Amended from

Australian Standard™

General conditions of contract for design and construct

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This document has been amended from a Standards Australia document. A copy of the relevant marked up Standards Australia document can be provided on request.
This Australian Standard was prepared by Committee OB/3, General Conditions of Contract. It was approved on behalf of the Council of Standards Australia on 7 September 1999 and published on 27 December 2000.

The following interests are represented on Committee OB/3:

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Australian Chamber of Commerce and Industry
Australian Procurement and Construction Council
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This Standard was issued in draft form for comment as DR 97528.
PREFACE

This Standard was prepared by the Joint Standards Australia/Standards New Zealand Committee OB/3, General Conditions of Contract.

This Standard incorporates Amendment No 1 (March 2005). The changes required by the Amendment are indicated in the text by a marginal bar and amendment number against the clause, note, table, figure or part thereof affected.

This Standard is the result of a consensus among Australian and New Zealand representatives on the Joint Committee to produce it as an Australian Standard.

AS 4902—2000 General conditions of contract for design and construct, is a part of the suite of conditions of contract based on AS 4000—1997 General conditions of contract.

This Standard covers the following types of project procurement methods:

(a) design and construct;
(b) design development and construct; and
(c) design, novate and construct.

If the project procurement method chosen by the Principal is:

(a) design and construct—the Principal would provide the Principal’s project requirements, would not normally provide a detailed preliminary design and would not require novation;

(b) design development and construct—the Principal would provide the Principal’s project requirements, would always provide a preliminary design and accordingly would complete Annexure Part A Items 10 and 11;

(c) design, novate and construct—the Principal would provide the Principal’s project requirements, would always provide a preliminary design, would complete Annexure Part A Items 10 and 11 and would complete Annexure Part A Item 20 stating which subcontract (including consultant’s agreement) or selected subcontract is to be novated to the Contractor.

Subclauses 8.6 and 29.2, prefixed by *, are optional, and may be omitted in the Contract, where necessary, without making consequential amendments but such omission should be clearly shown on the face of the document by striking out these subclauses or indicating clearly in clause 1 of Annexure Part E or elsewhere that they are not to apply. See paragraph (i) of clause 1 for the effect of stating deletions in Annexure Part E.

Warnings

(1) Users of this Australian Standard are warned that clause 15 (Damage to persons and property other than WUC) does not limit the liability of parties for special, indirect or consequential losses.

This unlimited liability applies notwithstanding any limitations or exclusions permitted under insurance clauses 16A (Insurance of the Works), 16B (Professional indemnity insurance) and 17 (Public liability insurance).

Parties wishing to limit their liability should seek insurance and legal advice before entering a contract under this Standard.

(2) Principals should ensure that their specific requirements are fully and completely incorporated in the Principal’s project requirements obtaining specialist advice if necessary. Where a Contractor provides a proposed design as part of its tender, the parties should consider whether that design should form part of the preliminary design.

(3) The risk allocation, drafting, interpretation and construction of this Standard are interrelated. Users who alter the Standard do so at their own risk and
should obtain specialist advice as to whether it is suitable for a particular project.

(4) Contractors should ensure that they satisfy the requirements of payment for unfixed plant and materials.

(5) Legislation has come into force in some jurisdictions dealing with security of payments. Parties intending to use this Standard should seek expert advice as to their rights and obligations under such legislation.
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Annexure – Part A 60
1 Interpretation and construction of Contract

1.1 Definitions

In the Contract, except where the context otherwise requires:

- **Item** means an Item in Annexure Part A;
- **Access Legislation** has the meaning given to that term in the Extension Project Agreement;
- **Access Regulator** has the meaning given to that term in the Extension Project Agreement;
- **Access Seeker** has the meaning given to that term in the Extension Project Agreement;
- **access undertaking** has the meaning given to that term in the Extension Project Agreement;
- **adjustment event** has the meaning given in clause 35A;
- **advance deduction amount** means the amount stated in Item 7C;
- **advance payment** means the amount stated in Item 7B;
- **allocation principles** means the principles which detail how any adjustments to the contract sum should be allocated across the different Segments, as contained in Annexure Part I;
- **baseline contamination** means contamination on or under the site and its near surrounds (if any) identified in the baseline site report;
- **baseline program** means the program for performance of the WUC, which at the date of this Contract is the program contained in Annexure Part H, as updated from time to time in accordance with clause 31;
- **baseline site conditions** means the physical conditions on the site and its near surrounds identified in the baseline site report;
- **baseline site report** means the report (or reports) contained or referred to in Annexure Part G;
- **business day** means any day other than a Saturday, Sunday, Public Holiday in Queensland or 27, 28, 29, 30 and 31 December;
certificate of practical completion has the meaning in subclause 33.6;

Claim has the meaning given to that term the Extension Project Agreement;

compensable cause means:

(a) any act, default or omission of the Independent Certifier, the Principal or its consultants, agents or other contractors (not being a contractor employed by the Contractor); or

(b) those listed in Item 31;

Compensation Payment the amount of compensation payable by the Contractor to the Principal where the Contract is terminated by the Principal under subclause 38.4(b), calculated in accordance with subclause 38.12;

Condition Precedent Satisfaction Date has the meaning given to that term in the Extension Project Agreement;

confidential information of a disclosing party means:

(a) the terms of this Contract; and

(b) information disclosed (whether before or after the commencement of this Contract) by, or on behalf of, the disclosing party to the recipient which:

(i) is by its nature confidential or commercially sensitive;

(ii) is identified by the disclosing party as confidential or commercially sensitive;

(iii) the recipient knows or ought to know is confidential or commercially sensitive; or

(iv) relates to the business, operations or financial affairs of the disclosing party or a related body corporate of it,

but does not include information which:

(v) is or becomes public knowledge other than by breach of the Contract or by a breach of confidentiality by the recipient or any third party to whom the recipient has disclosed the information;

(vi) is in the possession of the recipient or a related body corporate of it without restriction in relation to disclosure before the date of receipt; or
(vii) has been independently developed or acquired by the recipient or a related body corporate of it;

**consequential loss** means:

(a) any loss of profits, loss of production, loss of revenue or wasted overheads;

(b) any loss of whatever nature concerning the supply of product from a mine to any third party or the making of product available to transport;

(c) any loss of business opportunities;

(d) any loss of or damage to goodwill or reputation;

(e) any loss of or damage to credit rating; and

(f) any loss or damage that does not naturally, according to the usual course of things, flow from a breach of contract,

but does not include, and the exclusion in clause 43.2 does not apply to, any of the following Claims to the extent that the party that has suffered or incurred such loss would in the absence of this definition be entitled to recover them at law:

(g) any additional costs or expenses reasonably incurred by that party in connection with mitigating the effects of any breach of the Contract by the other party (including implementing a workaround solution in respect of or otherwise mitigating any failure of a party to comply with the requirements (including warranties) of the Contract) provided that if a loss arising from the breach of the Contract is itself not recoverable because it is a Consequential Loss, the costs or expenses incurred in mitigating that loss shall also be treated as (non-recoverable) Consequential Loss;

(h) a Loss (including a Loss arising out of a Claim by a third party) in respect of:

(i) the cost of repairing, replacing or reinstating any real or personal property of any person (including the Contractor or the Principal) that has been lost, damaged or destroyed; or

(ii) personal injury to or death of any person;

(i) in respect of any personal injury claim, special loss or economic loss as those terms are used in the context of personal injury claims;
(j) any liquidated damages for which that party is liable under the *Contract* or compensation pursuant to subclause 38.12;

(k) the break fee pursuant to subclause 39.2; or

(l) any fines or penalties imposed by a governmental or regulatory body for failure by that party to comply with any legislative requirement as a result of the other party's failure to comply with the requirements of the *Contract*, and any costs or expenses incurred by the that party in dealing with any actions, investigations, inquiries or proceedings by a governmental or regulatory body in respect of such failures or breaches;

**construction plant** means appliances and things used in the carrying out of WUC but not forming part of the *Works*;

**consultant** means any person engaged by the *Contractor* to perform consultancy services in connection with WUC;

**contamination** means the presence on, in, over or under land (including surface, subsurface and ground water) of a substance (including odours) or heat, sound, vibration or radiation at a concentration or intensity above the concentration or intensity at which the substance, heat, sound, vibration or radiation is normally or naturally present on, in, over or under that land (including surface, subsurface and ground water) in the same locality, being a presence that presents a risk of harm to human health or any other aspect of the environment;

**Contract** means the contract comprising the documents listed in the *Formal Instrument of Agreement* as together forming the contract;

**contract sum** means the lump sum payable by the *Principal* to the *Contractor* to complete the *Works*, as specified in clause 2 of the *Formal Instrument of Agreement*, including provisional sums but excluding any pre-funding payment;

**Contractor** means the person bound to carry out and complete WUC;

**Contractor’s design obligations** means all tasks necessary to design and specify the *Works* required by the *Contract*, including preparation of the design documents and, if the documents stated in Item 10 as describing the *Principal’s project requirements* include a preliminary design, developing the preliminary design;

**Contractor’s Requirements** means the standards, safety management system requirements and other rail infrastructure requirements from time to time of the *Contractor* in its capacity as Rail Infrastructure Manager of the rail infrastructure;
date for practical completion means the date provided in Item 7, but if any EOT for practical completion is directed by the Independent Certifier, granted by the Principal or allowed in any expert determination or litigation, it means the date resulting therefrom;

date of practical completion means:
(a) the date evidenced in a certificate of practical completion as the date upon which practical completion was reached; or
(b) where another date is determined in any expert determination or litigation as the date upon which practical completion was reached, that other date;
defect means any:
(a) defect, shrinkage, movement, error, omission, deficiency or other imperfection in the Works in respect of, or arising from, any cause including design, materials or workmanship;
(b) aspect of the Works which is not in accordance with this Contract; or
(c) physical damage to the Works resulting from any of the matters referred to in paragraphs (a) and (b) of this definition;
defects rectification period has the meaning given in Item 32;
defects register has the meaning given in subclause 34.2(a);
Depreciating Asset means an asset that satisfies section 40-30 of the Income Tax Assessment Act 1997 (Cth);
design documents means the drawings, specifications and other information, samples, models, patterns and the like required by the Contract and created (and including, where the context so requires, those to be created by the Contractor) for the construction of the Works;
direction includes agreement, approval, assessment, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement;
disclosing party has the meaning in subclause 8.5(a);
discretionary variation has the meaning in subclause 35.1;
dispute has the meaning in clause 41;
EOT (from ‘extension of time’) has the meaning in subclause 33.3;
excepted risk has the meaning in subclause 14.3;

Expansion has the meaning given to that term in the access undertaking;

Extension has the meaning given to that term in the Unit Holders Deed;

Extension Infrastructure Sub-Lease has the meaning given to that term in the Extension Project Agreement;

Extension Land has the meaning given to that term in the Rail Corridor Agreement;

Extension Project Agreement means the agreement entitled “User Funding – Extension Project Agreement: [insert Extension name]” between the Principal, the Contractor and others;

Financier’s Engineer [Drafting note: subject to confirmation that financiers will be appointing a separate engineer]

final certificate has the meaning in subclause 36.4;

final payment has the meaning in clause 36;

final payment claim means the final payment claim referred to in subclause 36.4;

force majeure event means:

(a) storm surge, earthquake, tsunami, typhoon, tornado, cyclone, dust storms, flood, fire, explosion, washaway, landslide, catastrophe, and/or other natural calamity or physical disaster;

(b) riot, piracy, war, invasion, terrorist act, act of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, blockade or civil commotion;

(c) malicious damage or sabotage;

(d) ionising radiation or contamination by radioactivity;

(e) failure of electricity supply from the electricity grid;

(f) embargo or sanctions arising from any act of any government or other authority or agency;

(g) epidemic, pandemic, or quarantine restriction;

(h) pressure waves caused by aircraft or other aerial devices travelling at sonic or super-sonic speeds;

(i) maritime or aviation disasters;

(j) the discovery of unexploded ordnance; and

(k) encountering any species of flora or fauna which delays the WUC because it poses a danger to health and safety or due to the requirement to protect or conserve that flora or fauna; and
(l) train or motor vehicle accident
but only to the extent that:

(m) it is beyond the reasonable control of (and not caused by) the party claiming the force majeure event (including any subcontractor or any agent or employee of any of them); and

(n) the risk is not expressly assumed elsewhere in the Contract by one of the parties;

Formal Instrument of Agreement means the formal instrument of agreement forming part of this Contract;

GST has the meaning given in the GST Law;

GST Law has the meaning given to that expression in the A New Tax System (Goods and Services Tax) Act 1999 (Cth);

Independent Certifier means the person appointed to carry out the Independent Certifier Services on the terms of the Independent Certifier Deed in accordance with clause 19;

Independent Certifier Deed means the document so entitled between the Independent Certifier, the Principal, the Contractor and the Access Regulator, which is in the form (or substantially in the form) of the document contained in Annexure Part K;

Independent Certifier Services means the services required to be performed by the Independent Certifier under the Independent Certifier Deed and the administration of this Contract and the performance of duties which this Contract requires the Independent Certifier to perform;

insolvency event has the meaning given to that term in the Extension Infrastructure Sub-Lease;

Insurance Schedule means the schedule contained in Annexure Part F;

Integrated Network Deed has the meaning given to that term in the Extension Project Agreement;

intellectual property right means any patent, registered design, trademark or name, copyright or other protected right;

joint claim has the meaning given to that term in subclause 33.5B;

Landholder Requirements has the meaning given to that term in the Rail Corridor Agreement;

latent condition has the meaning in subclause 24.1;

legislative requirement includes:

(a) Acts, Ordinances, regulations, by-laws, orders, awards and proclamations of the jurisdiction where WUC or the particular part thereof is being carried out;
(b) certificates, licences, consents, permits, approvals and requirements of organisations having jurisdiction in connection with the carrying out of WUC; and

(c) fees and charges payable in connection with the foregoing;

Loss has the meaning given to that term the Extension Project Agreement;

payment claim means a claim for payment made by the Contractor under clause 36;

peak exposure date means the date on which the termination exposure amount is greater than on any other day during the term of this Contract, calculated in reference to the projected termination costs modelling contained in Annexure Part E;

peak termination exposure means the amount stated in Item 7D, being the termination exposure amount on the peak exposure date, calculated with reference to the project termination costs modelling contained in Annexure Part E (which modelling will have regard to the amount of any advance payment projected to be made by the Principal under the Contract in determining the termination exposure amount);

practical completion is that stage in the carrying out and completion of WUC when:

(a) the Works are complete in accordance with the requirements of this Contract (including the Principal’s project requirements) except for minor defects:

(i) which do not prevent the Works from being reasonably capable of being used for their stated purpose;

(ii) which the Independent Certifier determines the Contractor has reasonable grounds for not promptly rectifying; and

(iii) the rectification of which will not prejudice the convenient use of the Works;

(b) those tests which are required by the Contract to be carried out and passed before the Works reach practical completion have been carried out and passed;

(c) documents and other information required under the Contract which, in the Independent Certifier’s opinion, are essential for the use, operation and maintenance of the Works have been supplied; and
(d) the Contractor in its capacity as “Rail Infrastructure Manager” has certified that the Works are ready to enter operational service;

Preference Unit Holder means the meaning given to that term in the Unit Holders Deed;

pre-funding payment means the amount payable by the Principal for feasibility and other work undertaken by the Contractor in respect of the Works prior to the date of this Contract, being the amount stated in Item 7A;

pre-termination work has the meaning in subclause 39B(a);

preliminary design means the documents stated in Item 11;

prescribed notice has the meaning in subclause 40.1;

pricing information means any pricing or cost information in relation to:

(a) the conduct of WUC other than WUC undertaken by subcontractors or suppliers of the Contractor; and

(b) the conduct of WUC undertaken by subcontractors or suppliers of the Contractor if, and to the extent that, such information falls within the scope of a defined set of information which is agreed between the Contractor and the applicable subcontractor or supplier (at the time of entry into the applicable subcontract or supply agreement) as being pricing information;

Principal means the Principal stated in Item 1;

Principal’s Approvals means the certificates, licences, consents, permits and approvals specified in Item 9A which must be obtained by the Principal;

Principal’s Engineer means the person appointed by the Principal (and notified to the Contractor and the Independent Certifier) to inspect the progress of the WUC on behalf of the Principal;

Principal’s project requirements means the Principal’s written requirements for the Works described in the documents stated in Item 10 which:

(a) shall include the stated purpose for which the Works are intended;

(b) may include the Principal’s design, timing and cost objectives for the Works; and

(c) where stated in Item 10, shall include a preliminary design;

program has the meaning in clause 31;

progress certificate has the meaning in subclause 36.1(d);

progress payment has the meaning in subclause 36.1(h);
provisional sum has the meaning in clause 3 and includes monetary sum, contingency sum and prime cost item;

public liability policy has the meaning in clause 16;

QCA Act means the Queensland Competition Authority Act 1997 (Qld);

QCA determination means a determination made by the Access Regulator in respect of the Extension;

qualifying cause of delay means:
(a) any act, default or omission of the Independent Certifier, the Principal or its consultants, agents or other contractors (not being employed by the Contractor) including a delay by the Independent Certifier in certifying the price of a discretionary variation under subclause 35.3(a)(i);

(b) an adjustment event; or

(c) any event or delay which this Contract provides gives rise to an entitlement for the Contractor to claim an EOT;

Rail Corridor Agreement has the meaning given to that term in the Extension Project Agreement;

rail infrastructure means rail transport infrastructure (as defined under the TIA) for which the Contractor is the owner, lessee or sublessee (including, for the avoidance of doubt, the rail infrastructure of the Extension), the use of which is declared for the purposes of Part 5 of the Access Legislation pursuant to section 250(1)(a) of the Access Legislation;

Rail Infrastructure Manager has the meaning given to that term in the Rail Safety National Law (Queensland) Act 2017 (Qld);

recipient has the meaning in subclause 8.5(a);

Redundant Extension Infrastructure means “Redundant Extension Infrastructure” as defined in:
(a) the Extension Infrastructure Head-Lease; and/or
(b) the Extension Infrastructure Sub-Lease;

Regulatory Asset Base has the meaning given to that term in the access undertaking;

required rating has the meaning in subclause 5.2;
scope difference means any part of the scope in the Principal’s project requirements set out in Annexure Part B that as a result of a QCA determination:

(a) is different to the scope for the Works included in the Contractor’s documents or submissions to the QCA as part of the Expansion Process; and

(b) requires the Contractor to construct that part of the Works to a standard that is not in accordance with the Contractor’s Requirements, details of which are set out in Annexure Part M

security has the meaning given to that term in subclause 5.1(a);

Segments has the meaning to that term in the Unit Holders Deed;

separable portion means a portion of the Works identified as such in the Separable Portion Annexure;

site means the lands and other places to be made available and any other lands and places made available to the Contractor by the Principal for the purpose of the Contract;

subcontractor in clause 3 includes a consultant;

substantial breach means:

(a) in respect of the Contractor, the breaches of this Contract listed in subclause 38.2; and

(b) in respect of the Principal, the breaches of this Contract listed in subclause 38.7;

temporary works means work used in carrying out and completing WUC, but not forming part of the Works;

termination exposure amount means the amount which would be payable to the Contractor if the Contract was terminated under subclauses 32.5, 35A.3(b) or 39.1;

test has the meaning in subclause 29.1 and includes examine and measure;

TIA has the meaning given to that term in the Extension Infrastructure Sub-Lease;

Train has the meaning given to that term in the access undertaking;

Transaction Document and Transaction Documents have the meaning given to those terms in the Extension Project Agreement;

Trust Administration Costs has the meaning given to that term in the Unit Holders Deed;
unexpected contamination means any contamination at the site which is not baseline contamination;

Unit Holders Deed has the meaning given to that term in the Extension Project Agreement;

WHS Act means the Work Health and Safety Act 2011 (Qld);

the Works means the whole of the work to be carried out and completed in accordance with the Contract, including work that occurs as a result of discretionary variations or adjustment events provided for by the Contract, which by the Contract is to be handed over to the Principal;

work includes the provision of materials;

work site means each part of the site or place WUC is to be performed and other obligations under the Contract fulfilled; and

WUC (from ‘work under the Contract’) means the work which the Contractor is or may be required to carry out and complete under the Contract and includes any work that occurs as a result of discretionary variations or adjustment events, remedial work, construction plant and temporary works,

and like words have a corresponding meaning.

1.2 Interpretation

In the Contract:

(a) references to days mean calendar days and references to a person include an individual, firm or a body, corporate or unincorporate;

(b) time for doing any act or thing under the Contract shall, if it ends on a day that is not a business day, be deemed to end on the day next following which is a business day;

(c) clause headings and subclause headings shall not form part of, nor be used in the interpretation of, the Contract;

(d) words in the singular include the plural and words in the plural include the singular, according to the requirements of the context. Words importing a gender include every gender;

(e) communications between the Principal, the Independent Certifier and the Contractor shall be in the English language;

(f) measurements of physical quantities shall be in legal units of measurement of the jurisdiction in Item 8;

(g) unless otherwise provided, prices are in the currency in Item 9(a) and payments shall be made in that currency at the place in Item 9(b); and

(h) the law governing the Contract, its interpretation and construction, and any agreement to arbitrate, is the law of the jurisdiction in Item 8.
1.3 Contra proferentum
In the interpretation of this Contract no rule of construction applies to the disadvantage of one party on the basis that the party put forward or drafted this Contract or any provision in it.

2 Nature of Contract
2.1 Performance and payment
The Contractor shall carry out and complete WUC in accordance with the Contract and directions authorised by the Contract.

The Principal shall pay the Contractor for the due and proper performance of the carrying out and completion of WUC the contract sum adjusted by any additions or deductions made pursuant to the Contract.

2.2 Contractor’s warranties
(a) Subject to subclauses 2.2(b) and 2.2(c), and without limiting the generality of subclause 2.1, the Contractor warrants to the Principal that the Contractor:

(i) at all times shall be suitably qualified and experienced, and shall exercise due skill, care and diligence in the carrying out and completion of WUC;

(ii) has examined any preliminary design included in the Principal’s project requirements and that such preliminary design is suitable, appropriate and adequate for the purpose stated in the Principal’s project requirements;

(iii) shall carry out and complete the Contractor’s design obligations to accord with the Principal’s project requirements; and

(iv) shall carry out and complete WUC in accordance with the design documents so that the Works, when completed, shall:

(A) be fit for their stated purpose; and

(B) comply with all the requirements of the Contract.

(b) The Contractor provides no warranty to the Principal as to whether the railway, as augmented by the Works, will fulfil the incremental capacity requirements of the Principal or any capacity requirements stated in the Principal’s project requirements.

(c) The Contractor provides no warranty to the Principal that any part of the Works or the WUC required which is a scope difference will be fit for its stated purpose and the warranty under subclause 2.2(a)(iv)(A) shall not apply in respect of any scope difference.

2.3 Warranties unaffected
The warranties remain unaffected notwithstanding:

(a) that design work (including the preliminary design) has been carried out by or on behalf of the Principal and included in the Principal’s project requirements;

(b) any receipt or review of, or comment or direction on, the design documents by the Independent Certifier; or

(c) any discretionary variation or adjustment event.
3 Provisional sums

A provisional sum included in the Contract shall not itself be payable by the Principal but where pursuant to a direction the work or item to which the provisional sum relates is carried out or supplied by the Contractor, the work or item shall be priced by the Independent Certifier, and the difference shall be added to or deducted from the contract sum.

Where any part of such work or item is carried out or supplied by a subcontractor, the Independent Certifier shall allow the amount payable by the Contractor to the subcontractor for the work or item, disregarding:

(a) any damages payable by the Contractor to the subcontractor or vice versa; and
(b) any deduction of cash discount for prompt payment,

plus an amount for profit and attendance calculated by using the percentage thereon stated in Item 13 or elsewhere in the Contract, or, if not so stated, as assessed by the Independent Certifier.

4 Separable portions

The interpretations of:

(a) date for practical completion;
(b) date of practical completion;
(c) practical completion;
(d) certificate of practical completion; and
(e) defects rectification period,

and clauses 5, 14, 16, 33, 34, and 36.4 will apply separately to each separable portion and references therein to WUC and the Works will mean so much of those things as is comprised in the relevant separable portion.

[Drafting note: A Separable Portion may (but will not always) be the same as a Segment. Segments are a different concept (used to determine cost contributions between Preference Unit Holders), whereas Separable Portions may encompass parts of a number of Segments being discrete physical components of work.]

5 Security

5.1 Provision

(a) Within 10 business days of the Condition Precedent Satisfaction Date the Principal shall provide the Contractor, as security for the Principal’s payment obligations under the Contract, bank guarantees in aggregate equal to the peak termination exposure (‘security’).

(b) Security provided in accordance with subclause 5.1(a) must satisfy the requirements listed in subclause 5.2.
5.2 Requirements of security

Security must:

(a) be in the form contained in Annexure Part J (or such other form as the Contractor may approve);
(b) be in favour of the Contractor;
(c) be unconditional; and
(d) be at all times provided by an issuer bank that maintains the credit rating stated in Item 14 (the ‘required rating’).

5.3 Recourse

The Contractor may only have recourse to the security if:

(a) the Contractor is entitled to payment of an amount from the Principal under the Contract;
(b) the Contractor remains unpaid by the Principal for any amounts it is entitled to be paid under the Contract after the time for payment for that amount pursuant to the terms of the Contract; and
(c) at least 5 days have elapsed since the Contractor notified the Principal of its intention to have recourse to the security.

5.4 Replacement Security

If:

(a) any security provided by the Principal under this clause 5 has an expiry date; or
(b) the credit rating of the entity providing the security under this clause 5 falls below the minimum specified in clause 5.2,

the Principal shall provide a replacement security to the Contractor which complies with all requirements stipulated in this clause 5:

(c) in the case of (a) above, by the date which is fourteen (14) days before the date on which the relevant security is due to expire; or
(d) in the case of (b) above, within fourteen (14) days of the credit rating falling below the minimum required by this clause 5,

and such replacement security shall be effective from the date of receipt.

Subclause 5.4 does not require the Principal to issue a replacement security where the date by which the Contract requires the Contractor to return a security to the Principal predates the expiry date of that security.

The Contractor shall simultaneously return the original security to the Principal in exchange for a replacement security which complies with all requirements stipulated in this clause 5.
5.5 **Reduction and release**
Subject to its rights to have recourse to the *security*, the *Contractor* must upon the written request of the *Principal* on or after the *peak exposure date* release the *security* as follows:

(a) when the value (as assessed by the *Independent Certifier*) of the *termination exposure amount* is less than or equal to 75% of the *peak termination exposure*, that part of the *security* so that the amount of the *security* held by the *Contractor* is equal to 75% of the *peak termination exposure*;

(b) when the value (as assessed by the *Independent Certifier*) of the *termination exposure amount* is less than or equal to 50% of the *peak termination exposure*, that part of the *security* so that the amount of the *security* held by the *Contractor* is equal to 50% of the *peak termination exposure*;

(c) when the value (as assessed by the *Independent Certifier*) of the *termination exposure amount* is less than or equal to 25% of the *peak termination exposure*, that part of the *security* so that the amount of the *security* held by the *Contractor* is equal to 25% of the *peak termination exposure*; and

(d) when the value (as assessed by the *Independent Certifier*) of the *termination exposure amount* is 0% of the *peak termination exposure*, any remaining *security*.

5.6 **Trusts and interest**
Any interest earned on the *security* will be retained by the *Contractor*. The *Contractor* shall not hold the *security* or the proceeds of the *security* on trust.

5.7 **Not used**

5.8 **Quantum of Security**
The parties acknowledge and expressly agree that this *Contract* is not subject to the condition that may otherwise be implied by section 67K(2) of the *Queensland Building and Construction Commission Act 1991* (Qld). Section 67K(2) implies a condition into building contracts that the total value of security and retention moneys held prior to *practical completion* is not to be more than 5% of the contract price, unless the contract expressly provides otherwise.

By initialling this **subclause 5.8** in the space provided below, the parties expressly agree that this *Contract* is not subject to the condition imposed by section 67K(2) and explained above.

*Initialled for and on behalf of the Contractor: ........................................
Initialled for and on behalf of the Principal:........................................

6 **Evidence of Contract**
The *Formal Instrument of Agreement* is evidence of the *Contract* once it has been executed by the parties.
7 Service of notices

A notice (and other documents) shall be deemed to have been given and received:

(a) if addressed or delivered to the relevant address in the Contract or last communicated in writing to the person giving the notice; and

(b) on the earliest date of:
   (i) actual receipt;
   (ii) confirmation of correct transmission of fax; or
   (iii) 3 days after posting.

8 Contract documents

8.1 Discrepancies

When construing the documents which together form the Contract the following rules of construction apply:

(a) in the event of any inconsistency between the documents which form the Contract, the order of precedence is provided in clause 5 of the Formal Instrument of Agreement; and

(b) figured shall prevail over scaled dimensions in a discrepancy.

Otherwise, if either party discovers any inconsistency, ambiguity or discrepancy in any document in the documents which form the Contract, that party shall give the Independent Certifier written notice of it. The Independent Certifier, thereupon, and upon otherwise becoming aware, shall direct the Contractor as to the interpretation and construction to be followed.

If any direction under this subclause directs that any discrepancy, ambiguity or discrepancy be resolved other than in accordance with the order of precedence in clause 5 of the Formal Instrument of Agreement and this causes the Contractor to incur more or less cost than otherwise would have been incurred had the direction not been given, the direction shall be an adjustment event and the Contractor will be entitled to claim an adjustment to the contract sum in accordance with clause 35A.

Otherwise, the Contractor shall bear the cost of compliance with a direction under this subclause.

8.2 Principal-supplied documents

The Principal shall supply to the Contractor the documents and number of copies thereof, both stated in Item 16.

They shall:

(a) remain the Principal’s property and be returned to the Principal on written demand; and

(b) not be used, copied nor reproduced for any purpose other than WUC.
8.3 Contractor-supplied documents

The Contractor shall supply to the Independent Certifier the documents and number of copies at the times or stages stated in Item 17.

Other documents and information required by the Contract, unless elsewhere stated in the Contract, shall be supplied not less than 14 days before the work described in the documents is commenced and shall be in a form satisfactory to the Independent Certifier.

If the Contractor submits a document to the Independent Certifier, then except where the Contract otherwise provides:

(a) the Independent Certifier shall not be required to check that document for errors, omissions, inconsistencies, ambiguities, discrepancies or compliance with the Contract;

(b) any Independent Certifier's acknowledgment, comment or approval shall not affect the warranties given by the Contractor or prejudice the Contractor's obligations under the Contract; and

(c) if the Contract requires the Contractor to obtain the Independent Certifier's direction about that document, the Independent Certifier shall give, within the time stated in Item 18, the appropriate direction, including reasons if the document is not suitable.

The Contractor may rely on an Independent Certifier's direction to change any documents submitted to the Independent Certifier by the Contractor unless and until such direction is amended or overturned by a determination under clause 41 of this Contract. If:

(a) a direction is made by the Independent Certifier to change a document submitted pursuant to this subclause 8.3;

(b) the Contractor notifies the Independent Certifier in writing before any WUC is performed in reliance upon the changed document that it is of the view that the change was not necessary for compliance with the Contract and the Independent Certifier does not reverse the direction to change the relevant document (or does so after some WUC has been performed in reliance upon the direction of the Independent Certifier); and

(c) the directed change is determined under clause 41 of this Contract to have not been required for the relevant document to comply with the Contract, the Independent Certifier's direction under this clause shall be treated as an adjustment event under clause 35A (where the Independent Certifier reversed its direction after some WUC had been performed in reliance upon the direction, the adjustment event ends upon the Independent Certifier's reversal of the direction).

The Contractor's right under this subclause 8.3 to rely on an Independent Certifier's direction does not limit or otherwise affect any warranty given by the Contractor under the Contract.

Copies of documents supplied by the Contractor shall be the Principal's property but shall not be used nor copied otherwise than for the use, repair, maintenance or alteration of the Works.
8.4 Availability

The Contractor shall keep available to the Independent Certifier and the Principal one complete set of documents affecting WUC (supplied by a party or the Independent Certifier):

(a) on site, until the date of practical completion (or where there are separable portions, the last date of practical completion); and

(b) at the Contractor’s corporate office, for a period of 7 years after the date of practical completion (or where there are separable portions, the last date of practical completion).

8.5 Confidential information

(a) Without limiting the rights and obligations of either party under another Transaction Document with respect to confidentiality, a party (‘recipient’):

(i) may use confidential information of the other party (‘disclosing party’) only for the purposes of the Contract; and

(ii) must keep confidential all confidential information of a disclosing party except for disclosures permitted under subclause 8.5(b).

(b) A recipient may disclose confidential information of a disclosing party:

(i) where disclosure is compelled by law;

(ii) where the disclosing party is seeking to have any work pre-approved by the Access Regulator, to the Access Regulator, or if disclosure is lawfully required by the Access Regulator;

(iii) to the Independent Certifier, Principal’s Engineer or an independent expert appointed in accordance with this Contract;

(iv) to those employees and agents of the recipient who need to know or use confidential information of the disclosing party;

(v) where disclosure is authorised in writing by the disclosing party; or

(vi) where the information is in the public domain other than through a breach of this subclause 8.5.

(c) This subclause 8.5 shall survive the termination of the Contract.

8.6 Media

Neither party shall disclose any information concerning the project for distribution through any communications media without the other party’s prior written approval (which shall not be unreasonably withheld).

8.7 Variation pricing information

(a) The parties agree that other than in accordance with subclauses 8.7(b) to 8.7(e) inclusive nothing in the Contract requires the Contractor to disclose pricing information in relation to the contract sum to the Principal, the Independent Certifier, the Principal’s Engineer nor Financier’s Engineer and the Contractor will not be required to disclose any pricing information in relation to the contract sum to the Principal, the Independent Certifier, the Principal’s Engineer nor Financier’s Engineer.
(b) At the written request of the Principal the Contractor will disclose pricing information to the Principal if such disclosure is necessary for the Principal to assess or agree any provisional sum or the amount of any adjustment to the contract sum in respect of an adjustment event provided that:

(i) the Principal will only use the pricing information for the purposes described in subclause 8.7(b) and will not disclose pricing information to any person other than those employees and agents of the Principal who need to know or use that information in connection with those purposes; and

(ii) without limiting subclause 8.7(b)(i), the Principal must not disclose pricing information to any Preference Unit Holders or Access Seekers.

(c) At the written request of the Independent Certifier the Contractor will disclose pricing information to the Independent Certifier provided that such disclosure is necessary for the Independent Certifier to carry out the Independent Certifier Services.

(d) At the written request of the Access Regulator the Contractor will disclose pricing information to the Access Regulator provided that:

(i) such disclosure is necessary for the Access Regulator to carry out its statutory functions as regulator in respect of the Transaction Documents; and

(ii) the Access Regulator first enters into a confidentiality agreement with the Contractor whereby the Access Regulator agrees to keep pricing information confidential in accordance with the terms of this subclause 8.7.

(e) The parties agree that the Independent Certifier may share pricing information with the Principal’s Engineer and Financier’s Engineer if required by that person to properly carry out its duties, provided that the Principal will procure that the Principal’s Engineer and Financier’s Engineer do not share pricing information with any person other than the Independent Certifier.

9 Assignment and subcontracting

9.1 Assignment

Neither party shall, without the other’s prior written approval (including approval of the terms of the assignment) assign the Contract or any payment or any other right, benefit or interest thereunder other than as permitted in accordance with the terms of clauses [11.4 and/or 11.5 of] the Extension Project Agreement.

9.2 Principal granting security

The Contractor consents to the Principal granting security over its rights under this Contract in accordance with clause [16.6] of the Integrated Network Deed.
9.3 Not used

9.4 Not used

9.5 Contractor’s responsibility

Except where the Contract otherwise provides, the Contractor shall be liable to the Principal for the acts, defaults and omissions of subcontractors and employees and agents of subcontractors as if they were those of the Contractor.

10 Intellectual property rights

10.1 Warranties and indemnities

(a) The Principal warrants that other than any design, materials, documents and methods of working warranted by the Contractor under subclause 10.1(b), the Principal’s project requirements shall not infringe any intellectual property right.

(b) The Contractor warrants that any design, materials, documents and methods of working provided by the Contractor, including any provided to the Principal by or on behalf of the Contractor which form part of the Principal’s project requirements, shall not infringe any intellectual property right. The Contractor must acquire sufficient intellectual property rights from subcontractors and suppliers to enable it to comply with this subclause.

(c) Each party shall indemnify the other against such respective infringements.

10.2 Not used

11 Legislative requirements

11.1 Compliance

The Contractor shall satisfy all legislative requirements except those in Item 22(a) which are to be satisfied by or on behalf of the Principal.

The Contractor, upon finding that a legislative requirement is at variance with the Contract or the Principal’s project requirements, shall as soon as reasonably practicable give the Independent Certifier and the Principal written notice thereof.

11.2 Changes

(a) If any change in a legislative requirement:

(i) necessitates a change:

(A) to the Principal’s project requirements;

(B) to the Works;

(C) to so much of WUC as is identified in Item 22(b);

(D) to an order or award of the jurisdiction where WUC (or a particular part thereof) is being carried out;
(E) being the provision of services by a municipal, public or other statutory
authority in connection with WUC; or
(F) in a fee or charge or payment of a new fee or charge;
(ii) the change comes into effect between:
(A) the date of this Contract; and
(B) the date of practical completion; and
(iii) causes the Contractor to incur more or less cost than otherwise would have
been incurred.
that change will be treated as an adjustment event and the Contractor will be entitled
to an adjustment to the contract sum in accordance with clause 35A.

(b) The parties agree that no changes in legislative requirements have been priced into
the contract sum as at the date of the Contract.

11.3 Approvals
(a) The Principal must obtain Principal’s Approvals.
(b) The Contractor shall obtain and maintain, at the Contractor’s cost and expense, all
approvals (other than Principal’s Approvals) necessary for the lawful
design and
construction of the Works and carrying out the WUC.

11.4 Workplace Health and Safety
(a) For the purpose of this subclause 11.4 the words “Principal Contractor”, “serious
bodily injury”, “work-related illness” and “work injury” have the meanings assigned to
them by the WHS Act.
(b) On and from the date of this Contract, and from time to time during the term of the
Contract, for each work site:
(i) the Principal shall appoint the Contractor (or a nominee of the Contractor
identified by the Contractor) to be the Principal Contractor pursuant to the WHS
Act;
(ii) the Contractor (or its nominee) shall be deemed to have accepted the
appointment; and
(iii) the Contractor (or its nominee) shall in respect of the work to be executed under
the Contract be responsible for the performance of the functions of Principal
Contractor at the relevant work site within the meaning of the WHS Act and
regulations thereto.
(c) If any person other than the Contractor or its nominee is appointed by the Principal as
Principal Contractor for any work site:
(i) the Principal must consult with the Contractor prior to such appointment; and
(ii) the Principal must procure that the person so appointed carries out its functions
as Principal Contractor in a manner which is not inconsistent with the
Contractor’s role as Rail Infrastructure Manager.
(d) An appointment of the Contractor (or its nominee) as Principal Contractor under the WHS Act shall continue during the currency of this Contract until the date of practical completion unless sooner suspended or revoked by the Principal giving notice in writing to the Contractor of its suspension or revocation, or by the Principal terminating this Contract pursuant to any provision of this Contract or according to law.

(e) The Contractor shall notify the Independent Certifier and the Principal of every work-related illness, work injury or serious bodily injury which occurs on the site as soon as possible after such occurrence.

11.5 Rail safety

The Principal acknowledges and agrees:

(a) the Contractor is the Rail Infrastructure Manager in respect of the railway, including the Works; and

(b) it will (and ensure its employees, agents and other contractor’s will) in respect of the performance of the WUC and the safe operation of the site comply with all directions on safety matters given by the Contractor to ensure compliance with its obligations as Rail Infrastructure Manager.

12 Protection of people and property

Insofar as compliance with the Contract permits, the Contractor shall:

(a) take measures necessary to protect people and property;

(b) avoid unnecessary interference with the passage of people and vehicles; and

(c) prevent nuisance and unreasonable noise and disturbance.

If the Contractor damages property, the Contractor shall as soon as reasonably practicable rectify the damage and pay any compensation which the law requires the Contractor to pay.

13 Not used

14 Care of the work and reinstatement of damage

14.1 Care of WUC

Except as provided in subclause 14.3, the Contractor shall be responsible for care of:

(a) the whole of WUC from and including the date of commencement of WUC to 4.00 pm on the date of practical completion, at which time responsibility for the care of the Works (except to the extent provided in paragraph (b)) shall pass to the Principal; and

(b) outstanding work and items to be removed from the site by the Contractor after 4.00 pm on the date of practical completion until completion of outstanding work or compliance with clauses 28, 29 and 34.

Without limiting the generality of paragraph (a), the Contractor shall be responsible for the care of unfixed items accounted for in a progress certificate and the care and preservation of
things entrusted to the Contractor by the Principal or brought onto the site by subcontractors for carrying out WUC.

14.2 Reinstatement
If loss or damage, other than that caused by an excepted risk, occurs to WUC during the period of the Contractor’s care, the Contractor shall at its cost, rectify such loss or damage.

In the event of loss or damage being caused by any of the excepted risks (whether or not in combination with other risks), the Contractor shall to the extent directed by the Principal, rectify the loss or damage and any such work will be an adjustment event and will entitle the Contractor to an adjustment to the contract sum in accordance with clause 35A. If loss or damage is caused by a combination of excepted risks and other risks, the Independent Certifier in pricing the adjustment to the contract sum shall assess the proportional responsibility of the parties.

14.3 Excepted risks
The excepted risks causing loss or damage, for which the Principal is liable, are:

(a) any negligent act or omission of the Principal or its consultants, agents, employees or other contractors (not being employed by the Contractor);

(b) any risk specifically excepted elsewhere in the Contract;

(c) terrorism, war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power, martial law or confiscation by order of any Government or public authority;

(d) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel not caused by the Contractor or its subcontractors or either’s employees or agents;

(e) use or occupation of any part of WUC by the Principal or its consultants, agents or other contractors (not being employed by the Contractor); and

(f) defects in such part of the design of WUC, including the preliminary design provided by the Principal, as is not warranted under clause 2.

14.4 Title in the Works
Title in work, goods, components, parts or materials provided by the Contractor in the performance of the WUC shall pass to the Principal as soon as incorporated into the Works.

15 Damage to persons and property other than WUC

15.1 Indemnity by Contractor
Insofar as this subclause 15.1 applies to property, it applies to property other than WUC.

The Contractor shall indemnify the Principal against:

(a) loss of or damage to the Principal’s property; and

(b) claims in respect of personal injury or death or loss of, or damage to, any other property,
arising out of or as a consequence of the carrying out of WUC, but the indemnity shall be reduced proportionally to the extent that the act or omission of the Principal or its consultants, agents or other contractors (not being employed by the Contractor) may have contributed to the injury, death, loss or damage.

This subclause 15.1 shall not apply to:

(a) the extent that the Contractor’s liability is limited by another provision of the Contract;
(b) exclude any other right of the Principal to be indemnified by the Contractor;
(c) things for the care of which the Contractor is responsible under subclause 14.1; and
(d) claims in respect of the Principal’s right to have WUC carried out under an approval or permit obtained or to be obtained by the Principal.

15.2 Indemnity by Principal
The Principal shall indemnify the Contractor in respect of claims referred to in subclause 15.1(d).

16 Public liability insurance
Before commencing WUC, the Contractor shall effect and maintain for the duration of the Contract, a public liability policy.

The policy shall:

(a) be in the joint names of the parties;
(b) cover the:
   (i) respective rights and interests; and
   (ii) liabilities to third parties,
   of the parties, the Independent Certifier, consultants and subcontractors from time to time, whenever engaged in WUC;
(c) cover the parties’ respective liability to each other for loss or damage to property (other than property required to be insured by clause 16A) and the death of or injury to any person (other than liability which the law requires to be covered under a workers compensation insurance policy);
(d) be endorsed to cover the use of any construction plant not covered under a comprehensive or third party motor vehicle insurance policy;
(e) provide insurance cover for an amount in respect of any one occurrence of not less than the sum in Item 25; and
(f) be with an insurer and otherwise in terms both approved in writing by the Principal (which approvals shall not be unreasonably withheld). The parties agree that the insurance arrangements described in the Insurance Schedule are approved by the Principal.
16A Insurance of the Works

Before commencing WUC, the Contractor shall insure all the things referred to in subclause 14.1 against loss or damage resulting from an insurable cause until the Contractor ceases to be responsible for their care.

Without limiting the generality of the obligation to insure, such insurance shall cover the Contractor's liability under subclause 14.2 and things in storage off site and in transit to the site but may exclude:

(g) the cost of making good fair wear and tear or gradual deterioration, but shall not exclude the loss or damage resulting therefrom;

(h) the cost of making good faulty design, workmanship and materials, but shall not exclude the loss or damage resulting therefrom;

(i) consequential loss of any kind, but shall not exclude loss of or damage to the Works;

(j) damages for delay in completing or for the failure to complete the Works;

(k) loss or damage resulting from ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel resulting from any cause; and

(l) loss or damage resulting from the excepted risks referred to in subclause 14.3.

The insurance cover shall be for the amount specified in Item 23.

Insurance shall be in the joint names of the parties, shall cover the parties, consultants and subcontractors whenever engaged in WUC for their respective rights, interests and liabilities and, except where the Contract otherwise provides, shall be with an insurer and in terms both approved in writing by the Principal (which approvals shall not be unreasonably withheld). The parties agree that the insurance arrangements described in the Insurance Schedule are approved by the Principal.

The insurance shall be maintained until the Contractor ceases to be responsible under subclause 14.1 for the care of the Works.

16B Professional indemnity insurance

Before commencing WUC, the Contractor shall effect and maintain professional indemnity insurance with levels of cover not less than stated in Item 24(a).

The insurance shall be maintained until the final certificate is issued and thereafter for the period as stated in Item 24(b).

The Contractor shall ensure that every consultant, if within a category stated in Item 24(c), shall effect and maintain professional indemnity insurance with levels of cover not less than stated in Item 24(c) applicable to that category.

Each such consultant’s professional indemnity insurance shall be maintained until the final certificate is issued and thereafter for the period as stated in Item 24(d).
17 Insurance of employees

Before commencing WUC, the Contractor shall insure against statutory and common law liability for death of or injury to persons employed by the Contractor. The insurance cover shall be maintained until completion of all WUC.

Where permitted by law, the insurance policy or policies shall be extended to provide indemnity for the Principal’s statutory liability to the Contractor’s employees.

The Contractor shall ensure that all consultants and subcontractors have similarly insured their employees.

18 Inspection and provisions of insurance policies

18.1 Proof of insurance

Before the Contractor commences WUC and whenever reasonably requested by the Principal, the Contractor shall provide to the Principal certificates of currency in respect of insurance required to be effected and maintained by the Contractor under this Contract.

Insurance shall not limit liabilities or obligations under other provisions of the Contract.

18.2 Not used

18.3 Notices from or to insurer

Except for insurance of employees as required by clause 17, the Contractor shall ensure that each insurance policy contains provisions which:

(a) requires the insurer to inform both parties, whenever the insurer gives a party or a consultant or a subcontractor a notice in connection with the policy;

(b) provides that a notice of claim given to the insurer by either party, the Independent Certifier, a consultant or a subcontractor shall be accepted by the insurer as a notice of claim given by both parties, the Independent Certifier, the consultant and the subcontractor; and

(c) requires the insurer, whenever the Contractor fails to maintain the policy, promptly to give written notice thereof to both parties and prior to cancellation of the policy.

18.4 Notices of potential claims

The Contractor shall, as soon as practicable, inform the Principal in writing of any occurrence that may give rise to a claim under an insurance policy required by clauses 16A or 16 and shall keep the Principal informed of subsequent developments concerning the claim. The Contractor shall ensure that consultants and subcontractors in respect of their operations similarly inform the parties.

18.5 Settlement of claims

Upon settlement of a claim under the insurance required by clause 16A:

(a) to the extent that reinstatement has been the subject of a payment or allowance by the Principal to the Contractor, if the Contractor has not completed such reinstatement, insurance moneys received shall, if requested by either party, be paid into an agreed bank account in the joint names of the parties. As the Contractor reinstates the loss or
damage, the *Independent Certifier* shall certify against the joint account for the cost of reinstatement; and

(b) to the extent that reinstatement has not been the subject of a payment or allowance by the *Principal* to the *Contractor*, the *Contractor* shall be entitled immediately to receive from insurance moneys received, the amount of such moneys so paid in relation to any loss suffered by the *Contractor*.

### 18.6 Cross liability

Any insurance required to be effected in joint names in accordance with the *Contract* shall include a cross liability clause in which the insurer agrees to waive all rights of subrogation or action against any of the persons constituting the insured and for the purpose of which the insurer accepts the term ‘insured’ as applying to each of the persons constituting the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall sum insured not being increased thereby).

### 19 Independent Certifier

(a) Unless appointed prior to the date of this *Contract*, the *Independent Certifier* will, as soon as possible after the date of this *Contract*, be appointed (jointly) by the parties and the *Access Regulator* under the *Independent Certifier Deed* to carry out the *Independent Certifier Services*.

(b) The *Contractor* and the *Principal* agree that the form of *Independent Certifier Deed* at *Annexure Part K* is agreed as between the *Contractor* and the *Principal* and that the *Contractor* and the *Principal* must act reasonably in consenting or refusing consent to any proposed changes to the form of *Independent Certifier Deed* at *Annexure Part K* sought by a party, the *Access Regulator* or the proposed *Independent Certifier*.

(c) The *Principal* and the *Contractor* acknowledge and agree that the *Independent Certifier* must act fairly, reasonably, honestly, independently and in accordance with the timeframes and requirements set out in this *Contract* in carrying out the functions required of the *Independent Certifier* under this *Contract*, including the terms and scope of services set out in the *Independent Certifier Deed*.

(d) The costs of the *Independent Certifier* will be borne by the *Principal*. For the avoidance of doubt, such costs have not been allowed for in the *contract sum*.

(e) If the *Independent Certifier Deed* is terminated for any reason, the *Independent Certifier* retires, resigns or goes on extended leave or the *Independent Certifier* is unable to continue in that role for any reason, the *Principal* and the *Contractor* will appoint another person on substantially the same terms as the terms of the *Independent Certifier Deed* and the *Principal* and the *Contractor* will enter into an *Independent Certifier Deed* with that replacement or new *Independent Certifier*.

(f) If the replacement *Independent Certifier* has not been appointed within 20 *business days* of the date on which a replacement is proposed by a party, the parties will accept the appointment of the person nominated by the *Access Regulator* and that person will be appointed *Independent Certifier* in accordance with this *clause 19*. 
21 Representatives

(a) Each of the Principal and the Contractor:
   (i) will ensure a person is appointed as its representative under this Contract;
   (ii) may (subject to subclause 21(a)(iii)) at any time replace any person appointed
        as its representative, in which event that party will appoint another person as its
        representative; and
   (iii) must give 5 business days prior written notice of a replacement under
        subclause 21(a)(ii) to the other party and the Independent Certifier.

(b) Each of the Principal and the Contractor appoint the persons named in Item 25A as
    their representatives at the date of this Contract.

(c) A representative appointed by a party under this clause 21:
   (i) will be authorised to act on behalf of that party in enforcing its rights and
       discharging its obligations under this Contract; and
   (ii) matters within that representative’s knowledge shall be deemed to be within the
        knowledge of the party which appointed it.

23 Site

23.1 Access and possession

Subject to subclause 35A.3, the Contractor has and agrees to maintain sufficient
possession of the site to enable the Contractor to carry out and complete the WUC on the
site.

The Principal acknowledges and agrees that, subject to the following paragraph, the
Contractor may, prior to the date of practical completion, use (at the Contractor’s risk,
including in relation to its own losses and liabilities and in relation to any damage to the
Works caused by such use) for the purpose of running trains on the operational railway
network such parts of the Works which:

(a) interface with the operational railway network; and

(b) the Contractor (in its capacity as “Rail Infrastructure Manager”) has certified is ready to
    enter operational service.

23.2 Access for Principal and others

The Principal and the Principal’s employees, consultants and agents (including the
Principal’s Engineer) may at any time after reasonable written notice to the Contractor have
access to any part of the site for the purpose of inspecting the progress of the WUC in
accordance with the Landholder Requirements under the Rail Corridor Agreement.
The Contractor shall at all reasonable times give the Independent Certifier access to WUC. The Principal shall ensure that none of the persons referred to in this subclause 23.2 impedes the Contractor.

23.3 Minerals, fossils and relics
Valuable minerals, fossils, articles or objects of antiquity or of anthropological or archaeological interest, treasure trove, coins and articles of value found on the site shall as between the parties be and remain the property of the Principal. Immediately upon the discovery of these things the Contractor shall:

(a) take precautions to prevent their loss, removal or damage; and
(b) give the Independent Certifier written notice of the discovery.

Encountering such objects shall be an adjustment event and any costs so incurred by the Contractor under this subclause 23.3 shall entitle the Contractor to an adjustment to the contract sum in accordance with clause 35A.

24 Latent conditions

24.1 Scope
Latent conditions are physical conditions on the site and its near surrounds, including artificial things but excluding weather conditions, which differ materially from the baseline site conditions.

24.2 Notification
The Contractor, upon becoming aware of a latent condition while carrying out WUC, shall promptly, and where possible before the latent condition is disturbed, give the Independent Certifier written notice of the general nature thereof.

If required by the Independent Certifier promptly after receiving that notice, the Contractor shall, as soon as practicable, give the Independent Certifier a written statement of:

(a) the latent condition encountered and the respects in which it differs materially from the baseline site conditions;
(b) the additional work, resources, time and cost which the Contractor estimates to be necessary to deal with the latent condition; and
(c) other details reasonably required by the Independent Certifier.

The parties agree that if the Contractor provides a notice and claims under subclause 35A.2(a) in respect of a latent condition it will be taken to have satisfied the requirement to make a written statement under this subclause 24.2.

24.3 Adjustment Event
Encountering a latent condition shall be an adjustment event and shall entitle the Contractor to an adjustment to the contract sum in accordance with clause 35A.
24.4 **Baseline conditions**
The Contractor confirms that all work necessary to overcome all baseline site conditions so that the Works are completed in accordance with the Contract has been allowed for in the contract sum and the baseline program.

25 **Not Used**

25A **Contamination**

(a) The Contractor shall comply, and ensure its employees, subcontractors and suppliers comply, with all legislative requirements in relation to contamination.

(b) Should any contamination on, under or emanating from the site:

(i) be disturbed or exacerbated by the carrying out of the WUC; or

(ii) otherwise arise out of or in connection with the course of the WUC,

the Contractor shall:

(iii) give the Independent Certifier written notice providing details of the nature of the contamination;

(iv) dispose of, or otherwise deal with, such contamination in accordance with any legislative requirements; and

(v) remediate the site and any other affected areas in accordance with any applicable legislative requirements.

(c) The Contractor confirms all work necessary to overcome and remove or remediate baseline contamination, as required by this clause 25A, has been allowed for in the contract sum and the baseline program.

(d) The parties agree that:

(i) the Principal takes the risk of any contamination which is unexpected contamination, other than unexpected contamination which is caused by the negligence or breach of this Contract by the Contractor; and

(ii) removing or remediating unexpected contamination (or otherwise incurring increased costs as a result of encountering unexpected contamination), other than unexpected contamination which is caused by the negligence or breach of this Contract by the Contractor, will be an adjustment event and the Contractor will be entitled to claim an adjustment to the contract sum in accordance with clause 35A.

26 **Cleaning up**

The Contractor shall keep the site and WUC clean and tidy and regularly remove rubbish and surplus material.
Within 14 days after the date of practical completion, the Contractor shall remove temporary works and construction plant. The Independent Certifier may extend the time to enable the Contractor to perform remaining obligations.

If the Contractor fails to comply with the preceding obligations in this clause, the Independent Certifier may direct the Contractor to rectify the non-compliance and the time for rectification.

27 Materials, labour and construction plant

Except where the Contract otherwise provides, the Contractor shall supply everything necessary for the proper performance of the Contractor's obligations and discharge of the Contractor's liabilities.

In respect of any materials, machinery or equipment to be supplied by the Contractor in connection with the Contract, the Independent Certifier may direct the Contractor to:

(a) supply particulars of the mode and place of manufacture, the source of supply, the performance capacities and other related information; and

(b) arrange reasonable inspection at such place or sources by the Independent Certifier, the Principal and persons authorised by the Principal.

28 Quality

28.1 Quality of material and work

Unless otherwise provided, the Contractor shall use suitable new materials and proper and tradesmanlike workmanship.

28.2 Quality assurance

If the Contract elsewhere requires further quality assurance, the Contractor shall:

(a) plan, establish and maintain a conforming quality system; and

(b) ensure that the Independent Certifier has access to the quality system of the Contractor, consultants and subcontractors so as to enable monitoring and quality auditing.

Any such quality system shall be used only as an aid to achieving compliance with the Contract and to document such compliance. Such system shall not discharge the Contractor's other obligations under the Contract.

28.3 Defective work

If the Independent Certifier becomes aware of work done (including material provided) by the Contractor which does not comply with the Contract, the Independent Certifier shall as soon as practicable give the Contractor written details thereof. If the subject work has not been rectified, the Independent Certifier may direct the Contractor to do any one or more of the following at the Contractor's cost (including times for commencement and completion):

(a) remove the material from the site;

(b) demolish the work;
(c) redesign, reconstruct, replace or correct the work; and
(d) not deliver it to the site.

28.4 Acceptance of defective work
Instead of a direction pursuant to subclause 28.3, the Principal may direct the Contractor that the Principal elects to accept the subject work, and such direction will be an adjustment event and the Independent Certifier may adjust the contract sum accordingly.

28.5 Timing
The Independent Certifier or the Principal, as applicable, may give a direction pursuant to this clause at any time before the expiry of the last defects rectification period.

29 Examination and testing

29.1 Tests
At any time before the expiry of the last defects rectification period, the Independent Certifier may (acting reasonably) direct that any WUC be tested. The Contractor shall give such assistance and samples and make accessible such parts of WUC as may be directed by the Independent Certifier.

29.2 Covering up
The Independent Certifier may direct that any part of WUC shall not be covered up or made inaccessible without the Independent Certifier’s prior written direction.

29.3 Who conducts
Tests shall be conducted as provided elsewhere in the Contract or by the Independent Certifier or a person (which may include the Contractor) nominated by the Independent Certifier.

29.4 Notice
The Independent Certifier or the Contractor (whichever is to conduct the test) shall give reasonable written notice to the other of the date, time and place of the test. If the other does not attend, the test may nevertheless proceed.

29.5 Delay
Without prejudice to any other right, if the Contractor or the Independent Certifier delays in conducting a test, the other, after giving reasonable written notice of intention to do so, may conduct the test.

29.6 Completion and results
On completion of the tests, the Contractor shall make good WUC so that it fully complies with the Contract.

Results of tests shall be promptly made available by each party to the other and to the Independent Certifier.
29.7 **Costs**

Costs in connection with testing pursuant to this clause 29 shall be borne by the Principal except where the Contract otherwise provides or the test is consequent upon, or reveals a failure of the Contractor to comply with the Contract (including this clause 29).

30 **Working hours**

If the working hours and working days on the site are not stated elsewhere in the Contract, they shall be as notified by the Contractor to the Independent Certifier before commencement of work on site.

31 **Programming**

The Contractor has prepared the baseline program and the baseline program is the program for the WUC at the date of this Contract.

The Contractor will update the baseline program to take into account any EOTs approved by the Independent Certifier in accordance with this Contract. The Contractor must provide a copy of such updated baseline program to the Independent Certifier promptly.

The Independent Certifier may have regard to the baseline program when assessing claims for EOTs under the Contract.

32 **Suspension**

32.1 **Independent Certifier’s suspension**

The Independent Certifier may direct the Contractor to suspend the carrying out of the whole or any part of WUC for such time as the Independent Certifier thinks fit, if the Independent Certifier is of the opinion that it is necessary:

(a) as a result of a material breach of this Contract by the Contractor (or a consultant, a subcontractor or the employees or agents of any of the Contractor); or

(b) to comply with a court order.

32.1A **Principal’s suspension**

Without limiting subclause 32.1, where the Principal has a right under and in accordance with clause 7.5(a)(iv) of the Unit Holders Deed to suspend the Contractor’s performance of this Contract, the Principal may direct the Contractor to suspend the carrying out of the whole or any part of the WUC.

32.2 **Contractor’s suspension**

Without prejudice to its rights under subclause 38.9, the Contractor may suspend the carrying out of the whole or any part of the WUC if the Principal fails to make any payment to the Contractor which is due under the Contract, provided that the Contractor has given 10 business days prior notice to the Principal and the Independent Certifier that it intends to suspend its performance in accordance with this subclause 32.2, and the Principal has failed to remedy the relevant breach of this Contract in that period.
32.3 Recommenement  
(a) Where the WUC has been suspended in accordance with subclause 32.1, as soon as the Independent Certifier becomes aware that the reason for any suspension no longer exists, the Independent Certifier shall direct the Contractor to recommence suspended WUC as soon as reasonably practicable.

(b) Subject to subclause 32.5, where the WUC has been suspended in accordance with subclause 32.1A, the Principal may direct the Contractor to recommence the WUC at any time on giving reasonable notice to the Contractor and Independent Certifier.

(c) Where the WUC has been suspended in accordance with subclause 32.2, the Contractor will, as soon as reasonably practicable in the prevailing circumstances, recommence WUC suspended when the Principal has remedied the breach which gave rise to the Contractor’s rights to suspend under subclause 32.2.

32.4 Cost  
The Principal shall bear the cost of suspension pursuant to subclause 32.1(b) (save where the relevant court order is the result of a negligent act, negligent omission or breach of contract by the Contractor), subclause 32.1A, subclause 32.2 or subclause 35A.3(a)(i) and the Contractor will be entitled to claim:

(a) an EOT in accordance with subclause 33.5; and

(b) an adjustment event in accordance with clause 35A, as a result of such suspension.

32.5 Termination by Contractor  
(a) If the Principal has suspended performance of whole or part of the WUC under subclause 32.1A, and the suspension continues for a period of 180 (one hundred and eighty) business days, the Contractor may elect, by written notice to the Principal, to terminate this Contract on the date specified in such notice, subject to the provisions of clause 39B.

(b) Where the Contractor terminates this Contract under this subclause 32.5, it will be entitled to compensation from the Principal in accordance with subclause 39.2.

33 Time and progress  
33.1 Progress  
The Contractor shall ensure that WUC reaches practical completion by the date for practical completion.

33.2 Notice of delay  
A party becoming aware of anything which will probably cause delay to WUC shall promptly give the Independent Certifier and the other party written notice of that cause and the estimated delay.
33.3 Claim
The Contractor shall be entitled to such extension of time for carrying out WUC (including reaching practical completion) as the Independent Certifier assesses (‘EOT’), if:
(a) the Contractor is or will be delayed in reaching practical completion by a qualifying cause of delay; and
(b) the Contractor gives the Independent Certifier, within 28 days of when the Contractor should reasonably have become aware of that causation occurring, a written claim for an EOT evidencing the facts of causation and of the delay to WUC (including extent).

If further delay results from a qualifying cause of delay evidenced in a claim under paragraph (b) of this subclause, the Contractor shall claim an EOT for such delay by as soon as reasonably practicable giving the Independent Certifier a written claim evidencing the facts of that delay.

33.4 Assessment
When both non-qualifying and qualifying causes of delay overlap, the Independent Certifier shall apportion the resulting delay to WUC according to the respective causes’ contribution.

In assessing each EOT the Independent Certifier shall disregard questions of whether:
(a) WUC can nevertheless reach practical completion without an EOT; or
(b) the Contractor can accelerate,
but shall have regard to what prevention and mitigation of the delay has not been effected by the Contractor.

33.5 Extension of time
Within 28 days after receiving the Contractor’s claim for an EOT, the Independent Certifier shall give to the Contractor and the Principal a written direction evidencing the EOT so assessed. If the Independent Certifier does not do so, there shall be a deemed assessment and direction for an EOT as claimed.

Notwithstanding that the Contractor is not entitled to or has not claimed an EOT, the Principal may at any time and from time to time before issuing the final certificate direct an EOT.

33.5A Determination of disputes
If either party is not satisfied with the Independent Certifier’s written direction under subclause 33.5 it may refer the matter for resolution under subclause 41.3.

33.5B Joint claims and assessment
(a) Any claim for an EOT made by the Contractor under subclause 33.3 may, at the Contractor’s election, be made jointly with a claim for an adjustment to the contract sum under clause 35A, (a ‘joint claim’) provided that each claim relates to the same subject matter. Any claim for an EOT (whether or not it is part of a joint claim) arising out of or in connection with an adjustment event is subject to subclause 35A.2(d).

Where there is any inconsistency between a claim procedure requirement in subclause 33.5 and in subclause 35A.2(a), the stricter requirement will apply.
(b) Where the Contractor makes a joint claim the Independent Certifier will assess each claim comprising the joint claim together and any determination made by the Independent Certifier concerning a joint claim must determine the matters arising in respect of all other claims comprising that joint claim.

(c) The parties agree that:

(i) any dispute between the parties which concerns a claim under a joint claim will, at the election of either party, include any matters in dispute in respect of the other claims comprising the joint claim; and

(ii) if a party makes an election under subclause 33.5B(c)(i), matters in dispute in respect of each claim comprising a joint claim will be treated as a single dispute for the purposes of clause 41.

33.6 Practical completion

The Contractor shall give the Independent Certifier at least 14 days written notice of the date upon which the Contractor anticipates that practical completion will be reached.

When the Contractor is of the opinion that practical completion has been reached, the Contractor shall in writing request the Independent Certifier to issue a certificate of practical completion. Within 14 days after receiving the request, the Independent Certifier shall give the Contractor and the Principal either a certificate of practical completion evidencing the date of practical completion or written reasons for not doing so.

If within 14 days of receiving a request under this subclause 33.6 to issue a certificate of practical completion the Independent Certifier fails to either:

(a) issue a certificate of practical completion evidencing the date of practical completion; or

(b) provide written reasons for not doing so,

either party may refer the matter for determination by expert determination under subclause 41.3.

If the Independent Certifier is of the opinion that practical completion has been reached, the Independent Certifier may issue a certificate of practical completion even though no request has been made.

33.7 Liquidated damages - practical completion

(a) If WUC does not reach practical completion by the date for practical completion, the Independent Certifier shall certify, as due and payable to the Principal, liquidated damages in Item 29(a) for every day after the date for practical completion and including the earliest of the date of practical completion or termination of the Contract.

(b) For the avoidance of doubt, liquidated damages for delay (at the rate identified in Item 29(a)) will accrue and be payable separately and cumulatively for each separable portion.

(c) If an EOT is directed after the Contractor has paid or the Principal has set off liquidated damages, the Principal shall forthwith repay to the Contractor such of those liquidated damages as represent the days the subject of the EOT.
The Contractor’s maximum aggregate liability to the Principal for liquidated damages payable under this subclause 33.7 is limited to the amount stated in Item 29(b).

The amount of liquidated damages payable under this subclause 33.7 shall be the Principal’s sole and exclusive remedy for the Works not reaching practical completion by the date for practical completion.

33.8 Acknowledgement

Without limiting subclauses 33.7(d) and 33.7(e), the Contractor acknowledges that:

(a) the Principal has obligations pursuant to the Extension Project Agreement in connection with the completion of the Works;

(b) the Principal will suffer a loss if the Works do not reach practical completion by the date for practical completion; and

(c) the liquidated damages for delay (at the rate identified in Item 29(a)) represent a genuine pre-estimate of the Principal’s loss in the event that the Works do not reach practical completion by the date for practical completion.

33.9 Delay damages

(a) Subject to subclause 33.9(b), for every day the subject of an EOT for a compensable cause and for which the Contractor gives the Independent Certifier a claim for delay damages pursuant to subclause 40.1, damages equal to the Contractor’s actual direct costs of the delay (plus a mark up for profit and overhead) certified by the Independent Certifier under subclause 40.3 shall be due and payable to the Contractor.

(b) When an EOT for a compensable cause and an adjustment event overlap, the Contractor must only claim an adjustment event, and not an EOT for a compensable cause, to the extent of such overlap.

34 Defects liability

34.1 Defect rectification

The Contractor shall carry out rectification at times and in a manner causing as little inconvenience to the occupants or users of the Works as is reasonably possible.

As soon as possible after the date of practical completion, the Contractor shall rectify all defects existing at the date of practical completion.

On and from the date of practical completion until expiry of the defects rectification period, the Independent Certifier may give the Contractor a direction to add a defect to the defects register which direction:

(a) shall identify the defect and the date for completion of its rectification; and

(b) may state a date for commencement of the rectification.

The Contractor shall rectify each defect which is (or ought to have been if the Contractor had complied with its obligations under subclause 34.2(a)) recorded in the defects register promptly after the later of the date of practical completion and becoming aware of the defect.
34.2  Defects register

(a)  The Contractor must prepare and maintain a written register ('defects register') which records:

(i) each defect which the Contractor becomes aware of during the defects rectification period (including as a result of a notification from the Principal or Independent Certifier that a defect exists); and

(ii) for each defect referred to in subclause 34.2(a)(i):

(A) the date on which the Contractor became aware of the defect;

(B) reasonable details of all steps taken by the Contractor to procure the rectification of the defect in accordance with the Contractor's obligation under subclause 34.1; and

(C) if applicable, the date on which the defect was rectified.

(b) Within 15 business days after the end of:

(i) each month during the defects rectification period; and

(ii) the defects rectification period,

the Contractor must give to the Principal and the Independent Certifier a copy of the defects register (current as at the end of the relevant month or at the end of the defects rectification period, as applicable).

35  Discretionary Variations

35.1  Proposing discretionary variations

(a)  The Contractor shall not vary WUC other than as directed under this clause 35 or in accordance with clause 35A.

(b)  At any time prior to the date of practical completion a party may by notice to the other party and the Independent Certifier propose to vary WUC by any one or more of the following:

(i) increase, decrease or omit any part;

(ii) change the character or quality;

(iii) change the levels, lines, positions or dimensions;

(iv) carry out additional work; or

(v) demolish or remove material or work no longer required by the Principal,

(a 'discretionary variation').

35.2  Notice

(a) Within 10 business days of the Principal providing a notice under subclause 35.1(b), the Contractor shall notify the Principal and the Independent Certifier whether it agrees in principle (subject to the provisions of this clause 35) to proceed with the proposed discretionary variation and if so, whether the proposed discretionary variation can be
effected. If the Contractor does not provide such notice, it shall be deemed that the Contractor does not agree with the proposed discretionary variation.

(b) If the Contractor has stated in its notice under subclause 35.2(a) that it will proceed with the discretionary variation, within 20 business days of that notice the Contractor will provide to the Principal and the Independent Certifier an estimate of the:

(i) effect on the program (including the date for practical completion) of the proposed discretionary variation; and

(ii) cost (including all warranties and time-related costs, if any) of the proposed discretionary variation.

(c) If the Contractor proposes the discretionary variation under subclause 35.1(b), it will include with its notice under that subclause that same information it is to provide to the Principal under subclause 35.2(b).

(d) Within [x] business days of the Contractor’s estimate under subclauses 35.2(b) or 35.2(c), the Principal and the Contractor will meet to discuss whether to proceed with the discretionary variation and if the parties do agree to proceed, then the matter shall be referred to the Independent Certifier for certification in accordance with subclause 35.3.

35.3 Certification of agreement to proceed

(a) Notwithstanding that the Principal and the Contractor have reached agreement to proceed with a discretionary variation under subclause 35.2(d), neither party will be obliged to proceed with that discretionary variation until:

(i) the agreement of the parties has been referred to the Independent Certifier for certification and the Independent Certifier has certified that the adjustment to the contract sum agreed by the parties is reasonable in the circumstances, having regard to the principles stated in subclause 35.4; and

(ii) each of the Principal and the Contractor have stated in writing that it accepts the Independent Certifier’s certification under subclause 35.3(a)(i).

(b) The Independent Certifier will make its certification under subclause 35.3(a)(i) within [x] business days of the submission of the parties’ agreement under subclause 35.2(d).

(c) The Independent Certifier’s certification under subclause 35.3(a)(i) will (if accepted by the parties) be effective to:

(i) vary the Principal’s project requirements to take into account the discretionary variation;

(ii) vary the date for practical completion in accordance with that agreement; and

(iii) adjust the contract sum in accordance with the Independent Certifier’s certification.

(d) If the parties do not accept the Independent Certifier’s certification under subclause 35.3(a)(i), they may still agree to proceed with the discretionary variation and the contract sum will be adjusted by an amount as agreed between them and the
Principal’s project requirements and the date for practical completion will be varied accordingly.

35.4 Pricing Principles

The Independent Certifier when certifying an adjustment to the contract sum under subclause 35.3(a)(i) (due to a discretionary variation) or when pricing an adjustment under subclause 35A.4 (due to an adjustment event) will have regard to what is reasonable in the circumstances, taking into account the following principles (in order of precedence):

(a) prior agreement of the parties, if the Independent Certifier considers it reasonable in the circumstances given the nature of the work required by the discretionary variation or adjustment event; and

(b) reasonable rates or prices, which shall include a reasonable amount for profit and overheads,

and any deductions certified by the Independent Certifier shall include a reasonable amount for profit but not overheads.

35A Adjustment Events

35A.1 Adjustment events

Each of the following is an adjustment event:

(a) any act of prevention, negligent act, negligent omission or breach of this Contract by the Independent Certifier (its agents, employees, contractors, subcontractors or consultants), the Principal (its agents, employees, contractors, subcontractors or consultants, other than the Contractor), except where the act of prevention, negligence or the breach is due to the Contractor’s failure to comply with its obligations under this Contract or some other wrongful act or omission of the Contractor or its agents, employees, contractors, subcontractors or consultants;

(b) any delay (except to the extent contributed to by the Contractor) in providing the Contractor with access to port or other coal supply chain land or infrastructure, where the provision of such is required to be completed in order for the Contractor to commence or carry out the WUC;

(c) industrial action other than industrial action which is specific to the site or which is limited to the Contractor’s employees;

(d) inclement weather which affects part or all of the site or delays or disrupts the WUC;

(e) delay or disruption to the WUC which occurs as a result of either the Principal or Contractor complying with an injunction or other court order in relation to the site or the WUC (other than where caused by the default or negligence of the Contractor);

(f) any delay by the Principal in providing access to the site for the Contractor to commence or carry out the WUC (if so required by the Contract);

(g) a latent condition that is an adjustment event pursuant to subclause 24.3;

(h) an unexpected contamination that is an adjustment event pursuant to subclause 25A(d)(ii);
(i) a force majeure event that is an adjustment event pursuant to subclause 39A(a);

(j) a change in legislative requirements that is an adjustment event pursuant to subclause 11.2;

(k) a suspension that is an adjustment event pursuant to subclause 32.4(b); and

(l) any other matter expressly identified in this Contract as an adjustment event which gives the Contractor an entitlement to an adjustment to the contract sum.

35A.2 Notification of an adjustment event

(a) To make a claim on any basis for or arising out of an adjustment event (including a claim for an EOT), the Contractor must:

(i) within 14 days of the earlier of when the Contractor becomes aware, or ought reasonably have become aware, of the commencement, or existence, of the adjustment event, deliver a notice in writing to the Principal and the Independent Certifier:

(A) notifying the adjustment event;

(B) providing details of the adjustment event; and

(C) stating all actions the Contractor proposes to take to mitigate the adverse consequences of the adjustment event;

(ii) within 42 days of the earlier of when the Contractor becomes aware, or ought reasonably have become aware, of the commencement, or existence, of the adjustment event, submit a written claim for the adjustment event that includes detailed particulars (to the extent known at that time) of the adjustment event, including:

(A) the adjustment event and its cause;

(B) any change required to the WUC to overcome the effects of the adjustment event;

(C) any omission or addition to the Works which may be required as a result of the adjustment event;

(D) any modification required to the Principal’s project requirements which may be required as a result of the adjustment event;

(E) any adjustment to the contract sum required as a result of the above;

(F) where the Contractor elects to make a joint claim, the number of days EOT claimed together with the basis of calculating that period, including evidence that the Contractor has been or will be delayed in reaching practical completion); and

(G) states the measures that the Contractor has taken or proposes to take to mitigate the adverse consequences of the adjustment event; and

(iii) if the adjustment event or its effects continue beyond the period of 42 days after the commencement of the adjustment event, submit a further written claim for the adjustment event:
(A) every 28 days (or such other period as the parties may agree) after the
first claim submitted under subclause 35A.2(a)(ii) until 7 days after the
end of the effects of the adjustment event; and

(B) containing the information required by clause subclause 35A.2(a)(ii).

(b) A claim under subclause 35A.2(a) may be submitted as part of a joint claim.

(c) The Contractor must as soon as practicable after the commencement of an adjustment event, use all reasonable endeavours to mitigate the adverse consequences of the adjustment event.

(d) Notwithstanding any other provision of this Contract, compliance by the Contractor with subclause 35A.2(a) is condition precedent to any entitlement of the Contractor to claim adjustment to the contract sum or an EOT arising out of or in connection with an adjustment event. If the Contractor fails to comply with subclause 35A.2(a)(iii), the Contractor is only prevented from making a claim from the last date upon which the updated claim could have been made in accordance with subclause 35A.2(a)(iii).

35A.3 Work outside of Extension Land

(a) If the Contractor notifies the Principal and the Independent Certifier that as a result of an adjustment event, WUC needs to be carried out, or any of the Works situated, outside of the Extension Land:

(i) the relevant part of the WUC will be immediately suspended;

(ii) the parties will take steps under the Rail Corridor Agreement with the aim of procuring that the relevant land be included as part of the Extension Land; and

(iii) notwithstanding the terms of subclauses 35A.2(a) or 35A.4(a), the Contractor shall not be required to submit a notice or claim under subclause 35A.2(a) (and the information required under that notice) and no further steps are required under this clause 35A until the relevant determination under the Rail Corridor Agreement has been given.

(b) If the WUC is suspended under subclause 35A.3(a)(i) for a period 180 days, then subject to clause 39B, the Principal may by written notice to the Contractor terminate the Contract.

(c) If the Contract is terminated pursuant to subclause 35A.3(b), the Contractor will be entitled to compensation from the Principal as if the Contract had been terminated for convenience in accordance with subclause 39.1.

35A.4 Independent Certifier’s determination

(a) Subject to subclause 35A.2(d) and subclause 35A.4(b), within 28 days of submission of a claim under subclause 35A.2(a)(ii) the Independent Certifier must issue a direction to the Contractor on its assessment of the adjustment event including:

(i) any change required to the WUC;

(ii) any omission or addition to the Works;

(iii) any modification required to the Principal’s project requirements;
in accordance with subclause 35A.4(b), any adjustment to the contract sum; and

(v) where the claim is a joint claim, any entitlement to an EOT, which assessment must be in accordance with clause 33,

which is required as a result of the occurrence of the adjustment event.

(b) If the adjustment event continues or its effects continue beyond the period referred to in subclause 35A.2(a)(ii) and the Contractor submits a claim under subclause 35A.2(a)(iii):

(i) any direction issued by the Independent Certifier under subclause 35A.4(a) will be considered an “interim determination”; and

(ii) within 28 days of the submission of a final updated claim under subclause 35A.2(a)(iii), the Independent Certifier must issue a direction on its final assessment of the adjustment event including those matters referred to in subclauses 35A.4(a)(iii), (iv) and (v) (and such final assessment may adjust one or more of the interim determinations made under subclause 35A.4(a)).

(c) In making an assessment regarding an adjustment to the contract sum required as a result of an adjustment event, the Independent Certifier will have regard to the pricing principles set out at subclause 35.4. Any assessment of an EOT is subject to the provisions of clause 33.

35A.5 Determination of disputes

If either party is not satisfied with any part or all of the Independent Certifier’s written direction under subclause 35A.4, it may refer the matter for resolution under subclause 41.3.

35A.6 Proceed at own risk

Prior to:

(a) receiving a direction from the Independent Certifier under subclause 35A.4(a); and

(b) where the has been a referral of a dispute regarding an adjustment event for resolution under subclause 41.3, the expert making its determination,

the Contractor may proceed with any modification to the WUC, which in its opinion is required to overcome the effects of an adjustment event, at its own risk.

35B Segment allocation and Depreciating Assets

(a) Within 20 business days following any adjustment to the contract sum in accordance with clauses 35 or 35A, the Contractor will provide the Principal a breakdown of the manner in which that adjustment was allocated across the Segments.

(b) The Contractor shall prepare the breakdown referred to in subclause 35B(a) in accordance with the allocation principles.

(c) As soon as reasonably practicable following practical completion the Contractor will provide the Principal with a final statement detailing all of the cost breakdowns given to the Principal under subclause 35B(a).
(d) When requested to do so in writing by the Principal the Contractor must provide the Principal for each Depreciating Asset forming part of the Works details of when the relevant asset is installed and ready for use.

36 Payment

36.1A Advance Payment
Within 10 business days of the Condition Precedent Satisfaction Date the Principal will pay the advance payment to the Contractor.

36.1 Progress claims
(a) The Contractor shall claim payment progressively in accordance with this clause 36.
(b) On the last business day of each month, the Contractor may make a payment claim by submitting a claim for payment to the Principal setting out the Contractor's calculation of the progress payment payable on account of the WUC carried out to the date of the payment claim.
(c) A payment claim must be given in writing to the Independent Certifier and the Principal and must:
   (i) include details of the moneys then due to the Contractor pursuant to provisions of the Contract;
   (ii) include the total amount previously certified under this clause 36;
   (iii) include the amount of the contract sum being claimed by the Contractor;
   (iv) provide details of any discretionary variations or adjustment events which have occurred since the previous payment claim made by the Contractor, including any necessary adjustment to the contract sum; and
   (v) include such other information as the Independent Certifier may reasonably require.
(d) The Independent Certifier shall within 10 business days after the Contractor submits the payment claim:
   (i) if it agrees with the payment claim, adopt its assessment; or
   (ii) if it disagrees with the payment claim, prepare its own assessment, and issue to the Contractor a progress certificate ('progress certificate') for that amount.
(e) In making its assessment under subclause 36.1(d) the Independent Certifier will measure the progress of WUC against each item of work described in the lump sum breakdown contained at Annexure Part C.
(f) The parties agree that:
   (i) the first payment claim submitted during the term of this Contract will include the amount payable to the Contractor for the pre-funding payment, and the Independent Certifier will not be entitled to disagree with the existence or quantum of this part of the payment claim; and
(ii) the *advance payment* is intended to be deducted from the last amounts payable from the *Principal* to the *Contractor* pursuant to *progress certificates* for work performed up to the *date of practical completion*. Accordingly, the *Independent Certifier* must deduct the lesser of:

(A) the amount equivalent to the *advance payment*; or

(B) the amount(s) otherwise payable under the last *progress certificate* (or last *progress certificates*, if necessary) for work performed up to the *date of practical completion*,

from the last progress certificate (or last progress certificates, if applicable).

The *Independent Certifier* must issue a *progress certificate* within 30 days of the *date of practical completion* certifying the amount payable, if any, by the *Contractor* to the *Principal* for the portion of the *advance payment* not already deducted by the *Independent Certifier* in earlier *progress certificates*. The *Contractor* must pay to the *Principal* the amount certified in that *progress certificate* within 15 business days after the date on which it is issued by the *Independent Certifier*.

(g) The *progress certificate* (or where the *payment claim* is final, *final certificate*) shall:

(i) state the *payment claim* to which it relates;

(ii) state the amount of the payment the *Principal* is required to make;

(iii) specify the amount, if any, of the *advance payment* to be deducted for that *progress certificate* (or *final certificate*) in accordance with *subclause 36.1(f)(ii)*; and

(iv) if the payment the *Independent Certifier* considers is due is less than the amount claimed in the *payment claim*, state why it is less and the reasons for withholding payment.

(h) The *Principal* shall within 15 business days after the *Contractor* submits a *payment claim* pay the *Contractor* the amount stated in the *progress certificate* (*progress payment*).

### 36.2 Certificates

Neither a *progress certificate* nor a *progress payment* shall be evidence that the subject *WUC* has been carried out satisfactorily. Payment other than *final payment* shall be payment on account only.

### 36.3 Not used

### 36.4 Final payment claim and certificate

Within 28 days after the expiry of the last *defects rectification period*, the *Contractor* shall give the *Independent Certifier* a written *final payment claim* endorsed ‘Final Payment Claim’ being a progress claim together with all other claims whatsoever in connection with the subject matter of the *Contract*.

Within 42 days after the expiry of the last *defects rectification period*, the *Independent Certifier* shall issue to both the *Contractor* and the *Principal* a *final certificate* evidencing the
moneys finally due and payable between the Contractor and the Principal on any account whatsoever in connection with the subject matter of the Contract.

Those moneys certified as due and payable shall be paid by the Principal or the Contractor, as the case may be, within 7 days after the debtor receives the final certificate.

The final certificate shall be conclusive evidence of accord and satisfaction, and in discharge of each party’s obligations in connection with the subject matter of the Contract except for:

(a) fraud or dishonesty relating to WUC or any part thereof or to any matter dealt with in the final certificate;

(b) any defect or omission in the Works or any part thereof which was not apparent at the end of the last defects rectification period, or which would not have been disclosed upon reasonable inspection at the time of the issue of the final certificate;

(c) any accidental or erroneous inclusion or exclusion of any work or figures in any computation or an arithmetical error in any computation; and

(d) unresolved issues the subject of any notice of dispute pursuant to clause 41, served before the 7th day after the issue of the final certificate.

36.5 Interest
Interest in Item 35 shall be due and payable after the date of default in payment.

36.6 Other moneys due
The Principal may elect that moneys due and owing otherwise than in connection with the subject matter of the Contract also be due to the Principal pursuant to the Contract.

37 Payment of workers, consultants and subcontractors

37.1 Workers, consultants and subcontractors
The Contractor shall give in respect of a progress claim, documentary evidence of the payment of moneys due and payable to:

(a) workers of the Contractor and of the subcontractors;

(b) consultants; and

(c) subcontractors,

in respect of WUC the subject of that claim.

If the Contractor is unable to give such documentary evidence, the Contractor shall give other documentary evidence of the moneys so due and payable to workers, consultants and subcontractors.

Documentary evidence, except where the Contract otherwise provides, shall be to the Independent Certifier’s satisfaction.

37.2 Withholding payment
Subject to the next paragraph, the Principal may withhold moneys certified due and payable in respect of the progress claim until the Contractor complies with subclause 37.1.
The Principal shall not withhold payment of such moneys in excess of the moneys evidenced pursuant to subclause 37.1 as due and payable to workers, consultants and subcontractors.

37.3 Direct payment
Before final payment, the Principal, if not aware of a relevant relation-back day (as defined in the Corporations Law) may pay unpaid moneys the subject of subclause 37.1 directly to a worker, consultant or subcontractor where:

(a) permitted by law;
(b) given a court order in favour of the worker, consultant or subcontractor; or
(c) requested in writing by the Contractor.

Such payment and a payment made to a worker, consultant or subcontractor in compliance with a legislative requirement shall be deemed to be part-satisfaction of the Principal’s obligation to pay pursuant to subclauses 37.1 or 36.4, as the case may be.

38 Default or insolvency
38.1 Preservation of other rights
If a party breaches (including repudiates) the Contract, nothing in this clause shall prejudice the right of the other party to recover damages or exercise any other right or remedy.

38.2 Contractor’s default
If the Contractor commits a substantial breach of the Contract, the Principal may, by hand or by registered post, give the Contractor a written notice to show cause.

Substantial breaches by the Contractor are:

(a) failing to:
   (i) not used;
   (ii) comply with the Contractor’s defect rectification obligations pursuant to subclause 34;
   (iii) provide evidence of insurance;
   (iv) comply with a direction of the Independent Certifier pursuant to subclause 28.3 or subclause 34; or
   (v) use the materials or standards of work required by the Contract;
(b) wrongful suspension of work;
(c) subject to the provisions of the Contract, refusing to proceed with the WUC in accordance with the requirements of the Contract or abandoning all or substantially all of the WUC;
(d) not used; and
(e) in respect of clause 37, knowingly providing documentary evidence containing an untrue statement.
38.3 Principal’s notice to show cause
A notice under subclause 38.2 shall state:
(a) that it is a notice under clause 38 of these General Conditions;
(b) the alleged substantial breach;
(c) that the Contractor is required to show cause in writing why the Principal should not exercise a right referred to in subclause 38.4;
(d) the date and time by which the Contractor must show cause (which shall not be less than 10 business days after the notice is received by the Contractor); and
(e) the place at which cause must be shown.

38.4 Principal’s rights
(a) If the Contractor fails to show reasonable cause by the stated date and time, the Principal may, by written notice to the Contractor, suspend payment.
(b) If the Principal exercises its rights under subclause 38.4(a) and within 30 business days of the Principal exercising those rights, the Contractor fails:
   (i) to show reasonable cause;
   (ii) to remedy the breach; or
   (iii) if the breach is not capable of remedy, to make other arrangements to the reasonable satisfaction of the Principal,
        the Principal may, by written notice to the Contractor, terminate the Contract.

38.5 Not used

38.6 Not used

38.7 Principal’s default
If the Principal commits a substantial breach of the Contract, the Contractor may, by hand or by registered post, give the Principal a written notice to show cause.

Substantial breaches by the Principal are failing to make a payment due and payable pursuant to the Contract.

38.8 Contractor’s notice to show cause
A notice given under subclause 38.7 shall state:
(a) that it is a notice under clause 38 of these General Conditions;
(b) the alleged substantial breach;
(c) that the Principal is required to show cause in writing why the Contractor should not exercise a right referred to in subclause 38.9;
(d) the date and time by which the Principal must show cause (which shall not be less than 10 business days after the notice is received by the Principal); and
(e) the place at which cause must be shown.
38.9 Contractor’s rights

If the Principal fails to show reasonable cause by the stated date and time, the Contractor may, by written notice to the Principal, suspend the whole or any part of WUC.

The Contractor shall remove the suspension if the Principal remedies the breach.

Without prejudice to its rights under subclause 32.5 and subject to clause 39B the Contractor may, by written notice to the Principal, terminate the Contract, if within 30 days of the date of its show cause notice under subclause 38.8 the Principal fails:

(a) to remedy the breach; or

(b) if the breach is not capable of remedy, to make other arrangements to the reasonable satisfaction of the Contractor.

Following a suspension of WUC in accordance with this subclause 38.9 the Contractor will be entitled to claim:

(c) an EOT in accordance with subclause 33.5; and

(d) an adjustment to the contract sum in accordance with clause 35A, in respect of any delay or increased costs incurred by it as a result of the WUC being suspended.

38.10 Termination

Subject to subclause 38.12, if the Contract is terminated pursuant to subclauses 38.4(b) or 38.9, subject to clause 39B the parties’ remedies, rights and liabilities shall be the same as they would have been under the law governing the Contract had the defaulting party repudiated the Contract and the other party elected to treat the Contract as at an end and recover damages.

38.11 Insolvency

If an insolvency event occurs in respect of either party, then:

(a) where the insolvency event has occurred in respect of the Contractor, the Principal may, without giving a notice to show cause, exercise the right under subclause 38.4(b); or

(b) where the insolvency event has occurred in respect of the Principal, the Contractor may, without giving a notice to show cause, exercise the right under subclause 38.9.

The rights and remedies given by this subclause are additional to any other rights and remedies. They may be exercised notwithstanding that there has been no breach of contract.

38.12 Compensation to Principal

(a) If the Contract is terminated by the Principal in accordance with subclause 38.4(b) or under common law as a result of a repudiation by the Contractor, then:

(i) the Principal is not obliged to pay any further amounts to the Contractor (including entitlements accrued before termination); and
(ii) subject to subclauses 38.12(b) and 38.12(c), within 2 months after the date the Access Regulator makes the final decision referred to in subclause 38.12(b)(ii), the Contractor shall pay the Principal the lesser of:

(A) an amount equal to [tbc]% of the contract sum plus the total Trust Administration Costs; and

(B) an amount equal to:

(1) [tbc]% of the amount which is the difference between the contract sum which has been paid to the Contractor as at the date of termination and the amount of the contract sum which the Access Regulator has approved for inclusion in the Regulatory Asset Base; plus

(2) an amount calculated as follows:

\[(\text{Non-RAB amount/CS Amount}) \times \text{TTAC}\]

Where:

\[
\begin{align*}
\text{Non-RAB amount} &= \text{CS Amount less the portion of CS Amount that the Access Regulator has approved for inclusion in the Regulatory Asset Base;} \\
\text{CS Amount} &= \text{the contract sum which has been paid to the Contractor as at the date of termination; and} \\
\text{TTAC} &= \text{Total Trust Administration Costs.}
\end{align*}
\]

(b) The parties confirm that the Compensation Payment under subclause 38.12(a) can only be calculated once:

(i) the Contractor has made a submission to the Access Regulator for the inclusion in the Regulatory Access Base of at least 75% of the amount of the contract sum that has been paid to the Contractor as at the date of termination; and

(ii) the Access Regulator has considered that submission and made a final decision as to the amount of the contract sum referred to in subclause 38.12(b)(i) to be included in the Regulatory Asset Base.

(c) If, following the calculation of the Compensation Payment, the Access Regulator increases the amount of the contract sum paid by the Principal that is included in the Regulatory Asset Base:

(i) the Compensation Payment must be recalculated in accordance with subclause 38.12(a)(ii) (Revised Compensation Payment); and

(ii) if the Revised Compensation Payment is less than the Compensation Payment, the Principal must refund to the Contractor the amount of the difference.

(d) The amount calculated under this subclause 38.12 shall be the Principal's sole entitlement to compensation arising from the termination of the Contract.
39 Termination for convenience

39.1 Termination by Principal
Subject to clause 39B, where the Principal has a right or obligation under and in accordance with clause 7.5(a)(v) or clause 10.2(a) of the Unit Holders Deed to terminate this Contract, it may by 40 business days written notice to the Contractor terminate this Contract.

39.2 Compensation
If this Contract is terminated pursuant to subclauses 32.5, 35A.3(b) or 39.1 then the Principal shall be liable to pay the Contractor the total of:

(a) for work executed prior to the date of termination and for which the Contractor has not been paid, the amount which would have been payable for that work if the Contract had not been terminated;

(b) actual costs incurred by the Contractor prior to the date of termination, including (but not limited to) the cost of materials reasonably ordered by the Contractor for WUC, which the Contractor is liable to accept;

(c) the costs of the Contractor in demobilising from the WUC and the site, including (but not limited to) demobilisation of personnel and the cost of removal of construction plant (which for the avoidance doubt include break costs and/or early termination fees payable to subcontractors and consultants); and

(d) the break fee specified in Item 36A (save where the termination was pursuant to subclause 35A.3(b) and the relevant adjustment event did not arise out of a breach of contract or negligent act or negligent omission of the Principal).

39A Force Majeure

(a) If a force majeure event causes delay or disruption to the WUC or otherwise affects the performance of the Contract, the Contractor will be entitled to claim:

(i) an EOT in accordance with subclause 33.5; and

(ii) an adjustment event in accordance with clause 35A,
in respect of the effects of the force majeure event to the extent such effects could not have been avoided or mitigated by the Contractor taking reasonable steps.

The Contractor shall be entitled to recover from the Principal the costs incurred in taking such reasonable steps.

(b) Subject to clause 39B, if a delay caused by a force majeure event continues for more than 180 days, the Principal party may terminate this Contract by giving written notice to the Contractor.

39B Pre-termination work

(a) If the Principal or the Contractor (as applicable) provides to the other party a termination notice under subclauses 32.5(a), 35A.3(b), 38.9, 39.1 or 39A such notice
(or as part of that notice where it is should it be given by the Contractor) shall be a deemed instruction to the Contractor to:

(i) remove Redundant Extension Infrastructure; and

(ii) restore the site to the condition it was in prior to the commencement of the WUC, (the ‘pre-termination work’).

(b) The Contractor may within [21 days] of the termination notice elect to proceed with all, some or none of the pre-termination work under a deemed instruction under subclause 39B(a).

(c) The Principal agrees that it is responsible to pay the Contractor under this Contract for all pre-termination work that the Contractor elects to undertake under subclause 39B(b) and that the Contractor undertaking such pre-termination work will be an adjustment event entitling the Contractor to claim an adjustment to the contract sum in accordance with clause 35A.

(d) If the Contractor exercises its entitlement to undertake pre-termination work under subclause 39B(b), this Contract will remain on foot only to the extent necessary to facilitate the performance of the pre-termination work until the later of:

(i) the date on which the Contractor notifies the Principal that the pre-termination work is complete; and

(ii) the date on which this Contract would have terminated but for the operation of this clause 39B,

after which date the Contract is terminated.

(e) If the Contractor does not exercise its entitlement to undertake pre-termination work under subclause 39B(b), this Contract will terminate the date on which the Contract would have terminated in the absence of this clause 39B.

40 Notification of claims

40.1 Communication of claims

The prescribed notice is a written notice of the general basis and quantum of the claim.

As soon as practicable after a party becomes aware of any claim in connection with the subject matter of the Contract, that party shall give to the other party and to the Independent Certifier the prescribed notice or a notice of dispute under subclause 41.2.

This subclause and subclause 40.3 shall not apply to any claim, including a claim for payment (except for claims which would, other than for this subclause, have been included in the final payment claim), the communication of which is required by another provision of the Contract.

40.2 Liability for failure to communicate

The failure of a party to comply with the provisions of subclause 40.1 or to communicate a claim in accordance with the relevant provision of the Contract shall, inter alia, entitle the other party to damages for breach of the Contract but shall neither bar nor invalidate the claim.
40.3 Independent Certifier’s decision

If within 28 days of giving the prescribed notice the party giving it does not notify the other party and the Independent Certifier of particulars of the claim, the prescribed notice shall be deemed to be the claim.

Within 56 days of receipt of the prescribed notice the Independent Certifier shall assess the claim and notify the parties in writing of the decision. Unless a party within a further 28 days of such notification gives a notice of dispute under subclause 41.2 which includes such decision, the Independent Certifier shall certify the amount of that assessment to be moneys then due and payable.

41 Dispute resolution

41.1 Procedure for resolving Disputes

Any dispute between the Principal and the Contractor arising out of or in connection with this Contract or the WUC (including questions concerning this Contract’s existence, meaning or validity) (‘dispute’) must be resolved in accordance with the procedures set out in this clause 41.

41.2 Negotiation

(a) If a dispute (other than a dispute referred under subclause 33.5A or 35A.5) arises then a party may give notice to the other party requesting that the dispute be referred for resolution by negotiation between the representatives of the parties, being:

(i) in the case of the Contractor, its chief executive officer (or his or her delegate); and

(ii) in the case of the Principal, a senior representative who has authority to resolve the dispute,

(the ‘senior executives’).

(b) A notice under subclause 41.2(a) must:

(i) state that it is a notice under subclause 41.2(a); and

(ii) include or be accompanied by reasonable particulars of the matters the subject of the dispute.

(c) If a dispute is referred for resolution by negotiation under subclause 41.2(a), then the senior executives must meet and use reasonable endeavours acting in good faith to resolve the dispute. The joint decision (if any) of the senior executives will be reduced to writing and will be contractually binding on the parties.

(d) If the dispute remains unresolved (in whole or in part) 15 business days after the date on which the notice referred to in subclause 41.2(a) was served, then:

(i) either party may refer the matter to litigation; or

(ii) the senior executives may jointly resolve to refer the matter to expert determination under subclause 41.3.
41.3 **Expert determination**

If a *dispute* has been referred to expert determination pursuant to subclauses 33.5A, 35A.5, 33.6 or 41.2(d)(ii), then subclauses 41.4 to 41.8 (inclusive) shall apply.

41.4 **Selection of expert**

(a) If a *dispute* under subclauses 33.5A, 35A.5 or 41.2(d)(ii) is referred to expert determination, the parties must nominate (by mutual agreement) an expert to determine the *dispute*.

(b) If the parties have not nominated an expert within 5 *business days* of a *dispute* under subclauses 33.5A, 35A.5 or 41.2(d)(ii) being referred to expert determination, then the expert is to be nominated (at the request of either party by):

(i) where the parties agree the dispute is:
   (A) purely of a technical nature, the President (for the time being) of Engineers Australia – Queensland Division; or
   (B) purely of a financial or accounting nature, the President (for the time being) of The Institute of Chartered Accountants in Australia – Queensland Branch; and

(ii) in all other cases, the President (for the time being) of the Queensland Law Society.

(c) If the expert is to be nominated by a person referred to in subclause 41.4(b) and that person declines to nominate a person as the expert but provides a list of people that could be appointed as the expert:

(i) the first person specified in that list will be taken to be nominated as the expert;

(ii) if the first person specified in that list does not accept the appointment as the expert, the next person specified in that list will be taken to be nominated as the expert; and

(iii) the process specified in subclause 41.4(c)(ii) will apply to the next and each subsequent person specified in that list until a person that is taken to be nominated as the expert accepts the appointment as the expert;

(d) Subject to subclause 41.4(c), if the expert is to be nominated by a person referred to in subclause 41.4(b) and the person nominated as the expert does not accept the appointment as the expert, then an alternative person is to be nominated as the expert (at the request of either party) by the same person referred to in subclause 41.4(b).

(e) It is the intention of the parties that the expert appointed to determine a *dispute* will be a person with appropriate skills having regard to the nature of the matters in *dispute*.

(f) Any agreement for expert determination under this *Contract* will not constitute an arbitration agreement for the purposes of the Commercial Arbitration Act 2013 (Qld).

(g) The *Principal* and the *Contractor* must enter into an agreement with the expert on the terms of the form of agreement contained in Annexure Part L or such other reasonable terms as the expert may require.
41.5 **Rules of expert determination**

The expert determination process will be administered, and the expert will be required to act in accordance with the terms of the agreement in Annexure Part L.

41.6 **Expert finding**

(a) The determination of the expert must be in writing and will be final and binding on the parties.

(b) Upon submission by any party, the expert may amend the determination to correct:

(i) a clerical mistake;

(ii) an error from an accidental slip or omission;

(iii) a material miscalculation of figures or a material mistake in the description of any person, thing or manner; or

(iv) a defect in form.

41.7 **Costs**

The Principal and the Contractor must bear their own costs in connection with the expert determination proceedings and must pay an equal portion of the cost of the expert.

41.8 **Place of expert determination**

The place of any expert determination will be Brisbane.

41.9 **Continue to perform**

Notwithstanding the existence of a dispute, each party must continue to perform its obligations under this Contract.

41.10 **Summary or urgent relief**

Nothing will prejudice the right of a party to institute proceedings to seek urgent injunctive, interlocutory or declaratory relief.

42 **Waiver of conditions**

Except as provided at law or in equity or elsewhere in the Contract, none of the terms of the Contract shall be varied, waived, discharged or released, except with the prior written consent of the parties.

43 **Liability**

43.1 **Liability cap**

(a) Subject to subclause 43.1(b), the Contractor’s maximum aggregate liability to the Principal:

(i) under this Contract;

(ii) in tort (including negligence);

(iii) under any statute; and
(iv) otherwise at law,
and irrespective of how it arises, is limited to the amount specified in Item 37.

(b) The limitation of liability in this clause 43 does not apply:

(i) to the extent that the liability of the Contractor to the Principal is an insured liability in accordance with the terms of a policy of insurance required to be effected and maintained under this Contract, in respect of an amount equal to any amount recovered by the Contractor under any such policy of insurance (or which would have been received but for the Contractor's breach of this Contract or a failure to comply with any relevant insurance policy);

(ii) to any amounts due under the indemnity under subclause 10.1(c);

(iii) to any liquidated damages due and payable under subclause 33.7; or

(iv) to any loss:

(A) arising from:

(1) fraud of the Contractor;
(2) criminal conduct of the Contractor;
(3) the death or injury of any person;
(4) loss, damage to, or destruction of, any property other than the WUC; or
(5) any claim for payment made by the Contractor's employees; or

(B) that cannot be excluded by law.

43.2 Exclusion of consequential loss

(a) A party will not be liable for any Consequential Loss:

(i) pursuant to this Contract;
(ii) arising from any Claim in connection with or by reason of this Contract; or
(iii) under an indemnity given by a party to another party under this Contract, save and except for Consequential Loss where:

(iv) any Claim for the Consequential Loss is one which the party is insured under an insurance policy required under the Transaction Documents and then to the extent the party receives the proceeds of the policy of insurance;

(v) there is an entitlement of the Principal to recover a loss from the Contractor under another Transaction Document (subject to the terms of that Transaction Document);

(vi) such exclusion is otherwise prohibited by law; or

(vii) the Consequential Loss is caused or contributed to by that party committing:

(A) a wilful default, being a deliberate breach of a material obligation with the knowledge that (or with conscious disregard as to whether) the breach
was likely to have harmful consequences, but does not include any
innocent mistake or error of judgment; or
(B) fraud (as defined by civil common law of Queensland),
but only to the extent caused or contributed to by such wilful default or fraud.

(b) This subclause 43.2 survives termination of this Contract.

44 GST

44.1 Construction
In this clause 44:
(a) unless there is a contrary indication, words and expressions which are not defined in
this Contract but which have a defined meaning in GST Law have the same meaning
as in the GST Law; and
(b) references to GST payable and input tax credit entitlement include GST payable by,
and the input tax credit entitlement of, the representative member for a GST group of
which the entity is a member and the GST joint venture operator of any GST joint
venture of which the entity is a participant.

44.2 Consideration GST exclusive
Unless otherwise expressly stated, all prices or other sums payable or consideration to be
provided under this Contract are exclusive of GST.

44.3 Payment of GST
If GST is payable on any supply made by a party (or any entity through which that Party acts)
(Supplier) under or in connection with this Contract, the recipient of the supply will pay to the
Supplier an amount equal to the GST payable on the supply.

44.4 Timing of GST payment
The amount referred to in subclause 44.3 must be paid in addition to and at the same time
and in the same manner (without any set-off or deduction) that the consideration for the
supply is to be provided under this Contract.

44.5 Tax invoice
The Supplier must deliver a tax invoice or an adjustment note to the recipient of a taxable
supply before the Supplier is entitled to payment of an amount under subclause 44.3, and
the recipient can withhold payment of the amount until the Supplier provides a tax invoice or
an adjustment note, as appropriate.

44.6 Adjustment event
If an adjustment event arises in respect of a taxable supply made by a Supplier under this
Contract, the amount payable by the recipient under subclause 44.3 will be recalculated to
reflect the adjustment event and a payment will be made by the recipient to the Supplier, or
by the Supplier to the recipient, as the case requires.
44.7 Reimbursements
Where a party is required under this Contract to pay for, reimburse or contribute to any expense, loss, liability or outgoing of another party or indemnify another party in relation to such an expense, loss, liability or outgoing, the amount required to be paid, reimbursed or contributed by the first party will be the sum of:

(a) the amount of the expense, loss, liability or outgoing less any input tax credits in respect of the expense, loss, liability or outgoing to which the other party is entitled; and

(b) if the payment, reimbursement or contribution is subject to GST, an amount equal to that GST.

44.8 Calculations based on other amounts
If an amount of consideration payable or to be provided under or in connection with this Contract is to be calculated by reference to:

(a) any expense, loss, liability or outgoing suffered or incurred by another person (Cost), that reference will be to the amount of that Cost excluding the amount of any input tax credit entitlement of that person relating to the Cost suffered or incurred; and

(b) any price, value, sales, proceeds, revenue or similar amount (Revenue), that reference will be to that Revenue determined by deducting from it an amount equal to the GST payable on the supply for which it is consideration.
Annexure – Part A

Annexure to the Australian Standard General Conditions of Contract for Design and Construct

This annexure shall be completed and issued as part of the tender documents and, subject to any amendments to be incorporated into the Contract, is to be attached to the General Conditions of Contract and shall be read as part of the Contract.

<table>
<thead>
<tr>
<th>Item</th>
<th>Description</th>
<th>ACN</th>
<th>ABN</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Principal (clause 1)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Principal's address</td>
<td>Phone</td>
<td>Fax</td>
</tr>
<tr>
<td>3</td>
<td>Contractor (clause 1)</td>
<td>ACN</td>
<td>ABN</td>
</tr>
<tr>
<td>4</td>
<td>Contractor's address</td>
<td>Phone</td>
<td>Fax</td>
</tr>
<tr>
<td>5</td>
<td>Independent Certifier (clause 1)</td>
<td>ACN</td>
<td>ABN</td>
</tr>
<tr>
<td>6</td>
<td>Independent Certifier's address</td>
<td>Phone</td>
<td>Fax</td>
</tr>
<tr>
<td>7</td>
<td>Date for practical completion (clause 1)</td>
<td>As stated in the Separable Portions Annexure.</td>
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<tr>
<td>7A</td>
<td>Amount of pre-funding payment (clause 1)</td>
<td>$[to be inserted]</td>
<td></td>
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<tr>
<td>7B</td>
<td>Amount of advance payment (clause 1)</td>
<td>5% of the contract sum.</td>
<td></td>
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<tr>
<td>7C</td>
<td>Amount of advance deduction amount (clause 1)</td>
<td>means, in respect of a progress certificate, an amount equal to 5% of the applicable payment claim by the Contractor that is certified for payment under subclause 36.1;</td>
<td></td>
</tr>
<tr>
<td>7D</td>
<td>Peak termination exposure amount (clause 1)</td>
<td>$[to be inserted]</td>
<td></td>
</tr>
</tbody>
</table>
8. Governing law
(subclause 1.2(h))
the law of the State of Queensland
If nothing stated, that of the jurisdiction where the site is located

9. (a) Currency
(subclause 1.2(g))
Australian dollars
If nothing stated, that of the jurisdiction where the site is located

(b) Place for payments
(subclause 1.2(g))
If nothing stated, the Principal's address

9A. The Principal’s Approvals
(clause 1)
[to be inserted]

10. The Principal’s project requirements are described in the following documents
(clause 1)

1  Preliminary design (if included in Item 11)
2  The scope of work contained in Annexure Part C.
3
4
5

11. Preliminary design
(clause 1)

(a) A preliminary design
* is included
* is not included
in the Principal's project requirements.
If neither deleted, a preliminary design is not included

(b) The preliminary design documents are:
1  [to be inserted]
2
3
4
5

12. Not used

13. Provisional sum, percentage for profit and attendance
(clause 3)
[to be inserted]%

14. Credit rating of issuer of security
(subclause 5.2)
a long-term credit rating by Standard & Poor’s Rating Services of at least A (or the equivalent rating by another internationally recognised ratings agency)

15. Not used

16. Not used
17 Documents, numbers of copies, and the times or stages at which they are to be supplied by the Contractor (subclause 8.3)

<table>
<thead>
<tr>
<th>Document</th>
<th>No. of copies</th>
<th>Time/stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>[to be inserted]</td>
<td></td>
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<td>2</td>
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<td>3</td>
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<td></td>
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<td>5</td>
<td></td>
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</tr>
</tbody>
</table>

18 Time for Independent Certifier's direction about documents (subclause 8.3)

- [to be inserted] days
- If nothing stated, 14 days

19 Not used

20 Not used

21 Not used

22 Legislative requirements

(a) Those excepted (subclause 11.1) [to be inserted]

(b) Identified WUC (subclause 11.2(a)(i)(C)) [to be inserted]

23 Insurance of the Works (clause 16A)

- Refer to Insurance Schedule.

24 Professional indemnity insurance (clause 16B)

(a) Levels of cover of Contractor's professional indemnity insurance shall be not less than

- Refer to Insurance Schedule.
(b) Period for which Contractor's professional indemnity insurance shall be maintained after issue of the final certificate

If nothing stated, 6 years

(c) Categories of consultants and levels of cover of consultants' professional indemnity insurance

<table>
<thead>
<tr>
<th>Category</th>
<th>Levels of cover</th>
</tr>
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<tbody>
<tr>
<td>[to be inserted]</td>
<td>$</td>
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<tr>
<td>$</td>
<td>$</td>
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<td>$</td>
<td>$</td>
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<tr>
<td>$</td>
<td>$</td>
</tr>
</tbody>
</table>

If nothing stated, $1 000 000

(d) Period for which each consultant's professional indemnity insurance shall be maintained after issue of the final certificate

If nothing stated, 6 years

25 Public liability insurance (clause 16)

Refer to Insurance Schedule.

Amount per occurrence shall be not less than $25

25A Principal's representative (subclause 21(b))

Contractor's representative (subclause 21(b))

Not used

27 The information, materials, documents or instructions and the times by, or periods within which they are to be given to the Contractor (clause 31)

<table>
<thead>
<tr>
<th>Documents or instructions</th>
<th>Times/Periods</th>
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<tbody>
<tr>
<td>[to be inserted]</td>
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</table>

Not used
<table>
<thead>
<tr>
<th></th>
<th>Description</th>
<th>Notation</th>
</tr>
</thead>
<tbody>
<tr>
<td>29(a)</td>
<td>Liquidated damages - practical completion, rate (subclause 33.7)</td>
<td>Refer to Separable Portions Annexure</td>
</tr>
<tr>
<td>29(b)</td>
<td>Liquidated damages - practical completion, maximum payable (subclause 33.7)</td>
<td>[to be inserted]% of the contract sum</td>
</tr>
<tr>
<td>30</td>
<td>Not used</td>
<td></td>
</tr>
<tr>
<td>31</td>
<td>Other compensable causes (paragraph (b) of clause 1 and subclause 33.9)</td>
<td>[to be inserted]</td>
</tr>
<tr>
<td>32</td>
<td>Defects rectification period (clause 34)</td>
<td>the period commencing on the date of this Contract and ending 13 months after the date of practical completion.</td>
</tr>
<tr>
<td>33</td>
<td>Not used</td>
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<tr>
<td>34</td>
<td>Not used</td>
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<td>35</td>
<td>Interest rate on overdue payments (subclause 36.5)</td>
<td>% per annum</td>
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<td></td>
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<td>If nothing stated, 18% per annum</td>
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<td>36</td>
<td>Not used</td>
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<tr>
<td>36A</td>
<td>Break fee (subclause 39.2(d))</td>
<td>[to be inserted]</td>
</tr>
<tr>
<td>37</td>
<td>Liability cap (subclause 43.1(a))</td>
<td>[to be inserted with an amount that does not exceed the contract sum]</td>
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</table>
## Separable Portions Annexure

<table>
<thead>
<tr>
<th>Separable portion</th>
<th>No. 1</th>
</tr>
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<tbody>
<tr>
<td>(clause 1)</td>
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</tr>
<tr>
<td>Description of Separable Portion</td>
<td>[to be inserted]</td>
</tr>
<tr>
<td>(clause 1)</td>
<td></td>
</tr>
<tr>
<td>Date for Practical Completion</td>
<td>[to be inserted]</td>
</tr>
<tr>
<td>(clause 1)</td>
<td></td>
</tr>
<tr>
<td>Liquidated damages - practical completion, rate (clause 33.7)</td>
<td>[to be inserted]</td>
</tr>
</tbody>
</table>

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<thead>
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<tr>
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<td>[to be inserted]</td>
</tr>
<tr>
<td>(clause 1)</td>
<td></td>
</tr>
<tr>
<td>Date for Practical Completion</td>
<td>[to be inserted]</td>
</tr>
<tr>
<td>(clause 1)</td>
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<tr>
<td>Liquidated damages - practical completion, rate (clause 33.7)</td>
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</table>

<table>
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<tbody>
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<tr>
<td>Description of Separable Portion</td>
<td>[to be inserted]</td>
</tr>
<tr>
<td>(clause 1)</td>
<td></td>
</tr>
<tr>
<td>Date for Practical Completion</td>
<td>[to be inserted]</td>
</tr>
<tr>
<td>(clause 1)</td>
<td></td>
</tr>
<tr>
<td>Liquidated damages - practical completion, rate (clause 33.7)</td>
<td>[to be inserted]</td>
</tr>
</tbody>
</table>
AS 4902-2000

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