of this Agreement under clause 72.4 (Consequences of not rebuilding or repairing).

38. General provisions relating to Events

38.1 Late notices

If the Contractor fails to perform its obligations under clause 35.2 (Notices) or clause 36.2 (Notices) on time, then any relief or extension of time granted in respect of the Event (or, in the case of Compensation Extension Events and Compensation Intervening Events, the payment of any amount) shall be at the absolute discretion of the Transport Agency.

38.2 Meeting

The parties will, if required by the Transport Agency, meet within five Business Days of provision by the Contractor of a notice under clause 35.2 (Notices) or clause 36.2 (Notices) to discuss and agree the consequences of the claimed Event, including:

- (a) any questions or issues the Transport Agency may wish to raise concerning any information contained within the notice;
- (b) the reasons why the Contractor considers that the occurrence of the Event prevents or will prevent it from complying with its obligations under this Agreement;
- (c) the expected duration of any delay or non-compliance arising as a direct result of the Event;
- (d) what further steps (if any) the Contractor may reasonably take in order to avoid or mitigate the effects of the Event (including any steps the Contractor has taken or is proposing to take to make a claim under the Insurance Policies);
- (e) the extent to which insurance may mitigate the effects of the Event; and
- (f) any other matters that the Transport Agency may wish to raise in connection with the Event.

38.3 Alternative arrangements

The Transport Agency may make its own arrangements for alternate means of providing any of the AMM Services that have been suspended as a result of an Event, whether from the P2Wk Project Site or elsewhere and from any person, and in any such case Part 17 (Transport Agency Step-in) shall apply.

38.4 Duty to mitigate

During any period in which an Event impairs or may impair the Contractor's ability to comply with its obligations under this Agreement, the Contractor shall do everything it can reasonably do within its power to avoid or mitigate the effect of it being prevented from complying with its obligations.

38.5 Where relief is not available

- (a) Nothing in clause 35.3 (Relief available) or clause 36.3 (Relief available) entitles the Contractor to any relief from its obligations under this Agreement which are not affected by the relevant Event.
- (b) No extension of time, relief or payment of compensation is available to the Contractor under this Part 11 (Events) if and to the extent that:

- (i) an Immediate Termination Event was subsisting at the time of the Event;
- (ii) the relevant Event or its consequences could have been prevented by the exercise of a standard of care and diligence consistent with that of a prudent person undertaking the obligations under this Agreement;
- (iii) the relevant Event or its consequences were otherwise caused or contributed to directly or indirectly by the negligence of the Contractor or any Contractor Personnel or the failure by the Contractor or any Contractor Personnel to comply with their respective obligations;
- (iv) in relation to payment of compensation only, the Contractor would have been entitled to coverage under the Required Insurance for the Event or its consequences if the Contractor:
 - (A) had complied with its obligations under Part 18 (Insurance and Reinstatement) of this Agreement; and/or
 - (B) had complied with the terms of the Required Insurances; or
- (v) the relevant Event or its consequences were otherwise within the control of the Contractor (including within the scope of contingency planning that the Contractor had or ought to have had in place in accordance with the Works Project Management Plan or otherwise in accordance with Good Industry Practice).

38.6 Claim Floors

- (a) Subject to clause 38.6(b), the Contractor shall not be entitled to any extension of time, relief or payment of compensation under clause 35 (Extension Events) or clause 36 (Intervening Events) where:
 - (i) in respect of a claim for an extension of time due to an Extension Event (which is not a Compensation Extension Event), the relevant Event does not result in or is agreed or determined not to be likely to result in a time delay exceeding one working day; or
 - (ii) in respect of a claim for an extension of time and/or compensation due to a Compensation Extension Event, the relevant Event does not result in or is agreed or determined not to be likely to result in either:
 - (A) a time delay exceeding one working day; or
 - (B) a Change in Costs exceeding \$50,000;
 - (iii) in respect of a claim for compensation due to a Compensation Intervening Event, the relevant Event does not result in or is agreed or determined not to be likely to result in a Change in Costs exceeding:
 - (A) \$10,000 for a Compensation Intervening Event not comprising a Natural Disaster Event; or
 - (B) \$250,000 for a Compensation Intervening Event comprising a Natural Disaster Event,

(provided that this clause 38.6(a)(iii) shall not limit the Contractor's ability to make claims under clause 36 (Intervening Events) for relief, other than compensation for Changes in Costs, to which it is otherwise entitled under that clause).

- (b) Notwithstanding clause 38.6(a), where over any rolling 12 month period following Financial Close:
 - (i) multiple Extension Events (which are not Compensation Extension Events) occur, none of which is agreed or determined to be individually likely to result in a time delay exceeding one working day but which, taken together, are agreed or determined to be likely to result in an aggregate time delay exceeding five working days;
 - (ii) multiple Compensation Extension Events occur, none of which is agreed or determined to be individually likely to result in either:
 - (A) a time delay exceeding one working day; or
 - (B) a Change in Costs exceeding \$50,000,
 but which, taken together, are agreed or determined to be likely to result in either:
 - (C) an aggregate time delay exceeding five working days; or
 - (D) an aggregate Change in Costs exceeding \$50,000; and/or
 - (iii) multiple Compensation Intervening Events (excluding Natural Disaster Events) occur, none of which is agreed or determined to be individually likely to result in a Change in Costs exceeding \$10,000 but which, taken together, are agreed or determined to be likely to result in an aggregate Change in Costs exceeding \$30,000,

the Contractor shall, provided the relevant Events have been notified to the Transport Agency in accordance with clauses 35.2(a) (Notices) (subject to clause 38.6(c)) or 36.2(a) (Notices) (as applicable) be entitled to an extension of time, relief and/or payment of compensation under and to the extent available in accordance with clause 35 (Extension Events) or clause 36 (Intervening Events).

- (c) For the purposes of clauses 38.6(a) and 38.6(b), **working day** means a period of 9 hours in any day.
- (d) In the case of an Event where the Contractor does not reasonably expect the relief sought to meet the thresholds set out in clause 38.6(a), the Contractor shall notify the Transport Agency of such expectation in the notice provided under clause 35.2(a) or 36.2(a) and the Contractor shall be relieved from its obligation to demonstrate to the satisfaction of the Transport Agency or the Independent Reviewer (as applicable) the matters set out in clause 35.2(b) or 36.2(b) until such time as the Contractor reasonably considers that the relief sought will meet such thresholds.

38.7 Partial relief

Where there are multiple causes of a delay, to which clause 35 (Extension Events) would apply, or where there are multiple causes of a failure or likely failure on the part of the Contractor to comply with its obligations under this Agreement, to which clause 36 (Intervening Events) would apply, and at least one of those causes is not an Event, the

Contractor will only be granted relief under clause 35 (Extension Events) or clause 36 (Intervening Events) (as applicable) for the causes that constitute an Event and:

- (a) in the case of an Extension Event, the Independent Reviewer will be required to apportion the delay and/or the Change in Costs accordingly; or
- (b) in the case of an Intervening Event, the Transport Agency, acting reasonably, will apportion the failure to comply and/or the Change in Costs accordingly.

38.8 Cessation of Event

The Contractor must notify the Transport Agency immediately after it ceases to be prevented from performing any of its obligations under this Agreement as a result of an Event. Following such notification, the Contractor shall continue to perform its obligations under this Agreement in accordance with its terms.

38.9 Step-in

The rights of the Contractor to suspension of obligations by reason of an Event do not affect the rights of the Transport Agency under clause 64 (Step-in Rights) of this Agreement.

38.10 No Claim

The Contractor will not be entitled to make any Claim against the Transport Agency arising out of or in connection with an Event other than under and in accordance with this Part 11.

38.11 Relief from termination

- (a) If:
 - (i) an Immediate Termination Event, Remediable Contractor Default or any failure to rectify a Remediable Contractor Default or to implement a Prevention Plan occurs; and
 - (ii) the Transport Agency is satisfied (acting reasonably) that the Immediate Termination Event, Remediable Contractor Default or failure to rectify a Remediable Contractor Default or to implement a Prevention Plan is caused by an Event,

then, subject to the Contractor's compliance with the relevant provisions of this Part 11, the Transport Agency shall not be entitled to terminate this Agreement under clause 75.5 (Termination Notice) in respect of that Immediate Termination Event or Remediable Contractor Default or, for so long as the Event continues to prevent rectification of a Remediable Contractor Default or the implementation of a Prevention Plan, for that failure to rectify a Remediable Contractor Default or to implement a Prevention Plan.

- (b) Where the Contractor is provided with relief under clause 38.11(a) in respect of a failure to rectify a Remediable Contractor Default or to implement a Prevention Plan, the period provided to cure a Remediable Contractor Default or to implement a Prevention Plan (as applicable) will be extended by a day for each day's relief provided in respect of the Event which prevented rectification of the Remediable Contractor Default or the implementation of the Prevention Plan as described in clause 38.11(a).

Part 12 – Changes

39. Generally

39.1 Change process must be followed

No payment will be made in respect of any variation to this Agreement, unless the processes and procedures set out in this Part 12 have been complied with.

39.2 Obligations unaffected without express consent

Unless and to the extent otherwise expressly agreed by the Transport Agency, in relation to each Change, the Contractor must continue to comply with its obligations under this Agreement until a Change has become a Confirmed Change in accordance with this Part 12.

39.3 Directions

- (a) Any claim by the Contractor against the Transport Agency for costs, expenses and/or relief in connection with a direction given to the Contractor by the Transport Agency will only be dealt with under this Part 12 as a Change if:
 - (i) the Transport Agency determines, or it is determined under clause 39.3(e), that the direction constitutes a Change; and
 - (ii) the Transport Agency does not withdraw or modify the direction within 10 Business Days after the later of:
 - (A) the date of receipt of the Contractor's notice under clause 39.3(b); or
 - (B) if any part of such notice is disputed, the date on which a determination is made pursuant to clause 39.3(e),
 as applicable.
- (b) The Contractor must, if it wishes to make a claim for costs, expenses and/or relief in connection with a direction given to it by the Transport Agency, within 15 Business Days of receiving that direction and before complying with that direction, give written notice to the Transport Agency:
 - (i) stating that it considers the direction constitutes or involves a Change and the classification of that Change (as set out in clause 40.2 (Classification of Change)), provided that, for the purpose of this clause, a direction may constitute or involve a Change whether or not that direction is made in furtherance of the Objectives;
 - (ii) setting out the legal basis for the claim, whether based on a term of this Agreement or otherwise, and if based on a term of this Agreement, clearly identifying the specific term;
 - (iii) setting out the facts relied on in support of the claim in sufficient detail to permit verification; and
 - (iv) detailing the estimated Change in Costs to be claimed and the proposed methodology by which that Change in Costs will be calculated, on an Open Book Basis,

and, if the Contractor has given notice to the Transport Agency that it wishes to make such a claim in respect of a direction, the Contractor will, subject to clause 39.3(d), not be required to comply with that direction until the later of it being determined that the direction does not constitute a Change or the Change becoming a Confirmed Change in accordance with this Part 12 (Changes).

- (c) If the Contractor fails to comply with clause 39.3(b), then the Transport Agency will have no liability to the Contractor nor will the Contractor have any cause of action against the Transport Agency or any Transport Agency Related Person in respect of the direction.
- (d) Notwithstanding clauses 39.3(b) and 44.3, if the Transport Agency advises the Contractor that a direction must be acted on by the Contractor within a time period which is less than the relevant time period under clause 39.3(b), and the Contractor notifies the Transport Agency prior to acting on that direction that it wishes to make a claim for costs and expenses on the basis that such direction is a Change:
 - (i) then where the Contractor (acting reasonably) considers that, if the direction was determined to be a Change, it would be entitled to refuse to implement that Change in accordance with clause 41.4(a), then:
 - (A) the Contractor must notify the Transport Agency; and
 - (B) the Contractor will not (unless otherwise agreed) be required to comply with that direction until the later of it being determined that the direction either would not entitle the Contractor to refuse to implement that Change in accordance with clause 41.4(a), does not constitute a Change or the Change becoming a Confirmed Change in accordance with Part 12 (Changes); or
 - (ii) otherwise, the Contractor will act on the direction immediately but will then provide the information set out in clause 39.3(b) as soon as reasonably practicable thereafter.
- (e) If the Contractor disputes any determination on the part of the Transport Agency under clause 39.3(a) that a direction is not a Change, the parties shall resolve the matter in accordance with the Accelerated Dispute Resolution Procedures.
- (f) Without limitation to clause 87.4(e) (Accelerated Dispute Resolution Procedures), any determination in accordance with the Accelerated Dispute Resolution Procedures in relation to whether a direction constitutes a Change where the amount claimed exceeds the relevant thresholds referred to in clause 87.4(d) will be binding on the parties unless and until otherwise:
 - (i) agreed by the parties; or
 - (ii) determined by the competent courts of New Zealand.

39.4 Change Compensation Principles

Any payment by the Transport Agency to the Contractor in respect of a Change (as provided for in this Part 12) is governed by the terms of Schedule 17 (Change Compensation Principles). No amount is payable by the Transport Agency to the Contractor in respect of a Change, except as expressly provided in this Part 12 and then only to the extent provided for in Schedule 17 (Change Compensation Principles).

40. Initiation of Change procedure

40.1 Initiation of Change

- (a) If a party wishes to propose a Change, such party must initiate the change procedure set out in this Part 12 by sending a Change Notice to the other party.
- (b) If the Transport Agency is the sender of a Change Notice:
 - (i) it must complete section 1 of the Change Notice; and
 - (ii) the Contractor must complete sections 2 and 3 of the Change Notice (comprising the Change Proposal for that Change Notice) and return the completed Change Notice to the Transport Agency within:
 - (A) 15 Business Days in the case of a Non-Material Change; or
 - (B) 30 Business Days in the case of a Material Change,
 of the date of receipt of the Change Notice or within 10 Business Days of the resolution of the Dispute if the matter has been referred for resolution in accordance with the Accelerated Dispute Resolution Procedures under clause 40.3.
- (c) If the Contractor is the sender of a Change Notice, it must complete sections 1, 2 and 3 of the Change Notice.
- (d) If the Contractor breaches clause 40.1(b)(ii), the Transport Agency may, on giving written notice to the Contractor and allowing the Contractor not less than 10 Business Days to remedy the breach, exercise its rights under clause 46.2(c).

40.2 Classification of Change

The party sending the Change Notice must specify, and include sufficient detail to enable the other party to determine, whether the proposed Change is:

- (a) a Material Change; or
- (b) a Non-Material Change.

40.3 Failure to agree classification

If the parties are unable to agree whether a Change is a Material Change or a Non-Material Change, they shall resolve the matter in accordance with the Accelerated Dispute Resolution Procedures.

40.4 Funding of Material Change

If the Transport Agency is the sender of the Change Notice, and the Change is identified in the Change Notice as a Material Change, the Transport Agency must specify in section 1 of the Change Notice whether it intends to pay the Contractor the Capital Expenditure involved in implementing the Material Change or whether the Contractor is required to use its best endeavours to obtain its own funding.

40.5 Staged Upgrade Change

- (a) The Staged Upgrade Change can only be initiated by the Transport Agency where, in the reasonable opinion of the Transport Agency:
 - (i) the Trigger Movement Caps are expected to be breached or the Contractor has incurred deductions in respect of a Traffic Movement listed in Table 3 of Appendix 3 of Schedule 13 (Performance Regime) on more than 25 occasions in any Contract Quarter; or
 - (ii) the Staged Upgrade Change is required in order to ensure that any of the Transport Agency's key required outcome objectives, set out in paragraph (d) of the definition of Objectives, are met,

and cannot be initiated prior to Service Commencement.
- (b) Where the Transport Agency provides the Contractor with written notice initiating the Staged Upgrade Change:
 - (i) the Transport Agency will issue a Change Notice;
 - (ii) the Contractor must respond with a Change Proposal that complies with clause 41 (Change Proposal and response) as modified by paragraph 3 (Staged Upgrade Change) of Schedule 17 (Change Compensation Principles); and
 - (iii) to the extent of any inconsistency, paragraph 3 (Staged Upgrade Change) of Schedule 17 (Change Compensation Principles) will prevail over this Part 12 (Changes).

40.6 MLR Infrastructure

If the Transport Agency initiates a Change to de-scope or remove the MLR Infrastructure, the Contractor's Change Proposal must be consistent with and incorporate (to the extent applicable to that Change) the details set out in the MLR Infrastructure Baseline.

41. Change Proposal and response

41.1 Matters to be covered in Change Proposal

The Change Proposal must (having regard to the nature and classification of the Change):

- (a) set out all the steps that the Contractor proposes to take to implement and verify completion of the Change;
- (b) set out the schedule for implementing the Change (including, as applicable, a revised Construction Programme);
- (c) detail all the consequences of the Change that are reasonably foreseeable consistent with Good Industry Practice;
- (d) detail the proposed Change in Costs (on an Open Book Basis) and the Contractor's proposal for financing such Change in Costs, including:
 - (i) confirmation that the Contractor has used its best endeavours to source finance for any Capital Expenditure, and the extent to which the Contractor has actually sourced finance to cover any Capital Expenditure;

- (ii) any Capital Expenditure for the account of the Transport Agency; and
- (iii) any effect on the Unitary Charge;
- (e) include any competitive quotations required by the Transport Agency;
- (f) detail the relief to be given to the Contractor in respect of its obligations under this Agreement;
- (g) include, as applicable, a draft amendment agreement setting out the changes required to any Project Document in order to facilitate the Change;
- (h) otherwise be in accordance with this Part 12 and Schedule 17 (Change Compensation Principles); and
- (i) include the information required for a Change Proposal as specified in the form of Change Notice set out in Schedule 16 (Change Notice).

41.2 Material Change - value for money

- (a) The Contractor must, when preparing a Change Proposal for a Material Change, set out information in the Change Proposal sufficient to demonstrate:
 - (i) how any Capital Expenditure to be incurred or avoided as a consequence of the Material Change is being measured in a cost effective manner, including showing when such expenditure will be incurred or avoided;
 - (ii) that any expenditure that will be avoided, which was anticipated to be incurred in respect of any of the Services affected by the Change, has been taken into account in determining the estimated Change in Costs; and
 - (iii) how the Contractor and any Contractor Related Person proposes to minimise any increase in costs and maximise any reduction in costs.
- (b) The Transport Agency will not be obliged to accept the reasonableness or accuracy of any quote, estimate, valuation, allowance or cost submitted by the Contractor in a Change Proposal for a Material Change.
- (c) The Transport Agency may require and rely on independent valuations or assessments from independent reviewers, quantity surveyors or other qualified experts appointed by the Transport Agency at the Transport Agency's own expense for this purpose.
- (d) Without limiting the foregoing, the parties acknowledge and agree that any verification by an expert appointed under clause 41.2(c) is solely for the Transport Agency's benefit and notwithstanding verification by that expert, the Transport Agency in its absolute discretion (and at any time) may elect to accept the Change in Costs proposed by the Contractor or any other quote, estimate, valuation, allowance or cost submitted by the Contractor in connection with its Change Proposal for a Material Change.

41.3 Material Change - other requirements

- (a) Following receipt of a Change Proposal for a Material Change, the Transport Agency may conduct:
 - (i) a full cost audit of the Change Proposal on an Open Book Basis; and

- (ii) a full technical audit of the Change,

and the Contractor will be solely responsible for the costs of those audits unless the Change is a Transport Agency-initiated Change.

- (b) The Contractor must give the Transport Agency access to all information and documentation that the Transport Agency may request for the purpose of conducting the audits under clause 41.3(a).
- (c) If a Change is a Significant Material Change, the Transport Agency may, in its absolute discretion, require the Contractor to obtain competitive quotations for the work or for elements of the work involved in implementing the Change in accordance with paragraph 2.9 of Schedule 17 (Change Compensation Principles) (in which case the competitive quotations will form part of the Change Proposal).

41.4 Contractor's right to refuse

- (a) The Contractor shall be entitled to refuse a Transport Agency-initiated Change only where that Change (if implemented):
 - (i) requires the Services to be performed by the Contractor in a way that infringes any Law;
 - (ii) would be inconsistent with Good Industry Practice;
 - (iii) would cause any existing Consent to be revoked;
 - (iv) would materially and adversely affect the health and safety of any person on the P2Wk Project Site; or
 - (v) would cause any existing Insurance Policy to become void or voidable.
- (b) The Contractor must provide the Transport Agency with written notice of its refusal of a Transport Agency-initiated Change within 10 Business Days of its receipt of the relevant Change Notice. The notice must set out the reason or reasons for such refusal and provide all supporting documentation (including copies of all relevant legal or professional assessments), that the Contractor contends support its refusal of the Transport Agency-initiated Change. If the Transport Agency disputes the Contractor's grounds for refusal, then the Transport Agency may refer the Dispute for resolution in accordance with the Accelerated Dispute Resolution Procedures.

42. Agreeing the Change Proposal

42.1 Parties to meet

As soon as practicable (and in any event within 10 Business Days) after the Transport Agency receives a Change Proposal, the parties shall meet and endeavour to agree its terms.

42.2 Evaluation of Change Proposal

The Transport Agency shall evaluate the Change Proposal in good faith taking account of all the relevant issues, including whether:

- (a) the Change Proposal has been completed to the reasonable satisfaction of the Transport Agency;

- (b) additional Capital Expenditure or a change in the Unitary Charge is required and, if so, whether such additional Capital Expenditure or such change in the Unitary Charge complies with the Change Compensation Principles;
- (c) the Change will affect the quality of any of the Services or the likelihood of successful delivery of any of the Services;
- (d) the Change will interfere with the relationship of the Transport Agency and third parties (including other Governmental Entities);
- (e) the financial strength of the Contractor, each Contractor Related Person and any other person who is proposed to undertake the Change, is sufficient to perform the Change; and/or
- (f) the Change will materially affect the risks or costs to which the Transport Agency is or may be exposed.

42.3 Documentation

The parties will, in accordance with the requirements of the Change Notice, document agreement to the Change Proposal (including agreement to and execution of any applicable amendment agreement incorporated within the Change Proposal).

43. Financing of Capital Expenditure

43.1 Payment

- (a) The Transport Agency acknowledges that where the Change is a Transport Agency-initiated Material Change and the Contractor has confirmed in the Change Proposal that finance is not available to pay for all the Capital Expenditure required to implement the Change, the Transport Agency will:
 - (i) agree to pay for such Capital Expenditure for which finance is not available;
 - (ii) withdraw the Change; or
 - (iii) vary the Change in accordance with clause 44.2 (Alternative responses) so that such additional finance is either available or no longer required to effect the Change.
- (b) If the Change is a Material Change and the Transport Agency has agreed to pay all or part of the Capital Expenditure required to implement the Change, the parties will also document (in accordance with the requirements of the Change Notice):
 - (i) the amount and timing of the costs to be incurred by the Contractor in implementing the Change to the extent such costs are to be borne by the Transport Agency; and
 - (ii) the process by which the amount and timing of such costs will be verified during the implementation of the Change.

44. Confirmation or withdrawal of Change Notice

44.1 Confirmation of Change

In order for a Change to become a Confirmed Change, the Transport Agency must complete sections 4.2 and 4.3 of the relevant Change Notice and sign and return a copy of that Change Notice to the Contractor, as soon as reasonably practicable after the parties have agreed the terms of the Change Proposal (and in any case within 10 Business Days after such agreement).

44.2 Alternative responses

If the Transport Agency does not confirm a Change in accordance with clause 44.1, the Transport Agency may alternatively provide any one of the following responses:

- (a) if the Transport Agency is the sender of the Change Notice then the Transport Agency may:
 - (i) withdraw the Change Notice by giving written notice to the Contractor (except where comprising a MLR Change);
 - (ii) direct that changes be made to the Change Proposal (**change proposal variations**) whereupon the Contractor must:
 - (A) resubmit the Change Proposal, incorporating the change proposal variations, to the Transport Agency within 10 Business Days after such direction (in which case clause 42.2 (Evaluation of Change Proposal) will apply); or
 - (B) if it disputes the change proposal variations, refer the Dispute for resolution in accordance with the Accelerated Dispute Resolution Procedures within five Business Days after such direction,

provided that if the Transport Agency does not take any action under this clause 44.2(a) within 15 Business Days of the date of the Change Proposal, it will be deemed to have withdrawn the relevant Change Notice.
- (b) If the Contractor is the sender of the Change Notice then the Transport Agency may:
 - (i) where the Change is submitted as a Material Change, refuse the Change by giving written notice to the Contractor;
 - (ii) where the Change is submitted as a Non-Material Change, refuse the Change by giving written notice to the Contractor if the Transport Agency (acting reasonably) determines that the Change would not meet the definition of Non-Material Change, in which case the Contractor must:
 - (A) not implement the Change; or
 - (B) if it disputes that the Transport Agency is entitled to refuse the Non-Material Change, refer the Dispute for resolution in accordance with the Accelerated Dispute Resolution Procedures within five Business Days of the Contractor receiving the Transport Agency's refusal; or
 - (iii) direct change proposal variations, whereupon the Contractor must:

- (A) resubmit the Change Proposal, incorporating the change proposal variations, to the Transport Agency within 10 Business Days after such direction (in which case clause 42.2 (Evaluation of Change Proposal) will apply); or
- (B) if it disputes the change proposal variations, refer the Dispute for resolution in accordance with the Accelerated Dispute Resolution Procedures within five Business Days after such direction,

provided that if the Transport Agency does not provide any response to the Contractor under this clause 44.2(b) within 15 Business Days of the date the Change Proposal, it will be deemed to have rejected the relevant Change Notice.

- (c) If the Contractor exercises its rights under clause 44.2(a)(ii)(B) or clause 44.2(b)(ii)(B), and the Transport Agency is not satisfied with the determination of the relevant Dispute under the Accelerated Dispute Resolution Procedures, then the Transport Agency shall be under no obligation to confirm the Change under clause 44.1.
- (d) Notwithstanding the foregoing, the Transport Agency may not refuse any Change proposed by the Contractor to the extent such Change:
 - (i) is required in order for the Contractor to implement and comply with any Change in Law;
 - (ii) comprises a MLR Change; or
 - (iii) relates to a direction which is agreed or determined to comprise a Change under clause 39.3 (Directions), where the Contractor has complied with the requirements of clause 39.3(d) (Directions) itself and then only to the extent that the Contractor has already implemented the direction that constitutes a Change,

in which case the Transport Agency will be obliged to confirm the Change under clause 44.1 on the basis determined under the Accelerated Dispute Resolution Procedures or as otherwise agreed by the parties.

44.3 No work to be started

Subject to clause 39.3(d) (Directions), the Contractor will not begin, or allow to begin, any work, and will not, except as expressly provided for in clause 45 (Contractor's Costs), have any entitlement to make a claim against the Transport Agency in respect of any Change, until such time as that Change becomes a Confirmed Change.

45. Contractor's costs

45.1 Generally

The Transport Agency will not incur any liability in respect of any costs and expenses incurred by the Contractor, any Contractor Related Person or any other person in connection with the preparation, processing and approval of a Change Notice or a Change Proposal, except to the extent provided in this clause 45.

45.2 Withdrawn Change

If the Transport Agency is the sender of a Change Notice for a Material Change and the Change Notice is subsequently withdrawn by the Transport Agency under clause 44.2

(Alternative responses), the Transport Agency must pay the reasonable additional third party costs incurred by the Contractor in preparing the Change Proposal, provided that:

- (a) the Contractor has properly completed sections 2 and 3 of the Change Notice in accordance with this Part 12 and has used its best endeavours to submit a reasonably priced Change Proposal in accordance with Good Industry Practice;
- (b) the additional third party costs incurred by the Contractor must only incorporate the direct costs invoiced by a third party to the Contractor or a Contractor Related Person in connection with preparing that Change Proposal and must not include any Margin payable to the Contractor or a Contractor Related Person; and
- (c) the Contractor has provided the Transport Agency with such evidence as the Transport Agency may reasonably require in order to verify the additional third party costs and that such costs can be substantiated in accordance with clause 18 (Record Keeping).

46. Implementation of Changes

46.1 Contractor's obligations

- (a) Subject to any Consents which must be obtained or modified being so obtained or modified, the Contractor must implement each Confirmed Change in accordance with its terms.
- (b) The Contractor must ensure that the Services are performed in accordance with this Agreement during and following the implementation of a Confirmed Change except and to the extent otherwise expressly specified in that Confirmed Change.

46.2 Transport Agency's rights and obligations

- (a) The Transport Agency's obligations in respect of any Change are:
 - (i) as set out in a Change Notice; and
 - (ii) only to take effect if the Change has been confirmed by the Transport Agency under clause 44.1 (Confirmation of Change).
- (b) In the event of a conflict between a Confirmed Change and the Change Compensation Principles, the Confirmed Change will be interpreted subject to the Change Compensation Principles, except and to the extent that the Confirmed Change contains terms expressly derogating from the Change Compensation Principles and specifying what those derogations are.
- (c) Where:
 - (i) the Contractor is in breach of clause 40.1 (Initiation of Change);
 - (ii) the Transport Agency has elected or has been deemed to withdraw or refuse a Change Notice under clause 44.2 (Alternative responses);
 - (iii) the Contractor has refused a Transport Agency-initiated Change under clause 41.4 (Contractor's right to refuse); or
 - (iv) the Transport Agency otherwise (and for whatever reason) declines or does not confirm a Change under clause 44.1 (Confirmation of Change),

the Transport Agency is not obliged to engage the Contractor to carry out such Change and may have that Change carried out by a third party.

- (d) Where the Transport Agency exercises its rights under clause 46.2(c):
 - (i) the Transport Agency will notify the Contractor of the identity of the third party and the nature and timing of the work to be done to implement the Change;
 - (ii) the Works Requirements, the Service Requirements, and any other relevant parts of this Agreement will be varied, the definition of "Fit for the Intended Purposes" will be deemed to be qualified, and relief from Charges, Deductions and Service Failure Points will be permitted to the extent agreed by the parties or determined under the Accelerated Dispute Resolution Procedures to be necessary to accommodate the Change and to leave the parties in no better and no worse a position as a result of the Change;
 - (iii) the Contractor (at its own cost) must co-operate with the third party to enable the Transport Agency-initiated Change to be implemented in accordance with the prescribed programme; and
 - (iv) the Contractor will enter into and comply with such co-ordination and interface agreements with third party suppliers undertaking the Change as are required under and in accordance with clause 14.4 (Co-ordination with other contractors).

47. Variations to Agreement

- (a) To the extent that a Confirmed Change requires amendment or variation to the terms of this Agreement as a result of the implementation of that Change, this Agreement will be varied to reflect such Confirmed Change and if such variations are not agreed, the Dispute will be resolved in accordance with the Accelerated Dispute Resolution Procedures.
- (b) No amendment to this Agreement evidencing any Confirmed Change will be effective unless it is in writing and signed by or on behalf of both parties.

48. Change in Law

48.1 Occurrence

Notwithstanding a Change in Law, the Contractor must comply (to the extent that it is lawful) with all obligations imposed on it under this Agreement.

48.2 Notification of Qualifying Change in Law

The Contractor must notify the Transport Agency promptly on becoming aware of any actual or impending (and probable) Qualifying Change in Law. If the Contractor fails to notify the Transport Agency, the Transport Agency may notify the Contractor of that Qualifying Change in Law. The Contractor must then, as soon as practicable, send to the Transport Agency a written notice (**Contractor's Notice**) expressing its opinion on the likely effects of the Qualifying Change in Law, giving details of:

- (a) any necessary change to the Services and the steps that the Contractor will need to take as a result of that change being implemented;
- (b) any changes required to the terms of this Agreement;

- (c) any relief required from compliance with its obligations under this Agreement; and
- (d) any increase or decrease in operating expenditure and/or Capital Expenditure that will be required to comply with this Agreement as a result of a Qualifying Change in Law,

accompanied by a Change Notice detailing the procedure for implementing the change in the Services.

48.3 Parties to discuss

As soon as practicable (and in any event within 10 Business Days) after receipt by the Transport Agency of a Contractor's Notice under clause 48.2, the parties shall meet to discuss and agree the issues referred to in clause 48.2 and any ways in which the Contractor can mitigate the effects of the Qualifying Change in Law, including:

- (a) providing evidence that the Contractor has used its best endeavours (including (where practicable) the use of competitive quotations) to oblige its Sub-contractors to minimise any increase in costs and maximise any reduction in costs;
- (b) demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner; and
- (c) demonstrating that any expenditure that will be avoided, which was anticipated to be incurred in respect of any of the Services affected by the Qualifying Change in Law, has been taken into account in determining the amounts proposed under clause 48.2(d).

48.4 Transport Agency options on receipt of Contractor's Notice

- (a) Within 15 Business Days of the meeting referred to in clause 48.3, the Transport Agency must either:
 - (i) accept the Change Notice accompanying the Contractor's Notice, subject to any agreements reached under clause 48.3, in which case the parties must take such actions as are specified in the Change Notice;
 - (ii) vary any requirements of this Agreement necessary to avoid or mitigate the consequences of the Qualifying Change in Law, in which case the Transport Agency's election to vary this Agreement will be deemed to be a Change initiated by the Transport Agency and the provisions of clause 42 (Agreeing the Change Proposal) will apply; or
 - (iii) issue a notice that it disputes the details contained in the Contractor's Notice. Any such Dispute will be resolved in accordance with the Accelerated Dispute Resolution Procedures.
- (b) If the Transport Agency issues a notice under clause 48.4(a)(iii), no later than five Business Days following the Contractor's Notice being agreed between the parties or determined by an Independent Expert, the Transport Agency may elect either option available to it under clause 48.4(a)(i) or 48.4(a)(ii).

48.5 Qualifying Change in Law

If a Qualifying Change in Law occurs, then:

- (a) the Contractor must propose the allocation of all of the financial consequences (both positive and negative) of that Qualifying Change in Law as either capital or operating consequences. The allocation must cover all of the costs, Losses, benefits and

savings, such that the outcome identifies the total net capital and net operating consequences of that Qualifying Change in Law (with costs to the Contractor reflected as a positive number, and savings to the Contractor reflected as a negative number), with any Dispute relating to the allocation to be resolved in accordance with the Accelerated Dispute Resolution Procedures;

- (b) the financing implications and the compensation payable to the Contractor for the financial consequences of that Qualifying Change in Law will be addressed, and any applicable changes to this Agreement implemented, as a Material Change in accordance with this clause 48.5 and with Part 12 (Changes) of this Agreement;
- (c) subject to clauses 48.5(d) and 48.5(e), the Contractor will be entitled to any Change in Costs (if positive) directly resulting from the Qualifying Change in Law;
- (d) the:
 - (i) General Change in Law Contractor's Share (in relation to Cumulative Capital Expenditure and Qualifying Opex); and
 - (ii) Specific Change in Law Contractor's Share (in relation to net capital and operating consequences (if a positive number) of the Qualifying Change in Law),
 will be solely for the account of the Contractor; and
- (e) if that Qualifying Change in Law is a Specific Change in Law, the Transport Agency will be entitled to compensation for an amount equivalent to 100 per cent of the net capital and operating consequences, if that net amount is a negative number, arising from that Specific Change in Law.

48.6 Change in Consents

- (a) A change to the P2Wk Designation, Designation 404 or the Resource Consents will only comprise a Change in Law if a change is required to the P2Wk Designation, Designation 404 or the Resource Consents by Law or by action of the relevant Local Authority other than any temporary or permanent change:
 - (i) comprised by any stop work notice, clean-up notice, infringement notice or abatement notice or other warning or enforcement action taken by a Local Authority in respect of the non-compliance or alleged non-compliance with the P2Wk Designation, Designation 404 or the Resource Consents by the Contractor or any Contractor Personnel;
 - (ii) resulting from non-compliance with the terms of the P2Wk Designation, Designation 404 or the Resource Consents by the Contractor or any Contractor Personnel; or
 - (iii) initiated by the Contractor or any Contractor Personnel other than to the extent resulting from a Change in Law.
- (b) The Contractor may only seek relief in respect of a Contractor Consent not comprising the P2Wk Designation, Designation 404 or the Resource Consents for a Change in Law occurring after such Consent has been issued (and any appeal in respect of that Consent will not comprise a Change in Law).
- (c) The Contractor may only seek relief in respect of a Transport Agency Consent for a Change in Law if a change is required to that Consent by Law or by action of the relevant Local Authority after such Consent has been issued.

48A Warkworth to Wellsford Interchange

The parties acknowledge that as at Financial Close, the Transport Agency is considering options for the development of a new state highway from Warkworth to Wellsford. Several routes remain under consideration, and the new state highway is likely to intersect the P2Wk Main Alignment. The parties agree that if the selected route intersects the P2Wk Main Alignment and necessitates the development of the Warkworth to Wellsford Interchange, the optimal position that they may (without prejudice to their respective rights under this Agreement and the Transport Agency's rights and obligations under its procurement policies) seek to achieve is as follows:

- (a) the Contractor will be offered the opportunity to design, construct, finance and maintain the Warkworth to Wellsford Interchange;
- (b) a contractor procured by the Transport Agency under a separate process will develop the balance of the Warkworth to Wellsford state highway (and the Contractor will not be responsible for such works);
- (c) the performance regime for the P2Wk Project will be amended to include the Warkworth to Wellsford Interchange on terms consistent with the balance of the performance regime; and
- (d) the Contractor will be requested to procure private finance for the Warkworth to Wellsford Interchange, to be repaid by way of an increase to the Unitary Charge, rather than the Transport Agency funding the Warkworth to Wellsford Interchange by way of one or more lump sum payments.

This clause is indicative only and without prejudice to the Transport Agency's ultimate decision on the procurement strategy for the Warkworth to Wellsford state highway, including the Warkworth to Wellsford Interchange, and does not bind the Transport Agency or the Contractor to undertake any element of the procurement of the Warkworth to Wellsford Interchange on the terms set out above or any other terms.

Part 13 – Unitary Charge and Refinancing

49. Unitary Charge

49.1 Obligation to pay and sole remedy

- (a) The Transport Agency must pay the Contractor the Quarterly Unitary Payment in respect of each Payment Period or (where applicable) the AMM Early Services Fee for each AMM Month, each calculated in accordance with Schedule 14 (Payment Mechanism).
- (b) Subject to clause 49.1(d) and clause 49.1(e), the sole remedies of the Transport Agency in respect of a failure to provide the AMM Services in accordance with this Agreement are:
 - (i) where Charges, Deductions and/or Service Failure Points are applicable for any such failure, the operation of Schedule 14 (Payment Mechanism);
 - (ii) the granting of injunctive relief, a decree of specific performance or other discretionary remedies available from any Court of competent jurisdiction (whether or not Charges or Deductions are applicable for any such failure); and
 - (iii) the remedies set out in clause 75 (Termination on Contractor Default).
- (c) Subject to clause 49.1(d), the sole remedies of the Transport Agency in respect of any delay in respect of the carrying out of the Works Provisioning are:
 - (i) where the Contractor fails to comply with clause 25.6 (Absences) the remedies set out in clause 25.7 (Monitoring);
 - (ii) where the Service Commencement Date does not occur on or prior to the Planned Service Commencement Date, the remedies set out in clause 25.9 (Delays - liquidated damages); and
 - (iii) the remedies set out in clause 75 (Termination on Contractor Default) where the circumstances set out in clauses 75.2(a)(i), 75.2(a)(ii) or 75.2(a)(vi) apply.
- (d) In addition to its remedies under clauses 49.1(b) and 49.1(c), the Transport Agency may exercise:
 - (i) any other express right or remedy of the Transport Agency under this Agreement; and
 - (ii) its right to claim, on or after termination of this Agreement, the amount of its costs, Losses, damages and expenses suffered or incurred as a result of rectifying or mitigating the effects of:
 - (A) any breach of this Agreement by the Contractor; or
 - (B) any negligent act or omission on the part of the Contractor,
 after taking account of:
 - (C) sums already recovered by the Transport Agency under this Agreement; and

- (D) any compensation payable by the Transport Agency under Part 19 (Termination),

and provided that the Transport Agency shall not be entitled to recover any additional amounts from the Contractor in respect of a failure or event;

- (iii) for which it has been paid, or is entitled to be paid, liquidated damages in accordance with clauses 25.9 (Delays - liquidated damages), 29.5 (Snagging Defects) or 29.8 (Planned Close-out Dates); or
 - (iv) subject to clause 49.1(e), for which a Charge, Deduction or Service Failure Point has been, or is able to be, applied.
- (e) Clause 49.1(d)(iv) does not preclude the Transport Agency from recovering amounts from the Contractor in respect of a failure or event:
- (i) pursuant to clause 17.3(f) (Health and safety obligations), 20.2(d) (Transport Agency monitoring), 22.2(b) (Contractor's conduct on P2Wk Project Site), 24.6 (Indemnity), 28.1(d) (Integration), or 58.1(i) (General indemnities);
 - (ii) for damage to property for which the Contractor bears the risk of loss or damage under this Agreement;
 - (iii) for any third party property damage incurred by the Transport Agency or Transport Agency Personnel or for which the Transport Agency or Transport Agency Personnel are liable and which the Contractor bears the risk of under this Agreement;
 - (iv) subject to clause 58.7 (Liabilities, claims and losses in respect of tolling revenue), for any reasonably foreseeable economic loss of the Transport Agency or Transport Agency Personnel (including as a consequence of liability incurred to a third party) to which the Required Insurances respond or would, but for any act or omission of the Contractor or any insured person other than the Transport Agency, respond;
 - (v) for any of the Transport Agency's other rights or remedies under this Agreement upon the occurrence of a Charge or Deduction (or an event giving rise to the same) which are not remedies for monetary compensation; and/or
 - (vi) for Losses incurred by the Transport Agency in exercising its Step-in Rights under clause 64 (Step-in Rights), to the extent that the Transport Agency is permitted to recover such Losses in accordance with clause 67 (Relief and payments on step-in).

49.2 Report and invoice

- (a) No later than the tenth Business Day of each Payment Period, the Contractor shall submit to the Transport Agency:
 - (i) a report certified by the Contractor:
 - (A) specifying the Quarterly Unitary Payment or the AMM Early Services Fee (as applicable) for the immediately preceding Payment Period;
 - (B) setting out individually each item that has been taken into account in calculating the Quarterly Unitary Payment or the AMM Early Services Fee (as applicable) in accordance with Schedule 14 (Payment Mechanism);

- (C) setting out full details of any relief from any Charges, Deductions or Service Failure Points claimed under clause 49.4;
 - (D) setting out any Additional Payments due to the Contractor and/or any Moneys Owning to the Transport Agency;
 - (E) setting out a comprehensive explanation of the basis on which such Additional Payments are being claimed, and when the costs associated with such Additional Payments were incurred (including supporting documentation, where applicable); and
 - (F) setting out any other matters required to be included in that report in accordance with Schedule 12 (Service Requirements), Schedule 7 (Governance and Service Management) and Schedule 21 (Reporting);
- (ii) an invoice (the form of which must have been previously approved by the Transport Agency) (a **valid invoice**) for the amount (if any) shown by the report as owing by the Transport Agency to the Contractor and for all GST payable by the Transport Agency in respect of that amount.
- (b) If the Contractor becomes entitled to any Additional Payments prior to the Service Commencement Date, the Contractor shall submit to the Transport Agency a valid invoice for such Additional Payments and a report certified by the Contractor setting out:
 - (i) the Additional Payments due to the Contractor; and
 - (ii) a comprehensive explanation of the basis on which such Additional Payments are being claimed, and when the costs associated with such Additional Payments were incurred.
 - (c) If the Contractor submits a report or an invoice that is incomplete, incorrect or in breach of clause 49.2(a) or clause 49.2(b), the Transport Agency may reject the invoice and that invoice will not be considered as valid.

49.3 Payment

- (a) No moneys are payable to the Contractor by the Transport Agency unless the Transport Agency has received:
 - (i) a valid invoice from the Contractor; and
 - (ii) (where the payment is one to which clause 49.2(a) applies) the report for the Payment Period to which that invoice relates.
- (b) The Transport Agency shall pay the amount stated in any valid invoice submitted under clause 49.2 on or before the 20th of the month following the month in which such invoice was received by the Transport Agency (or if such day is not a Business Day, on the Business Day immediately preceding that day) (the **Relevant Payment Date**). This clause 49.3(b) is subject to clause 49.5.
- (c) Payment of the Quarterly Unitary Payment or the AMM Early Services Fee (as applicable), any Additional Payment or any other moneys by the Transport Agency to the Contractor does not constitute acceptance by the Transport Agency that the Contractor has performed its obligations, nor does it constitute (nor is it to be construed as) a waiver of any of the Transport Agency's rights and remedies, whether under this Agreement or at Law.

- (d) If a report shows a net amount owed by the Contractor to the Transport Agency, then the Contractor shall pay that amount to the Transport Agency on or before the 20th of the month following the month in which such report was received by the Transport Agency (or if such day is not a Business Day, on the next Business Day).
- (e) Except where otherwise specifically provided in this Agreement, where any payment due from the Contractor to the Transport Agency or from the Transport Agency to the Contractor under any provision of this Agreement is not paid on or before its due date, it shall bear interest at the Prescribed Rate from the due date (whether before or after any judgment) until the date of actual payment.
- (f) All moneys payable to or by the Transport Agency under this Agreement are to be invoiced and paid only in Dollars.

49.4 Relief from Charges, Deductions and Service Failure Points

The Transport Agency may not impose any Charges, Deductions or Service Failure Points if and to the extent that it has been demonstrated to the reasonable satisfaction of the Transport Agency that the event or circumstance giving rise to the Charge, Deduction or Service Failure Point is a direct result of:

- (a) a Confirmed Change implemented by the Contractor under clause 46.1 (Contractor's obligations), to the extent specified in that Confirmed Change;
- (b) a Change implemented by or on behalf of the Transport Agency under clause 46.2(c), to the extent agreed or determined under clause 46.2(d);
- (c) the Transport Agency making a specific request or giving specific instructions to the Contractor (in any case, against the reasonable advice of the Contractor, and provided that the Contractor has advised the Transport Agency in writing of the impact such request or instructions will have on the ability of the Contractor to perform its obligations under this Agreement);
- (d) an Intervening Event, for so long as and to the extent that the Contractor is eligible for relief in respect of that Intervening Event under Part 11 (Events);
- (e) the Transport Agency exercising its Step-in Rights under Part 17 (Transport Agency Step-in);
- (f) the deferral or acceleration of Scheduled Maintenance in accordance with a confirmed request from the Transport Agency under clause 32.2(c) (Acceleration or deferral of Scheduled Maintenance), with relief from Charges limited as set out in clause 32.2(b);
- (g) the conduct of an Asset Survey or a Road Safety Audit (with relief under this clause 49.4 limited to relief from Deductions and Service Failure Points only); or
- (h) a failure by the Contractor to exercise a statutory power set out in the applicable statutory delegation instrument where:
 - (i) the Transport Agency does not have such function or power due to the relevant part of the P2Wk Roads not being declared a motorway (in accordance with section 71 of the GRPA); or
 - (ii) that power has been amended or revoked.

49.5 Disputed Amounts

- (a) The Transport Agency may withhold the payment of any amount invoiced by the Contractor that the Transport Agency considers on reasonable grounds:
 - (i) is not an amount to which the Contractor is entitled under the terms of this Agreement; or
 - (ii) is not an amount to which the Contractor is entitled on the Relevant Payment Date,
 (each a **Disputed Amount**), pending agreement or determination with respect to that Disputed Amount.
- (b) The Transport Agency must pay any amount invoiced by the Contractor that is not disputed by the Transport Agency on or before the Relevant Payment Date.
- (c) The Transport Agency shall notify the Contractor in writing within 10 Business Days of receipt by the Transport Agency of the relevant invoice of any Disputed Amount, together with a report setting out:
 - (i) particulars as to the quantum of that Disputed Amount;
 - (ii) the reasons for such dispute; and
 - (iii) such supporting evidence as the Transport Agency may wish to provide in respect of the dispute.
- (d) Within 10 Business Days following receipt by the Contractor of a notice served by the Transport Agency under clause 49.5(c), the Contractor shall respond by notifying the Transport Agency as to whether or not it agrees with the statements made in that notice. If the Contractor indicates that it does agree, or if the Contractor fails to respond within 10 Business Days, the Transport Agency will not be required to pay to the Contractor any amounts withheld under clause 49.5(a).
- (e) If the Contractor responds under clause 49.5(d) indicating that it does not agree with all or any of the statements made in a notice served by the Transport Agency under clause 49.5(c), the matter or matters in question shall be determined in accordance with the Accelerated Dispute Resolution Procedures.
- (f) If it is agreed or determined that:
 - (i) the Transport Agency has withheld an amount that the Contractor was entitled to be paid; or
 - (ii) the Contractor has claimed under clause 49.2 and has been paid an amount that it was not entitled to be paid,
 the Transport Agency shall pay such amount to the Contractor or the Contractor shall repay such amount to the Transport Agency (as applicable) together with interest on that amount at the Prescribed Rate calculated on a daily basis and compounded quarterly from the date on which payment was or should have been made until all relevant monies have been paid in full (whether before or after judgment).
- (g) The Contractor is not excused from the performance of any of its obligations under this Agreement because the Transport Agency has exercised its rights under this clause 49.5.

49.6 Rights of set-off

- (a) The Transport Agency may at any time deduct from any amount payable to the Contractor:
 - (i) any Moneys Owing to the Transport Agency; and
 - (ii) any Claim to Moneys Owing which the Transport Agency may have against the Contractor,
 under any Project Document.
- (b) The Contractor must not at any time deduct from money otherwise due to the Transport Agency (including any Moneys Owing to the Transport Agency) under any Project Document:
 - (i) any debt or other money due from the Transport Agency to the Contractor; or
 - (ii) any Claim to money which the Contractor may have against the Transport Agency.
- (c) The Transport Agency will provide the Contractor with reasonable details of the basis on which it is setting off any amount under this clause 49.6.
- (d) Notwithstanding clause 49.6(a), the Transport Agency acknowledges that it will not be entitled to deduct any Moneys Owing from any payment to or for the account of the Contractor if:
 - (i) this Agreement has been terminated under clause 74 (Termination for Convenience), clause 76 (Termination on Uninsurable Event) or clause 77 (Termination on Uninsurability); and
 - (ii) such deduction would reduce the amount payable to or for the account of the Contractor in connection with the termination of this Agreement to an amount less than the Base Senior Debt Termination Amount.

49.7 Independent Reviewer Overstatement Amount

- (a) As soon as practicable after the Independent Reviewer has provided its final Close-out Certificate the Contractor must calculate the Independent Reviewer Overstatement Amount, if applicable, in accordance with the following formula:

$$IRAO = \sum_{i=1}^n [(IRMMA_i - IRAMA_i)] \times (1 + CR)^z$$

Where:

$IRAO$ = the Independent Reviewer Overstatement Amount.

n = The month in which the final payment to the Independent Reviewer, in respect of Close-out, is due and payable under the Independent Reviewer Agreement.

$IRMMA_i$ = 50% of the maximum amount payable to the Independent Reviewer for month i in accordance with the Independent Reviewer Agreement, as included in Cells "J71:CA71" of the Base Case sheet entitled "Returnables".

$IRAMA_i$ = 50% of the actual amount invoiced by the Independent Reviewer for month i for services delivered in accordance with the Independent Reviewer Agreement.

$CR = R_{di} - CF_i$

Where:

R_{di} = The all-up hedged interest rate applicable to the senior debt facility for month i expressed as a monthly rate of interest.

CF_i = The monthly commitment fee rate applicable to the senior debt facility for month i .

$z = n - i$, which is the number of months from month i to the expiry of the month in which the final payment to the Independent Reviewer, in respect of Close-out, is due and payable under the Independent Reviewer Agreement.

- (b) Where the Independent Reviewer Overstatement Amount is a positive number, it will be recoverable by the Transport Agency from the Contractor as Moneys Owing and the Contractor must either:
 - (i) pay the Transport Agency the Independent Reviewer Overstatement Amount prior to the date of the next Quarterly Unitary Payment; or
 - (ii) include the same within the next quarterly report delivered by the Contractor under clause 49.2 in which case the Transport Agency may set it off against the relevant Quarterly Unitary Payment.
- (c) If the Independent Reviewer Overstatement Amount would be a negative number it will be deemed to be zero and no Independent Reviewer Overstatement Amount will be payable.

49A Early Commencement

49A.1 Notification of Anticipated Service Commencement Date

- (a) If the Contractor determines that the Anticipated Service Commencement Date is prior to the Planned Service Commencement Date, it must provide the Transport Agency with no less than five months prior notice of the Anticipated Service Commencement Date.
- (b) The Contractor must provide the Transport Agency with written notice of any change to the Anticipated Service Commencement Date after a notice has been issued under clause 49A.1(a).
- (c) This clause 49A will only apply, notwithstanding any notification of an Anticipated Service Commencement Date, where the Service Commencement Date actually occurs before the Planned Service Commencement Date.

49A.2 Early Commencement Options

- (a) If the Anticipated Service Commencement Date is three months or less prior to the Planned Service Commencement Date, the Transport Agency may, within 20 Business Days after receipt of the Contractor's notice under clause 49A.1, notify the Contractor in writing:
 - (i) that the AMM Early Fee Option will apply;
 - (ii) that the Base Case Update Option will apply; or
 - (iii) that neither the AMM Early Fee Option nor the Base Case Update Option will apply (in which case the Quarterly Unitary Payment will be paid from the Service Commencement Date).

- (b) If the Anticipated Service Commencement Date is more than three months prior to the Planned Service Commencement Date, the Transport Agency may, within 20 Business Days after receipt of the Contractor's notice under clause 49A.1, notify the Contractor in writing:
 - (i) that the AMM Early Fee Option will apply but only from the date three months prior to the Planned Service Commencement Date and only where the Anticipated Service Commencement Date is no more than four months prior to the Planned Service Commencement Date;
 - (ii) that the Base Case Update Option will apply; or
 - (iii) that neither the AMM Early Fee Option nor the Base Case Update Option will apply (in which case the Quarterly Unitary Payment will be paid from the Service Commencement Date).

49A.3 AMM Early Fee Option

Where the Transport Agency elects that the AMM Early Fee Option will apply:

- (a) from the AMM Early Services Date until the day before the Planned Services Commencement Date, the Transport Agency will pay the Contractor the AMM Early Services Fee in accordance with Schedule 14 (Payment Mechanism); and
- (b) the Service Commencement Date will be the Planned Service Commencement Date, the Transport Agency will pay the Contractor the Quarterly Unitary Payment in accordance with Schedule 14 (Payment Mechanism) and the Contractor will provide the AMM Services.

49A.4 Base Case Update Option

Where the Transport Agency elects that the Base Case Update Option will apply, the Base Case will be updated, in accordance with clause 5 (Base Case and Base Case adjustments) with effect from the Service Commencement Date, to reflect the impact of the Service Commencement Date occurring prior to the Planned Service Commencement Date, including any financing cost savings and adjustments to reflect amendments to or reprofiling of any Swaps and the timing and quantum of equity contributions resulting from the same.

50. GST, Rates and Taxes

50.1 Goods and Services Tax (GST)

- (a) In this clause 50 and in clauses 50.2 and 50.3, words and phrases defined in the GST Act have the meaning given in that Act, unless the context requires otherwise.
- (b) Unless expressly provided to the contrary, any consideration payable for a supply made under this Agreement is stated before the addition of any GST chargeable on that supply.
- (c) The parties agree that where GST is chargeable on a supply made by one party (the **Supplier**) to the other party (the **Recipient**) under this Agreement, the Supplier will issue a tax invoice to the Recipient and the Recipient will pay to the Supplier the GST chargeable on that supply, in addition to the consideration payable for that supply, unless section 5(23) of the GST Act applies to that supply. Subject to clauses 50.2 and 50.3, the Recipient shall pay the GST to the Supplier at the same time as the consideration is paid to the Supplier.

- (d) The Contractor shall provide the Transport Agency with any information reasonably requested by the Transport Agency in relation to the amount of GST chargeable on a supply made under this Agreement and payable by the Transport Agency to the Contractor.

50.2 Zero rating of P2Wk Project Lease

- (a) The Contractor undertakes that:
 - (i) it will be a registered person on the Service Commencement Date and will provide its tax registration number to the Transport Agency before that date;
 - (ii) it is acquiring the P2Wk Project Lease with the intention of using it for making taxable supplies;
 - (iii) it does not intend to use the P2Wk Project Lease as a principal place of residence for itself or a person treated as associated with it under section 2A(1)(c) of the GST Act; and
 - (iv) it will not at any time be a member of a group registered for GST under section 55 of the GST Act other than any group comprising the Contractor and one or more of the Contractor Entities.
- (b) The parties agree that the supply of the P2Wk Project Lease evidences a supply of an interest in land and accordingly, in reliance on the Contractor's undertakings in clause 50.2(a), the Transport Agency will treat the supply of the P2Wk Project Lease as zero rated for GST purposes under section 11(1)(mb) of the GST Act.
- (c) Unless section 5(23) of the GST Act applies to the supply of the P2Wk Project Lease, if for any reason it is determined that the supply of the P2Wk Project Lease is chargeable with GST other than at a rate of zero per cent, the Contractor shall be entitled to recover (and the Transport Agency will pay to the Contractor) the amount of any direct costs (including penalties and interest, legal or other advisory costs, and any costs of financing the additional GST amount), resulting from the supply of the P2Wk Project Lease being chargeable with GST other than at a rate of zero per cent, on the Contractor providing reasonable evidence to the Transport Agency of the Contractor's liability for such costs.

50.3 Design and Construction Payment - GST

- (a) Each party:
 - (i) acknowledges and agrees that:
 - (A) the Design and Construction Payment is consideration for a Supply; and
 - (B) it will not seek to treat the Supply as zero rated for GST purposes; and
 - (ii) warrants (in relation to itself) that it is registered for GST and that it accounts for GST on a monthly cycle and on an invoice accounting basis.
- (b) Subject to this clause 50.3, the Transport Agency will satisfy its obligation to pay the GST chargeable on the Supply to the Contractor by way of a GST offset (as agreed with IRD). The parties will each use their reasonable endeavours to agree on any documentation and other arrangements required to facilitate this offset.

- (c) The Transport Agency will ask IRD to make the transfer of the GST Credit from the Transport Agency to the Contractor as contemplated in this clause 50.3 (the **Transfer**). The Contractor will use its best endeavours to assist the Transport Agency in arranging the Transfer, including for the avoidance of doubt by issuing a tax invoice (as that term is defined in the GST Act) to the Transport Agency in respect of the Supply promptly after the Supply has been made for the purposes of the GST Act.
- (d) The Transfer, to the extent that it is sufficient to satisfy the GST charged on the Supply, is agreed by the parties to be payment towards the Transport Agency's obligation under the Agreement to pay to the Contractor the GST charged on the Supply.
- (e) To the extent that the amount transferred falls short of the GST charged on the Supply, the Transport Agency will pay in clear funds to the Contractor, by the date one Business Day prior to the Due Date, the amount of that shortfall (provided that the Contractor has first provided a tax invoice to the Transport Agency in respect of the Supply, as contemplated in clause 50.3(c)).
- (f) The Transport Agency will deliver a copy of the Offset Confirmation to the Contractor by the date two Business Days prior to the Due Date. If the Transport Agency does not deliver a copy of the Offset Confirmation to the Contractor by the date two Business Days prior to the Due Date then the Transport Agency will pay in clear funds to the Contractor, by the date one Business Day prior to the Due Date, the relevant amount of GST due under this Agreement (provided that the Contractor has first provided a tax invoice to the Transport Agency in respect of the Supply, as contemplated in clause 50.3(c)).
- (g) If the Transport Agency fails to pay an amount of GST which the Transport Agency is liable to pay under this clause 50.3 then the Transport Agency shall pay to the Contractor, in addition to that GST, Default GST. It shall not be a defence to a claim against the Transport Agency for Default GST that the Contractor has failed to mitigate its damages by paying an amount of GST when it fell due under the GST Act.

50.4 Rates and Taxes

- (a) The Transport Agency is responsible for and will pay all Rates and Taxes assessed on or in relation to the P2Wk Project Site, except to the extent that the Contractor causes such Rates or Taxes or any applicable penalty component to be assessed by or as a result of an act or omission of the Contractor other than an act or omission expressly permitted by this Agreement. For the avoidance of doubt:
 - (i) any costs and losses recoverable from the Contractor under section 43 of the Forest and Rural Fires Act 1977 resulting from fires starting or emanating on or from the P2Wk Project Site will, as between the Transport Agency and the Contractor, be the responsibility of the Contractor; and
 - (ii) any costs and losses recoverable or levies imposed on the P2Wk Project Site under sections 45, 46 and 46A of the Forest and Rural Fires Act 1977, will be the responsibility of the Transport Agency under this clause 50.4.
- (b) Subject only to clause 50.4(a), the Contractor will pay all Rates and Taxes assessed on it, under any Project Document or any transaction evidenced or contemplated by it or in respect of, or because of its involvement in the Project.
- (c) The Contractor will use its reasonable endeavours to ensure that any Rates or Taxes for which the Transport Agency is liable under clause 50.4(a) are invoiced directly by the relevant Governmental Entity to the Transport Agency. Where any invoices for which the Transport Agency is liable under clause 50.4(a) are addressed to the

Contractor rather than to the Transport Agency, the Transport Agency will meet the invoiced costs by way of an Additional Payment.

51. Refinancing – general provisions

51.1 Refinancing

- (a) The Contractor shall not undertake or permit any Refinancing other than subject to and in accordance with this clause 51 and clause 52 (Refinancing – Transport Agency consent).
- (b) Subject to the other provisions of this Agreement (which will prevail if there is any inconsistency with this clause 51.1(b)), it is intended that the following principles will apply to the Refinancing regime:
 - (i) Refinancings that are proposed to be General Refinancings or Permitted Refinancings may be undertaken by the Contractor with the prior written consent of the Transport Agency, with the grounds on which the Transport Agency may grant or withhold its consent being set out in this clause 51 and clause 52;
 - (ii) Refinancings that are proposed to be Exempt Refinancings may be undertaken by the Contractor without the prior written consent of the Transport Agency, provided that Exempt Refinancings must be reported to the Transport Agency to the extent required under clause 55.2(a);
 - (iii) the Transport Agency's financial obligations in respect of any Refinancing will be solely as set out in Schedule 14 (Payment Mechanism) and (where applicable) Schedule 18 (Calculation of Compensation on Termination); and
 - (iv) the Transport Agency will be entitled to a payment equal to 50 per cent of any Refinancing Gain arising from a Qualifying Refinancing as set out in clause 53.1 (Refinancing Gain).
- (c) Nothing in this Agreement will preclude a Refinancing that complies with the requirements of this clause 51 and clause 52 from qualifying as a General Refinancing or Permitted Refinancing where the financial accommodation being or to be provided is in the form of a bond or other debt instrument rather than in the form of a loan.

51.2 Refinancing – restrictions on funders

- (a) The Contractor must not undertake or permit any Refinancing that is, in whole or in part, arranged or funded by an Unsuitable Third Party.
- (b) The Contractor must not undertake or permit any Refinancing or Qualifying Bank Transaction other than:
 - (i) with Qualifying Lenders; and/or
 - (ii) with the Transport Agency's prior written consent.
- (c) Where the Contractor wishes to undertake or permit a Refinancing or Qualifying Bank Transaction with a person that is not a Qualifying Lender, it must first obtain the written consent of the Transport Agency. Such consent must not be unreasonably withheld or delayed and will be deemed to have been given if no response is received within 10 Business Days after a written request for consent has been provided to the Transport Agency.

51.3 Refinancing - general provisions

- (a) The Contractor shall promptly provide the Transport Agency with the following details of any proposed Refinancing (other than an Exempt Refinancing):
 - (i) where it considers the Refinancing to be a Permitted Refinancing, a certificate signed by a director of Contractor General Partner on behalf of the Contractor stating that the Refinancing meets the applicable Permitted Refinancing Conditions, including reasonable particulars as to how the Refinancing meets the applicable conditions;
 - (ii) a copy of the draft financial model relating to the Refinancing (if any), including the basis for the assumptions used in that draft financial model;
 - (iii) a comparison of the Refinancing (together with all other then-current Core Senior Debt) with the Modelled Senior Debt assumed in the Base Case as at the time of the Refinancing;
 - (iv) any material changes to the obligations of the Contractor or a Contractor Related Person to their funders;
 - (v) the identity of the persons intending to arrange and/or finance the Refinancing;
 - (vi) drafts of the documentation proposed to undertake the Refinancing;
 - (vii) particulars of any Refinancing Gain; and
 - (viii) such other information as the Transport Agency may reasonably request for the purpose of assessing whether or not the Refinancing meets, as applicable, the General Refinancing Conditions or the relevant Permitted Refinancing Conditions.
- (b) The Transport Agency shall (before, during and at any time after a Refinancing) have unrestricted rights of audit (on an Open Book Basis) over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with that Refinancing.
- (c) The Contractor shall, within 10 Business Days after completion of any Refinancing (other than an Exempt Refinancing), provide the Transport Agency with true copies of the applicable Senior Financing Agreements.
- (d) No entry into or termination of, amendments to or replacements of any Financing Agreement shall have the effect of increasing the Transport Agency's Liabilities on termination of this Agreement unless:
 - (i) the Contractor has obtained the Transport Agency's consent under this Agreement to such entry into or termination of, amendments to or replacements of any Financing Agreement; and
 - (ii) such Liabilities are payable by the Transport Agency under Schedule 18 (Calculation of Compensation on Termination).
- (e) Where a single transaction comprises two or more component parts, each of which is or may be considered a Refinancing in its own right, each such component will be considered individually for compliance with the applicable Permitted Refinancing Conditions and/or Exempt Refinancing Conditions and/or for the purposes of the Transport Agency's consent under clause 52.

52. Refinancing – Transport Agency consent

52.1 Transport Agency consent to Refinancing

- (a) Subject to clause 51 (Refinancing – general provisions) and this clause 52, the Contractor shall not undertake or permit any Refinancing without the prior written consent of the Transport Agency.
- (b) If the Contractor wishes to undertake or permit a Refinancing (other than an Exempt Refinancing), the Contractor shall first provide the Transport Agency with details of the proposed Refinancing in accordance with clause 51.3 and request and obtain the Transport Agency's prior written consent.
- (c) The Transport Agency shall approve or reject the Contractor's request for consent to a General Refinancing (acting reasonably) within 20 Business Days of receiving the details of the proposed General Refinancing as required under clause 51.3.
- (d) The Transport Agency shall approve or reject the Contractor's request for consent to a Permitted Refinancing within five Business Days of receiving the details of the proposed Permitted Refinancing as required under clause 51.3. The Transport Agency may only withhold such consent if the proposed Permitted Refinancing:
 - (i) does not meet one or more of the applicable Permitted Refinancing Conditions; and/or
 - (ii) does not comply with clause 51.2 (Refinancing - restrictions on funders).
- (e) If the Transport Agency does not approve or reject a request for consent to a proposed Permitted Refinancing within the period referred to in clause 52.1(d), the Transport Agency will be deemed to have consented to the Permitted Refinancing.
- (f) If the Contractor wishes to undertake or permit an Exempt Refinancing it may do so without the prior consent of the Transport Agency, provided that the Exempt Refinancing meets such of the Exempt Refinancing Conditions as the Contractor reasonably considers are applicable in the circumstances, and any such Exempt Refinancing will be deemed to have received the consent of the Transport Agency for the purposes of this Agreement.

52.2 General Refinancing conditions

Without limitation to the Transport Agency's rights under clause 51.2 (Refinancing – restrictions on funders), it will be reasonable for the Transport Agency to withhold its consent to a proposed General Refinancing if, in the Transport Agency's reasonable opinion, that General Refinancing would not meet one or more of the following conditions:

- (a) that Refinancing would not result in a material increase or material adverse change in the profile of the risks or liabilities of the Transport Agency under any Project Document without adequate compensation to the Transport Agency except to the extent that Refinancing is an arm's length resetting of interest rate hedging permitted under clause 52.5;
- (b) the terms and conditions of that Refinancing (taken as a whole) are in accordance with market practice at the time;
- (c) the terms and conditions of that Refinancing (taken as a whole) are not materially more onerous or disadvantageous to the Contractor than the terms and conditions under the then-current Senior Financing Agreements, and the Transport Agency

considers (acting reasonably) that the Contractor's ability to perform its obligations under the Project Documents will not be materially and adversely affected by those terms and conditions or the indebtedness assumed under that Refinancing;

- (d) the draft financial model for that Refinancing shows that the Contractor will be able to adequately service and repay the indebtedness assumed under that Refinancing; and
- (e) the indebtedness assumed under that Refinancing will be used solely for the Project.

52.3 Permitted Refinancing conditions

- (a) If the Contractor wishes to undertake or permit a Permitted Refinancing it must seek the consent of the Transport Agency in accordance with clause 52.1 and:
 - (i) in the case of a proposed Core Refinancing, the Refinancing must meet each of the Core Refinancing Conditions as set out in clause 52.4(b);
 - (ii) in the case of a proposed Permitted Hedging, the Refinancing must meet each of the Permitted Hedging Conditions as set out in clause 52.5(b); and
 - (iii) in the case of a proposed Rescue Refinancing, the Refinancing must meet each of the Rescue Refinancing Conditions as set out in clause 52.6(b).
- (b) Where any proposed Refinancing (other than an Exempt Refinancing) does not meet each of the applicable Permitted Refinancing Conditions, the Contractor may only undertake or permit that Refinancing as a General Refinancing in accordance with clause 52.1.

52.4 Core Refinancing Conditions

- (a) For a Refinancing to be a Core Refinancing, it must meet each of the conditions set out in clause 52.4(b) or clause 52.4(c) (as applicable).
- (b) Except where clause 52.4(c) applies, a Refinancing will only be a Core Refinancing if:
 - (i) it has a first Drawdown Date that falls after the end of the Lock-in Period (provided that the Contractor may incur or draw down Core Senior Debt, of a maximum principal amount of no greater than the Core Senior Debt Cap (and that complies with the other conditions set out in this clause 52.4(b), at any time during the Lock-in Period);
 - (ii) it has a scheduled maturity date no later than 10 years after its first Drawdown Date;
 - (iii) it has a maximum principal amount (at any time during its scheduled term) of no greater than the Core Senior Debt Cap; and
 - (iv) where the terms of the Refinancing include a Lock-up DSCR, such Lock-up DSCR (at any time during its scheduled term) is no less than 0.05 below the Minimum Projected DSCR at any time during its scheduled term (as determined at the time of the Refinancing).
- (c) A Refinancing undertaken for the purpose of funding Swap Breakage Costs will be a Core Refinancing (without needing to satisfy the conditions set out in clause 52.4(b)) provided that it has a scheduled maturity date of the earlier of:
 - (i) the original maturity date for the Swap in respect of which the Swap Breakage Costs were incurred; and

- (ii) the Floating Rate Commencement Date.

52.5 Permitted Hedging Conditions

- (a) The Contractor must not enter into any Swap other than:
 - (i) a Permitted Hedging that meets the applicable conditions set out in clause 52.5(b); or
 - (ii) by way of a General Refinancing under clause 52.2.
- (b) Any Swap entered into by the Contractor:
 - (i) on or prior to Financial Close must be entered into in accordance with the Financial Close Adjustment Protocol; and
 - (ii) after Financial Close may only be entered into:
 - (A) to hedge floating interest rate exposures, to the extent not representing interest exposures on principal amounts within the definition of Modelled Principal Amount (as defined in Schedule 14 (Payment Mechanism) for any Debt Contract Quarter, on Arms' Length Terms;
 - (B) for a period of no longer than the underlying tenor of the relevant debt to which the Swap applies; and
 - (C) for a notional principal amount of no more than the principal amount of the relevant debt to which the Swap applies,

and will comprise Permitted Hedging to the extent it complies with the requirements of this clause 52.5(b).
- (c) The Contractor must ensure that at Financial Close the aggregate of all notional amounts of Permitted Hedging in place covers no less than 97 per cent and no more than 103 per cent of the Core Senior Debt from Financial Close to the Floating Rate Commencement Date.

52.6 Rescue Refinancing Conditions

- (a) For a Refinancing to be a Rescue Refinancing, it must meet each of the conditions set out in clause 52.6(b).
- (b) A Refinancing will only be a Rescue Refinancing if it:
 - (i) is arranged and drawn down as a consequence of, or to cure, prevent, avoid, or mitigate the effects of, a default, review event or mandatory prepayment event under a Senior Financing Agreement; and
 - (ii) has a scheduled maturity date no later than five years after its first Drawdown Date.

52.7 Exempt Refinancing Conditions

- (a) Each Exempt Refinancing must meet such of the Exempt Refinancing Conditions set out in clause 52.7(b) as the Contractor reasonably considers are applicable in the circumstances.

- (b) The Exempt Refinancing Conditions are:
- (i) that Refinancing would not result in a material increase or material adverse change in the profile of the risks or liabilities of the Transport Agency under any Project Document without adequate compensation to the Transport Agency;
 - (ii) the Contractor considers (acting reasonably) that its ability to perform its obligations under the Project Documents will not be materially and adversely affected by the terms and conditions of that Refinancing (taken as a whole); and
 - (iii) that the indebtedness assumed under that Refinancing (if any) will be used solely for the Project.

53. Refinancing Gain and Base Interest Amount

53.1 Refinancing Gain

The Transport Agency will receive a 50 per cent share of any Refinancing Gain arising from a Qualifying Refinancing, by way of an adjustment to the Quarterly Unitary Payment in accordance with paragraph 1 of Schedule 14 (Payment Mechanism).

53.2 Payment of Refinancing Gain

The Transport Agency may elect, to receive its share of any Refinancing Gain arising from a Qualifying Refinancing as follows:

- (a) in amounts representing 50 per cent of the applicable Refinancing Gain (Lump Sum) as a single lump sum to be deducted from the Quarterly Unitary Payment in respect of the Contract Quarter in which the Qualifying Refinancing is completed (provided that, to the extent that such lump sum would exceed the incremental cashflow equivalent to the Refinancing Gain (Lump Sum) for the corresponding Contract Quarter, the remaining balance will be deducted from the component of the Quarterly Unitary Payment otherwise attributable to Distributions for that and each subsequent Contract Quarter until the Refinancing Gain (Lump Sum) is paid in full) provided that any such deduction from amounts available for Distributions is not at that time prohibited under the terms of the Senior Financing Agreements; or
- (b) in amounts representing 50 per cent of the applicable Refinancing Gain (Quarterly) to be deducted from the Quarterly Unitary Payments paid in respect of each Contract Quarter (n) to which the definition of Refinancing Gain (Quarterly) applies.

53.3 Base Interest Amount

Notwithstanding any other provision in this Agreement the Transport Agency will not, as a result of any Refinancing, be liable to increase any Base Interest Amount or to alter any input to the calculation of any Base Interest Amount except to the extent expressly agreed by the Transport Agency.

53.4 Establishment of Principal Adjustment Amount

- (a) The Contractor may require alterations to the calculation of the Base Interest Amount, by establishing a Principal Adjustment Amount, only in accordance with this clause 53.4.
- (b) The Contractor may only exercise its right to establish a Principal Adjustment Amount:

- (i) where, as at the date of exercise of such right, the Modelled Principal Amount exceeds 103 percent of Core Senior Debt at that date;
 - (ii) no more than three times in aggregate; and
 - (iii) to take effect between the Floating Rate Commencement Date and the Expiry Date.
- (c) Where the Contractor elects to establish a Principal Adjustment Amount it must give the Transport Agency not less than 10 Business Days' prior notice setting out:
 - (i) the date of commencement of the Principal Adjustment Amount (**PAA Commencement Date**); and
 - (ii) the quantum of the Principal Adjustment Amount for each Contract Quarter for which it is to apply (which must be a positive number no greater than the amount required for the Modelled Principal Amount to equal Core Senior Debt for the relevant Contract Quarter).
- (d) The Transport Agency will not be required to implement a Project Adjustment Amount that does not comply with the requirements of clauses 53.4(b) and 53.4(c).
- (e) Where the Contractor establishes a Principal Adjustment Amount it must pay the Transport Agency the following amounts, which will comprise Moneys Owning:
 - (i) all direct costs incurred by the Transport Agency in connection with the establishment of the Principal Adjustment Amount, including but not limited to transaction and advisory costs and the mark to market costs, if any, incurred by the Transport Agency in amending or altering any of its underlying interest rate management arrangements to reflect the Principal Adjustment Amount; and
 - (ii) a transaction fee comprising, as applicable:
 - (A) five basis points per annum, on the Principal Adjustment Amount, in respect of the first Principal Adjustment Amount established by the Contractor;
 - (B) seven basis points per annum, on the Principal Adjustment Amount, in respect of the second Principal Adjustment Amount established by the Contractor; and
 - (C) nine basis points per annum, on the Principal Adjustment Amount, in respect of the third Principal Adjustment Amount established by the Contractor.
- (f) Each Principal Adjustment Amount will take effect from the relevant PAA Commencement Date and will be applied, to establish the Base Interest Amount, in respect of each applicable Contract Quarter from that date.

Part 14 – Warranties and undertakings

54. Contractor warranties

The Transport Agency has entered into this Agreement in reliance on, and the Contractor makes the warranties and representations to the Transport Agency set out under, clause 54.1 and clause 54.2.

54.1 General warranties

The Contractor warrants and represents to the Transport Agency that:

- (a) it is a limited partnership duly formed and validly existing under, and is registered in accordance with, the Limited Partnerships Act and all details of the Contractor required to be provided under that Act for the register of limited partnerships maintained under that Act have been provided;
- (b) it has the power and the authority to own its assets and to carry on its business as it is now being conducted;
- (c) neither it nor any of its assets enjoys any immunity from set-off, suit or execution;
- (d) it has the power under the Limited Partnerships Act and the Contractor Partnership Agreement to enter into and to exercise its rights and perform its obligations under the Project Documents;
- (e) all actions necessary on the part of the Contractor to authorise the execution of and the performance of its obligations under the Project Documents have been taken or, in the case of any Project Document executed after the Execution Date, will be taken before such execution;
- (f) the obligations expressed to be assumed by the Contractor under the Project Documents to which it is party, are, or in the case of any Project Document executed after the Execution Date, will be on their execution, legal, valid, binding and enforceable;
- (g) each Project Document is, or in the case of any Project Document executed after the Execution Date, will be on its execution, in proper form for enforcement in New Zealand;
- (h) the execution and delivery of the Project Documents to which it is party, and the performance of the Contractor's obligations under the Project Documents to which it is party, does not contravene any provision of:
 - (i) any existing Laws either in force, or enacted but not yet in force, that are binding on the Contractor;
 - (ii) the Contractor Partnership Agreement;
 - (iii) any order or decree of any court or arbitrator which is binding on the Contractor; or
 - (iv) any obligation which is binding on the Contractor or on any of its assets or revenues;

- (i) Contractor General Partner has the authority and power under the Contractor Partnership Agreement and the Limited Partnerships Act to enter into the Project Documents in its capacity as general partner of the Contractor and thereby to bind the Contractor as a limited partnership; and
- (j) all assets of the Contractor are:
 - (i) owned by the Contractor; and
 - (ii) under the management and control of Contractor General Partner.

54.2 Information warranties

The Contractor further warrants and represents to the Transport Agency that:

- (a) as at the date of the Contractor's Proposal the statements and representations made in the Contractor's Proposal were true and correct;
- (b) the particulars regarding the Contractor, the Contractor Entities and each Major Sub-contractor as set out in Schedule 2 (Contractor Warranted Data) are true and correct and:
 - (i) no other person has any legal or beneficial interest in the Contractor, the Contractor Entities or a Major Sub-contractor; and
 - (ii) there is no agreement, arrangement or understanding in existence:
 - (A) under which further shares or other interests (including Partnership Interests) in the Contractor or the Contractor Entities may be issued to any person or under which any person is entitled to call for the issue of any shares or other interests (including Partnership Interests); or
 - (B) that has resulted in or may result in any sale, transfer or disposal of any legal, beneficial, equitable or other interest in any or all of such shares or other interests (including Partnership Interests) other than by way of enforcement action undertaken by or on behalf of Senior Lenders pursuant to a Senior Financing Agreement;
- (c) all information provided by the Contractor to the Transport Agency under or in relation to this Agreement is, or will be when disclosed, complete and accurate in all material respects and that the use of that information by either party (for the purpose for which it was disclosed) will not breach the Intellectual Property rights of any third party;
- (d) the Contractor has not, other than in connection with the Project, traded at any time since its registration as a limited partnership under the Limited Partnerships Act, nor has the Contractor incurred any liabilities or entered into any document or agreement in respect of the Project, other than the Project Documents, or as contemplated under any Project Document;
- (e) no Probity Event has occurred or is continuing in relation to the Contractor or a Contractor Related Person;
- (f) no Claim is presently being assessed and no litigation, arbitration or administrative proceedings are presently in progress or, to the best of the Contractor's knowledge (after having made due enquiry), pending or threatened against it or any of its assets which will or may have a Material Adverse Effect; and

- (g) the copies of the Project Documents which the Contractor has delivered or, when executed, will deliver to the Transport Agency are or, as applicable, will be, true and complete copies of such documents and there are not any other agreements or documents in existence replacing or relating to any of the Project Documents which would materially affect the interpretation or application of any of the Project Documents.

54.3 Deemed repetition

Each of the warranties set out in clause 54.1 and clause 54.2 is deemed to be repeated each day during the Contract Term by reference to the facts existing on that day, except that:

- (a) the warranties in clause 54.2(a) and clause 54.2(b) are made only as at the Execution Date and the date of Financial Close; and
- (b) the warranty in clause 54.2(c) is made only as at the time that the relevant information is provided.

54.4 No limitation

The Transport Agency and the Contractor acknowledge and agree that none of the representations and warranties made by the Contractor under clause 54.1 or clause 54.2 or elsewhere in this Agreement will be interpreted as being limited or affected by any endorsement or failure to endorse, or failure to review or comment on, any of the Reviewable Documents under the Review Procedures, or by any report or failure to report, or comment made by the Independent Reviewer or an Independent Expert.

55. Contractor undertakings

55.1 General undertakings

The Contractor undertakes to the Transport Agency that, for so long as this Agreement remains in full force:

- (a) it shall not cease to be resident in New Zealand or transfer in whole or in part its undertaking, business or trade outside of New Zealand;
- (b) it shall not undertake the performance of its obligations under this Agreement otherwise than through itself or a Sub-contractor;
- (c) it shall not, without the written consent of the Transport Agency (such consent not to be unreasonably withheld or delayed), incorporate any company or form any partnership or purchase or acquire or subscribe for any shares or other interests (including Partnership Interests) in any company or other entity save where such entity is solely involved in providing the Services;
- (d) it shall not, without the written consent of the Transport Agency (such consent not to be unreasonably withheld or delayed), make any loans or grant any credit or give any guarantee or indemnity to or for the benefit of any person or otherwise voluntarily or for consideration assume any liability (whether actual or contingent) in respect of any obligation of any other person except in the ordinary course of business and as contemplated by the Project Documents;
- (e) it shall not change or cease its business or start any other business;
- (f) it shall take reasonable care not to do anything, or omit to do anything, that would cause the Transport Agency to be in breach of any applicable Laws;

- (g) it shall consult with the Transport Agency as soon as practicable as to any event that has or may materially and adversely affect the performance of its obligations under this Agreement;
- (h) it shall not create, permit or suffer to exist any Security Interest over all or any of its assets, without the prior written consent of the Transport Agency, except for Permitted Security Interests;
- (i) it shall not, without the prior written consent of the Transport Agency, (and whether by a single transaction or by a series of transactions whether related or not) sell, transfer, lend, create or permit a Security Interest to subsist over, or to otherwise dispose of:
 - (i) any of its rights under any Project Document or Financing Agreement to which it is party;
 - (ii) all or any part of, or any interest in the P2Wk Project other than as expressly provided for in any Project Document (and then only if the Transport Agency has first given its express approval to the same); or
 - (iii) the whole or any part of its business or assets that would affect the ability of the Contractor to perform its obligations under this Agreement,

nor agree, offer, attempt or purport to do any of those things, except:

 - (iv) as expressly provided for in the Project Documents; or
 - (v) by way of a Permitted Security Interest; and
- (j) it shall not (unless otherwise expressly permitted by this Agreement) contract with, assume or permit to subsist any Liability in favour of, or buy, sell or dispose of assets to or from a Contractor Related Person otherwise than on Arms' Length Terms.

55.2 Financial information

The Contractor shall:

- (a) provide to the Transport Agency on or before each of 31 March, 30 June, 30 September and 31 December in each Contract Year a certificate setting out the required information in relation to Exempt Refinancings in the form set out in Annexure 1 (Form of Quarterly Finance Summary) to Schedule 4 (Financing);
- (b) at the request of the Transport Agency, provide to the Transport Agency any information provided by it to the Senior Lenders during the term of this Agreement and any other information relating to the Project that the Transport Agency may reasonably require;
- (c) provide to the Transport Agency copies of:
 - (i) its monthly management accounts within five Business Days of their preparation;
 - (ii) its annual audited and half yearly accounts within five Business Days of their publication (in each case prepared in accordance with GAAP); and
 - (iii) its annual report and annual business plan (within five Business Days of their preparation) showing in the case of the annual business plan the Contractor's budget for its current and each of the two following financial years; and

- (d) promptly on the occurrence of a Financing Default notify the Transport Agency of such Financing Default.

55.3 Event information

The Contractor shall:

- (a) promptly advise the Transport Agency of any material damage to or destruction of all or any part of the P2Wk Project;
- (b) promptly advise the Transport Agency of any event in relation to the P2Wk Project or the provision of the Services that give rise or may give rise to:
 - (i) a material health or safety risk (including any failure to comply with any Law relating to health and safety); or
 - (ii) an accident, injury or damage to persons (including death) on or about the P2Wk Project Site or in connection with any act or omission on the part of the Contractor or any Sub-contractor;
- (c) promptly advise the Transport Agency of any industrial action which may affect the Project, and the actions the Contractor has taken or proposes to take to minimise or overcome the effects of the industrial action;
- (d) promptly advise the Transport Agency of any substantial dispute between the Contractor or any Contractor Related Person and any Governmental Entity;
- (e) promptly advise the Transport Agency on becoming aware of the occurrence of any Termination Event or any other material breach by it of its warranties or obligations under this Agreement, another Project Document or a Financing Agreement;
- (f) within five Business Days after becoming aware that any litigation, arbitration, administrative or adjudication or mediation proceedings before or of any court, arbitrator or Governmental Entity (**Legal Proceedings**) has been threatened or commenced against:
 - (i) the Contractor or a Contractor Entity; or
 - (ii) a Major Sub-contractor (where such Legal Proceedings relate to, or may have a material adverse effect on the performance of, any of the Services undertaken or to be undertaken by that Major Sub-Contractor),

give the Transport Agency notice of such Legal Proceedings.
- (g) promptly advise the Transport Agency of any circumstances which would, with the giving of notice and/or lapse of time, constitute a Contractor Default; and
- (h) promptly advise the Transport Agency of any circumstances that:
 - (i) give rise to a drawstop or change the drawdown milestones as specified in the Senior Financing Agreements; or
 - (ii) would, with the giving of notice and/or lapse of time, give rise to an event of default, cancellation, prepayment event or similar event (whatever called) under any Financing Agreement to which the Contractor or any Contractor Related Person is party.

Part 15 – Confidentiality and Intellectual Property

56. Confidential Information

56.1 Non-disclosure

Subject to clause 56.2 and clause 56.3, each party shall treat as confidential and not disclose to any third party nor use for its own benefit (other than for the purposes of this Agreement) any Confidential Information that is the Confidential Information of another person disclosed pursuant to this Agreement.

56.2 General exceptions

Clause 56.1 does not preclude a party disclosing Confidential Information:

- (a) if that information was known, or becomes known, to the public through no act or default of the recipient;
- (b) that the recipient is required by Law to disclose so long as the recipient provides written notice of the required disclosure promptly on receipt of notice of the required disclosure (if it is permitted to do so by Law);
- (c) that was lawfully known to the recipient prior to the date it was received;
- (d) that becomes available to the recipient from a source other than the person that disclosed that information, provided that the recipient has no reason to believe such source is itself bound by an obligation of confidence to the person that disclosed that information or is otherwise prohibited by Law from disclosing such information;
- (e) that has been or is independently developed by the recipient;
- (f) to any rating agency in connection with the credit rating of that party;
- (g) as required by the rules of any recognised stock exchange;
- (h) to the extent that such disclosure is authorised by this Agreement; or
- (i) if such disclosure is approved for release with the prior written consent of the party that disclosed that information.

56.3 Limited disclosure

- (a) The Contractor may, subject to clause 56.3(b), disclose (or permit a Sub-contractor to disclose) the Confidential Information of the Transport Agency to:
 - (i) the Contractor General Partner and any of the Contractor's or the Contractor General Partners' respective Officers, employees, Sub-contractors or Professional Advisors who need to know the same for the purposes of this Agreement;
 - (ii) a Senior Lender or a Senior Lender's Professional Advisors or to any person and its Professional Advisors where it is proposed that a person should or may provide finance (whether directly or indirectly and whether by loan, equity participation or otherwise) to:

- (A) the Contractor and/or a Contractor Entity in accordance with the provisions of this Agreement; or
- (B) (with the prior written consent of the Transport Agency, not to be unreasonably withheld) a Major Sub-contractor or its Affiliates,

but only to the extent reasonably necessary to enable a decision to be taken in relation to the finance proposal; and

- (iii) any prospective purchaser of shares or Partnership Interests (as applicable) in the Contractor or a Contractor Entity in accordance with the provisions of this Agreement or (with the prior written consent of the Transport Agency, not to be unreasonably withheld) any prospective purchaser of shares or other interests (including Partnership Interests) in a Major Sub-contractor or its Affiliates, but only to the extent reasonably necessary to enable a decision to be taken in relation to the proposed purchase,

and the Contractor will ensure (and must procure that any Sub-contractor ensures) that the proposed recipient of any information disclosed under this clause 56.3(a) is made aware of and will comply with the terms of this clause 56.

- (b) The Contractor will not disclose the Confidential Information of the Transport Agency under clause 56.3(a) unless, where the Transport Agency provides notice to the Contractor that the same is required, that person has given a written confidentiality undertaking to the Contractor and for the benefit of the Transport Agency substantially similar to those set out in this clause 56 (the form of the undertaking to be first approved by the Transport Agency).
- (c) The Transport Agency may disclose the Confidential Information of the Contractor to:
 - (i) any Transport Agency Related Person and any potential New Contractor;
 - (ii) any Transport Agency Personnel; and
 - (iii) those who otherwise need to know the same in connection with the operation, administration and management of the Services and this Agreement,

provided, and to the extent that, such disclosure under clauses 56.3(c)(ii) and (iii) is necessary for the then-current and/or ongoing operation, administration and management of the Services and this Agreement.

- (d) The Transport Agency will ensure that any person to which it discloses Confidential Information of the Contractor is made aware of and will comply with the terms of this clause 56.
- (e) The Contractor acknowledges that the Transport Agency is or may be subject to the Official Information Act 1982 and that the Transport Agency is obliged to disclose Confidential Information under that Act if so requested and if there is no good reason under the terms of that Act to withhold that information. The Transport Agency shall use its reasonable endeavours to advise the Contractor of any request received by it under the Official Information Act 1982 that relates to Confidential Information of the Contractor.
- (f) The Transport Agency may, in its own right or through another Governmental Entity, provide public access to or distribution of this Agreement, provided that the Transport Agency will, prior to providing public access to or distribution of the Agreement, seek to agree with the Contractor which, if any, sections of this Agreement should be withheld from public access or distribution.

57. Intellectual Property

57.1 Preliminary

In this Agreement, the term:

- (a) **Background IP** means Intellectual Property Material of the Transport Agency, any Transport Agency Related Person, or their respective licensors, or the Contractor, any Contractor Personnel, or their respective licensors, that is:
 - (i) already in existence prior to the Execution Date; or
 - (ii) developed other than solely:
 - (A) as part of the Services; or
 - (B) for the purposes of the Services or this Agreement,

and which is utilised as part of the Services or for the purposes of the Services or this Agreement;
- (b) **Developed IP** means Intellectual Property Material:
 - (i) that is developed as part of the Services, or for the purposes of the Services or this Agreement; and/or
 - (ii) includes additions to or adaptations, customisations or enhancements of or deletions or derivatives from Background IP; and
- (c) **Use** means, in relation to any Intellectual Property Material, the accessing, possessing, using, storing, copying, translating, adapting, customising, enhancing, or sub-licensing of that material, and includes the incorporation of that Intellectual Property Material with other materials and the creation of new versions of or derivatives from those Intellectual Property Materials.

57.2 Sub-contractors

The Contractor shall ensure that:

- (a) its obligations under clauses 57.3, 57.4 and 57.5 are flowed down to Major Sub-contractors in accordance with clause 16.1(f); and
- (b) the Transport Agency is entitled to directly enforce any such obligations against the Sub-contractors under the Contracts (Privity) Act 1982.

57.3 Background IP

- (a) The Contractor acknowledges and agrees that the Transport Agency, a Transport Agency Related Person or their respective licensors is and remains the owner of all Transport Agency Background IP. Neither the Contractor, nor any Contractor Personnel has (by virtue of this Agreement or otherwise) any Claim on, entitlement to, or rights in relation to any Transport Agency Background IP except to the extent provided in this clause 57.
- (b) The Transport Agency acknowledges and agrees that the Contractor or any Contractor Personnel or their respective licensors is and remains the owner of all

Contractor Background IP. Neither the Transport Agency, nor any Transport Agency Related Person has (by virtue of this Agreement or otherwise) any Claim on, entitlement to, or rights in relation to any Contractor Background IP except to the extent provided in this clause 57.

57.4 Developed IP

- (a) Subject to clause 57.5, all Intellectual Property rights in the Developed IP vest in the Transport Agency at the time of its creation and at each and every stage of its development.
- (b) The Contractor shall ensure, where necessary, that it secures the right to undertake such vesting and shall do all such things and sign all such documents required to ensure that all Developed IP is transferred and assigned to the Transport Agency to ensure compliance with clause 57.4(a). The Contractor shall mark any copyright work comprising Developed IP with the legend "© Transport Agency copyright [*insert the year of generation of the work*]".

57.5 Licensing of Transport Agency Background IP and Developed IP

- (a) The Transport Agency hereby grants to the Contractor:
 - (i) a non-exclusive, royalty-free, transferable, perpetual, irrevocable, worldwide licence to Use all Developed IP without restriction (subject to confidentiality and security obligations); and
 - (ii) the right to grant sub-licences to the Sub-contractors on the same basis.
- (b) Subject to clause 57.5(d) and clause 57.5(e), the Transport Agency:
 - (i) shall make available to the Contractor all Transport Agency Background IP that the Transport Agency reasonably considers is necessary for the performance of the Contractor's obligations under this Agreement;
 - (ii) hereby grants to the Contractor, to the extent the Transport Agency is legally able to do so, a non-exclusive, royalty-free, non-transferable and irrevocable licence to Use such Transport Agency Background IP during the Contract Term solely for the purpose of the performance of the Contractor's obligations under this Agreement; and
 - (iii) may, at its discretion and by giving written notice to the Contractor, impose restrictions on the Contractor's Use of all or part of the Transport Agency Background IP, provided that such restrictions must not cause the Contractor to be unable to perform its obligations under this Agreement.
- (c) The Transport Agency gives no warranty as to the suitability for the Contractor's purpose of any Transport Agency Background IP licensed under this clause 57.5. The Contractor must not, by any act or omission, in any way prejudice ownership by the Transport Agency of any Transport Agency Background IP or the Developed IP.
- (d) Any licence granted to the Contractor under clause 57.5(b) includes the right on the part of the Contractor to grant a sub-licence to a Sub-contractor, so long as:
 - (i) the Contractor gives the Transport Agency reasonable prior notice of its intention to grant such sub-licence; and

- (ii) if so required by the Transport Agency, that Sub-contractor first enters into a direct undertaking with the Transport Agency on terms reasonably satisfactory to the Transport Agency.
- (e) No sub-licence may be granted by the Contractor, except in accordance with this clause 57.5.

57.6 Licensing of Contractor Background IP

- (a) The Contractor hereby grants to the Transport Agency a non-exclusive, transferable, irrevocable, perpetual, royalty-free licence to Use Contractor Background IP (with the right to grant sub-licences in the same), in order to obtain the full benefit of the Project and to achieve the Objectives.
- (b) The Contractor shall ensure that none of the Contractor Background IP is assigned, transferred, sold or made subject to an exclusive licence to Use for the benefit of any third party during or after the Contract Term, unless it preserves for the Transport Agency and any Transport Agency Related Person the rights granted under this clause 57.6.
- (c) Clause 57.6(b) does not apply to assignments that fall within paragraph (c) of the definition of Permitted Security Interest.

57.7 Moral Rights

The Contractor, in respect of all Developed IP:

- (a) to the extent permitted by any Laws, will not, and will take all reasonable steps to ensure that all Contractor Personnel will 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 in respect of any Developed IP against the Transport Agency, a Transport Agency Related Person, or any third party to whom the Transport Agency or a Transport Agency Related Person licenses (whether express or implied), or grants any other rights to use, possess, modify, vary or amend any Developed IP;
- (b) will procure that all individuals who are, or may be, authors of any Developed IP, sign, date and return to the Contractor a Moral Rights consent (in a form acceptable to the Transport Agency), prior to those individuals commencing work on the creation of any Developed IP;
- (c) will, within 10 Business Days of a request from the Transport Agency, provide to the Transport Agency any Moral Rights consent that is obtained under clause 57.7(b); and
- (d) will maintain an up-to-date record of the names and contact details of each person who is an author of any Developed IP and the Developed IP of which such person is an author, and provide a copy of any updated records to the Transport Agency on request.

Part 16 – Indemnities and liability

58. Indemnities

58.1 General indemnities

The Contractor shall (subject to clause 58.4) be responsible for, and indemnify and keep indemnified, each Indemnified Party (on demand) from and against, all Claims, Losses and Liabilities arising from:

- (a) death or personal injury;
- (b) loss of or damage to any property, including:
 - (i) the P2Wk Project;
 - (ii) property belonging to the Transport Agency or for which the Transport Agency is responsible; and
 - (iii) property belonging to any third party;
- (c) breach of statutory duty; and
- (d) third party actions, Claims and/or demands made against an Indemnified Party, arising out of, or as a consequence of:
 - (e) the design, construction or manufacture of the P2Wk Project, except to the extent:
 - (i) such design is undertaken by Transport Agency Personnel as a result of a Change; or
 - (ii) such construction or manufacture is undertaken by Transport Agency Personnel (as a result of a Change or otherwise);
 - (f) the operation or maintenance of the P2Wk Project by the Contractor;
 - (g) the performance or non-performance by the Contractor of the Services;
 - (h) the performance or non-performance by the Contractor of its other obligations under this Agreement;
 - (i) an Intellectual Property Claim; or
 - (j) the presence on the P2Wk Project Site or Other Land of the Contractor or any Contractor Personnel or any other person for which the Contractor or any Contractor Personnel is responsible.

58.2 Release of Indemnified Parties

- (a) The Contractor releases, to the maximum extent permitted by Law, each Indemnified Party from all Claims, Losses and Liabilities resulting from any accident, damage, death or injury arising from the use or occupation by the Contractor or any Contractor Personnel of the P2Wk Project Site, Other Land, or any Extra Land.

- (b) The release under clause 58.2(a) is absolute, except to the extent that the accident, damage, death or injury is a direct consequence of a fraudulent, unlawful, wilful, reckless or negligent act or omission of an Indemnified Party.

58.3 Other Contractor's indemnities

In addition, the Contractor is responsible for, and releases and indemnifies each Indemnified Party (on demand) from and against all Claims, Losses and Liabilities under:

- (a) clause 17.3(f) (Health and safety obligations);
- (b) clause 20.2(d) (Transport Agency monitoring);
- (c) clause 22.2(b) (Contractor's conduct on P2Wk Project Site);
- (d) clause 24.6 (Indemnity);
- (e) clause 28.1(d) (Integration); and
- (f) any other term of this Agreement, whereby the Contractor has agreed to indemnify or release any Indemnified Party.

58.4 Limits on indemnity cover

The Contractor is not obliged to indemnify or release an Indemnified Party, in respect of any indemnity or release given under this Agreement:

- (a) to the extent that the Claims against or Losses and Liabilities of the Indemnified Party occur directly as a result of:
 - (i) the Contractor acting on instructions given in writing or directions given by the Transport Agency in accordance with this Agreement, provided that the Contractor has:
 - (A) first notified the Transport Agency in writing of the consequences of so acting; and
 - (B) implemented the instruction or direction in a manner that is not negligent and is in accordance with Good Industry Practice,

except that, where it is not reasonably practicable to give such written notification in the circumstances, the Contractor shall be entitled to notify the Transport Agency's Representative verbally provided that such verbal notification is confirmed in writing by the Contractor as soon as reasonably practicable thereafter;
 - (ii) a fraudulent, unlawful, wilful, reckless or negligent act or omission of any Indemnified Party;
 - (iii) failure on the part of the Transport Agency to perform its obligations under this Agreement;
 - (iv) any Event, but only to the extent that the Contractor is entitled to relief from that Event and/or its consequences in accordance with the provisions of this Agreement;

- (v) any Losses incurred by an Indemnified Party as a result of tolling revenue (if any) in respect of the P2Wk Main Alignment (or any other tolled road) not being collectable due to an Unavailability Event,

except to the extent that such act or omission under clause 58.4(a)(ii) or such failure to perform under clause 58.4(a)(iii), was caused or contributed to by an act or omission of the Contractor;

- (b) to the extent the Transport Agency's entitlement to recovery is restricted in accordance with clauses 49.1(d)(iii) or 49.1(d)(iv) (Obligation to pay and sole remedy); or
- (c) to the extent of any indirect or consequential Losses or Liabilities, to the extent that the same are both:
 - (i) assumed by an Indemnified Party in a contract between that Indemnified Party and a third party; and
 - (ii) Losses or Liabilities for which that Indemnified Party would not be liable at Law in the absence of the contract between the relevant Indemnified Party and the third party.

58.5 Specific provisions relating to Intellectual Property Claims

- (a) The indemnity set out in clause 58.1 will not apply to an Intellectual Property Claim to the extent that the Intellectual Property Claim:
 - (i) arises solely from a modification, updating or development, carried out by or for an Indemnified Party, to any Contractor Background IP or Developed IP, where such modification, updating or development is not authorised or approved by the Contractor in writing; or
 - (ii) is in respect of Contractor Background IP and has been made as a direct result of the Transport Agency acting in breach of clause 57.6 (Licensing of Contractor Background IP).
- (b) Where an Intellectual Property Claim disrupts the Services or an Indemnified Party's use of the P2Wk Project, or otherwise prevents an Indemnified Party from obtaining the full benefit of this Agreement, the Contractor will (unless otherwise requested by the Indemnified Party) at its own expense immediately:
 - (i) obtain for the Indemnified Party the legal right to continued use of the infringing items; or
 - (ii) replace, modify or resupply the infringing items so that there is no further infringement, without adversely affecting their performance or functionality.

58.6 Privity

This Part 16 of this Agreement is (for the purposes of the Contracts (Privity) Act 1982) intended to confer benefits in favour of, and be enforceable by, all Indemnified Parties, provided that in any such claim by an Indemnified Party under that Act, the Contractor shall (for the purposes of section 9 of that Act) be entitled to rely on all defences, exclusions from liability and counter-claims that would be available to the Contractor if such claim were raised by the Transport Agency.

58.7 Liabilities, claims and losses in respect of tolling revenue

- (a) Despite any other provision of this Agreement, neither the Contractor nor any Contractor Entity or Subcontractor has any Liability to the Indemnified Parties, nor are the Indemnified Parties entitled to make any Claim, in respect of any Losses incurred or sustained by the Indemnified Parties as a result of tolling revenue (if any) in respect of the P2Wk Main Alignment (or any other tolled road) not being collectable due to an Unavailability Event or any other event that impacts on traffic flow on the P2Wk Main Alignment.
- (b) The Indemnified Parties release, to the maximum extent permitted by Law, each of the Contractor, the Contractor Entities and all Subcontractors from all Claims, Losses and Liabilities resulting from any Losses incurred or sustained by the Indemnified Parties as a result of tolling revenue (if any) in respect of the P2Wk Main Alignment (or any other tolled road) not being collectable due to an Unavailability Event or any other event that impacts on traffic flow on the P2Wk Main Alignment.
- (c) Despite any other provision of this Agreement, this clause 58.7 is (for the purposes of the Contracts (Privity) Act 1982) intended to confer benefits in favour of, and be enforceable by, the Contractor, the Contractor Entities and all Subcontractors.

59. Conduct of third party indemnity claims

59.1 Notice

- (a) Where an Indemnified Party wishes to make a Claim under this Agreement against the Contractor in relation to a claim made against it by a third party (a **Third Party Claim**), the Transport Agency shall give notice of that Third Party Claim to the Contractor as soon as reasonably practicable setting out full particulars of the same.
- (b) The Transport Agency will not, and will procure that any applicable Indemnified Party will not, settle or compromise any Third Party Claim made against the relevant person without the prior written consent of the Contractor, provided that the Contractor complies with its obligations under this clause 59.

59.2 Contractor's undertakings

The Contractor undertakes that:

- (a) it shall not (and shall procure that any Major Sub-contractor shall not), without the prior written consent of the Transport Agency, settle or compromise any Claim to which the Transport Agency is, or is likely to become, a party;
- (b) it shall ensure that its Major Sub-contractors give undertakings identical to those given by the Contractor to the Transport Agency under this clause 59 and shall require that its Major Sub-contractors impose an obligation on any Sub-contractor engaged by them to provide no less beneficial undertakings for the benefit of the Transport Agency; and
- (c) where the Contractor and/or the Contractor's insurers elect to instruct a solicitor to investigate or defend any claim against the Contractor and, in the Contractor's reasonable opinion, the Transport Agency is likely to become materially involved in that claim, the Contractor will use its best endeavours to procure that the insurers agree to waive client privilege to any information or documents supplied to the solicitor to the extent necessary to enable such information or documents to be provided to the Transport Agency on request.

59.3 Assumption of control of Third Party Claims

The Contractor shall be entitled to assume the conduct of the defence of any Third Party Claim no less than five Business Days after a request to that effect being made by the Contractor to the Transport Agency on the following conditions:

- (a) the Contractor shall be solely responsible for all the costs and expenses of that defence (including any negotiations associated with, and any settlement of, that Third Party Claim);
- (b) subject to clauses 70.1 (Obligations of parties) and 70.9(a) (Other obligations of Contractor in relation to insurances) the Contractor shall keep the Transport Agency regularly and fully informed as to all matters pertaining to that Third Party Claim and shall consult with and take into account each relevant Indemnified Party's views on the conduct of the defence (including in relation to any negotiations associated with, and any settlement of, that Third Party Claim);
- (c) where Legal Proceedings have been issued against an Indemnified Party, the Contractor shall, if so requested by the Transport Agency, use its best endeavours to obtain leave of the court for itself to be substituted as defendant in place of that Indemnified Party and/or for that person to withdraw from the Legal Proceedings;
- (d) while an Indemnified Party remains a party to any Legal Proceedings issued in connection with a Third Party Claim, the Contractor shall use its best endeavours to diligently defend, arbitrate and otherwise conduct the litigation or settle the claim;
- (e) the Contractor shall not enter into any settlement or compromise in relation to any Third Party Claim without first obtaining the prior written consent of the Transport Agency (which must not be unreasonably withheld or delayed); and
- (f) the Transport Agency, at the Contractor's expense, will offer reasonable assistance to the Contractor in its defence of the Third Party Claim.

60. Contractor's Claims

60.1 Compensation Extension Event or Compensation Intervening Event

Despite any other term of this Agreement, the Contractor is not entitled to:

- (a) any common law or equitable rights, including rights to damages; or
- (b) any other rights under contract, tort or otherwise,

in relation to any breach of this Agreement by the Transport Agency, to the extent that such breach gives rise to a Compensation Extension Event or a Compensation Intervening Event or this Agreement otherwise provides an express remedy (other than the entitlement to the payment of interest) in relation to such breach.

60.2 Recovery

Despite any other term of this Agreement (other than clause 60.3), the Contractor shall not, if it is obliged to maintain insurance under Part 18 (Insurance and Reinstatement) of this Agreement, bring any Claim or action against any Indemnified Party in respect of any Losses in circumstances where the Contractor is able to recover such Losses under such insurance (or where it would have been able to recover such Losses had it been complying with its obligations under this Agreement).

60.3 Maximum level of insurance

Clause 60.2 does not prevent the Contractor from claiming against any Indemnified Party for any Losses:

- (a) not covered because of the level of deductible under such insurance; or
- (b) to the extent such Losses exceed the maximum level of such insurance,

in each case to the extent the relevant Insurance Policies comply with this Agreement.

61. No double counting

Notwithstanding any other provisions of this Agreement, neither party shall be entitled to recover compensation or make a Claim under this Agreement in respect of any Loss that it has incurred to the extent that it has already been compensated in respect of that Loss under this Agreement or otherwise.

Part 17 – Transport Agency Step-in

62. Interpretation

In this Part 17, references to the Transport Agency taking action are deemed to include references to the Transport Agency procuring the taking of action by others on behalf of the Transport Agency.

63. When Step-in Applies

If the Transport Agency reasonably considers that it needs to take action in connection with the P2Wk Project or the Services:

- (a) because:
 - (i) of serious injury or death to persons;
 - (ii) the Transport Agency assesses that there is a serious risk to the health and safety of persons;
 - (iii) of material damage or destruction to property (including all or part of the P2Wk Project);
 - (iv) the Transport Agency assesses that there is a serious risk to property (including all or part of the P2Wk Project); or
 - (v) of a serious risk to the Environment following identification of Contamination affecting or threatening to affect all or part of the P2Wk Project Site or any Adjoining Property;
- (b) to enable it to discharge a statutory duty; or
- (c) to provide any of the Services that have been suspended as a result of an Event under clause 38.3 (Alternative arrangements),

then the Transport Agency will be entitled to take all or any of the actions described in clause 64 (Step-in Rights).

64. Step-in Rights

64.1 Extent of Step-in Rights

To the extent reasonably required to remedy the reasons for step-in as notified to the Contractor under clause 65.1 (Particulars of notice), and subject to clause 64.3, the Transport Agency may:

- (a) access those parts of the P2Wk Project Site occupied by the Contractor or used by the Contractor for the purposes of providing the Services, to the same extent the Contractor is entitled to access and use the same;
- (b) temporarily assume total or partial management and control of all or part of the P2Wk Project and/or the provision of the Services;

- (c) take such steps (including suspension of the Services in whole or in part) as in the reasonable opinion of the Transport Agency are necessary or desirable:
 - (i) to mitigate, remedy or minimise the effects of the threat or event which caused the risk; or
 - (ii) to continue the provision of the Services as required under this Agreement;
- (d) do all things and perform all such acts that the Contractor is obliged or authorised to do under or in connection with this Agreement, or any other Project Document to which the Contractor is party; and
- (e) do all things and perform all such acts which the Transport Agency is authorised or empowered to do with respect to the Contractor under:
 - (i) this Agreement or any Project Document; or
 - (ii) any Law.

64.2 Exercise of Step-in Rights

The Transport Agency shall, in exercising its Step-In Rights, endeavour to remedy the reasons for step-in as notified under clause 65.1 (Particulars of notice) and do so in a manner consistent with its obligations under clause 7.6 (Transport Agency's obligations to Contractor).

64.3 Step-in prior to Service Commencement Date

The Transport Agency will not, if it exercises its Step-in Rights prior to the Service Commencement Date, exercise any right:

- (a) to undertake Works Provisioning; or
- (b) to remove or modify any element of the P2Wk Project (except to the extent reasonably necessary to remedy the reasons for step-in as notified under clause 65.1 (Particulars of notice)).

65. Notice

65.1 Particulars of notice

The Transport Agency must first notify the Contractor, before exercising its Step-in Rights, of:

- (a) the date that it will first exercise its Step-in Rights;
- (b) the Services that are the subject of step-in; and
- (c) the reasons why the Transport Agency is exercising its Step-in Rights.

65.2 Emergency

If there is an emergency, the Transport Agency need not comply with clause 65.1 before exercising its Step-in Rights, but it will do so as soon as reasonably practicable following the decision to exercise its Step-in Rights.

65.3 Power of attorney

The Contractor irrevocably:

- (a) appoints the Transport Agency and the Transport Agency's nominees from time to time, jointly and severally, as the Contractor's attorney with full power and authority to exercise all or any of the Transport Agency's Step-in Rights;
- (b) agrees to ratify and confirm whatever action is taken by the Transport Agency and its nominees, provided such action is not unlawful or negligent; and
- (c) on request from the Transport Agency to execute a separate power of attorney in terms of this clause 65, agrees to execute such separate power of attorney.

66. Contractor's rights and obligations on Step-in

66.1 Suspension

The Contractor's rights and obligations under this Agreement (other than in respect of clause 66.2) are suspended for the period that the Transport Agency is exercising its Step-in Rights but only to the extent necessary to permit the Transport Agency to exercise those rights.

66.2 Contractor must co-operate

Where the Transport Agency has exercised, or while the Transport Agency is exercising, its Step-in Rights, the Transport Agency shall keep the Contractor reasonably informed of the actions it proposes to take and, to the extent known, the likely duration of the exercise of its Step-in Rights and the Contractor must:

- (a) do such things as the Transport Agency may require to assist the Transport Agency in the exercise of its Step-in Rights (including facilitating ongoing access to any support or other services provided by employees, Sub-contractors or third parties);
- (b) not do anything by either act or omission that impedes or frustrates the Transport Agency in the exercise of its Step-in Rights; and
- (c) ensure that none of the Contractor Personnel, by either act or omission, impede or frustrate the Transport Agency in the exercise of its Step-in Rights.

67. Relief and payments on step-in

67.1 Step-in prior to Service Commencement Date – Contractor breach

Where and to the extent that the Transport Agency exercises its Step-in Rights prior to the Service Commencement Date as a result of a breach of the Contractor's obligations under this Agreement:

- (a) the Contractor will not be entitled to any relief from its obligations under this Agreement; and
- (b) the Transport Agency may recover from the Contractor as Moneys Owed, on demand, the direct Losses it incurs as a result of exercising its Step-in Rights.

67.2 Step-in on or after Service Commencement Date – Contractor breach

Where and to the extent that the Transport Agency exercises its Step-in Rights on or after the Service Commencement Date as a result of a breach of the Contractor's obligations under this Agreement, the Transport Agency may deduct from the Quarterly Unitary Charge otherwise payable to the Contractor during the Step-in Period the aggregate of:

- (a) the direct Losses the Transport Agency incurs as a result of exercising its Step-in Rights (other than costs and expenses incurred by the Transport Agency in delivering any of the AMM Services); and
- (b) the greater of:
 - (i) all reasonable costs and expenses incurred by the Transport Agency in delivering any of the AMM Services whether directly or through a contractor to the Transport Agency; or
 - (ii) the amount estimated by the Transport Agency, acting reasonably, to represent the costs not incurred by the Contractor as a result of it not providing any of the AMM Services during the Step-in Period,

provided that if the amount to be deducted from the Quarterly Unitary Charge under this clause exceeds the Quarterly Unitary Charge, the Transport Agency may recover the difference from the Contractor, on demand, as Moneys Owning.

67.3 Step-in – no Contractor breach

Where and to the extent that the Transport Agency exercises its Step-in Rights other than as a result of a breach of the Contractor's obligations under this Agreement:

- (a) the Contractor will be entitled to such relief as is determined under Part 11 (Events) of this Agreement; and
- (b) the Transport Agency will bear its own direct Losses incurred as a result of exercising its Step-in Rights.

68. Step-out

68.1 Cessation

The Transport Agency:

- (a) may at any time after it has exercised its Step-in Rights; and
- (b) shall, promptly after it has remedied the reasons for exercising its Step-in Rights to its satisfaction,

notify the Contractor of the Step-out Date, provided that the Step-out Date must be not less than 10 Business Days and not more than 30 Business Days (unless otherwise agreed by the Contractor, acting reasonably) after the date of the Transport Agency's notice given under this clause 68.1.

68.2 Consequences

On the Step-out Date (or earlier where agreed between the parties, acting reasonably):

- (a) the Contractor must immediately recommence performance of its obligations which were suspended under clause 66.1 (Suspension); and
- (b) the Transport Agency will give reasonable assistance to the Contractor to ensure that this process of transition is undertaken as smoothly as possible.

69. Contractor's Acknowledgements

69.1 Transport Agency not liable

The Contractor acknowledges and agrees that the Transport Agency is not obliged:

- (a) to exercise all or any of its rights under this Part 17 at any time;
- (b) to remedy any Contractor Default or other breach by the Contractor of this Agreement; or
- (c) to mitigate, remedy or minimise the effects of the event or risk that triggered the Transport Agency's exercise of its Step-in Rights.

69.2 Release

Except in relation to any Claim under Part 11 (Events) of this Agreement, the Contractor releases the Transport Agency from all Liability (whether present or future, or quantified or not) that the Transport Agency may otherwise incur under this Agreement or at Law, arising directly or indirectly as a result of the Transport Agency's exercise of its Step-in Rights, unless and to the extent that it is proven that the Transport Agency has acted unlawfully, wilfully, recklessly, or negligently.

69.3 No Claim

The Contractor agrees that it will not make any Claim (except to the extent permitted under Part 11 (Events) of this Agreement) against the Transport Agency in connection with the Transport Agency's exercise of its Step-in Rights, unless and to the extent that it is proven that the Transport Agency has acted unlawfully, wilfully, recklessly, or negligently.

69.4 Other rights not affected

The Transport Agency may exercise its rights under this Part 17 without in any way affecting the other rights and remedies then available to the Transport Agency under this Agreement or at Law, in equity, under statute or otherwise.

Part 18 – Insurance and reinstatement

70. Insurance

70.1 Obligations of parties

No party to this Agreement shall take any action or fail to take any action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any Insurance Policy in which that party is an insured, a co-insured or an additional insured person.

70.2 Specified insurances

- (a) Prior to the commencement of Works Provisioning, the Contractor shall take out and maintain the relevant insurances described in Sub-part 1 (Design and Construction Phase) of Part 1 (Required Insurances) of Schedule 15 (Insurance) and any other insurances as may be required by Law. These insurances must be effective in each case no later than the date on which the relevant risk commences.
- (b) The Contractor shall, from Works Completion and during the balance of the Contract Term, take out and maintain the relevant insurances described in Sub-part 2 (Services Phase) of Part 1 (Required Insurances) of Schedule 15 (Insurance) and any other insurances as may be required by Law.

70.3 Other insurances

- (a) The Transport Agency may at any time notify the Contractor in writing that it requires the Contractor:
 - (i) to procure and maintain an Insurance Policy against a risk not specifically provided for or contemplated by Part 1 (Required Insurances) of Schedule 15 (Insurance); or
 - (ii) to increase the amount of cover or change the terms of an existing Insurance Policy.
- (b) If the Contractor receives a notification from the Transport Agency under clause 70.3(a), the Contractor will promptly advise the Transport Agency of the premium (or additional premium) payable in order to give effect to that requirement and the Transport Agency will promptly advise the Contractor whether that requirement remains.
- (c) Any premium (or additional premium) payable by reason of compliance with clause 70.3(a) (except in the case of insurance mandated by Law), will be borne by the Transport Agency by increasing the Unitary Charge by the amount required to meet such premium or additional premium. The Base Case will be updated and the adjustment to the Unitary Charge will be made in accordance with clause 5.2 (Updating Base Case) and clause 5.3 (Application to Base Case) respectively. Part 12 (Changes) will apply to any amendments to the Project Documents resulting from the addition or amendment of the insurance requirements referred to in this clause.
- (d) Any amendment to the Project Documents resulting from the addition or amendment of the insurance requirements referred to in this clause 70.3 and deemed to be a Change in accordance with clause 70.3(c) and Part 12 (Changes) will (except in the case of insurance mandated by Law) be deemed to be a Change initiated by the Transport Agency and the provisions of clause 42 (Agreeing the Change Proposal) will apply. For the avoidance of doubt, the Contractor will be under no obligation to

implement any addition or amendment of the insurance requirements referred to in this clause 70.3(d) until such Change is a Confirmed Change in accordance with Part 12 (Changes).

70.4 General provisions relating to insurances

- (a) The Insurance Policies must:
 - (i) be provided by Reputable Insurers;
 - (ii) subject to clause 70.4(b), include the terms and requirements specified in Schedule 15 (Insurance);
 - (iii) to the extent the relevant risk is able to be co-insured, be in the names of the parties specified in Schedule 15 (Insurance) as co-insured for their respective rights and interests; and
 - (iv) in respect of any Physical Damage Policy, provide for payment of any proceeds received by the Contractor to be applied in accordance with clause 72 (Reinstatement).
- (b) The parties acknowledge that the terms and requirements specified in Schedule 15 (Insurance) in relation to those Insurance Policies set out in Part 1 (Required Insurances) of Schedule 15 (Insurance), are a reflection of the insurance market as at Financial Close. If at any time either party considers (acting reasonably) that a certain term or requirement is no longer a reflection of the insurance market applicable to reasonably comparable infrastructure projects in Australasia at that time, then that party may send a written notice to the other party advising it of the same and the Transport Agency and the Contractor (both acting reasonably) will agree the replacement terms or requirements (as applicable) or resolve any Dispute in accordance with the Accelerated Dispute Resolution Procedures.

70.5 Evidence of policies and renewal certificates

- (a) The Contractor shall provide to the Transport Agency:
 - (i) Certificates of Currency for those Insurance Policies set out in Sub-part 2 (Services Phase) of Part 1 (Required Insurances) of Schedule 15 (Insurance), no less than 10 Business Days prior to Works Completion (and, in the case of any professional indemnity policy, such Certificate of Currency will be in a form as agreed by the parties and will contain such additional information as the Transport Agency may reasonably request);
 - (ii) on renewal or replacement of an existing Insurance Policy, a Certificate of Currency within 10 Business Days of the expiry of the existing Insurance Policy (and, in the case of any professional indemnity policy, such Certificate of Currency will be in a form as agreed by the parties and will contain such additional information as the Transport Agency may reasonably request);
 - (iii) subject to clauses 70.5(a)(iv) and 70.9(a):
 - (A) copies, on request, of all Insurance Policies; and
 - (B) any other information reasonably requested by the Transport Agency from time to time relating to the Insurance Policies;
 - (iv) in respect of any professional indemnity insurance policies, access to inspect those policies on reasonable notice at the Contractor's or Contractor's

insurance broker's offices in Auckland (and for the avoidance of doubt, the Contractor shall not be obliged to provide copies of such policies to the Transport Agency);

- (v) immediately on becoming aware of the same:
 - (A) written notice of any cancellation or proposed cancellation of an Insurance Policy by an insurer; and
 - (B) information on any circumstances that may reasonably be expected to materially affect coverage under and in accordance with any of the Insurance Policies; and
- (vi) evidence that the premia payable under all Insurance Policies have been paid and that the insurances are in full force and effect in accordance with the requirements of this clause 70 and Schedule 15 (Insurance).
- (b) Renewal certificates in relation to the Insurance Policies shall be obtained as and when necessary and copies (certified in a manner acceptable to the Transport Agency) shall be forwarded to the Transport Agency as soon as reasonably practicable but in any event within 10 Business Days of the renewal date of the Insurance Policies.

70.6 Payment of premia

Except where expressly set out in this Agreement, the insurance premia for the Insurance Policies shall at all times be the responsibility of the Contractor. The Contractor must punctually pay all premia and other amounts payable in respect of the Insurance Policies.

70.7 Failure to maintain insurances

- (a) If the Contractor is in breach of clause 70.2 or clause 70.3, the Transport Agency may pay any premia required to keep such insurances in force or procure and maintain such insurances and may in either case recover such amounts from the Contractor as Moneys Owning.
- (b) Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the Contractor of its liabilities and obligations under this Agreement.

70.8 Notification and preservation of claims and known circumstances

- (a) Subject to clause 70.9(a) in respect of any professional indemnity insurance policies, the Contractor shall give the Transport Agency notification within five Business Days of any insurance claim being made:
 - (i) in excess of \$50,000 on any of the Insurance Policies;
 - (ii) relating to any matter which may adversely affect the reputation of the Transport Agency; and
 - (iii) relating to any matter of high public interest,

or of any circumstances of which the Contractor is aware which may reasonably be expected to give rise to any such claim.
- (b) Subject to clause 70.9(a) in respect of any professional indemnity insurance policies:

- (i) such notice must be accompanied by full details of the incident or event giving rise to the claim; and
- (ii) the Contractor must promptly take steps to ensure that its rights, and the rights of any other persons to whom the benefit of the Insurance Policy extends, are fully preserved.

70.9 Other obligations of Contractor in relation to insurances

Without limiting the Transport Agency's rights or the Contractor's obligations under this clause 70, the Contractor must also:

- (a) not do or permit or omit to do anything which prejudices any Insurance Policy;
- (b) rectify anything which may, if not rectified, prejudice any Insurance Policy;
- (c) subject to clause 70.9(e), promptly reinstate an Insurance Policy if it lapses, with a Reputable Insurer and on terms compliant with the insurance requirements of this Agreement;
- (d) not cancel, vary or allow any Insurance Policy to lapse without the prior written consent of the Transport Agency. The Contractor must seek the consent of the Transport Agency at least 10 Business Days before the proposed cancellation, variation or lapse;
- (e) notify the insurers of any relevant Insurance Policy of any Change relating to the P2Wk Project that increases the value of the P2Wk Project;
- (f) fully and promptly disclose all material information to all relevant insurers (and to any persons acting on their behalf) relating to the Insurance Policies in all respects; and
- (g) comply at all times with the terms of each Insurance Policy.

70.10 Indexation

- (a) The minimum limit of indemnity for each of the Relevant Insurances shall be Indexed, provided such minimum limits of indemnity shall only be increased on each renewal date for that Relevant Insurance where the limit that is Indexed becomes equal to or exceeds the next whole insurable amount available in the insurance market.
- (b) The maximum deductible for each of the Relevant Insurances shall be Indexed, provided such maximum deductible may only be increased on each renewal date for that Relevant Insurance where the deductible that is Indexed becomes equal to or exceeds the next whole deductible amount available in the insurance market.

70.11 Recovery Events

- (a) The Contractor may, at its own cost and subject to this clause 70.11, recover or seek to recover all or any part of its costs attributable to a Recovery Event from any person (not being the Transport Agency or any Transport Agency Personnel) responsible for or contributing to that Recovery Event (including any insurer of such person) (in this clause 70.11 the **Debtor**).
- (b) Where the relevant Recovery Event resulted in Fatality or Serious Injury, the Contractor may only seek to recover costs from a Debtor with the prior written consent of the Transport Agency. In such circumstances the Contractor may, within 20 Business Days of the Recovery Event, submit to the Transport Agency a request to

recover the cost of repairing the damage from the Debtor, which must include sufficient detail in relation to:

- (i) the circumstances resulting in the damage to the P2Wk Project, including a description of the Recovery Event or crash, any witness statements, New Zealand police report, Incident Reports (including any applicable Fatality/Serious Injury Report) or other information relating to the circumstances;
- (ii) the traffic management and any other assistance provided by the Contractor immediately following the Recovery Event;
- (iii) the damage to the P2Wk Project, including any photographs or assessments;
- (iv) the works required to repair the damage to the P2Wk Project;
- (v) a breakdown of the actual and reasonable costs incurred in repairing the damage to the P2Wk Project;
- (vi) invoices for any components necessary for the repair; and
- (vii) a plan (**Insured Party Plan**) detailing how the Contractor proposes to:
 - (A) determine whether the Debtor is insured in relation to the damage arising from the Recovery Event, including its reasonable estimation of the time likely to be required to make this determination; and
 - (B) pursue a claim against the Debtor, if and to the extent the Debtor is found to be insured in respect of the damage arising from that Recovery Event.
- (c) Within 10 Business Days after the receipt of an Insured Party Plan, the Transport Agency must, in its absolute discretion (which may be exercised, without limitation, on grounds of reputation):
 - (i) accept the Insured Party Plan (on any reasonable conditions (or if the Transport Agency considers in its absolute discretion that the Insured Party Plan is likely to impact on the reputation of the Transport Agency, any conditions) including (if the Transport Agency so requires) any limitation on the amount to be invoiced to the Debtor); or
 - (ii) propose reasonable amendments to the Insured Party Plan (or if the Transport Agency considers in its absolute discretion that the Insured Party Plan is likely to impact on the reputation of the Transport Agency, any amendments).
- (d) Where the Transport Agency:
 - (i) proposes amendments to the Insured Party Plan which the Contractor accepts, the Contractor must incorporate these proposed amendments into the Insured Party Plan and re-submit the plan for approval in accordance with clause 70.11(c) within 10 Business Days of the Contractor's receipt of the proposed amendments; or
 - (ii) proposes amendments to the Insured Party Plan which the Contractor does not accept, either party may refer the matter for dispute resolution in accordance with Part 21 (Dispute Resolution) of this Agreement.
- (e) Where the Transport Agency accepts the Insured Party Plan or the parties agree on an amended Insured Party Plan, the Contractor may ascertain the Debtor's insurance

position and pursue a claim against the Debtor, to the extent of the Debtor's insurance, only in accordance with the Insured Party Plan or as otherwise agreed between the parties.

- (f) If, after the Transport Agency has accepted the Insured Party Plan or the parties have agreed to an amended Insured Party Plan, the Contractor receives additional information in relation to the Recovery Event, the Contractor may, within 10 Business Days of receipt of the additional information, submit to the Transport Agency a revised Insured Party Plan (the **Revised Insured Party Plan**) and the procedure set out in clauses 70.11(c) and 70.11(d) shall apply as if all references to Insured Party Plan were to Revised Insured Party Plan.
- (g) For the avoidance of doubt, the Contractor's obligation to repair the damage to the P2Wk Project under this Agreement is not affected by this clause 70.11. The Transport Agency's decision to approve a recovery request, or the failure to recover any costs from the Debtor, does not entitle the Contractor to any relief from its obligations, of any nature, under the Agreement.
- (h) If the Contractor does not submit a request to the Transport Agency under clause 70.11(a), it will have no right to recover costs resulting from a Recovery Event that results in a Fatality or in Serious Injury, whether or not under this clause 70.11.

71. Uninsurable risks

71.1 Procedure to follow

If a risk usually covered by any Required Insurance (other than the loss of equity return component of a Business Interruption Policy) becomes Uninsurable, then:

- (a) the Contractor shall notify the Transport Agency within five Business Days of becoming aware of the same;
- (b) if both parties agree, or it is determined in accordance with the Accelerated Dispute Resolution Procedures, that the risk is Uninsurable and that the Uninsurable risk is not caused by the actions or omissions of the Contractor or any Contractor Personnel, the parties shall meet to discuss the means by which the risk should be managed or shared (including considering the issue of self-insurance by either party); and
- (c) where and to the extent that the Uninsurable risk is one that would usually be covered under the Motor Vehicle Insurance Policy, the Statutory Fines and Penalties Liability Policy or their equivalents, the Transport Agency shall be entitled to require the Contractor to self-insure in respect of such risk without any alteration to the Unitary Charge.

71.2 Consequences of being unable to agree

- (a) If the parties cannot agree how to manage or share an Uninsurable risk usually covered by any Required Insurance (other than the loss of equity return component of a Business Interruption Policy), this Agreement shall continue and the Transport Agency shall, on the occurrence of that risk (at the Transport Agency's option), either pay to the Contractor (or the relevant third party, as applicable):
 - (i) an amount equal to the insurance proceeds that would have been payable had the relevant insurance continued to be available, and this Agreement will continue; or

- (ii) an amount calculated in accordance with Part 4 (Compensation on Uninsurable Event or Uninsurability) of Schedule 18 (Calculation of Compensation on Termination) plus (in relation to third party liability insurance only) the amount of the insurance proceeds that would have been payable, whereupon this Agreement will terminate under clause 77 (Termination on Uninsurability).
- (b) Where under clause 71.2(a) this Agreement continues:
 - (i) then the Unitary Charge shall be reduced by an amount equal to 150 per cent of the proportion of the annual premia (pro rated by the unutilised portion of the policy against the overall term of the policy where not paid on an annual basis) attributable to the risk that has become Uninsurable most recently paid by the Contractor under the relevant Insurance Policies in respect of the relevant risk, and will be Indexed from the date on which those annual premia were most recently paid. Where the risk is Uninsurable for part of a year, the reduction in the Unitary Charge shall be pro-rated to the number of months for which the risk is Uninsurable; and
 - (ii) the Contractor shall approach the insurance market at least every quarter to establish whether the risk remains Uninsurable. As soon as the Contractor becomes aware that the risk is no longer Uninsurable, the Contractor shall take out insurance for such risk as soon as reasonably practicable, and maintain that insurance in accordance with this Agreement (and the deduction from the Unitary Charge under clause 71.2(b)(i) will cease to apply).

71.3 Terrorist Risk

- (a) Clauses 71.1 and 71.2 do not apply to Terrorist Risk.
- (b) If a Terrorist Risk occurs the Contractor shall notify the Transport Agency within five Business Days of becoming aware of the same and unless the parties have agreed otherwise the Transport Agency must, at its option, either:
 - (i) pay to the Contractor the amount that would have been payable under:
 - (A) prior to Works Completion, the Contract Works Insurance (Material Damage) Policy and the Contract Works Insurance (Advance Loss of Profits) Policy; or
 - (B) on or after Works Completion, the Industrial Special Risks (Material Damage) Policy and Industrial Consequential Loss (Business Interruption) Insurance Policy,

as if the Terrorist Risk was not excluded from coverage under the relevant policies, and this Agreement will continue; or
 - (ii) pay to the Contractor the amount calculated in accordance with Part 4 (Compensation on Uninsurable Event or Uninsurability) of Schedule 18 (Calculation of Compensation on Termination), whereupon this Agreement will terminate under clause 77 (Termination on Uninsurability).
- (c) If a Terrorist Risk occurs that:
 - (i) causes physical loss or destruction of, or damage to, the P2Wk Project with an estimated repair and/or reinstatement cost in excess of the sum insured under the applicable Physical Damage Policy (despite not being insured under such policy); or

- (ii) prevents the Contractor from carrying out its obligations under this Agreement and continues to subsist following the expiry of the period of indemnity under the applicable Business Interruption Policy (despite not being insured under such policy),

it will, in either case, comprise a Substantial Destruction Event.

71.4 No obligation

Nothing in this clause 71 shall oblige the Contractor to take out insurance in respect of a risk that is Uninsurable, except where the predominant cause of the risk being Uninsurable is any act or omission of the Contractor, any Contractor Personnel or a Contractor Related Person.

72. Reinstatement

72.1 Generally

- (a) Upon becoming aware of any material damage to, or destruction of all or any part of the P2Wk Project (the **Relevant Works**), the Transport Agency will (as soon as reasonably practicable) notify the Contractor as to whether it requires the Contractor:

- (i) to rebuild, repair or reinstate the Relevant Works on the basis of substantially the same specifications as those for the original Relevant Works;
- (ii) to rebuild, repair or reinstate the Relevant Works other than on the basis of substantially the same specifications as those for the original Relevant Works; or
- (iii) not to rebuild, repair or reinstate the Relevant Works,

and at the same time, the Transport Agency will notify the Contractor of any changes to the Transport Agency's Requirements regarding provision of the AMM Services. Any notice given by the Transport Agency under this clause will not prejudice the rights of the Contractor under clause 37 (Uninsurable Events).

- (b) If the Transport Agency notifies the Contractor that the Relevant Works:

- (i) are to be rebuilt, repaired or reinstated on the basis of substantially the same specifications as those for the original Relevant Works, clauses 72.2 and 72.3 will apply;
- (ii) are to be rebuilt, repaired or reinstated other than on the basis of substantially the same specifications as those for the original Relevant Works, the following provisions will apply:
 - (A) clauses 72.2 and 72.3; and
 - (B) Part 12 (Changes); or
- (iii) are not to be rebuilt, repaired or reinstated, clause 72.4 will apply.

72.2 Insurance proceeds and Natural Disaster Event Compensation

- (a) Subject to clause 72.1(a):
 - (i) all insurance proceeds received under any Physical Damage Policy; and

- (ii) all Natural Disaster Event Compensation,

shall be applied to repair, reinstate and replace each part or parts of the P2Wk Project in respect of which the proceeds were or the compensation was received.
- (b) All:
 - (i) insurance proceeds paid under any Physical Damage Policy in respect of a single event (or a series of related events) in an amount in excess of \$250,000; and
 - (ii) all Natural Disaster Event Compensation,

shall be paid (by or on behalf of the relevant insurers in respect of insurance proceeds, and by the Transport Agency in respect of Natural Disaster Event Compensation) into the Joint Insurance Account. The parties shall operate the signatory requirements of the Joint Insurance Account in order to give effect to the payment terms of this clause 72.

72.3 Reinstatement processes

- (a) Where the Transport Agency has given notice to the Contractor under clause 72.1(a)(i) or 72.1(a)(ii), the Contractor must make a claim on any relevant Physical Damage Policy or may (where applicable) make a claim under Part 11 (Events) in respect of any Natural Disaster Event. Where insurance proceeds or Natural Disaster Event Compensation is received or are receivable in an amount in excess of \$250,000 in respect of a single event (or a series of related events) (the **Relevant Incident**) the Contractor shall deliver as soon as practicable and in any event within 10 Business Days after making the claim, a plan prepared by the Contractor for the carrying out of the works necessary (the **Reinstatement Works**) to repair, reinstate or replace (the **Reinstatement Plan**) the Relevant Works, in accordance with clause 72.3(d).
- (b) The Reinstatement Plan shall set out:
 - (i) if the Major Sub-contractor responsible for the construction of the P2Wk Project will not be carrying out the Reinstatement Works, the identity of the person proposed to carry out the Reinstatement Works, which shall be subject to the prior written approval of the Transport Agency; and
 - (ii) the proposed terms and timetable on which the Reinstatement Works will be carried out (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written approval of the Transport Agency, which approval shall not be unreasonably withheld.
- (c) When the Transport Agency is satisfied (acting reasonably) as to the milestone structure set out in the Reinstatement Plan (where applicable) and that the Reinstatement Plan will enable the Contractor to comply with clause 72.3(d), the Transport Agency will approve the Reinstatement Plan and:
 - (i) the Reinstatement Plan shall be adopted;
 - (ii) the Contractor shall enter into such contractual arrangements as are necessary to procure the carrying out of the Reinstatement Works in accordance with the Reinstatement Plan;

- (iii) the Contractor shall, at its own cost, maintain a central register of all costs of the Reinstatement Works with real time access capability for both the Contractor and the Transport Agency;
- (iv) any amounts standing to the credit of the Joint Insurance Account (the **Relevant Proceeds**) (together with any interest accrued) may be withdrawn:
 - (A) by the Contractor (at any time prior to the Actual Termination Date or the Expiry Date, as applicable) for the sole purposes of funding the Reinstatement Works; or
 - (B) by the Transport Agency (following the earlier of the Actual Termination Date or the Expiry Date, as applicable) for the sole purposes of funding the Reinstatement Works;
- (v) the Transport Agency undertakes that, subject to compliance by the Contractor with its obligations under this clause 72, it shall not exercise any right which it may otherwise have to terminate this Agreement by virtue of the event which gave rise to the claim for the Relevant Proceeds (except where the same comprises, at any time, a Substantial Destruction Event);
- (vi) to the extent that:
 - (A) a Substantial Destruction Event has occurred;
 - (B) the Relevant Proceeds or the Natural Disaster Event Compensation amount payable to the Contractor in respect of the Relevant Incident are insufficient to complete the Reinstatement Works in accordance with the Reinstatement Plan; and
 - (C) the Transport Agency confirms in writing to the Contractor that, notwithstanding the occurrence of the Substantial Destruction Event, it wishes to complete the Reinstatement Works in accordance with the Reinstatement Plan,

the Contractor may make a claim under Part 11 (Events) in respect of the shortfall, less the amount (if positive) determined by an Independent Expert to represent the difference (if positive) between:

 - (D) the actual dollar value of the Reinstatement Works required to be undertaken to repair, replace or reinstate the damage to the P2Wk Project to the standards required under this Agreement; and
 - (E) the actual dollar value of the Reinstatement Works that would have been required to repair, replace or reinstate the damage to the P2Wk Project to the standards required under this Agreement if, on the date of the Substantial Destruction Event, the P2Wk Project had met the standards required under this Agreement;
- (vii) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Transport Agency and in accordance with clause 72.3(d), the Transport Agency shall, in respect of any Relevant Proceeds then held in the Joint Insurance Account that have not been withdrawn under clause 72.3(c)(iv):
 - (A) (subject to any right of set-off the Transport Agency may have under this Agreement and subject to clause 72.3(c)(vii)(B)) permit withdrawal by the Contractor of such Relevant Proceeds, together with any interest accrued; and

- (B) to the extent that the Relevant Proceeds have been paid by the Transport Agency as Natural Disaster Event Compensation, be entitled to the Relevant Proceeds; and
- (viii) subject to the provisions of clause 58.4 (Limits on indemnity cover), the Contractor shall be solely responsible for the payment of any shortfall.
- (d) Where insurance proceeds are or Natural Disaster Event Compensation is to be used:
 - (i) to rebuild, repair or reinstate the Relevant Works under a notice from the Transport Agency under clause 72.1(a)(i), the Contractor shall carry out the Reinstatement Works in accordance with the Works Requirements so that on completion of the Reinstatement Works, the provisions of this Agreement are complied with; or
 - (ii) to rebuild, repair or reinstate the Relevant Works under a notice from the Transport Agency under clause 72.1(a)(ii), the Contractor shall carry out the Reinstatement Works in accordance with the Works Requirements, as amended by the terms of the relevant Confirmed Change, so that on completion of the Reinstatement Works the provisions of this Agreement (as amended by that Confirmed Change) are complied with.
- (e) Where the Transport Agency determines under clause 72.1(a)(ii) that the Relevant Works are to be rebuilt, repaired or reinstated on the basis of different specifications from the original Relevant Works, and the cost of rebuild, repair or reinstatement according to such specifications exceeds the cost of rebuild, repair or reinstatement according to the original specifications, then the Transport Agency will bear the amount (if any) of the excess under this clause 72.3(e).
- (f) Where the rebuild, repair or reinstatement of the Relevant Works to different specifications will increase or decrease the cost of providing the AMM Services over the remainder of the Contract Term, the Transport Agency will, as applicable:
 - (i) pay the reasonable increased net cost of the Contractor; or
 - (ii) receive the benefit of the net decreased cost of the Contractor.
- (g) The Transport Agency will pay the amount of any excess under clause 72.3(e) and increased net cost under clause 72.3(f) in accordance with Part 12 (Changes).
- (h) The Relevant Works are to be rebuilt, repaired or reinstated to a standard that is the same as the specifications for the original Relevant Works, except to the extent established by a Confirmed Change.

72.4 Consequences of not rebuilding, repairing or reinstating

- (a) If the Transport Agency directs the Contractor not to rebuild, repair or reinstate the Relevant Works under clause 72.1(a)(iii) or where the Transport Agency has not elected to require the Reinstatement Works to be completed, following a Substantial Destruction Event under clause 72.3(c)(vi)(C), the Transport Agency must elect to either:
 - (i) exclude the Relevant Works and any associated Services from this Agreement, in which case it must provide the Contractor with a Change Notice to implement such Change and Part 12 (Changes) will apply; or
 - (ii) terminate this Agreement (which the Transport Agency may only elect to do, without prejudice to its rights under clause 74 (Termination for Convenience))

where a Substantial Destruction Event has occurred), in which case clause 72.4(b) will apply).

- (b) If the Transport Agency elects to terminate this Agreement under this clause 72.4, and the damage or destruction was caused:
 - (i) by an Uninsurable Event, or an Uninsurable risk to which clause 71 (Uninsurable Risks) applies, then this Agreement will be terminated under clause 76 (Termination on Uninsurable Event) or clause 77 (Termination on Uninsurability), as applicable;
 - (ii) by a breach of this Agreement by the Contractor, then an Immediate Termination Event will be deemed to have occurred and this Agreement will be terminated under clause 75 (Termination on Contractor Default); or
 - (iii) by neither of the circumstances in clause 72.4(b)(i) or clause 72.4(b)(ii), then this Agreement will be terminated under clause 74 (Termination for Convenience).

Part 19 – Termination

73. Termination Events

73.1 Subject to Financier Direct Deed

This Part 19 is subject to the terms of the Financier Direct Deed.

73.2 Remedies cumulative

The rights and remedies exercisable under this Part 19 are in addition, and without prejudice, to any other rights and remedies of the Transport Agency under this Agreement on or following the occurrence of a Termination Event.

73.3 Termination under Agreement only

This Agreement may only be terminated in accordance with its express terms.

73.4 Termination

This Agreement may be terminated:

- (a) for convenience in accordance with clause 74 (Termination for Convenience);
- (b) as a result of a Contractor Default in accordance with clause 75 (Termination on Contractor Default);
- (c) following the occurrence of an Uninsurable Event in accordance with clause 76 (Termination on Uninsurable Event); or
- (d) in accordance with clause 77 (Termination on Uninsurability), if the Transport Agency exercises its option to terminate this Agreement under clause 71 (Uninsurable Risks),

(each a **Termination Event**).

73.5 Termination Date

- (a) Subject to this clause 73.5, the Termination Date will be a fixed date as specified in a Termination Notice served on the Contractor under this Agreement.
- (b) The Termination Date specified in a Termination Notice must be:
 - (i) in the case of termination under clause 74 (Termination for Convenience), no less than 60 Business Days;
 - (ii) in the case of termination under clause 75 (Termination on Contractor Default) or clause 76 (Termination on Uninsurable Event), no less than 30 Business Days; or
 - (iii) in the case of termination under clause 77 (Termination on Uninsurability), no less than 20 Business Days,

after the date on which it is served.

- (c) If the Security Trustee issues a Step-in Notice (as defined in the Financier Direct Deed) before the Termination Date referred to in a Termination Notice, that Termination Date shall be deemed to be suspended and will not take effect until such time as:
 - (i) the Transport Agency is entitled to terminate this Agreement in accordance with the Financier Direct Deed; and
 - (ii) the Transport Agency gives the Contractor and the Security Trustee no less than five Business Days' notice that this Agreement will be finally terminated, with no further remedy rights for any party, and specifying the final Termination Date.

74. Termination for convenience

74.1 Transport Agency may terminate at any time

The Transport Agency may terminate this Agreement at any time on or before the Expiry Date under this clause 74.

74.2 Termination Notice

If the Transport Agency wishes to terminate this Agreement under this clause 74, it must give a Termination Notice to the Contractor stating that the Transport Agency is terminating this Agreement under this clause 74.

75. Termination on Contractor Default

75.1 General provision

- (a) The Transport Agency shall be entitled to terminate this Agreement in accordance with this clause 75 if a Contractor Default has occurred.
- (b) Where the Contractor Default is constituted by a Probity Event, then the terms of clause 75.6 will apply instead of clauses 75.4 and 75.5.

75.2 Contractor Default

For the purposes of this Agreement:

- (a) **Immediate Termination Event** means any one or more of the following:
 - (i) following the Independent Reviewer giving a notice under clause 25.7(c)(ii) (Monitoring);
 - (A) the Contractor does not refer any Dispute in respect of such notice to the Accelerated Dispute Resolution Procedures, under clause 25.7(d) (Monitoring); or
 - (B) any Dispute referred to the Accelerated Dispute Resolution Procedure under clause 25.7(d) (Monitoring) is determined in support of the Independent Reviewer's decision;
 - (ii) the Service Commencement Date does not occur on or before the Last Service Commencement Date;

- (iii) a Major Sub-contractor Breach;
 - (iv) a Controller Breach;
 - (v) failure by the Contractor to comply with clause 90.3 (Assignment by Contractor);
 - (vi) the Contractor Abandons the Works Provisioning at any time;
 - (vii) a Probity Event (as that term is defined by reference to paragraphs (a) to (d) of that definition) occurs to which clause 75.6(b) applies;
 - (viii) an Insolvency Event occurs in relation to the Contractor or a Contractor Entity;
or
 - (ix) any statement or representation made in any report or invoice provided or rendered to the Transport Agency by or through any Officer or employee of Contractor General Partner or of the Contractor is or proves to be false, misleading or incorrect in any material respect in circumstances where:
 - (A) the Officer or employee of Contractor General Partner or the Contractor wilfully or deliberately made that statement or representation having actual knowledge that such report or invoice was false, misleading or incorrect in any material respect; and
 - (B) the individual providing such report or invoice was not acting independently of Contractor General Partner or the Contractor (such phrase to have the meaning set out in clause 75.6); and
- (b) **Remediable Contractor Default** means any one or more of the following:
- (i) failure by the Contractor to comply with:
 - (A) clause 70.2 (Specified Insurances) or clause 70.3 (Other insurances);
 - (B) clause 4 (Other Project Documentation);
 - (C) clause 5 (Base Case and Base Case Adjustments); or
 - (D) clause 16 (Sub-contractors) other than a Major Sub-contractor Breach;
 - (ii) a breach by:
 - (A) the Contractor of any of its obligations under this Agreement (other than those obligations specifically referred to in clause 75.2(a) or its obligations under Schedule 13 (Performance Regime)); or
 - (B) the Contractor or any Contractor Related Person of any of the terms of any Project Document (other than this Agreement),

that has a Material Adverse Effect;
 - (iii) a Persistent General Breach;
 - (iv) the Contractor is at Level 4 SFP at any time;

- (v) any Material Adverse Effect resulting from any of the representations and warranties made (or deemed repeated) by the Contractor under this Agreement being found to be untrue or incorrect when made (or deemed repeated);
- (vi) it becomes unlawful for the Contractor to provide the Services except to the extent that the ground for such unlawfulness is a Change in Law and the same is eligible to be addressed by way of a Change under Part 12 (Changes) of this Agreement);
- (vii) the occurrence of either:
 - (A) the acceleration by a Senior Lender of repayment of all or a material part of the Senior Debt following a Financing Default; or
 - (B) an event that has prevented the Contractor from obtaining or continuing to have available funding under the Financing Agreements to the extent necessary for the provision of the Services in accordance with this Agreement excluding any drawstops under the Senior Financing Agreement that have existed for up to 90 days;
- (viii) either:
 - (A) all or any material part of any Project Document (excluding the Deed of Indemnity or the Delegation Instrument) is or becomes void, voidable, illegal, invalid or unenforceable as against the Contractor or any Contractor Related Person (other than by reason of a party waiving any of its rights); or
 - (B) a Major sub-contract is terminated otherwise than in accordance with its terms;
- (ix) an Insolvency Event occurs in relation to a Major Sub-contractor;
- (x) a Probity Event (of whatever nature) occurs, being a Probity Event that is not an Immediate Termination Event;
- (xi) a Refinancing Breach;
- (xii) an Unsuitable Third Party Controls or becomes entitled to Control:
 - (A) a Partner or a Shareholder; or
 - (B) a Major sub-contractor;
- (xiii) failure by the Contractor to comply with clause 91 (Change of Ownership), except where that failure to comply constitutes a Controller Breach;
- (xiv) on at least three occasions in six months, statements or representations made in any report or invoice provided or rendered to the Transport Agency by or through the Contractor are or prove to be false, misleading or incorrect in any material respect in circumstances where the Contractor or a Contractor Related Person (if that person is the source of the report or invoice) ought reasonably to have known that the report or invoice was false, misleading or incorrect in any material respect; or
- (xv) any statement or representation made in any report or invoice provided or rendered to the Transport Agency by or through the Contractor (except in circumstances that constitute an Immediate Termination Event) is or proves to

be false, misleading or incorrect in any material respect in circumstances where the Contractor or a Contractor Related Person (if that person is the source of the report or invoice) wilfully or deliberately made that statement or representation having actual knowledge that such report or invoice was false, misleading or incorrect in any material respect.

75.3 Notice of General Breach

- (a) The Transport Agency may, no more than 20 Business Days after it became aware of the occurrence of a General Breach, serve a notice of that General Breach on the Contractor. The Transport Agency will be deemed to become aware of any information submitted in a report by the Contractor pursuant to this Agreement on the date that report is provided to it.
- (b) Each notice of a General Breach must specify the type and nature of the General Breach and require the Contractor to remedy the General Breach, or the underlying circumstances that gave rise to the General Breach, to the Transport Agency's satisfaction within 20 Business Days of receiving the notice.

75.4 Warning Notice

- (a) The Transport Agency may, at any time after the occurrence of a Remediable Contractor Default, serve a Warning Notice on the Contractor.
- (b) Each Warning Notice must specify the type and nature of the Remediable Contractor Default, giving reasonable details, and stating whether or not the Remediable Contractor Default can be remedied. If the Warning Notice states that the Remediable Contractor Default can be remedied, then the Contractor must either:
 - (i) put forward a rectification programme (**Rectification Programme**) that is acceptable to the Transport Agency (acting reasonably) within 15 Business Days after the date the Contractor receives the Warning Notice, specifying:
 - (A) the timeframe within which the Remediable Contractor Default will be remedied;
 - (B) a work plan for the remedying of the Remediable Contractor Default within that timeframe;
 - (C) any temporary measures being put in place to mitigate the effects of the Remediable Contractor Default; and
 - (D) where the Warning Notice relates to a Remediable Contractor Default pursuant to clause 75.2(b)(iv), the proposed number of Service Failure Points that would be deemed to be suspended, and their period of suspension, following implementation of the approved Rectification Programme,

and rectify the Remediable Contractor Default in accordance with the Rectification Programme; or
 - (ii) remedy the Remediable Contractor Default within 20 Business Days (or such longer period as may be specified by the Transport Agency) after the date the Contractor receives the Warning Notice,

provided that, in the case of a Remediable Contractor Default under any of clauses 75.2(b)(i)(A), 75.2(b)(i)(B), 75.2(b)(xi), 75.2(b)(xiii), 75.2(b)(xiv), or 75.2(b)(xv), the Transport Agency will be entitled to require that the Remediable Contractor Default is

remedied in accordance with clause 75.4(b)(ii) where the Transport Agency considers, acting reasonably, that it is practicable to do so and has, in the relevant Warning Notice, set out the basis on which it considers it is practicable to do so.

- (c) If the Warning Notice states that the Remediable Contractor Default cannot be remedied, the Contractor must submit a plan (**Prevention Plan**) that is acceptable to the Transport Agency (acting reasonably) within 15 Business Days after the date the Contractor receives the Warning Notice, with the Prevention Plan setting out:
 - (i) any temporary measures being put in place to mitigate the effects of the Remediable Contractor Default;
 - (ii) how the Contractor intends to appropriately address the underlying circumstances that gave rise to the Remediable Contractor Default and prevent their recurrence;
 - (iii) the timeframe within which the Contractor will appropriately address the consequences of the Remediable Contractor Default; and
 - (iv) where the Warning Notice relates to a Remediable Contractor Default pursuant to clause 75.2(b)(iv), the proposed number of Service Failure Points that would be deemed to be suspended, and their period of suspension, following implementation of the approved Prevention Plan,

and the Contractor must implement the Prevention Plan in accordance with its terms.

- (d) The Contractor:
 - (i) must, during the implementation of the Rectification Programme or Prevention Plan (as applicable), keep the Transport Agency advised of progress against the timeframes set out therein;
 - (ii) may, where circumstances adversely affect the implementation of the Rectification Programme or Prevention Plan (as applicable) in accordance with its then-current terms, request a variation to such Rectification Programme or Prevention Plan for the Transport Agency to approve (acting reasonably), provided that the Contractor:
 - (A) notifies the Transport Agency of those circumstances, and submits the proposed variation no later than five Business Days prior to the due date for completion of the implementation of the Rectification Programme or Prevention Plan (as applicable);
 - (B) has complied, and continues to comply, with the Rectification Programme or Prevention Plan (except to the extent adversely affected by the circumstances notified) and has been diligently pursuing such rectification or prevention consistently with Good Industry Practice; and
 - (C) while pursuing such rectification or prevention, did not cause or contribute to such circumstances by its negligence or failure to comply with its obligations under this Agreement.
- (e) Where a Warning Notice is issued:
 - (i) to which clause 75.4(b)(i) applies, and the Contractor rectifies the Remediable Contractor Default in accordance with the Rectification Programme;

- (ii) to which clause 75.4(b)(ii) applies, and the Contractor remedies the Remediable Contractor Default within 20 Business Days after the date the Contractor receives the Warning Notice; or
- (iii) to which clause 75.4(c) applies, and the Contractor implements the Prevention Plan in accordance with its terms,

in each case to the satisfaction of the Transport Agency (acting reasonably) then in each case the Warning Notice in relation to the relevant Remediable Contractor Default will be deemed to be revoked and this Agreement will continue and (where applicable) the number of Service Failure Points specified in the Rectification Programme or Prevention Plan will be deemed to be suspended for the period specified in that Rectification Programme or Prevention Plan.

- (f) The Contractor may refer any Dispute under this clause 75.4 for resolution under the Accelerated Dispute Resolution Procedures, and must continue to diligently pursue the Rectification Programme or Prevention Plan (as applicable) pending determination of that Dispute.

75.5 Termination Notice

- (a) The Transport Agency may, at any time after the occurrence of an Immediate Termination Event, serve a Termination Notice on the Contractor.
- (b) If in the case of a Remediable Contractor Default, the timeframe for implementing the Rectification Programme or Prevention Plan (as applicable) has expired and the applicable Warning Notice has not been revoked under clause 75.4(e), then the Transport Agency may, subject to clause 38.11 (Relief from Termination) serve a Termination Notice on the Contractor.

75.6 Probity Event

- (a) In this clause 75.6:
 - (i) a "Sub-contractor" means a sub-contractor of the Contractor, a sub-contractor of a sub-contractor, and any other sub-contractor of whatever tier involved in the matters that are the subject of this Agreement;
 - (ii) the expression "not acting independently of" (when used in relation to the Contractor or a Sub-contractor) means and shall be construed as acting with the actual knowledge of any one or more of the Officers of the Contractor or the Sub-contractor (as applicable); and
 - (iii) the phrase "involved in the matters that are the subject of this Agreement" includes any involvement of whatever nature whether by way of the provision of any service, the exercise of any powers of managerial control, the exercise of any powers of direction or influence, or any other kind of involvement including by way of any financial interest.
- (b) If a Probity Event (as that term is defined in paragraphs (a) to (d) of the definition of Probity Event) has occurred for which an Officer or an employee of the Contractor, or a Contractor Entity is responsible, in circumstances where that employee was not acting independently of the Contractor or the Contractor Entity, then the Transport Agency may serve a Termination Notice on the Contractor and clause 75.5 will apply.
- (c) If a Probity Event has occurred for which an employee of the Contractor is responsible in circumstances where that employee was acting independently of the Contractor, then the Transport Agency may give written notice to the Contractor advising it that

the Transport Agency may serve a Warning Notice on it, unless within 10 Business Days of receipt of such written notice the Contractor terminates the employee's employment.

- (d) If a Probity Event has occurred for which an Officer or employee of a direct Sub-contractor to the Contractor is responsible, in circumstances where that employee was not acting independently of that Sub-contractor, then the Transport Agency may give written notice to the Contractor advising that the Transport Agency may serve a Warning Notice on it, unless within 10 Business Days of receipt of such written notice the Contractor terminates that Sub-contractor's sub-contract with the Contractor.
- (e) If a Probity Event has occurred for which an employee of a direct Sub-contractor to the Contractor is responsible, in circumstances where that employee was acting independently of that Sub-contractor, then the Transport Agency may give written notice to the Contractor advising it that the Transport Agency may serve a Warning Notice on it, unless within 10 Business Days of receipt of such written notice the Sub-contractor terminates that employee's employment.
- (f) If a Probity Event has occurred for which a person not specified in clauses 75.6(b) to (e) (inclusive) is responsible, then the Transport Agency may give written notice to the Contractor advising it that the Transport Agency may serve a Warning Notice on it, unless within 10 Business Days of receipt of such written notice the Contractor procures:
 - (i) in the case of an employee, the termination of that person's employment;
 - (ii) in the case of a contractor (whether or not contracted by the Contractor or a Sub-contractor), the termination of that contractor's contract to the extent relating to the matters that are the subject of this Agreement; and
 - (iii) in the case of any other person who has an ability to influence the Contractor in relation to the matters that are the subject of this Agreement or who exercises Control over the Contractor, a Contractor Related Person or any Sub-contractor, the removal of that person from any involvement in the matters that are the subject of this Agreement or from the exercise of any Control over the Contractor, a Contractor Related Person or any Sub-contractor (as applicable).
- (g) A Termination Notice or a Warning Notice served on the Contractor under this clause 75.6 must specify:
 - (i) the nature of the Probity Event that has occurred; and
 - (ii) the identity of the person whom the Transport Agency considers has been responsible for the occurrence of the Probity Event.
- (h) For the avoidance of doubt, where the Contractor is required to procure the termination of the employment of an employee of a Sub-contractor in accordance with this clause 75.6, the termination of that Sub-contractor's sub-contract will also be deemed to remedy any such Probity Event.

76. Termination on Uninsurable Event

The parties may only terminate this Agreement as a result of an Uninsurable Event in accordance with clause 37 (Uninsurable Events).

77. Termination on Uninsurability

77.1 Termination Notice

If a risk becomes Uninsurable and the Transport Agency elects to terminate this Agreement under clause 71.2 (Consequences of being unable to agree), the Transport Agency will serve a Termination Notice on the Contractor.

78. Consequences of termination

78.1 Compensation provisions

If this Agreement is terminated under:

- (a) clause 74 (Termination for Convenience), the terms of Part 2 (Compensation on Termination for Convenience) of Schedule 18 (Calculation of Compensation on Termination) shall apply;
- (b) clause 75 (Termination on Contractor Default), the terms of Part 3 (Compensation for Contractor Default) of Schedule 18 (Calculation of Compensation on Termination) shall apply; or
- (c) clause 76 (Termination on Uninsurable Event) or clause 77 (Termination on Uninsurability), the terms of Part 4 (Compensation on Uninsurable Event or Uninsurability) of Schedule 18 (Calculation of Compensation on Termination) shall apply,

in the calculation of the compensation (if any) payable by or to the Transport Agency as a result.

78.2 Compensation Sum

- (a) The Transport Agency will determine the Compensation Sum to be paid by it or to it, on termination of this Agreement, in accordance with this clause 78.2 and Schedule 18 (Calculation of Compensation on Termination).
- (b) The Compensation Sum and any other moneys that are paid as a result of termination of this Agreement under this Part 19, are paid in full and final settlement of each party's rights and claims against the other under this Agreement or any Project Document whether under contract, tort, restitution or otherwise, except in respect of:
 - (i) any antecedent liability of the Contractor to the Transport Agency which the Transport Agency has been unable to set off or deduct under the terms of this Agreement;
 - (ii) any antecedent liability of either party to the other that arose prior to the Actual Termination Date (but not from the termination itself) to the extent such liability has not been taken into account in determining the Compensation Sum; and
 - (iii) any liabilities arising in respect of any breach by either party of their obligations under clause 10.3 (Continuing obligations) which arise or continue after the Actual Termination Date to the extent such liabilities have not been taken into account in determining the Compensation Sum.
- (c) If the Compensation Sum is zero or a negative number, the Transport Agency shall have no obligation to make any payment to the Contractor and, with effect from the

time that the Compensation Sum is finally determined pursuant to this Agreement, the Transport Agency shall be released from all liability to the Contractor for breaches and/or termination of the Project Documents whether under contract, tort, restitution or otherwise except to the extent specified under clause 78.2(b).

- (d) If the Compensation Sum is a negative number, then an amount equal to the Compensation Sum shall be due and payable by the Contractor to the Transport Agency on the Compensation Date.
- (e) In the event of any Dispute as to the calculation of the Compensation Sum, the parties shall resolve that Dispute in accordance with the Accelerated Dispute Resolution Procedures.

78.3 Allocation of Compensation Sum

Any Compensation Sum payable by the Transport Agency under this Agreement will be deemed to include repayment in full of such part of the Rental Prepayment as would have, but for the termination of this Agreement, been attributable to the period from the Actual Termination Date until the Expiry Date. The Transport Agency will have no liability to repay any portion of the Rental Prepayment other than through payment of the Compensation Sum calculated in accordance with this Agreement.

78.4 Effect of Termination Notice

Following the serving of a Termination Notice:

- (a) the Contractor will continue to provide the Services until the Actual Termination Date; and
- (b) the Transport Agency will continue to pay the Quarterly Unitary Payment, subject to the terms of this Agreement, until the Actual Termination Date.

78.5 Termination Date

On and from the Actual Termination Date:

- (a) the Contractor will cease to provide the Services;
- (b) the Transport Agency will cease to pay the Quarterly Unitary Payment for any period after the Actual Termination Date, but will, if and when required under this Agreement, pay the Contractor the Post Termination Date Service Amount and/or any amounts payable under clause 84.4 (Disengagement Payment);
- (c) clause 10.3 (Continuing obligations) will apply;
- (d) the P2Wk Construction Lease or the P2Wk Project Lease (as applicable) will terminate; and
- (e) without limitation to Part 20 (Hand back and disengagement) and Schedule 19 (Disengagement), the Transport Agency may require the Contractor to transfer to the Transport Agency or its nominee (as specified by the Transport Agency) all or part of its rights, title and interest in and to all or part of the P2Wk Project, including Fitout for no additional consideration.

79. Payment of compensation

79.1 Payment of Compensation Sum

- (a) The Transport Agency must (if the Compensation Sum is a positive number) pay to the Contractor the Compensation Sum on the Compensation Date. Subject to clause 79.1(b), where the Transport Agency terminates this Agreement under clause 74 (Termination for Convenience), clause 76 (Termination on Uninsurable Event) or clause 77 (Termination on Uninsurability), the Transport Agency must pay the Base Senior Debt Termination Amount within 10 Business Days after the Actual Termination Date.
- (b) The Transport Agency will not be obliged to pay the Compensation Sum unless and until the Security Trustee has released all Security Interests over the P2Wk Project or has provided an undertaking satisfactory to the Transport Agency that it will do so on payment of the Compensation Sum.
- (c) The Transport Agency may require that, following the date of the Termination Notice, interest payable on the Senior Debt is paid directly by the Transport Agency (on behalf of the Contractor) to the Senior Lenders and the Quarterly Unitary Payment or Post Termination Date Service Amount (as applicable) otherwise payable to the Contractor will be reduced by such amounts.
- (d) The Transport Agency's obligation to pay the Compensation Sum under this clause 79.1 is, notwithstanding clause 49.6 (Rights of set-off), irrespective of whether or the extent to which the Contractor has complied or is complying with its obligations under clause 85 (Contractor's disengagement obligations) and Schedule 19 (Disengagement).

79.2 Adjustment of Compensation Sum

- (a) Where:
 - (i) an amount payable by the Transport Agency under clause 79.1 is attributable to interest payable by the Contractor to the Senior Lenders under the Senior Financing Agreements; and
 - (ii) the Contractor is required, in accordance with the Senior Financing Agreements, to gross-up the amount of such interest payable to the Senior Lenders for any Tax payable to a Governmental Entity in New Zealand,

then the Transport Agency shall pay to the Contractor such an additional amount as is necessary to put those persons treated for income tax purposes as deriving the additional amount in the same after Tax position as they would have been in had no such gross-up payment been required, taking account of any relief, allowances, deduction, setting off or credit in respect of Tax (whether available by choice or not) which may be available to those persons in relation to the gross-up payment, and whether any additional amount payable by the Transport Agency under this clause is assessable income of those persons.

- (b) If part or all of the Compensation Sum payable by the Transport Agency to the Contractor is characterised by Inland Revenue as taxable income rather than as a capital receipt, then the Transport Agency shall, following receipt of evidence of this assessment and such supporting evidence as it may reasonably require, pay to the Contractor such additional amount as is necessary to put those persons treated for income tax purposes as deriving the amount in the same after Tax position as they would have been in had the payment not been subject to Tax, taking account of any

relief, allowances, deduction, setting off or credit in respect of Tax (whether available by choice or not) that may be available to those persons to reduce the Tax payment.

- (c) If a Limited Partner is a limited partnership then references in clause 79.2(b) to "Limited Partner" shall be interpreted as including references to each of the partners of that limited partnership.
- (d) Clause 79.2(b) is intended to confer a benefit on, and be enforceable by, each Limited Partner under the Contracts (Privity) Act 1982.

79.3 Senior Debt

- (a) The Transport Agency shall be entitled to rely on a certificate from the Agent as conclusive evidence of the amount of Senior Debt outstanding at any relevant time.
- (b) The payment of the Compensation Sum in full shall discharge the Transport Agency's obligation to pay any element of compensation due to the Contractor that wholly or partly comprises Senior Debt.

Part 20 – Hand back and disengagement

80. Exit Survey

80.1 Timing

The Transport Agency shall be entitled to carry out, or procure the carrying out of, an Exit Survey:

- (a) three years prior to the Expiry Date;
- (b) eight months prior to the Expiry Date; and
- (c) one month prior to the Expiry Date,

to assess whether the P2Wk Project has been and is being maintained by the Contractor in accordance with its obligations under this Agreement.

80.2 Notification

The Transport Agency shall notify the Contractor in writing a minimum of 20 Business Days in advance of the date it requires each Exit Survey to commence.

80.3 Parties' obligations

Where the Transport Agency carries out or procures the carrying out of an Exit Survey, the Transport Agency shall use its reasonable endeavours to minimise any disruption to the provision of the AMM Services by the Contractor. The Contractor shall afford the Transport Agency or any person carrying out an Exit Survey any reasonable assistance required during the carrying out of the Exit Survey.

80.4 Results of Exit Survey

If an Exit Survey shows that the Contractor has not complied with or is not complying with any of its obligations under this Agreement for the maintenance of the P2Wk Project then the Transport Agency will:

- (a) notify the Contractor of the Outstanding Work that is required to ensure that the P2Wk Project is brought up to the Required Standard (or, in respect of the Exit Surveys referred to in clause 80.1(b) and 80.1(c), to enable the Contractor to meet the Hand Back Requirements on the Expiry Date);
- (b) specify a reasonable period within which the Contractor must carry out such rectification and/or maintenance work; and
- (c) recover the cost of the Exit Survey from the Contractor as Moneys Owning.

80.5 Contractor must perform Outstanding Work

The Contractor shall carry out such Outstanding Work notified under clause 80.4 within the period specified and any costs it incurs in carrying out such Outstanding Work shall be at its own expense.

81. Retention Fund Account or Standby Letter of Credit

81.1 Notification

If the Contractor has been notified under clause 80.4 (Results of Exit Survey) that rectification and/or maintenance work is required, then no more than 24 months prior to the Expiry Date the Transport Agency may (to the extent the Outstanding Work has not been carried out to the Required Standard in the interim) deduct the cost of the Outstanding Work as quantified by the Exit Survey from the next Quarterly Unitary Payment(s) and pay such amount into an interest bearing account (the **Retention Fund Account**).

81.2 Reimbursement

If and to the extent that the Contractor carries out the Outstanding Work to the Required Standard, the Transport Agency shall, to the extent that there are funds standing to the credit of the Retention Fund Account, reimburse the Contractor's costs of doing so from the Retention Fund Account. If the aggregate of the amounts from time to time paid into the Retention Fund Account are insufficient to cover the Contractor's costs, the Contractor shall bear the balance of such costs.

81.3 Withdrawals from Retention Fund Account

If and to the extent that the Contractor fails to carry out the Outstanding Work to the Required Standard within the period specified in clause 80.4 (Results of Exit Survey), the Transport Agency shall be entitled to carry out, or procure the carrying out of, the Outstanding Work at the Contractor's expense, and shall make withdrawals from the Retention Fund Account or, where there are insufficient funds in the Retention Fund Account, make deductions from the next Quarterly Unitary Payment(s) or recover such amounts from the Contractor as Moneys Owing, to pay for the Outstanding Work.

81.4 Payment of balance

The Transport Agency shall pay any credit balance in the Retention Fund Account to the Contractor if:

- (a) all the Outstanding Work has been carried out to the Required Standard;
- (b) all the Outstanding Work has been paid for; and
- (c) no Termination Notice is outstanding,

and such payment will be made as soon as practicable following the later of the Actual Termination Date, the Expiry Date or the expiry of the period notified to the Contractor under clause 80.4(b). If the Outstanding Work identified by the Transport Agency has not been carried out to the Required Standard, then clause 81.3 will apply.

81.5 Replacement with Standby Letter of Credit

The Contractor may, on written request to the Transport Agency, replace the Retention Fund Account with a Standby Letter of Credit, having a face value of no less than the cost of the Outstanding Work yet to be completed and being available to be drawn by the Transport Agency in the same circumstances as the Retention Fund Account. If the Retention Fund Account is so replaced, the Contractor will be entitled to be paid the balance of the Retention Fund Account along with accrued net interest (if any) on written request to the Transport Agency.

82. Expiry Date or Actual Termination Date

- (a) On the Expiry Date or Actual Termination Date after Service Commencement, the P2Wk Project must meet the Hand Back Requirements.
- (b) On and from the Expiry Date:
 - (i) clause 10.3 (Continuing obligations) will apply;
 - (ii) subject to its rights of set-off under this Agreement, the Transport Agency will make any payments then due and payable to the Contractor, including without limitation any payment due to the Contractor from the Retention Fund Account under clause 81.4 (Payment of balance);
 - (iii) the Contractor must pay all Moneys Owing to the Transport Agency; and
 - (iv) without limitation to this Part 20 (Hand back and disengagement) and Schedule 19 (Disengagement), the Transport Agency may require the Contractor to transfer to the Transport Agency or its nominee (as specified by the Transport Agency) all or part of its rights, title and interest in and to all or part of the P2Wk Project, including Fitout for no additional consideration.

83. Preparation for disengagement

83.1 Handover Package

The Contractor must prepare and maintain the Handover Package in accordance with Part 2 (Services Documentation) of Schedule 9 (Operative Documents).

83.2 Disengagement Plan

The Contractor must prepare and maintain the Disengagement Plan in accordance with Parts 1 (Works Provisioning Documentation) and 2 (Services Documentation) of Schedule 9 (Operative Documents) (as applicable).

84. Initiation of disengagement

84.1 Disengagement Services Notice

The Transport Agency may give written notice to the Contractor (a **Disengagement Services Notice**):

- (a) no later than 30 Business Days prior to the Expiry Date; or
- (b) at the same time as the serving of a Termination Notice,

requiring the Contractor to supply the Disengagement Services during the Disengagement Period.

84.2 Disengagement Period

The Disengagement Period shall start on the date specified in the Disengagement Services Notice and shall continue:

- (a) in relation to the Core Disengagement Services, until the same have been completed to the reasonable satisfaction of the Transport Agency; and
- (b) in relation to the Additional Disengagement Services, no more than 18 calendar months after the Expiry Date or the Actual Termination Date (as applicable).

84.3 Service delivery

During the Disengagement Period:

- (a) the Contractor will deliver the Core Disengagement Services in accordance with the terms of this Agreement and the Disengagement Plan;
- (b) the Contractor will not be required to deliver any AMM Services after the Expiry Date or the Actual Termination Date (as applicable) unless the Disengagement Services Notice requests that the Contractor continues to provide specified Additional Disengagement Services after that date (in which case clause 84.4 will apply);
- (c) the Transport Agency grants a licence to the Contractor, to the extent required, to access, occupy and remain on the P2Wk Project Site for the purposes of the provision of the Disengagement Services; and
- (d) notwithstanding the terms of Schedule 19 (Disengagement) or the Disengagement Plan, the Transport Agency, and not the Contractor, will be liable and responsible for:
 - (i) insuring the P2Wk Project; and
 - (ii) any lifecycle expenditure,

following the Expiry Date or the Actual Termination Date (as applicable).

84.4 Disengagement payment

- (a) In consideration for the Contractor providing the Additional Disengagement Services, the Transport Agency shall, for the duration of the Disengagement Period, pay an amount equal to the proportion of the Quarterly Unitary Charge (calculated in accordance with Schedule 14 (Payment Mechanism)) payable for the provision of the AMM Services that constitute, or are broadly comparable with, the Additional Disengagement Services.
- (b) The Contractor will remain subject to the applicable provisions of Schedule 13 (Performance Regime), provided that in no event shall the Contractor be liable for any Losses (including Deductions) relating to the Additional Disengagement Services in excess of the amount payable by the Transport Agency to the Contractor under this clause 84.4.

85. Contractor's disengagement obligations

85.1 General obligations

During the Disengagement Period, the Contractor shall:

- (a) co-operate fully with the Transport Agency or its nominee and any New Contractor;
- (b) undertake such transfers of Fixtures and Fitout, to the extent not already owned by the Transport Agency;

- (c) undertake such other conveyances and assignments and novations;
- (d) undertake such other transactions;
- (e) give such assurances; and
- (f) do all other acts and things,

as required by the terms of this Agreement or otherwise reasonably required by the Transport Agency to support a seamless transfer of responsibility for the P2Wk Project and/or the Services to the Transport Agency or its nominee or any New Contractor.

85.2 Disengagement Schedule

The obligations of the Contractor during the Disengagement Period are more particularly described in Schedule 19 (Disengagement).

86. Other requirements

86.1 Attorney

The Contractor irrevocably appoints the Transport Agency (acting through any person expressly nominated by the Transport Agency for this purpose) as the Contractor's lawful attorney with full power and agency to carry out the Contractor's obligations under this clause 86.1 and under Schedule 19 (Disengagement).

86.2 Step-in Rights not affected

Nothing in this Part 20 limits or affects the Transport Agency's rights and remedies under Part 17 (Transport Agency Step-in).

Part 21 – Dispute resolution

87. Disputes

87.1 Notice of Dispute

If there is a dispute arising in relation to any aspect of this Agreement or the subject matter of this Agreement (**Dispute**) then the party wishing to invoke the provisions of this Part 21 will serve a notice (a **Notice of Dispute**) on the other party, together with its submissions in relation to the Dispute.

87.2 Agreement to substitute Dispute Resolution Procedures

Where a Dispute arises the parties may elect not to invoke the provisions of this Part 21 and may utilise an alternate dispute resolution process but only if both parties agree.

87.3 Submissions

The submissions referred to in clause 87.1 will include (among other things) a description of the nature of the Dispute, the contractual or other legal basis on which the Dispute is based and (where relevant) the amount claimed.

87.4 Accelerated Dispute Resolution Procedures

- (a) Any Dispute (other than a Dispute of the type referred to in clause 87.4(c)(i)) will be first referred to the Disputes Panel with a view to resolving that Dispute. The Disputes Panel is constituted and will operate under clause 88 (Disputes Panel).
- (b) If the Disputes Panel is unable to resolve the Dispute under clause 88.10 (Timeframes for resolution), then either party may submit the Dispute for resolution under the Accelerated Dispute Resolution Procedures.
- (c) A Dispute will be submitted for resolution under the Accelerated Dispute Resolution Procedures if:
 - (i) the Dispute relates to any of the matters specified in this Agreement as being subject to the Accelerated Dispute Resolution Procedures;
 - (ii) the Dispute has been submitted by either party for resolution under the Accelerated Dispute Resolution Procedures under clause 87.4(b), clause 88.3(a), clause 88.4(b), clause 88.5(c) or clause 88.10 (Timeframes for resolution); or
 - (iii) both parties agree in writing that the Dispute should be resolved by way of the Accelerated Dispute Resolution Procedures.
- (d) A Dispute that is determined under the Accelerated Dispute Resolution Procedures will be final and binding on the parties (subject to clause 89.2(k)) if:
 - (i) the amount claimed in the Dispute is \$1,000,000 or less;
 - (ii) the Dispute relates to a claim for a postponement or other relief under this Agreement where the claimed amount associated with such postponement or other relief (as determined under the Accelerated Dispute Resolution Procedures), whether liquidated damages, deductions, delay or disruption costs or otherwise, is \$1,000,000 or less; or

- (iii) where both clauses 87.4(d)(i) and 87.4(d)(ii) apply, the aggregate disputed amount as claimed under those clauses is \$1,000,000 or less.
- (e) Where a Dispute has been determined under the Accelerated Dispute Resolution Procedures and the amount claimed in Dispute exceeds the relevant thresholds referred to in clause 87.4(d), either party may refer the Dispute to the competent courts of New Zealand for resolution.

87.5 Obligations continue

Despite the existence of a Dispute or the referral of a Dispute for resolution under this Part 21:

- (a) the Contractor must continue to provide the Services and perform its other obligations under this Agreement; and
- (b) the Transport Agency will continue to perform its obligations under this Agreement and may exercise its rights under this Agreement without regard to the existence of a Dispute, while that Dispute has not been resolved under this Part 21.

87.6 Urgent relief

Nothing in this Agreement shall preclude a party from seeking urgent injunctive or declaratory relief or from otherwise seeking urgent interlocutory relief from the courts. If interlocutory relief is sought by a party, then that party shall, subject to the extent of the relief obtained from the courts and following the period required to dispose of the application, submit the Dispute for resolution under this Part 21.

87.7 Timeframes

Any of the timeframes specified in clauses 88 (Disputes Panel) or 89 (Accelerated Dispute Resolution Procedures) may be varied by written agreement between the parties.

88. Disputes Panel

88.1 Establishment of Disputes Panel

As soon as is practicable after the Execution Date, the Transport Agency and the Contractor will establish a panel (**Disputes Panel**) as a forum for representatives of the parties to meet and attempt to resolve Disputes (other than Disputes of the type referred to in clause 87.4(c)(i)) arising between the parties in an informed and good faith manner.

88.2 Appointments

- (a) The Disputes Panel will comprise four members, two appointed by each of the Transport Agency and the Contractor. The Transport Agency and the Contractor will each nominate two persons to be its representatives on the Disputes Panel together with alternative representatives to represent that party when any of those nominees cannot act.
- (b) Each of the representatives on the Disputes Panel will be empowered to make decisions on behalf of, and to bind contractually, the party appointing such representative in all matters raised for determination by the Disputes Panel.

88.3 Convening of meetings of Disputes Panel

- (a) The Disputes Panel must meet within 10 Business Days of the date on which a Notice of Dispute is served, in respect of a Dispute that is not one that requires immediate referral to the Accelerated Dispute Resolution Procedures. If the Disputes Panel fails to meet within the timeframes specified by this clause 88.3(a), then either party may submit the Dispute for resolution under the Accelerated Dispute Resolution Procedures.
- (b) A meeting of the Disputes Panel may be convened on other occasions by any member of the panel giving not less than 10 Business Days' notice in writing to every other member of the Disputes Panel.

88.4 Quorum

- (a) The quorum of any meeting of the Disputes Panel will be at least one representative of each of the Transport Agency and the Contractor. If a quorum is not present within 30 minutes after the time appointed for commencement of the meeting, that meeting will be adjourned to the same time two Business Days after that meeting at the same place, or at such other time, day or place as the representatives of both the Contractor and the Transport Agency may agree.
- (b) In the event there is no quorum at the adjourned meeting, either party may submit the Dispute for resolution under the Accelerated Dispute Resolution Procedures.

88.5 Decision making

- (a) At any meeting the Disputes Panel may, by unanimous resolution, elect to appoint a mediator to assist them in resolving a Dispute on such terms as they may then agree or adopt.
- (b) At any meeting of the Disputes Panel, voting on any decision relating to the Dispute will be by unanimous resolution, with each representative having one vote, provided that if there is not a unanimous vote, then that decision will be referred to the next succeeding meeting of the Disputes Panel (which will be held as soon as possible but in any event no later than two Business Days after the initial meeting takes place).
- (c) If at the succeeding meeting the decision is again not unanimously agreed then either party may submit the Dispute for resolution under the Accelerated Dispute Resolution Procedures.

88.6 Resolutions

Duly passed resolutions of the Disputes Panel (whether or not involving determination of a Dispute) will be final and contractually binding on the Transport Agency and the Contractor provided that they are in writing and signed by all members of the Disputes Panel.

88.7 Appointments

The Transport Agency and the Contractor will each be entitled to terminate the appointment of a representative appointed by it to the Disputes Panel under clause 88.2 and to appoint a replacement.

88.8 Notices

Notices convening meetings of the Disputes Panel will specify the nature of business to be transacted and, unless otherwise agreed by the members of the Disputes Panel, no business other than that specified in the notice will be transacted at the meeting.

88.9 Location of meetings

Meetings of the Disputes Panel will be held in the city in which the Transport Agency is headquartered unless otherwise agreed by the parties.

88.10 Timeframes for resolution

The Disputes Panel will attempt to resolve a Dispute within 10 Business Days, following the date on which the Disputes Panel initially convenes to consider the Dispute under clause 88.3. If the Disputes Panel is unable to resolve the Dispute within that period, either party may submit the Dispute for resolution under the Accelerated Dispute Resolution Procedures.

88.11 Minutes

The Transport Agency will appoint one member of the Disputes Panel to be the secretary who will perform such duties as are specified by the Disputes Panel and will arrange for the minutes of each meeting to be kept. A copy of the minutes of each meeting will be given to each member of the Disputes Panel within five Business Days of each meeting and each member of the Disputes Panel will as soon as possible ratify the minutes as a true and correct record of the meeting.

89. Accelerated Dispute Resolution Procedures

89.1 Accelerated Dispute Panel

- (a) As soon as is practicable after the Execution Date, the parties by joint letter will request each of the Chair for the time being of LEADR, New Zealand, the President for the time being of the New Zealand Institute of Chartered Accountants and the President for the time being of the Institution of Professional Engineers New Zealand for a list of not less than three people with suitable expertise and experience to act as independent experts to resolve the Disputes which are to be resolved using the Accelerated Dispute Resolution Procedures (each an **Independent Expert**). That list will constitute the Accelerated Dispute Panel.
- (b) Either party may, following consultation with the other party, request amendment to the list of Independent Experts by written notice.

89.2 Accelerated dispute resolution process

- (a) Within five Business Days of a written request by either the Contractor or the Transport Agency to the other, the parties will meet to agree (if they have not previously agreed in writing) on an Independent Expert(s) to determine a Dispute under the Accelerated Dispute Resolution Procedures.
- (b) If the parties fail to meet or are unable to reach agreement on an Independent Expert(s) within five Business Days after that meeting, then such person will be nominated by the Transport Agency from the Accelerated Dispute Panel.
- (c) Once the Independent Expert(s) has been agreed or nominated, then either party may within five Business Days of such agreement or nomination, refer the Dispute to the

Independent Expert(s) by providing written notice to the other party and the Independent Expert(s).

- (d) The Independent Expert appointed or nominated will be required under their terms of engagement to make the determination based on the information made available to them by the parties and will notify the parties in writing of that determination as soon as possible and in any event within 20 Business Days of the referral of the Dispute to them (or such later date as the parties agree). The Independent Expert's determination will include a determination as to any amount in Dispute. The Independent Expert(s) will provide reasons for their determination.
- (e) Either party will be entitled to make written submissions to the Independent Expert(s) detailing (among other things) that party's understanding of the factual background to the Dispute, each party's position as to how the Dispute should be resolved and its arguments in support of its position. Such submissions will be provided to the Independent Expert(s) and the other party no later than 10 Business Days after the referral of the matter to the Independent Expert(s) under clause 89.2(c).
- (f) Either party will be entitled to submit a written response to the other party's written submissions, but such a response will be provided to the Independent Expert(s) and the other party no later than five Business Days after the date of submission of the other party's written submissions under clause 89.2(e).
- (g) If the Independent Expert(s) decides that further information is required for the purposes of their determination, the Independent Expert(s) may call for further submissions, documents or information from either or both parties and/or may call a conference between the parties.
- (h) The Independent Expert(s) may conduct a conference at their discretion but will give the parties reasonable notice of the conference and of the matters to be addressed at it. At the conference, the parties may be legally represented and both parties shall be entitled to be heard. The conference will be held in private.
- (i) In reaching a determination, the Independent Expert(s) will take account of the parties' written and oral submissions (if a conference is convened) and the relevant terms of this Agreement. The Independent Expert(s) may also:
 - (i) rely on their own knowledge, skill and experience in relation to the matter in Dispute;
 - (ii) open up, review and revise any opinion, instruction, determination or decision of whatever nature given or made under this Agreement other than a decision that is final or binding;
 - (iii) make their own enquiries without reference to the parties; and
 - (iv) (following consultation with the parties) commission their own advisers or consultants to assist the Independent Expert(s) in making their determination.
- (j) In making their determination, the Independent Expert(s) is not required to observe the rules of evidence.
- (k) The Independent Expert(s) will act as an expert and not an arbitrator and their determination will be final and binding on the parties, unless:
 - (i) there is manifest error (by way of clerical error, miscalculation or defect of form);
 - (ii) the amounts relating to the Dispute exceed those set out in clause 87.4(d); or

- (iii) unless and to the extent otherwise expressly provided under this Agreement.
- (l) The parties will comply with the Independent Expert's directions as to how their determination is to be implemented.
- (m) The Independent Expert may establish procedures and a timeframe for resolution of the Dispute to the extent that those matters are not already set out in this clause 89.
- (n) All information, data or documentation disclosed or delivered by a party to the Independent Expert(s) in consequence of or in connection with their appointment as Independent Expert(s) shall be treated as confidential. The Independent Expert(s) shall not, except as permitted by clause 56 (Confidential Information) disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the party disclosing or delivering the same and all copies shall be returned to such party on completion of the Independent Expert's work.
- (o) The cost of the Independent Expert(s) in making their determination will be borne equally by each of the parties to the Dispute. Each party is responsible for its own costs in connection with resolution of a Dispute unless the Independent Expert(s) orders otherwise.
- (p) If the Independent Expert(s) fails to provide a determination within the timeframes stipulated in this Agreement (or as otherwise agreed in writing between the parties), either party may terminate the process then underway and resubmit the Dispute under the Accelerated Dispute Resolution Procedures, with this clause 89 to then reapply to that Dispute as if it had not previously been submitted under the Accelerated Dispute Resolution Procedures.
- (q) The Independent Expert(s) will not be liable to the parties in relation to the Accelerated Dispute Resolution Procedures, except in the case of fraud or where the Independent Expert(s) is proven to have acted in bad faith.

Part 22 – Miscellaneous terms

90. Assignment

90.1 Agreement binding

This Agreement is binding on the parties and their respective successors and permitted assigns.

90.2 Assignment by Transport Agency

The Transport Agency may only assign and/or transfer the whole or any part of its rights and/or obligations under this Agreement without the prior written consent of the Contractor to:

- (a) any part of the Crown, as that term is defined in section 2 of the Public Finance Act 1989; and
- (b) any other public body where the Contractor and the Senior Lenders retain the benefit of the Deed of Indemnity or whose obligations under each Project Document are otherwise unconditionally and irrevocably guaranteed (in a form reasonably acceptable to the Contractor) by the Crown or a Minister of the Crown having the legal capacity, power and authority to perform the obligations under that guarantee and the obligations of the Transport Agency under the Project Documents,

and the Transport Agency must ensure that no assignment and/or transfer of the Transport Agency's rights and/or obligations under this Agreement occurs unless the assignee and/or transferee becomes subject to, and agrees to be bound by, the same rights and obligations as the Transport Agency's rights and obligations under the Project Documents.

90.3 Assignment by Contractor

- (a) The Contractor may not assign and/or transfer the whole or any part of its rights and obligations under this Agreement without the prior written consent of the Transport Agency and any purported assignment and/or transfer on the part of the Contractor without such prior written consent is deemed to be void.
- (b) A merger or amalgamation of the Contractor with another person or a merger or amalgamation of a substantial part of the Contractor's business with another person's business shall be deemed to be an assignment or transfer for the purposes of this clause.
- (c) Clause 90.3(a) does not apply to the granting of any security for any liabilities and secured obligations of the Contractor under the Senior Financing Agreements or to the enforcement of the same.

91. Change of Ownership

91.1 Restriction on Change of Ownership

- (a) A Change of Ownership must not occur during the Lock-in Period without the prior written consent of the Transport Agency, to be given or withheld at the Transport Agency's absolute discretion.

- (b) A Change of Ownership may only occur after the Lock-in Period if the Transport Agency determines (acting reasonably) that there are no grounds for withholding its consent under clause 91.3.
- (c) Notwithstanding clauses 91.1(a) and 91.1(b):
 - (i) HoldCo LP must at all times remain the sole limited partner of the Contractor;
 - (ii) HoldCo General Partner must at all times remain the sole general partner of HoldCo LP;
 - (iii) Contractor General Partner must at all times remain the sole general partner of the Contractor; and
 - (iv) Contractor General Partner must at all times remain a wholly owned subsidiary (as defined in sections 5 and 6 of the Companies Act 1993) of HoldCo General Partner.
- (d) Clauses 91.1(a), 91.1(b) and 91.1(c) are each subject to clause 91.4.

91.2 Notification

- (a) If a Change of Ownership is proposed, whether in the circumstances contemplated in clause 91.1(a) or clause 91.1(b), the Contractor shall notify the Transport Agency of that proposed Change of Ownership as soon as it becomes aware of the same.
- (b) The Contractor must promptly provide such particulars relating to the proposed Change of Ownership as the Transport Agency may reasonably require, including:
 - (i) the identity of each proposed Controller and its Affiliates;
 - (ii) the legal and beneficial owners of the proposed Controller and the proposed Controller's ultimate holding company;
 - (iii) the extent and nature of the proposed Change of Ownership; and
 - (iv) any other information necessary for the Transport Agency to determine whether or not to consent to the Change of Ownership.
- (c) The Contractor will:
 - (i) promptly provide such further information as the Transport Agency reasonably requires; and
 - (ii) obtain such written consents as may be required by the Transport Agency to undertake Probity Investigations in relation to each proposed Controller and its Affiliates.

91.3 Transport Agency determination

The Transport Agency may withhold its consent to a Change of Ownership under clause 91.1(b) if:

- (a) it has not been given all of the information required under clause 91.2(b) or under clause 91.2(c); or
- (b) the Transport Agency determines that:

- (i) the proposed Controller:
 - (A) is not solvent or reputable;
 - (B) is an Unsuitable Third Party; or
 - (C) does not have a sufficient level of financial, managerial and technical capacity to deliver the Project or provide the AMM Services relative to the financial, managerial and technical capacity of the existing Controller; or
- (ii) the proposed Change of Ownership:
 - (A) is against the public interest;
 - (B) could lead to the occurrence of a Probity Event; or
 - (C) would result in an increase in the level of risk or liabilities of the Transport Agency, or any Transport Agency Related Person.

91.4 Exceptions

- (a) Clauses 91.1(a) and 91.1(b) do not apply in respect of a Change of Ownership of HoldCo LP, HoldCo General Partner or of any Partnership Debt:
 - (i) as part of an intra-group transfer, restructure or reorganisation of the corporate group of which a HoldCo Limited Partner or a Shareholder is a member as at the Execution Date and there is no resulting change in ultimate beneficial interests;
 - (ii) where the transferee is an existing HoldCo Limited Partner or a Shareholder;
 - (iii) where the transferee is a corporate or unincorporated fund managed by, or under common management or Control with, the transferor;
 - (iv) arising out of any change in investors in a corporate or unincorporated fund, where such fund remains managed by, or under common management or Control with, a HoldCo Limited Partner or a Shareholder or any other person previously approved by the Transport Agency;
 - (v) as a consequence of any change in legal or beneficial ownership of any equity interest (including shares, units or other interests) in any direct or indirect equity holder of any HoldCo Limited Partner or Shareholder that: or
 - (A) does not result in a change of Control of such person;
 - (B) results in a change of Control of such person, and the new Controller is reputable; or
 - (C) is pursuant to an initial or other public offering of or in relation to any direct or indirect equity holder in such person, which does not result in any new Controller; or
 - (vi) as a result of any disposal by the Accident Compensation Corporation required under any Change in Law where the Accident Compensation Corporation has no discretion as to the class or identity of the recipients of any such disposal or as a result of any disposal by the Crown (as that term is defined in section 2 of the Public Finance Act 1989) of any direct or indirect interest in, or a demerger of, the Accident Compensation Corporation;

- (b) Subject to the Transport Agency's rights under clause 91.3, clauses 91.1(a), 91.1(b) and 91.1(c) do not apply in respect of a Change of Ownership of the Contractor or a Contractor Entity or of any Partnership Debt which is being transferred as a consequence of the exercise by the Senior Lenders of their rights in respect of the Partnership Interests or shares (as applicable) of the Contractor or a Contractor Entity or of any Partnership Debt granted in any document conferring security over the Partnership Interests or shares (as applicable) of the Contractor or a Contractor Entity or of any Partnership Debt.

92. Notices

92.1 Notices and references

Each notice or other communication under this Agreement must be made in writing by facsimile, email, personal delivery or by post to the addressee at the facsimile number, email address or address, and marked for the attention of the addressee, from time to time designated for the purpose by the addressee to the other party. The initial addressee, address, facsimile number and email address of the Transport Agency and the Contractor are set out in clause 92.2.

92.2 Addresses

The addressee, address, facsimile number and email address of the Transport Agency and the Contractor are:

Transport Agency	
Addressee:	The Transport Agency's Representative Contract PA 4030
Address:	New Zealand Transport Agency Level 11, HSBC House 1 Queen Street Private Bag 106602 Auckland 1143 New Zealand
Facsimile:	+64 (9) 969 9813
Email address:	[REDACTED]

Contractor	
Addressee:	[REDACTED]
Address:	[REDACTED] [REDACTED] [REDACTED]
Email address:	[REDACTED] copied to: <ul style="list-style-type: none"> • prior to the Service Commencement Date: <ul style="list-style-type: none"> • [REDACTED] • [REDACTED]; and

	<ul style="list-style-type: none"> • [REDACTED]; <p>and</p> <ul style="list-style-type: none"> • on and after the Service Commencement Date: • [REDACTED].
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or any replacement details notified to the other party by notice from time to time.

92.3 Deemed delivery

A communication will be deemed to be received:

- (a) in the case of a facsimile, on the Business Day on which it is dispatched or, if dispatched after 5.00 pm (in the place of receipt) on the next Business Day;
- (b) in the case of an email, on the Business Day on which it arrives in the recipient's information system (or if received in that system after 5.00pm, on the next Business Day), provided that if there is any dispute as to whether an email has been received, the email shall only be deemed to have been received at the time that the party giving notice produces a printed copy of the email which evidences that the email was sent to the correct email address of the party given notice; and
- (c) in the case of personal delivery or a letter, when delivered.

93. Counterparts

This Agreement may be signed in any number of counterparts all of which, when taken together, constitute one and the same instrument. A party may enter into this Agreement by executing any counterpart.

94. Severability

If any provision of this Agreement is or becomes unenforceable, illegal or invalid for any reason, the relevant provision shall be deemed to be modified to the extent necessary to remedy such unenforceability, illegality or invalidity. If such modification is not possible, then such provision shall be severed from this Agreement without affecting the enforceability, legality or validity of any other provision of this Agreement.

95. Waiver

Any delay, failure or forbearance by a party to exercise (in whole or in part) any right, power or remedy under, or in connection with, this Agreement shall not operate as a waiver of such right, power or remedy. A waiver of any breach of any provision of this Agreement shall not be effective unless that waiver is in writing and is signed by the party against whom that waiver is claimed. A waiver of any breach shall not be, or be deemed to be, a waiver of any other or subsequent breach.

96. Legal fees

If any legal action or other proceeding is brought for the enforcement of an obligation under this Agreement, the prevailing party shall be entitled to legal fees and other costs incurred in that action or proceeding on a solicitor/client basis (subject to review under the Lawyers and Conveyancers Act 2006) in addition to any other relief to which it may be entitled.

97. Public disclosure

All public disclosure by the Contractor relating to this Agreement including promotional or marketing material (but not including any announcement intended solely for internal distribution or any disclosure required by legal, accounting or regulatory requirements) shall be co-ordinated with and must first be approved in writing by the Transport Agency prior to its release.

98. Entire agreement

This Agreement and the other Project Documents constitute the entire agreement between the parties and supersedes and extinguishes all prior agreements and understandings between the parties about their respective subject matter.

99. Amendments in writing

No amendment to this Agreement will be effective unless it is in writing and signed by duly authorised signatories of both parties.

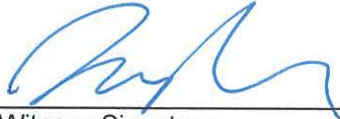
100. Governing law and jurisdiction

This Agreement is governed by, and is to be construed in accordance with, the Laws of New Zealand. Each party irrevocably submits to the non-exclusive jurisdiction of the New Zealand courts for the purpose of hearing and determining all disputes under or in connection with this Agreement.

Execution

Executed as an agreement.

SIGNED by the New Zealand Transport Agency, a crown entity established on 1 August 2008 by section 93 of the Land Transport Management Act 2003 in the presence of :



Witness Signature



Signature

Fergus Gammie

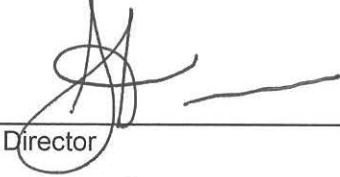
Print Name

Print Name **Duran Wong Moy**
Solicitor

Wellington
Witness Occupation

Place of residence

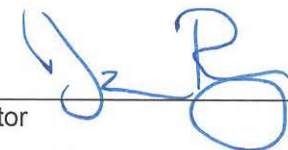
SIGNED on behalf of **NX2 LP** by its
general partner **NX2 GP Limited** by:



Director

Steven Proctor

Print name



Director

IAN PURDY

Print name