

NorthConnex Project

State Works Deed

Roads and Maritime Services
RMS

NorthConnex State Works Contractor Pty Ltd
State Works Contractor

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State Works Deed

Date 31 JANUARY 2015

Parties **Roads and Maritime Services** of Level 9, 101 Miller Street, North Sydney, New South Wales 2060 (**RMS**)

NorthConnex State Works Contractor Pty Ltd (ABN 19 169 328 385) of 101 Wallgrove Road, Eastern Creek, NSW 2766 (**State Works Contractor**)

Background

- A. The SWTC describes a defined scope of work, the totality of which must be provided or procured by the Project Company and RMS in accordance with the Project Deed.
- B. The Project Deed requires:
- (a) the Project Company to design and construct the Project Company's Works and the Temporary Works; and
 - (b) RMS to enter into the State Works Deed pursuant to which the State Works Contractor must procure and manage the design and construction of the State Works.
- C. In order to discharge their obligations to provide the totality of work contained in the SWTC:
- (a) RMS and the State Works Contractor will enter into this deed; and
 - (b) the State Works Contractor and the Project Company as principals (and not as agents of RMS) will enter into the D&C Deed, requiring the Contractor to design and construct the Project Works (being the Project Company's Works and the State Works) and the Temporary Works.
- D. RMS and the State Works Contractor have agreed that:
- (a) the State Works Contractor will procure the design and construction of the State Works; and
 - (b) RMS will pay the State Works Contractor,
- in accordance with this deed.

Operative provisions

1. Definitions and interpretation

1.1 Project Deed definitions

Definitions in the Project Deed apply in this deed unless the relevant term is defined in this deed.

1.2 Definitions

In this deed:

Aggregate State Works Payment means, as at any date, the aggregate of all State Works Instalments previously paid to the State Works Contractor by RMS under this deed up to that date.

Certificate of Initial Works Contribution means a certificate substantially in the form required by Schedule 8 certifying that the entire Initial Works Contribution has been paid.

Certificate of State Works Completion means a certificate substantially in the form required by Schedule 5 certifying that State Works Completion has been achieved.

Change of Control means, in relation to the State Works Contractor:

- (a) if the State Works Contractor comes under the Control of a person (acting alone or together with its Associates) who did not Control the State Works Contractor as at the date of this deed or following any event which is approved by RMS under clause 8; or
- (b) if a person (acting alone or together with its Associates) who was in Control of the State Works Contractor as at the date of this deed or following any event which is approved by RMS under clause 8 stops having Control of the State Works Contractor,

other than as a result of a Permitted Dealing.

D&C Deed Sum has the meaning given to that term in the D&C Deed.

Date of Initial Works Contribution means the date certified in a Certificate of Initial Works Contribution pursuant to clause 3(c)(i)B.

Date of State Works Completion means the date of State Works Completion, as stated in a Certificate of State Works Completion.

FCC means the document entitled "FCC" which sets out the forecast capital cost of the Project and which was initialled by the parties on or about the date of this deed.

Final Payment Date means the date on which the full amount of the State Works Payment has been paid to the State Works Contractor or set-off pursuant to this deed.

Initial Works Contribution means the first \$ (in aggregate) of the Total Project Costs paid by the Project Company or the State Works Contractor (or both).

Liquidated Damages (RMS) has the meaning given to it in the D&C Deed, and is the amount of liquidated damages payable by the Contractor to the Project Company and the State Works Contractor under the D&C Deed in respect of arising from a delay to the Project Works, calculated at a rate of \$.

Maximum Payment Claim Amount has the meaning given to that term in Schedule 6.

Net State Works Advances means, at any date, the difference between the State Works Advances made to that date and the State Works Repayments made to that date.

Payment Amount means the amount certified by the RMS Representative to be paid to the State Works Contractor under clause 5.3(a)(v).

Payment Claim means a progress claim in respect of the State Works Payment submitted by the State Works Contractor in accordance with clause 5.2 in the form of Schedule 2.

Payment Claim Date means each date after the Date of Initial Works Contribution which is the later to occur of:

- (a) the 25th day of a month; and
- (b) the date on which the latest of the following occurs:
 - (i) the State Works Contractor provides to the RMS Representative a contractor statement and a supporting statement in the form of Schedule 9:
 - A. which is executed on or after the twenty-fifth of the relevant month; and
 - B. which has been duly executed by a representative of the State Works Contractor who is in a position to know the facts declared;
 - (ii) the State Works Contractor provides to the Independent Certifier copies of all Payment Statements (SW) issued by the Sub IC under the D&C Deed up to the day prior to the date of the certification by the Independent Certifier referred to in subparagraph (b)(iii) of this definition;
 - (iii) the State Works Contractor provides to the RMS Representative certification by the Independent Certifier in the form of Schedule 4; and
 - (iv) the State Works Contractor demonstrates to the RMS Representative that the Project Company has effected and is maintaining all insurances required to be effected by the Project Company under clause 24.6 of the Project Deed, to the extent clause 24.6 of the Project Deed relates to the insurances referred to in paragraph 1 of Schedule 4.

Payment Schedule means Schedule 6.

Payment Statement means a payment statement issued by the RMS Representative in accordance with clause 5.3 in the form of Schedule 7.

Payment Statement (SW) has the meaning given to that term in the D&C Deed.

Permitted Dealing means:

Project Deed means the document entitled "NorthConnex Project - Project Deed" between RMS and the Project Company dated on or about the date of this deed.

SOP Act means the *Building and Construction Industry Security of Payment Act 1999* (NSW).

State Works means the components of the Project Works specified in Schedule 1 and such other works as agreed between the parties from time to time.

State Works Advances has the meaning given in the Project Deed.

State Works Completion means the stage when Completion (as defined in the Project Deed) is achieved in relation to the State Works.

State Works Instalments has the meaning given in the Project Deed and, for the purposes of clause 10.2(a)(ii) of this deed only, includes the State Works Reimbursement.

State Works Payment means the amount described as the "Forecast Cumulative Limit " for June 2019 in the Payment Schedule.

State Works Reimbursement means the amount of \$t

State Works Repayments means the amounts repaid from time to time by the State Works Contractor to the State Works Investors, in accordance with the State Works Contractor Facility Deed.

SWD Early Termination Amount means, on any date on or prior to the Date of Completion,

provided that, in calculating the amount referred to in paragraph

SWD FM Early Termination Amount means, on any date on or prior to the Date of Completion,

provided that, in calculating the amount referred to in paragraph

Total Project Costs means the sum of:

- (a) the aggregate amounts paid or payable to
- (b) to the extent not included in paragraph (a), all other amounts paid or payable by or on behalf of

less any amounts that have been paid

1.3 Interpretation

In this deed:

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

- (e) a reference to any Authority, institute, association or body is:
 - (i) if that Authority, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that Authority, institute, association or body are transferred to another organisation, deemed to refer to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as the case may be; and
 - (ii) if that Authority, institute, association or body ceases to exist, deemed to refer to the organisation which serves substantially the same purposes or object as that Authority, institute, association or body;
- (f) a reference to a document (including this deed and any other deed, agreement, instrument, guideline, code of practice or code and standard but not including RMS policies referred to in the SWTC) is to that document as amended, varied, novated, ratified, supplemented or replaced from time to time;
- (g) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or any section or provision of either of these includes:
 - (i) all ordinances, by-laws, regulations of and other statutory instruments (however described) issued under the statute or delegated legislation; and
 - (ii) any consolidations, amendments, re-enactments and replacements;
- (h) a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause schedule, exhibit, attachment or annexure to or of this deed;
- (i) a reference to:
 - (i) this deed includes all schedules, exhibits, attachments and annexures to it; and
 - (ii) the SWTC includes all Appendices to the SWTC;
- (j) a word importing the singular includes the plural (and vice versa) and a word indicating a gender includes every other gender;
- (k) if a word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- (l) "day" means calendar day;
- (m) a reference to a court or tribunal is to an Australian court or tribunal;
- (n) a reference to a group of persons is a reference to all of them collectively, to any two or more of them collectively and to each of them individually;
- (o) a reference to a "month" is a reference to a calendar month; and
- (p) a reference to "\$" or "dollar" is to Australian currency.

1.4 **Contra proferentem**

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

1.5 **Business Day**

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

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

1.6 **Certification**

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

1.7 **Order of precedence**

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

- (a) the deed, excluding the schedules and exhibits;
- (b) the schedules and the remaining exhibits,

except to the extent that any part of the various documents comprising this deed impose a higher standard, quality, level of service or quantum than any other part of the various documents comprising this deed in which case the higher standard, quality, level of service or quantum prevails.

1.8 **Provisions limiting or excluding liability**

Any provision of this deed which seeks to limit or exclude a liability of a party is to be construed as doing so only to the extent permitted by law.

1.9 **Condition precedent**

The rights and obligations of the parties under this deed will not commence until Financial Close.

2. **Obligations of State Works Contractor**

- (a) **(Design and construction of State Works):** The State Works Contractor must procure and manage the design and construction of the State Works to ensure that RMS fully discharges its obligations to the Project Company to procure the design and construction of the State Works under the Project Deed and, in respect of the State Works and the SWC Activities:
 - (i) must comply with all requirements of the Project Deed that apply to the Project Company's Works and the Project Company's Activities;

- (ii) assumes all obligations and gives all warranties to RMS that the Project Company assumes or gives in respect of the Project Company's Works or the Project Company's Activities;
- (iii) bears all risks and liabilities that the Project Company bears in respect of the Project Company's Works or the Project Company's Activities; and
- (iv) will have the benefit of all relief, rights, benefits and warranties provided under the Project Deed in favour of the Project Company in respect of the Project Company's Works and the Project Company's Activities,

as though:

- (v) the State Works were the Project Company's Works;
- (vi) the SWC Activities were the Project Company's Activities (other than to the extent the Project Company's Activities include the O&M Work); and
- (vii) the State Works Contractor were the Project Company.

- (b) **(Project Company's warranties, releases or waivers, acknowledgements and risks):** Without limiting clause 2(a), the State Works Contractor acknowledges that, in respect of the State Works and the SWC Activities, it:

- (i) gives all warranties to RMS;
- (ii) provides all releases or waivers in favour of RMS;
- (iii) makes all acknowledgements; and
- (iv) accepts all risks,

that the Project Company gives to RMS, provides in favour of RMS, acknowledges or accepts under the Project Deed in respect of the Project Company's Works and the Project Company's Activities, other than in relation to the O&M Work.

- (c) **(RMS's warranties, releases or waivers, acknowledgements and risks):** Without limiting clause 2(a)(iv), RMS acknowledges that it:

- (i) gives all warranties to the State Works Contractor;
- (ii) provides all releases or waivers in favour of the State Works Contractor;
- (iii) makes all acknowledgements; and
- (iv) accepts all risks,

that RMS gives to the Project Company, provides in favour of the Project Company, acknowledges or accepts under the Project Deed in respect of the Project Company's Works and the Project Company's Activities, other than in relation to the O&M Work, for the benefit of the State Works Contractor in respect of the State Works and the SWC Activities.

- (d) **(Project Company's obligations):** Without limiting clause 2(a), the State Works Contractor acknowledges that it must do everything necessary to ensure that the Project Company complies with its obligations under the Project Deed in relation to the design and construction of the Project Works, to the extent such obligations relate to the State Works.

3. Initial Works Contribution

- (a) **(No payment prior to Date of Initial Works Contribution):** Without limiting clause 5, the State Works Contractor acknowledges and agrees that it has no entitlement to, and RMS will not be liable to pay, any part of the State Works Payment prior to the Date of Initial Works Contribution.
- (b) **(Notice by the State Works Contractor):** When the State Works Contractor considers that the Initial Works Contribution has been made, the State Works Contractor may:
- (i) notify RMS and the Independent Certifier of its opinion; and
 - (ii) request the Independent Certifier to issue a Certificate of Initial Works Contribution stating the Date of Initial Works Contribution.
- (c) **(Independent Certifier to make determination):** The parties acknowledge that within 15 Business Days after the State Works Contractor complying with clause 3(b), the Independent Certifier is required to determine whether the Initial Works Contribution has been made and either:
- (i) if the Initial Works Contribution has been made, issue a Certificate of Initial Works Contribution to RMS and the State Works Contractor:
 - A. certifying that the Initial Works Contribution has been made; and
 - B. stating the Date of Initial Works Contribution; or
 - (ii) if the Initial Works Contribution has not been made, issue a notice to RMS and the State Works Contractor to this effect.
- (d) **(Date is final and binding):** Without limiting clause 3(e), the Certificate of Initial Works Contribution will be final and binding for the purpose only of establishing that the Initial Works Contribution has been made and will not be capable of challenge on any basis other than manifest error.
- (e) **(No approval):** A Certificate of Initial Works Contribution will not:
- (i) constitute an approval by RMS of the State Works Contractor's performance of its obligations under this deed;
 - (ii) be taken as an admission or evidence that the State Works comply with this deed; or
 - (iii) prejudice any rights or powers of RMS.
- (f) **(State Works Reimbursement):** RMS must pay the State Works Reimbursement on or prior to Financial Close and, for the purposes of clauses 5.11 and 10.2 of this deed, will be treated as having been paid on the date of Financial Close.

4. Representatives

- (a) RMS and the State Works Contractor acknowledge and agree that the RMS Representative acts at all times as the servant or agent of RMS and is subject to the directions of RMS and will act solely in the interests of RMS in connection with this deed.
- (b) Without limiting clause 4(a), the parties agree that the persons appointed by:

- (i) RMS under clause 6.1 of the Project Deed will also act as the RMS Representative under this deed; and
- (ii) the Project Company under clause 6.2 of the Project Deed to act as a representative of and be authorised to act on behalf of the Project Company in discharging the Project Company's functions under the Project Deed with respect to the design and construction of the Project Company's Works and the performance of the Project Company's Activities will also act as a representative of and be authorised to act on behalf of the State Works Contractor in discharging the State Works Contractor's functions under this deed.

5. Payment

5.1 Payment of State Works Payment

Subject to the provisions of this deed, RMS must pay the State Works Contractor the State Works Payment in accordance with the payment regime in this clause 5.

5.2 Payment Claims

- (a) **(Each Payment Claim Date):** The State Works Contractor may make a Payment Claim on each Payment Claim Date.
- (b) **(Reference Date)** The State Works Contractor agrees with RMS that the Payment Claim Date is, for the purposes of section 8 of the SOP Act, the "reference date" under this clause 5.
- (c) **(Submit Payment Claim):** If the State Works Contractor is entitled to make a Payment Claim under this deed, it must submit a Payment Claim to RMS in the form required by Schedule 2, containing particulars of the payment claimed by the State Works Contractor in respect of the State Works which may not exceed the lesser of:
 - (i) the value of the work which has been certified by the Independent Certifier in the form of Schedule 4; or
 - (ii) the Maximum Payment Claim Amount.
- (d) **(Amount of progress payment):** The State Works Contractor agrees that the amount of a progress payment (for the purposes of section 9 of the SOP Act and this clause 5) will be calculated by reference to the Payment Schedule.
- (e) **(No further Payment Claim):** The State Works Contractor must not submit any further Payment Claims after the full amount of the State Works Payment has been paid in accordance with this deed.

5.3 Payment Statements

- (a) Within 10 Business Days after receiving a Payment Claim submitted or purported to be submitted in accordance with clause 5.2, the RMS Representative (on behalf of RMS) will give the State Works Contractor (with a copy to RMS) a Payment Statement in the form of Schedule 7 certifying:
 - (i) the Payment Claim to which it relates;
 - (ii) the value of work completed by the State Works Contractor in respect of the State Works, calculated in accordance with the Payment Schedule;

- (iii) all amounts previously paid to the State Works Contractor by RMS under this deed in respect of the State Works;
- (iv) any amounts which RMS is entitled to retain, deduct, withhold or set-off (in accordance with any right to set-off which RMS may have pursuant to clause 5.9 or otherwise at Law) against any monies otherwise due to the State Works Contractor;
- (v) the amounts (if any) of the payment that RMS proposes to make to the State Works Contractor; and
- (vi) if the Payment Amount is less than the amount claimed in the Payment Claim:
 - A. the reason why the Payment Amount is less than the amount claimed in the Payment Claim (including if it is because the full amount of the State Works Payment will have been paid after payment of the relevant Payment Amount); and
 - B. if the reason for the difference is that RMS has retained, deducted, withheld or set-off payment for any reason, the reason for the retention, deduction, withholding or setting-off.
- (b) The State Works Contractor agrees with RMS that a Payment Claim submitted to the RMS Representative is received by the RMS Representative as agent for RMS and that a Payment Statement issued by the RMS Representative is issued by the RMS Representative as agent for RMS.
- (c) In issuing a Payment Statement, the RMS Representative may deduct from the amount which would otherwise be payable to the State Works Contractor, any amount which RMS is entitled to retain, deduct, withhold or set-off under this deed.
- (d) Any failure by the RMS Representative to set out in a Payment Statement an amount which RMS is entitled to retain, deduct, withhold or set-off from the amount which would otherwise be payable to the State Works Contractor by RMS will not constitute a waiver of, or otherwise limit or affect, RMS's right to subsequently retain, deduct, withhold or set-off any amount it is entitled to retain, deduct, withhold or set-off under this deed.

5.4 Payment of the Payment Amount

- (a) RMS must, within 15 Business Days after receipt of a valid Payment Claim issued by the State Works Contractor under clause 5.2, pay the Payment Amount to the State Works Contractor.
- (b) Subject to clause 14(e)(iv), on or before the due date for payment of a Payment Amount to the State Works Contractor, RMS will provide a recipient created tax invoice to the State Works Contractor in respect of the State Works Contractor's supply to which the payment relates.

5.5 Payment is not acceptance

- (a) **(Payment on account):** Any Payment Statement or payment made under this clause 5 is not:
 - (i) evidence of the value of work or evidence that the work has been satisfactorily carried out in accordance with this deed;
 - (ii) acceptance or approval by RMS or the Independent Certifier of the State Works Contractor's performance or compliance with this deed; or

(iii) an admission of liability by RMS,

and is made on account only.

(b) **(Corrections):** The RMS Representative may in any Payment Statement correct any previous Payment Statement issued by the RMS Representative.

5.6 Notice before State Works Completion

The State Works Contractor must give RMS (with a copy to the Independent Certifier) separate notices at least:

(a) 3 months; and

(b) 1 month,

prior to the date upon which the State Works Contractor reasonably expects to achieve State Works Completion.

5.7 State Works Completion

(a) **(Notice by the State Works Contractor):** When the State Works Contractor considers that it has achieved State Works Completion, the State Works Contractor must, in the form required by Schedule 3:

(i) notify RMS and the Independent Certifier of its opinion; and

(ii) request the Independent Certifier to issue a Certificate of State Works Completion stating the date on which the State Works Contractor achieved State Works Completion.

(b) **(Independent Certifier to make determination):** The parties acknowledge that within 15 Business Days after the State Works Contractor complying with clause 5.7(a), the Independent Certifier is required to determine whether State Works Completion has been achieved and either:

(i) if State Works Completion has been achieved, issue a Certificate of State Works Completion to RMS and the State Works Contractor:

A. certifying that State Works Completion has taken place;

B. stating the Date of State Works Completion; and

C. listing any minor Defect corrections of the kind referred to in the definition of State Works Completion which, in the Independent Certifier's opinion, remain to be performed; or

(ii) if State Works Completion has not been achieved:

A. issue a notice to RMS and the State Works Contractor listing the work remaining to be performed to achieve State Works Completion; or

B. issue a notice to RMS and the State Works Contractor stating that State Works Completion is so far from being achieved that it is not practicable to provide the list referred to in clause 5.7(b)(ii)A,

after which the State Works Contractor must continue to diligently progress the State Works to achieve State Works Completion.

- (c) **(Correction of Defects which did not prevent State Works Completion):** Without limiting the State Works Contractor's other obligations under this deed (including in respect of Defects), as soon as practicable upon receipt of a Certificate of State Works Completion, the State Works Contractor must diligently correct all of the Defects applicable to the State Works specified in the Certificate of State Works Completion.
- (d) **(Further notice by the State Works Contractor):** The State Works Contractor must give notice to RMS and the Independent Certifier when the work listed in a notice issued by the Independent Certifier under clause 5.7(b)(ii)A has been completed.
- (e) **(Resubmission):** Clauses 5.7(a), 5.7(b) and 5.7(c) will apply in respect of the State Works Contractor's notice under clause 5.7(d) in the same way as if it were the original notice given under clause 5.7(a).
- (f) **(No restriction on Independent Certifier):** The Independent Certifier, in making its determination as to whether State Works Completion has been achieved:
 - (i) will not be restricted by any notice, list or opinion which it previously provided to the State Works Contractor under clause 5.7(b)(ii)A; and
 - (ii) will be entitled to raise any other items of work (other than the minor Defects of the kind referred to in the definition of State Works Completion) as a ground for determining that State Works Completion has not been achieved.

5.8 Effect of Certificate of State Works Completion

- (a) **(Date is final and binding):** Without limiting clause 5.8(b), the Certificate of State Works Completion will be final and binding for the purpose only of establishing that State Works Completion has been achieved and will not be capable of challenge on any basis other than manifest error.
- (b) **(No approval):** A Certificate of State Works Completion will not:
 - (i) constitute an approval by RMS of the State Works Contractor's performance of its obligations under this deed;
 - (ii) be taken as an admission or evidence that the State Works comply with this deed; or
 - (iii) prejudice any rights or powers of RMS.

5.9 Set-off

RMS may set-off or deduct from any monies due to the State Works Contractor:

- (a) any debt or other monies due from the State Works Contractor to RMS; and
- (b) any bona fide claim to any money which RMS may have against the State Works Contractor whether for damages or otherwise,

whether under the RMS Project Documents or otherwise at Law relating to the Project.

5.10 Interest

If a party does not pay any money payable by it to any other party under this deed by the due date, the first mentioned party must pay interest on that amount on demand by the other party. Interest is:

- (a) payable from the due date until payment is made by the first mentioned party before and, as an additional and independent obligation, after any judgment or other thing into which the liability to pay the money payable becomes merged;
- (b) calculated on daily balances at the rate of _____ per annum; and
- (c)

5.11 Financing costs payment

- (a) Subject to clauses 5.11(b) and 5.11(d), if Completion is not achieved by the date which is _____ after the Date for Completion, the State Works Contractor must pay to RMS, in _____ an amount to account for _____, calculated at a rate of _____ % per annum on the aggregate of _____ from the date that is _____ after the Date for Completion up to and including the earlier of the Date of Completion or the date of termination of this deed and payable monthly in arrears.
- (b) Subject to clause 5.11(c), RMS's right to the recovery of _____ against the State Works Contractor pursuant to clause 5.11(a) will be limited to the Liquidated Damages (RMS) that the State Works Contractor and the Project Company recover from the Contractor under the D&C Deed.
- (c) RMS's rights will not be limited pursuant to clause 5.11(b) to the extent the State Works Contractor or the Project Company is unable to recover the Liquidated Damages (RMS) from the Contractor due to:
 - (i) a breach of the D&C Deed by the Project Company or the State Works Contractor not caused or contributed to by RMS or any of its Related Parties; or
 - (ii) a wrongful act or omission of the Project Company or the State Works Contractor not caused or contributed to by RMS or any of its Related Parties.
- (d) For the purposes only of this clause 5.11, the Date for Completion will be deemed to be extended by the same period (if any) by which the Sunset Date is extended in accordance with section 3(a) of Schedule 14 of the Project Deed.

5.12 Unfixed goods and materials

- (a) Unless otherwise agreed between RMS and the State Works Contractor, unfixed goods and materials must not be included in a Payment Claim or a Payment Statement, unless:
 - (i) the value of the unfixed goods and materials is greater than \$ _____ in the aggregate;
 - (ii) where the goods or materials are not located on the Construction Site, the State Works Contractor provides to RMS with its Payment Claim an unconditional undertaking:
 - A. _____ in the form of Schedule 7 to the Project Deed;
 - B. _____ in favour of RMS;
 - C. _____ where required, duly stamped;

- D. licensed in Australia with a credit rating of no less than the Required Rating, or as otherwise approved by RMS in its absolute discretion; and
 - E. payable at an office of the issuer in Sydney (or such other place as RMS may approve),
- for an amount equal to the amount of unfixed goods and materials included in the Payment Claim;
- (iii) the goods and materials are clearly marked as the property of RMS and:
 - A. are on the Construction Site; or
 - B. without limiting clause 5.12(a)(ii), are not on the Construction Site, but have been specifically manufactured for the State Works and are designated for incorporation into the State Works;
 - (iv) the goods and materials are adequately insured to the satisfaction of the Independent Certifier and properly stored in a secure place approved by the Independent Certifier; and
 - (v) the supplier of those goods and materials has certified in writing in favour of RMS that title to the goods and materials will pass to RMS upon the earlier of payment to the supplier by the State Works Contractor or incorporation into the State Works.
- (b) Upon payment of a Payment Statement which includes unfixed goods and materials, or incorporation of the goods and materials into the State Works, property in the unfixed goods and materials will vest in RMS.
 - (c) Subject to RMS's rights to have recourse to any unconditional undertaking and to the cash proceeds if any unconditional undertaking is converted into cash, RMS must release the unconditional undertaking for those items provided under clause 5.12(a)(ii) within 20 Business Days after the later of:
 - (i) property in the unfixed goods or materials vesting in RMS; and
 - (ii) incorporation of the goods or materials in their final location in the Motorway.

5.13 Change Payments

The parties acknowledge and agree that Changes under clause 12 of the Project Deed can be:

- (a) designed by the Project Company as a Change to the Project Company's Works; and
- (b) constructed by the State Works Contractor as a Change to the State Works.

to the extent agreed between RMS, the Project Company and the State Works Contractor.

6. Assumption of risk by State Works Contractor

Except to the extent expressly provided under this deed or the Project Deed:

- (a) the State Works Contractor accepts all risks in respect of the State Works, including the risk of:

- (i) the actual cost of the design and construction of the State Works being greater than the State Works Payment; and
 - (ii) the design and construction of the State Works not being completed in accordance with the requirements of this deed or so as to enable RMS satisfy its obligations to the Project Company under the Project Deed;
- (b) the State Works Contractor acknowledges that:
- (i) under the Project Deed, the Project Company is required to investigate, finance, fund, plan, design and construct the Project Company's Works and the Temporary Works; and
 - (ii) the State Works Contractor must integrate, interface and co-ordinate the design and construction of the State Works with the design and construction of the Project Company's Works and the Temporary Works; and
- (c) RMS will have no liability to the State Works Contractor and the State Works Contractor will have no Claim against RMS arising out of or in connection with the Project Works, the Temporary Works, the Project Activities or this deed, including:
- (i) the actual cost of the design and construction of the State Works being greater than the State Works Payment; or
 - (ii) the design and construction of the State Works not being completed in accordance with the requirements of this deed or so as to enable RMS to satisfy its obligations to the Project Company under the Project Deed.

7. Force majeure

7.1 Suspension of obligations

- (a) If a Force Majeure occurs the State Works Contractor's obligations under this deed which are affected by the Force Majeure will be suspended but only to the extent and for so long as such obligations are affected by the Force Majeure.
- (b) If a Force Majeure occurs and a notice under clause 29.1(a) of the Project Deed is issued, no party will be in default of its obligations under this deed in so far as the failure or delay in the observance or performance of those obligations by that party is caused by the Force Majeure specified in the notice under clause 29.1(a) of the Project Deed.
- (c) Upon the State Works Contractor becoming able to recommence performing its obligations which were suspended under clause 7.1(a), the State Works Contractor must recommence the performance of those obligations.

7.2 Duty to remedy Force Majeure

To the extent the effects of a Force Majeure relate to the State Works or the SWC Activities, the State Works Contractor must remedy and Mitigate those effects promptly in accordance with clause 24.10 of the Project Deed.

7.3 Alternative arrangements

During the period of suspension, RMS may make alternative arrangements for the performance of any suspended obligations (without incurring any liability to the State Works Contractor).

7.4 Cessation of Force Majeure

The State Works Contractor must notify RMS immediately after it ceases to be prevented or delayed from performing its obligations as a result of a Force Majeure.

7.5 No financial relief to the State Works Contractor

Subject to clause 21 of the Project Deed, RMS will not be obliged to provide any financial relief to the State Works Contractor during the period of suspension.

7.6 No compensation to RMS

The State Works Contractor will not be liable to compensate RMS for any costs or losses which RMS incurs during the period of suspension.

8. Assignment

8.1 Entitlement to assign

- (a) Subject to the Debt Financing Documents and the Financiers Tripartite Deed (from the date on which the Financiers Tripartite Deed comes into effect), the State Works Contractor must not sell, transfer, assign, mortgage, charge or otherwise dispose of, deal with, or encumber its interest in any of the Project Documents without the prior written consent of RMS and compliance with this clause 8.
- (b) In granting its consent under clause 8.1(a), RMS may withhold its consent in its absolute discretion.
- (c) RMS may sell, transfer or assign or otherwise dispose of or deal with its interest in the Project Documents without the prior written consent of the State Works Contractor provided it does so in accordance with clause 34.1(c) of the Project Deed.

8.2 Change of Control prior to State Works Completion

- (a) The State Works Contractor undertakes to RMS that the direct legal and beneficial owners of the State Works Contractor will remain unchanged until State Works Completion.
 - (b) Subject to clause 8.2(c), the State Works Contractor must not permit:
 - (i) any Change of Control of the State Works Contractor; or
 - (ii) a person:
 - A. who is not an Ultimate Shareholder; or
 - B. who is an Ultimate Shareholder but which is an entity managed by an Ultimate Shareholder (and not ultimately owned by an Ultimate Shareholder) which does not at the date of this deed or following any event which is approved by RMS under this clause 8, have an economic interest in the shares or units of the State Works Contractor,
- to acquire any shares, units or an economic interest in shares or units in any Holding Company (other than an Ultimate Shareholder) of the State Works Contractor,

prior to State Works Completion without the prior written consent of RMS (which may not be unreasonably withheld).

- (c) RMS's consent is not required for a change in, or the appointment of, the responsible entity, trustee or custodian of an entity where there is no change in the ultimate beneficial owner of the entity concerned.
- (d) RMS will be deemed to be acting reasonably under clause 8.2(b) if it withholds its consent where RMS is of the reasonable opinion that:
 - (i) the State Works Contractor has not provided it with full details of the proposed change and any further information reasonably requested by RMS; or
 - (ii) the new person:
 - A. is not in compliance with applicable anti-money laundering laws and anti-terrorism laws;
 - B. does not provide RMS with a letter of support in respect of any unpaid funding obligation of the transferring Ultimate Shareholder (which must be in a form and substance equivalent to the letters of support provided to RMS at Financial Close); and
 - C. does not demonstrate to the reasonable satisfaction of RMS that it is both a fit and proper person to be an investor in the Project and is of sufficient financial standing to meet its, and to put the State Works Contractor in funds to meet its, funding obligations in relation to the Project.

8.3 Change of Control after State Works Completion

For the purposes of clause 8.1, any Change of Control of the State Works Contractor after State Works Completion will be deemed to be an assignment by the State Works Contractor of its interest in this deed and the other Project Documents and such change will be subject to the terms and conditions of this clause 8.

9. Suspension

The parties agree that:

- (a) if the obligations of the Project Company are suspended for any reason under the Project Deed, RMS may elect by notice in writing to the State Works Contractor to suspend the obligations of both the State Works Contractor and RMS under this deed;
- (b) if the obligations of the State Works Contractor and RMS are suspended pursuant to clause 9(a), those obligations will recommence upon the obligations of the Project Company recommencing under the Project Deed; and
- (c) if a suspension occurs pursuant to clause 9(a), the State Works Contractor will not be entitled to:
 - (i) any adjustment of the State Works Payment; or
 - (ii) make any Claim against RMS arising out of, or in any way in connection with, the suspension, except to the extent relief is expressly allowed for under the Project Deed.

10. Termination

10.1 Terminated if Project Deed terminates

This deed terminates if the Project Deed terminates. This deed may not be terminated by any party in any other circumstances (including repudiation at common law).

10.2 Termination payments

- (a) If prior to Completion, this deed terminates under clause 10.1 as a result of RMS terminating the Project Deed by giving an Abandonment Notice under the Project Deed, RMS will be paid the sum of:

(i)

and

(ii)

and

(iii)

RMS will be paid the amount calculated in accordance with this clause 10.2(a) (and any interest payable on such amount in accordance with clause 5.10) in accordance with clause 27.9 of the Project Deed.

- (b) If this deed terminates under clause 10.1 prior to the Final Payment Date, the State Works Contractor agrees that, subject to clause 10.2(c), it will not be entitled to:

(i) any

(ii)

this deed or the termination.

- (c) Without limiting clause 27.15 of the Project Deed, if, prior to Completion, this deed terminates under clause 10.1 as a result of the Project Deed being terminated under:

(i) clause 9.10(c), 27.11 or 27.12 of the Project Deed, RMS must within 30 Business Days after the date of termination pay the SWD Early Termination Amount to the State Works Contractor; or

(ii) clause 27.13 of the Project Deed, RMS must within 30 Business Days after the date of termination pay the SWD FM Early Termination Amount to the State Works Contractor.

- (d) The State Works Contractor agrees that in calculating:

(i) the SWD Early Termination Amount, there will be no double counting of amounts that are included in the calculation of the Early Termination Amount under the Project Deed; and

- (ii) the SWD FM Early Termination Amount, there will be no double counting of amounts that are included in the calculation of the Uninsurable FM Termination Amount under the Project Deed.

11. Dispute resolution

Any dispute or difference arising out of, relating to, or in connection with this deed or the conduct of the parties in relation to this deed, or its subject matter (including any question regarding the existence, validity or termination of this deed) (**Dispute**) must be resolved in accordance with the Dispute Resolution Procedure, as if:

- (a) Schedule 24 of the Project Deed was set out in full in this deed; and
- (b) a reference therein:
 - (i) to "the Project Company" was a reference to "the State Works Contractor";
 - (ii) to "the parties" was a reference to "RMS and the State Works Contractor"; and
 - (iii) to "party" was a reference to either one of them,

provided that:

- (c) the State Works Contractor authorises the chief executive officer of the Project Company to resolve any Dispute on behalf of, and relinquish any right of, the State Works Contractor in connection with this deed;
- (d) the State Works Contractor's agreement will not be required to effect a valid selection of any expert or arbitrator; and
- (e) the State Works Contractor will not be obliged to pay any part of the costs of any expert or arbitrator.

12. Representations, warranties and covenants

12.1 Representations and warranties by the State Works Contractor

The State Works Contractor makes the following continuing representations and warranties for the benefit of RMS:

- (a) it has in full force and effect all authorisations necessary to enter into and perform its obligations under each Project Document to which it is expressed to be a party;
- (b) it has power to enter into and perform its obligations under each Project Document to which it is expressed to be a party, to carry out the transactions which those documents contemplate will be carried out by it and to carry on its business, and the entry into of each such document is a proper exercise of power;
- (c) its obligations under each Project Document to which it is expressed to be a party are valid and binding and are enforceable against it and in accordance with their respective terms subject to the availability of equitable remedies and, to the extent applicable, laws relating to the enforcement of creditors' rights;
- (d) it subsists and is properly constituted;
- (e) it is not a trustee or responsible entity of any trust nor does it hold any property subject to or impressed by any trust;

- (f) it is not in default of its material obligations under any RMS Project Document;
- (g) it is not involved in, and does not conduct, any business other than the business related to the Project and will not do so without the prior written approval of RMS;
- (h) its obligations under the State Works Security will rank ahead of, and its obligations under this deed and each Project Document to which it is expressed to be a party (other than the State Works Security) will rank at least equally with, all its other unsecured indebtedness, other than indebtedness preferred by law;
- (i) the execution, delivery and performance of each Project Document to which it is expressed to be a party and the transactions under each of them do not:
 - (i) violate its constituent documents or any law, regulation, treaty, judgment, ruling, order or decree of any court or official directive which is binding on it;
 - (ii) violate any other document or agreement to which it is a party or which is binding on it or any of its assets; or
 - (iii) cause a limitation on its powers or the powers of its directors or other officers to be exceeded;
- (j) it does not have immunity from the jurisdiction of a court or from legal process (whether through service of notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise);
- (k) no litigation (which has not been disclosed to RMS in writing prior to the date of this deed), arbitration, tax claim, dispute or administrative or other proceeding has been commenced or, to its knowledge, threatened against it which is likely to have a material adverse effect upon it or its ability to perform its financial or other obligations under any Project Document to which it is expressed to be a party; and
- (l) except as contemplated under a Project Document or in connection with a transaction which is contemplated by a Project Document, it will not trade or incur any Liabilities or carry on any business or enter into any document or agreement other than the Project Documents without RMS's prior written approval.

12.2 Representations and warranties by RMS

RMS makes the following continuing representations and warranties for the benefit of the State Works Contractor:

- (a) it is a statutory body validly constituted and existing under the *Transport Administration Act 1988* (NSW);
- (b) it has in full force and effect all authorisations necessary under its constituent legislation to enter into and perform its obligations under each Project Document to which it is expressed to be a party;
- (c) it is legally entitled and has all statutory power to enter into and perform its obligations under each Project Document to which it is expressed to be a party, to carry out the transactions contemplated by those documents, and the entry into of each such document is a proper exercise of power;
- (d) its obligations under each Project Document to which it is expressed to be a party are valid and binding and are enforceable against it in accordance with their respective terms subject to the availability of equitable remedies and, to the extent applicable, laws relating to the enforcement of creditors' rights; and

- (e) the execution, delivery and performance of each Project Document to which it is expressed to be a party and the transactions under each of them does not violate any law to which RMS is subject.

13. Restrictions on the State Works Contractor

13.1 Restrictions on business

The State Works Contractor must not (without the prior written approval of RMS) engage in any business other than procuring and managing the design and construction of the State Works and the carrying out of its obligations and the exercise of its rights under this deed.

13.2 Restrictions on acquisition of property and liabilities being incurred

The State Works Contractor must not (without the prior written approval of RMS) acquire or hold any property or incur any liability other than for the purposes of the State Works.

13.3 Restrictions on subcontracting

The State Works Contractor must not (without the prior written approval of RMS) enter into any Subcontracts other than the D&C Deed.

14. GST

- (a) Notwithstanding any other provision of this deed, any amount payable for a supply made under this deed which is calculated by reference to a cost, expense or other amount paid or incurred by a party will be reduced by an amount equal to any input tax credits which that party is entitled to in respect of that cost, expense or other amount.
- (b) Subject to clause 14(e), if GST becomes payable on any supply made by a party (**Supplier**) under or in connection with this deed:
- (i) any amount payable or consideration to be provided under any other provision of this deed for that supply (**Agreed Amount**) is exclusive of GST;
 - (ii) an additional amount will be payable by the party providing consideration for that supply (the **Recipient**), equal to the amount of GST payable on that supply as calculated by the Supplier in accordance with the GST law and payable at the same time and in the same manner as for the Agreed Amount; and
 - (iii) where clause 14(e)(iv) applies, the Supplier will provide a tax invoice (or equivalent documentation which complies with the GST law) to the Recipient in respect of that supply, no later than the time at which the Agreed Amount for that supply is to be provided under this deed.
- (c) Subject to clause 14(e), if for any reason, the GST payable by the Supplier in respect of a supply it makes under this deed (incorporating any increasing adjustments or decreasing adjustments relating to that supply) varies from the additional amount it receives from the Recipient under clause 14(e) in respect of that supply, the Supplier will provide a refund or credit to or will be entitled to receive the amount of this variation from the Recipient (as appropriate). Where an adjustment event occurs in relation to a supply, the Supplier will issue an adjustment note to the Recipient in respect of that supply within 14 days after becoming aware of that adjustment event occurring.

- (d) If the Recipient is dissatisfied with any calculation to be made by the Supplier under this clause, the Recipient may, at its own expense and after notifying the Supplier accordingly, refer the matter to an independent expert nominated by the President of the Institute of Arbitrators and Mediators Australia for expert determination, which will be final and binding on all parties (absent manifest error). The expert will act as an expert and not as an arbitrator and will take into account the terms of this deed, the matters required to be taken into account by the Supplier under this clause and any other matter considered by the expert to be relevant to the determination. The parties must release the expert from any liability in acting as an expert, except in the case of fraud on the part of the expert. However, this clause 14(d) shall not apply to any supply dealt with under clause 14(e).
- (e) The parties agree that, unless otherwise agreed in writing, the following will apply to all supplies made by the State Works Contractor to RMS under or in connection with this deed:
- (i) RMS will issue to the State Works Contractor a Recipient Created Tax Invoice (**RCTI**) for each taxable supply made by the State Works Contractor to RMS under this deed;
 - (ii) the State Works Contractor will not issue a tax invoice in respect of any taxable supply it makes to RMS;
 - (iii) each party acknowledges and warrants that at the time of entering into this deed, it is registered for GST and will notify the other party if it ceases to be registered; and
 - (iv) RMS may notify the State Works Contractor that it will no longer issue a RCTI for each taxable supply made by the State Works Contractor under this deed, in which case, from that point in time, RMS will not be required to issue RCTIs in respect of such supplies and the State Works Contractor will be required to issue tax invoices pursuant to clause 14(b)(iii).
- (f) Notwithstanding clause 14(b), if two parties (or entities on whose behalf those parties are acting) in accordance with this deed exchange non-monetary consideration:
- (i) notwithstanding clause 14(b) the additional amount payable on any supply by the Recipient to the Supplier shall be limited to an amount calculated as the monetary consideration provided by the Recipient for the taxable supply being made by the Supplier multiplied by the applicable GST rate; unless
 - (ii) it is determined, whether by agreement between the parties or by demand, assessment or private ruling issued by the Commissioner of Taxation that there is a disparity between:
 - A. the sum of the GST exclusive market value of the non-monetary consideration and the GST exclusive monetary consideration (if any) being provided by the Recipient to the Supplier; and
 - B. the sum of the GST exclusive market value of the non-monetary consideration and the GST exclusive monetary consideration (if any) being provided by the Supplier and having their nexus with the non-monetary consideration and monetary consideration being provided by the Recipient and referred to in clause 14(f)(ii)A.

- (iii) Where clause 14(f)(ii) applies, the Supplier and the Recipient will use best endeavours to determine a mutually acceptable means of calculating additional amounts to be provided between the parties to ensure, as far as possible that neither the Supplier nor the Recipient suffers a net cost or loss. If within 30 Business Days of the determination under clause 14(f)(ii), the parties are unable to agree on a means of calculating the additional amounts payable, clause 14(b) shall apply without any limitation imposed by this clause 14(b), however:
- A. the Supplier must only issue a tax invoice or an adjustment note to reflect the application of clause 14(f)(iii) after the parties have either reached an agreement under this clause 14(f)(iii) or have determined that they are unable to reach such an agreement; and
- B. the additional amount payable pursuant to clause 14(f)(iii) will only be payable 5 Business Days after the receipt by the Recipient of the tax invoice or adjustment note issued by the Supplier in accordance with clause 14(f)(ii)A.
- (iv) Where any party to this deed receives a demand, assessment or private ruling regarding the matters addressed in clause 14(e), it must notify the other parties to this deed of that fact and provide them with a copy of the demand, assessment or private ruling within 10 Business Days of receiving it. Before any party to this deed applies for a private ruling regarding the matters addressed in clause 14(e), it must provide the other parties to this deed with a copy of the private ruling request it intends to lodge with the Commissioner of Taxation no less than 20 Business Days prior to its lodgement of same.

15. Notices

15.1 How to give a notice

A notice or consent under this deed (**Notice**) is only effective if it is:

- (a) in writing, signed by or on behalf of the person giving it;
- (b) addressed to the person to whom it is to be given; and
- (c) either:
- (i) delivered or sent by pre-paid mail (by airmail, if the addressee is overseas) to that person's address;
- (ii) sent by fax to that person's fax number and the machine from which it is sent produces a report that states that it was sent in full; or
- (iii) subject to clause 15.1(d), sent by email in the form of a .pdf file of a letter (with or without attachments) to that person's email address; and
- (d) in the case of Notices which have been sent in accordance with clause 15.1(c)(iii) under clauses 3(b), 5 or 9(a), in addition to the Notice sent pursuant to clause 15.1(c)(iii), a copy of the Notice must also be printed and delivered or posted to the person's address or sent to the person's facsimile number in accordance with clauses 15.1(c)(i) or 15.1(c)(ii).

15.2 Effectiveness of notices

- (a) A Notice referred to in clause 15.1(d) will not be effective unless it is delivered in accordance with clause 15.1(c)(i) or clause 15.1(c)(ii).
- (b) A Notice issued pursuant to clause 15.1(c)(iii) and a Notice issued pursuant to clause 15.1(c)(i) or clause 15.1(c)(ii) must be identical, and in the event that they are not identical, neither Notice will constitute a valid Notice.

15.3 When a notice is given

A Notice that complies with this clause 15 is regarded as given and received:

- (a) if it is delivered or sent by fax:
 - (i) by 5.00 pm (local time in the place of receipt) on a Business Day - on that day; or
 - (ii) after 5.00 pm (local time in the place of receipt) on a Business Day, or on a day that is not a Business Day - on the next Business Day;
- (b) if it is sent by mail:
 - (i) within Australia – 2 Business Days after posting; or
 - (ii) to or from a place outside Australia – 5 Business Days after posting;
- (c) subject to clause 15.3(d), if it is sent by email:
 - (i) by 5:00pm (local time in the place of receipt) on a Business Day - at the time in the place to which it is sent equivalent to the time shown on the automatic receipt notification received by the party (as applicable) sending the email from the recipient; or
 - (ii) after 5:00pm (local time in the place of receipt) on a Business Day, or a day that is not a Business Day - on the Business Day following the date on which it is sent equivalent to the date shown on the automatic receipt notification received by the party (as applicable) sending the email from the recipient; and
- (d) where clause 15.1(c)(iii) applies, the relevant Notice will be taken to have been received on the later of:
 - (i) the date determined in accordance with clause 15.3(c); and
 - (ii) the date determined in accordance with clause 15.3(a) or 15.3(b) (as the case may be).

15.4 Address for notices

A person's address and fax number are those set out below, or as the person notifies the sender:

RMS

Address: Level 9
101 Miller Street
North Sydney
NSW 2060

Email address: NorthConnex@rms.nsw.gov.au
 Attention: General Manager, Motorway Projects

State Works Contractor

Address: 101 Wallgrove Road, Eastern Creek, NW 2766
 Email address: ncx@westlinkm7.com.au
 Attention: Chief Executive Officer
 Fax number: 02 9834 9211

and, prior to expiry of the last Defects Correction Period, with a copy to:

Address: Level 9, 1 Chifley Square, Sydney NSW 2000
 Email address: programdirector@northconnex.com.au
 Attention: Program Director
 Fax: 02 9254 4990

15.5 Communications by email

With respect to communications sent by email:

- (a) only the letter in .pdf format attached to the email and, subject to clause 15.5(b), any attachments to such letter which are referred to in the letter, will form part of the communication under this clause 15. Any text in the body of the email or the subject line will not form part of the communication;
- (b) an attachment to an email referred to in clause 15.1(c)(iii) will only form part of a communication under this clause 15 if it is in .pdf, .jpeg, .xls, .doc, .vsd, .mpp, .mdb, .xer or .ppt format, or such other format as may be agreed between the parties from time to time; and
- (c) the parties agree, with respect to any communications under or in connection with this deed:
 - (i) to ensure that their respective firewall and/or mail server (as applicable):
 - A. allows messages of up to 20 MB (or such greater size as may be agreed between the parties from time to time) to be received;
 - B. does not trap any messages in the spam filter which:
 - 1) in the case of notices sent by RMS to the State Works Contractor, have been sent from rms.nsw.gov.au; and
 - 2) in the case of notices sent by the State Works Contractor to RMS, have been sent from westlinkm7.com.au or such other domain as is notified to RMS in writing by the State Works Contractor; and
 - C. automatically sends a receipt notification to the sender upon receipt of a message; and
 - (ii) to use reasonable endeavours to ensure that their respective systems automatically send a notification message to each of the sender and the recipient when a message is received by the recipient's domain but cannot or will not be delivered to the recipient.

16. General

16.1 Governing law

This deed is governed by and must be construed according to the law applying in New South Wales.

16.2 Jurisdiction

- (a) Each party irrevocably submits to the non-exclusive jurisdiction of the courts of New South Wales, and the courts competent to determine appeals from those courts, with respect to any action or proceedings which may be brought at any time relating in any way to this deed,
- (b) Each party irrevocably waives any objection it may now or in the future have to the venue of any action or proceedings, and any claim it may now or in the future have that any action or proceedings have been brought in an inconvenient forum, where that venue falls within clause 16.2(a).

16.3 Cost

A party which has an obligation to do anything under this deed must perform that obligation at its cost, unless expressly provided for otherwise.

16.4 Waiver

- (a) Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by Law or under this deed by RMS will not in any way preclude, or operate as a waiver of, any exercise or enforcement, or further exercise or enforcement of that or any other right, power or remedy provided by Law or under this deed.
- (b) Any waiver or consent given by RMS under this deed will only be effective and binding on RMS if it is given or confirmed in writing by RMS.
- (c) No waiver by RMS of:
 - (i) a breach of any term of this deed; or
 - (ii) any other failure by the State Works Contractor to comply with a requirement of this deed, including any requirement to give any notice which it is required to give in order to preserve its entitlement to make any Claim against RMS,will operate as a waiver of:
 - (iii) another breach of that term or of a breach of any other term of this deed; or
 - (iv) another failure to comply with that requirement or of a failure to comply with any other requirement of this deed.

16.5 Further acts and documents

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

16.6 Provisions limiting or excluding liability

Any provision of this deed which seeks to limit or exclude a liability of a party is to be construed as doing so only to the extent permitted by Law.

16.7 Survival of certain provisions

Without limiting clause 16.14:

- (a) clauses 1, 5.9, 5.10, 5.11, 10.2, 11, 15 and 16 and any other provisions of this deed which are expressed to survive termination (together the **Surviving Clauses**) will survive rescission, termination or expiration of this deed;
- (b) if this deed is rescinded or terminated, no party will be liable to any other party except:
 - (i) under the Surviving Clauses; or
 - (ii) in respect of any breach of this deed occurring before such rescission or termination;
- (c) no right or obligation of any party will merge on completion of any transaction under this deed, and all rights and obligations under this deed survive the execution and delivery of any transfer or other document which implements any transaction under this deed; and
- (d) no provision of this deed which is expressed to survive the termination of this deed will prevent any other provision of this deed, as a matter of interpretation, also surviving the termination of this deed.

16.8 Counterparts

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

16.9 Amendments

This deed may only be varied by a deed executed by or on behalf of both RMS and the State Works Contractor.

16.10 Expenses

Each party must bear its own costs, including professional costs and disbursements, associated with the preparation and execution of this deed and any subsequent consent, agreement, approval or waiver hereunder or amendment thereto.

16.11 Severability of provisions

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

- (a) that will not affect or impair:
 - (i) the legality, validity or enforceability in that jurisdiction of any other provision of this deed; or
 - (ii) the legality, validity or enforceability under the Law of any other jurisdiction of that or any other provision of this deed; and

- (b) the provision will be construed in a manner which:
- (i) avoids the provision being void, illegal, invalid or unenforceable; and
 - (ii) subject to clause 16.11(b)(i), preserves to the maximum possible extent:
 - A. the enforceability of the provision and the provisions of this deed; and
 - B. the original effect and intent of this deed.

16.12 Exclusion of proportionate liability scheme

To the extent permitted by Law, Part 4 of the Civil Liability Act 2002 (NSW) (and any equivalent statutory provision in any other state or territory) is excluded in relation to all and any rights, obligations or Liabilities of either party under this deed whether such rights, obligations or Liabilities are sought to be enforced in contract, tort or otherwise.

Without limiting the above, the rights, obligations and Liabilities of RMS and the State Works Contractor under this deed with respect to proportionate liability are as specified in this deed and not otherwise, whether such rights, obligations or Liabilities are sought to be enforced by a claim in contract, in tort or otherwise.

16.13 Entire Agreement

To the extent permitted by Law, this deed:

- (a) embodies the entire understanding of the parties and constitutes the entire terms agreed upon between the parties; and
 - (b) supersedes any prior written or other agreement of the parties,
- in relation to the subject matter of this deed.

16.14 Indemnities

- (a) Each indemnity in this deed is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this deed.
- (b) It is not necessary for a party to incur expense or to make any payment before enforcing a right of indemnity conferred by this deed.
- (c) A party must pay on demand any amount it must pay under an indemnity in this deed.

16.15 No representation or reliance

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

16.16 Moratorium legislation

Unless application is mandatory by Law, any present or future Law will not apply to this deed so as to abrogate or otherwise prejudicially affect any rights, powers, remedies or discretions given or accruing to RMS.

16.17 No partnership, joint venture or other fiduciary relationship

Neither this deed nor any other Project Document to which RMS or the State Works Contractor are expressed to be parties creates a partnership, joint venture or fiduciary relationship between RMS (on the one hand) and the State Works Contractor (on the other hand).

16.18 Taxes

Subject to clause 35.2 of the Project Deed, the State Works Contractor must pay all Taxes which may be payable in respect of the SWC Activities, including any customs duty, tariffs and primage applicable to imported materials (including Materials) or Construction Plant.

Schedule 1 - State Works

(Clause 1.1)

State Works means the following components of the Project Works:

Item	Description	Cost
	Tunnel Works	
(a)		
(b)		
(c)		
	Southern Interchange	
6.5		
	Northern Interchange	
7.5		
		Total

Schedule 2 - Payment Claim

(Clause 5.2)

To: Roads and Maritime Services (**RMS**)

From: [A Director, Secretary or General Manager of the State Works Contractor]

In accordance with the terms of clause 5.2 of the State Works Deed between RMS and NorthConnex State Works Contractor Pty Ltd (ABN 19 169 328 385) (**State Works Contractor**) dated [insert date] (**State Works Deed**) with respect to the Project, I hereby submit this Payment Claim as follows:

Date of Payment Claim	Payment period	Particulars of State Works in respect of which payment is claimed	Documents or other information provided in respect of amount claimed	Amount claimed
<i>[Insert date of Payment Claim]</i>	<i>[Insert period in respect of which payment is claimed]</i>	<i>[Insert detailed list of work completed for which payment is claimed]</i>	<i>[Insert details of any supporting documentation or other information provided to verify amounts claimed]</i>	<i>[Insert amounts claimed in respect of each item of State Works]</i>
			<i>Total Amount claimed</i>	

1. All supporting documentation and information referred to in clauses 1.2 (definition of "Payment Claim Date") and 5.2 of the State Works Deed is contained in the Schedule to this Payment Claim, including:
 - (a) a contractor statement and a supporting statement conforming with the requirements of paragraph (b)(i) of the definition of Payment Claim Date in clause 1.2 of the State Works Deed; and
 - (b) a certification by the Independent Certifier conforming with the requirements of paragraph (b)(ii) of the definition of Payment Claim Date in clause 1.2 of the State Works Deed.

This is not a tax invoice.

For and on behalf of
NorthConnex State Works Contractor Pty Ltd

Signed:.....

Dated:.....

Schedule

Schedule 3 - State Works Contractor's Notice of State Works Completion

(Clause 5.7(a))

NorthConnex Project (Project)

To: Roads and Maritime Services (RMS) and APP Corporation Pty Limited (Independent Certifier)
Copy: Lend Lease Engineering Pty Ltd and Bouygues Construction Australia Pty Ltd and [insert name of Security Trustee]
From: [A Director, Secretary of General Manager] of NorthConnex State Works Contractor Pty Ltd (State Works Contractor)

In accordance with the terms of clause 5.7(a) of the deed between RMS and the State Works Contractor dated [insert] (**State Works Deed**), we hereby:

1. certify that State Works Completion has been achieved by the State Works Contractor on [insert] in accordance with the terms and conditions of the State Works Deed; and
2. request that the Independent Certifier issues a Certificate of State Works Completion stating the date on which State Works Completion was achieved.

.....
Signed for and on behalf of

NorthConnex State Works Contractor Pty Ltd

Schedule 4 - Independent Certifier's Verification Certificate

(Clause 1.2, definition of "Payment Claim Date")

To: Roads and Maritime Services (**RMS**), a New South Wales Government agency and NorthConnex State Works Contractor Pty Ltd (**State Works Contractor**)

From: APP Corporation Pty Limited (**Independent Certifier**).

In accordance with the terms of clause 1.2, definition of "Payment Claim Date" of the deed between RMS and the State Works Contractor dated *[insert]* entitled "NorthConnex Project State Works Deed" (**State Works Deed**) and with reference to all Payment Statements (SW) issued by the Sub IC under the D&C deed prior to the date of this Certificate, I hereby certify that:

1. all work to be the subject of the attached proposed Payment Claim by the State Works Contractor complies with the requirements of the State Works Deed, subject to the following:

[If applicable, insert details of any exceptions]
2. the value of the work to be the subject of the attached proposed Payment Claim by the State Works Contractor calculated in accordance with the Payment Schedule at Schedule 6 of the State Works Deed is *[insert amount]*.

.....

Signed by

[Project Director]

Schedule 5 - Independent Certifier's Certificate of State Works Completion

(Clause 1.2)

[ON INDEPENDENT CERTIFIER'S LETTERHEAD]

[insert date]

Project Representative [insert address]

Contractor [insert address]

Dear [insert name]

CERTIFICATE OF STATE WORKS COMPLETION

NorthConnex Project State Works Deed (**State Works Deed**)

We refer to the State Works Deed and hereby advise you that State Works Completion (as defined in the State Works Deed) was achieved on [insert date].

This Certificate of State Works Completion does not relieve the State Works Contractor of its obligation to rectify Defects under clause 5.7(c) of the State Works Deed and to complete any other outstanding obligations under the State Works Deed.

Yours sincerely

[]

for and on behalf of the Independent Certifier

Schedule 6 - Payment Schedule

(Clause 1.2)

The maximum amount of the Payment Claim that may be made by the State Works Contractor in respect of a particular month (**Maximum Payment Claim Amount**) must be calculated in accordance with the steps set out below.

1. _____ in respect of a particular month will be calculated by reference to the following formula:

2. _____ For the purposes of paragraph 1 above, the _____ will be the _____ (or both) to the _____ under the _____ the subject of the Payment Claim.

3. _____ For the purposes of paragraph 1 above, _____ will be the _____ in the _____

4. **(Maximum Payment Claim Amount):** The Maximum Payment Claim Amount will be calculated as follows:
 - (a) if the sum of:
 - (i) all Payment Amounts paid by RMS pursuant to clause 5.4 prior to the relevant Payment Claim Date; and
 - (ii) _____ calculated in accordance with paragraph 1, _____ is less than or equal to the _____ and
 - (b) if the sum of:
 - (i) all Payment Amounts paid by RMS pursuant to clause 5.4 prior to the relevant Payment Claim Date; and
 - (ii) _____ calculated in accordance with paragraph 1, _____ is greater than the

31 Dec 2014	
31 Jan 2015	
28 Feb 2015	
31 Mar 2015	
30 Apr 2015	
31 May 2015	

30 Jun 2015	
31 Jul 2015	
31 Aug 2015	
30 Sep 2015	
31 Oct 2015	
30 Nov 2015	
31 Dec 2015	
31 Jan 2016	
29 Feb 2016	
31 Mar 2016	
30 Apr 2016	
31 May 2016	
30 Jun 2016	
31 Jul 2016	
31 Aug 2016	
30 Sep 2016	
31 Oct 2016	
30 Nov 2016	
31 Dec 2016	
31 Jan 2017	
28 Feb 2017	
31 Mar 2017	
30 Apr 2017	
31 May 2017	
30 Jun 2017	
31 Jul 2017	
31 Aug 2017	
30 Sep 2017	
31 Oct 2017	

30 Nov 2017	
31 Dec 2017	
31 Jan 2018	
28 Feb 2018	
31 Mar 2018	
30 Apr 2018	
31 May 2018	
30 Jun 2018	
31 Jul 2018	
31 Aug 2018	
30 Sep 2018	
31 Oct 2018	
30 Nov 2018	
31 Dec 2018	
31 Jan 2019	
28 Feb 2019	
31 Mar 2019	
30 Apr 2019	
31 May 2019	
30 Jun 2019	

Schedule 7 - Form of Payment Statement

(Clause 5.3)

NorthConnex Project (Project)

To: NorthConnex State Works Contractor Pty Ltd (the State Works Contractor)
Copy: Roads and Maritime Services (RMS) a New South Wales Government agency
From: *[insert name of RMS Representative]*

In accordance with the terms of clause 5.3 of the State Works Deed between RMS and the State Works Contractor dated *[insert date]* (**State Works Deed**) with respect to the Project, I hereby certify that:

1. this payment statement relates to the following Payment Claim:

[insert details of Payment Claim to which State Works Contractor Payment Statement relates];
2. the value of work completed by the State Works Contractor in respect of the State Works is *[insert amount]*, calculated in accordance with the Payment Schedule;
3. RMS has previously paid the State Works Contractor *[insert amount]* under the State Works Deed in respect of the State Works;
4. RMS considers that it is entitled to retain, deduct, withhold or set-off (in accordance with any right to set-off which RMS may have pursuant to clause 5.9 of the State Works Deed or otherwise at Law) against any monies otherwise due to the State Works Contractor an amount of *[insert amount]*;
5. in respect of the Payment Claim described in paragraph 1, the amount to be paid by RMS is *[insert amount]*; and
6. *[delete if not applicable]* the amount to be paid by RMS as set out in paragraph 5 is less than the payment claimed in the Payment Claim described in paragraph 1, due to *[insert reason in accordance with clause 5.3 of the State Works Deed]*.

Terms defined in the Project Deed and the State Works Deed have the same meaning in this statement.

**Signed for and on behalf of
RMS Representative**

Date

IMPORTANT NOTE:

Any evaluation or issue of a Payment Statement by the **RMS Representative** will not:

1. constitute approval of any work nor will it be taken as admission or evidence that the part of the State Works covered by the Payment Statement has been satisfactorily carried out in accordance with the Project Deed or the State Works Deed; or
2. constitute a waiver of the requirements of clause 5.2 of the State Works Deed in relation to any

Payment Claim other than to the extent (if any) to which RMS expressly waives such requirements in respect of the Payment Claim the subject of the Payment Statement.

Schedule 8 - Independent Certifier's Certificate of Initial Works Contribution

(Clause 3(c))

NorthConnex Project (Project)

To: Roads and Maritime Services (RMS) and NorthConnex State Works Contractor Pty Ltd
(State Works Contractor)
Copy: Lend Lease Engineering Pty Limited and Bouygues Construction Australia Pty Ltd and
[insert name of Security Trustee]
From: APP Corporation Pty Limited

In accordance with the terms of clause 3(c) of the State Works Deed between RMS and the State Works Contractor dated [insert date] (**State Works Deed**) with respect to the Project, I certify that the entire Initial Works Contribution has been paid as at the Date of Initial Works Contribution specified below.

Date of Initial Works Contribution:

Terms defined in the State Works Deed have the same meaning in this certificate.

Signed for and on behalf of
APP Corporation Pty Limited

Date

Schedule 9 - Contractor Statement and supporting statement

(Clause 1.2)

Contractor's Statement

Contractor Statement

Payment of Workers, Worker's Compensation Premiums & Payroll Tax



Transport
Roads & Maritime
Services

This Statement must be provided whenever payment is sought for any work carried out for Roads and Maritime Services (RMS) by a Contractor (*see Notes 1 & 5 overleaf*).
RMS is entitled to withhold payment until this Statement is provided (*see Note 2*).

Workers Compensation
Insurance Certificate of
Currency for the work
period in question. Unless
the contractor is exempt



Details

Contractor's Legal Name	<input type="text"/>	
Contractor's Trading / Business Name	<input type="text"/>	
Contractor's ABN	<input type="text"/>	Contractor's ACN <input type="text"/>
Contractor's Address	<input type="text"/>	
Name or description of Contract or Works	<input type="text"/>	
Period of Work this Statement applies to (<i>see Note 3</i>)	From <input type="text"/>	To <input type="text"/>
Invoice or Payment Claim Numbers this applies to	<input type="text"/>	
Invoice or Payment Claim Dates this Statement applies to	<input type="text"/>	

Statement Validity Period

This Statement applies to all work performed by the Contractor for RMS in respect of the above Contract/ Works for the period stated above (*see Notes 3 & 4*).

Declaration

Tick one in each row

I declare that the following is true to the best of my knowledge and belief in respect of the Period of Work above:

• All workers engaged by the Contractor in respect of the works have been paid (<i>see Note 6</i>);	<input type="checkbox"/>
• All workers compensation insurance premiums have been paid and attached is a true copy of a Certificate of Currency for workers compensation insurance valid for the period covered by this Statement; or	<input type="checkbox"/>
• the Contractor is an exempt employer for workers compensation purposes (<i>see Note 7</i>);	<input type="checkbox"/>
• The Contractor is registered as an employer under the <i>Payroll Tax Act 2007</i> and has paid all payroll tax due in respect of employees; or	<input type="checkbox"/>
• the Contractor is not required to be registered;	<input type="checkbox"/>
• The Contractor has not engaged any subcontractors for the works, or	<input type="checkbox"/>
• The Contractor has engaged subcontractors and has obtained a similar statement to this Statement from each of those subcontractors (and believes it to be true)	<input type="checkbox"/>
• I am authorised to make this declaration and I am in a position to know the truth of its contents	<input type="checkbox"/>

Signature of Authorised Person

Name of Signatory (*print*)

Date

Position / Job Title of Signatory (*print - see Note 4*)

(*see Notes on page 2*)

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Notes

1. A Contractor is any person or company who carries out work under a contract of any kind for any business of RMS. References to “Subcontractor” and “Principal Contractor” in the legislation mentioned below have been changed in this Statement to “Contractor” and “RMS” respectively to avoid confusion.

2. This form is prepared for the purposes of section 127 of the *Industrial Relations Act 1996* (“IRA”), section 175B of the *Workers Compensation Act 1987* (“WCA”) and Schedule 2 Part 5 of the *Payroll Tax Act 2007* (“PTA”). These provisions allow RMS to withhold payment from a Contractor without any penalty unless and until the Contractor provides to RMS a Statement declaring that:

a. all workers compensation insurance premiums payable up to and including the date(s) on the Statement have been paid, and all premiums owing during the term of the contract will be paid; and

b. all remuneration payable to relevant employees for work under the contract has been paid; and

c. all payroll tax payable relating to the work undertaken has been paid.

3. Section 127 of the IRA says that the Statement must state the period to which it relates. For sequential statements ensure that the dates provide continuous coverage.

4. The person signing this declaration must be a person who is authorised by the Contractor either to sign this Statement (or to sign statements of this kind) and must be a person who is in a position to know the truth of the statements. The Contractor's principal accounting/financial officer may be appropriate. An individual project manager will normally not be appropriate. If the Contractor is a company then the person signing should be a director unless the company has delegated the power to sign such statements to another person (eg the principal accounting officer).

5. A Statement is not required where RMS is making payment to a receiver, liquidator or trustee in bankruptcy (see section 127(10) of the IRA, section 175B(12) of the WCA and Sch 2 Part 5 (20) of the PTA).

6. Section 127(6) of the IRA says that references to payments to workers means all types of remuneration to which they are entitled.

7. As of 30 June 2011, an employer is exempt from taking out workers compensation insurance if the employer pays less than \$7500 annually on wages, does not employ an apprentice or trainee and is not a member of a group for workers compensation purposes.

Generic Version of Statement

This form has been specially adapted for use specifically for Contractors working for RMS. Generic versions of this Statement for non-RMS use can be obtained at:

http://www.industrialrelations.nsw.gov.au/pdfs/subcontractor_statement_form.pdf; or

<http://www.osr.nsw.gov.au/lib/doc/forms/opt011.pdf>.

Record Retention

RMS will keep a copy of this Statement for 7 years. If the Contractor obtains a similar statement from its subcontractor then the Contractor must keep that statement for 7 years.

Offences for False Statement

Knowingly giving a false statement may be an offence under section 127(8) of the IRA, section 175B of the WCA and Sch 2 Part 5 clause 18(8) of the PTA.

Further Information

These notes are not intended as legal advice and Contractors should obtain their own professional advice if they have any questions about this Statement or these Notes. For more information, refer to OSR Revenue Ruling PT 59 at <http://www.osr.nsw.gov.au/lib/doc/rulings/rprt59.pdf>, visit the WorkCover website www.workcover.nsw.gov.au, Office of State Revenue website www.osr.nsw.gov.au, or the Office of Industrial Relations, Department of Commerce website www.commerce.nsw.gov.au. Copies of the *Workers Compensation Act 1987*, the *Payroll Tax Act 2007* and the *Industrial Relations Act 1996* can be found at www.legislation.nsw.gov.au.

Supporting Statement

This statement must accompany any payment claim served on a principal to a construction contract by a head contractor.

For the purposes of this statement, the terms “principal”, “head contractor”, “subcontractor”, and “construction contract” have the meanings given in section 4 of the *Building and Construction Industry Security of Payment Act 1999*.

*Head contractor: *[business name of head contractor]* ABN *[insert ABN]* has entered into a contract with *[business name of subcontractor]* ABN *[insert ABN]*, contract number/identifier *[insert]*.

OR

*Head contractor: *[business name of head contractor]* ABN *[insert ABN]* has entered into a contract with the subcontractors listed in the attachment to this statement.

**[delete whichever of the above does not apply]*

This statement applies for work between *[start date]* and *[end date]* inclusive (the construction work concerned), subject of the payment claim dated *[date]*.

I *[full name]* being the head contractor, a director of the head contractor or a person authorised by the head contractor on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of the matters that are contained in this supporting statement and declare that, to the best of my knowledge and belief, all amounts due and payable to subcontractors have been paid (not including any amount identified in the attachment as an amount in dispute).

Signature:

Full Name:

Date

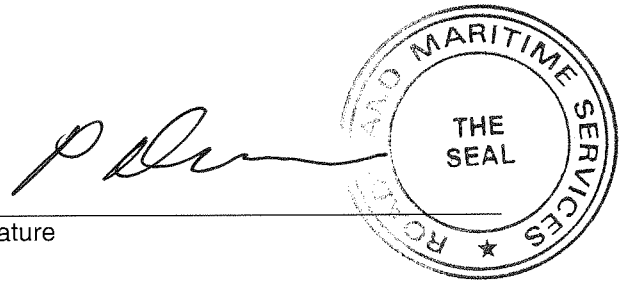
Position/Title:

Executed as a deed.

The Seal of Roads and Maritime Services
ABN 76 236 371 088 was hereunto affixed by its
authorised signatory:

Peter Duncan

Name



Signature

Executed by **NorthConnex State Works Contractor Pty Ltd** in accordance with
section 127 of the Corporations Act 2001 (Cth):

Andrew Sims

Signature of director

Andrew Sims

Full name of director

Andrew Head

Signature of company secretary/director

Andrew Head

Full name of company secretary/director