

## **NEW BRIDGEWATER BRIDGE PROJECT**

### **BACKGROUND IN RELATION TO DEED OF VARIATION – 16 DECEMBER 2022**

The Contractor approached the State requesting consideration of providing the Contractor with relief in relation to cost escalation in excess of what the Contractor anticipated at time of tender in August 2021.

During 2021-22, the Australian construction industry experienced construction cost escalation not experienced for decades. The road and bridge construction cost escalation of 8.8 per cent experienced between June 2021 and June 2022 is the highest annual change recorded for the corresponding Australian Bureau of Statistics index over the 23 years it has been recorded.

All civil and building contractors, and not just the New Bridgewater Bridge project's Contractor, are experiencing construction cost escalation. However, what makes this case different is a combination of:

- the scale of the works (greater than \$500 million)
- duration of the works (approximately four years from close of tenders to construction completion)
- the risk exposure period of the Contractor (that is between close of tender August 2021 to securing most subcontract agreements in the second half of 2022) coinciding with highest annual change recorded for the corresponding index over the 23 years it has been recorded
- the exposure of the State to potentially substantial project costs resulting from an adversarial rather than collaborative relationship with the Contractor.

The Deed of Variation includes a 'rise and fall' provision that adjusts monthly progress payments based on the relevant Australian Bureau of Statistics index at the time, relative to a baseline determined from a long-term average construction cost escalation of 3 per cent per annum. It also requires the Contractor use reasonable endeavours to ensure that equivalent rise and fall entitlements are included in its significant subcontract agreements.

The Deed of Variation also includes granting a measure of relief for the already experienced greater than anticipated construction cost escalation during the 12 months from tender in August 2021 via an incentive payment to be made upon successful completion of the works. The value of the incentive payment is reduced if traffic on the bridge is not achieved by the contracted date and by the value of any claims from the Contractor in relation to the management of several risks that the State is liable for, including but not limited to the unanticipated discovery of Aboriginal artefacts and management of contaminated material. This establishes financial incentives for the Contractor to proactively and cost-effectively manage several risks for which the State is liable pay the Contractor for associated management costs.

The value of the incentive payment is to be calculated after construction completion and shall remain commercial-in-confidence until 3 months after construction completion.

As at December 2022, the date for traffic on the bridge remains the end of 2024 and the date for construction completion is 29 July 2025. After the traffic transfers onto the new bridge, the associated road interchange works at either end of the bridge will be completed.

The associated costs will be fully funded from the existing project budget.



# Deed of Variation to D&C Deed

## New Bridgewater Bridge Project

Dated

Crown in Right of Tasmania  
(represented by the Department of State Growth)  
("State")

and

McConnell Dowell Constructors (Aust) Pty Ltd  
("Contractor")

# Deed of Variation - New Bridgewater Bridge Project

## Contents

<b>Details</b>	<b>1</b>	
<b>General terms</b>	<b>2</b>	
<b>1</b>	<b>Definitions and interpretation</b>	<b>2</b>
1.1	Terms defined in the D&C Deed	2
1.2	Definitions	2
1.3	Interpretation	2
<b>2</b>	<b>Amendments to D&amp;C Deed</b>	<b>2</b>
<b>3</b>	<b>Confirmation and acknowledgement</b>	<b>2</b>
3.1	Confirmation	2
3.2	Release and indemnity before the date of this Deed	2
3.3	Conflict	3
<b>4</b>	<b>Notices and other communications</b>	<b>3</b>
<b>5</b>	<b>Confidentiality</b>	<b>3</b>
<b>6</b>	<b>Miscellaneous</b>	<b>4</b>
<b>Schedule 1</b>	<b>Amendments</b>	<b>5</b>
<b>Schedule 2</b>	<b>Confidential Provisions</b>	<b>16</b>
<b>Signing page</b>		<b>17</b>

# New Bridgewater Bridge Project

## Details

<b>Parties</b>	<b>State and Contractor</b>	
<b>State</b>	Name	<b>Crown in Right of Tasmania (represented by the Department of State Growth)</b>
	ABN	36 388 980 563
	Address	C/- Department of State Growth, Parliament Square Building, 4 Salamanca Place, Hobart, TAS, 7000
	Email	bridgewaterbridge@stategrowth.tas.gov.au
	Attention	Secretary, Department of State Growth
<b>Contractor</b>	Name	<b>McConnell Dowell Constructors (Aust) Pty Ltd</b>
	ABN	71 002 929 017
	Address	Level 3, 109 Burwood Road, Hawthorn, VIC, 3122
	Email	BBRProjectDirector@mcdgroup.com
	Attention	Project Director
<b>Recitals</b>	<b>A</b>	On 19 July 2022, the State entered into the D&C Deed under which the State appointed the Contractor to carry out the D&C Activities.
	<b>B</b>	The State and the Contractor have agreed to vary the D&C Deed in the manner set out in this Deed.

# General terms

---

## 1 Definitions and interpretation

### 1.1 Terms defined in the D&C Deed

A term which has a defined meaning in the D&C Deed has the same meaning when used in this Deed unless it is expressly defined in this Deed, in which case the meaning in this Deed applies.

### 1.2 Definitions

In this Deed unless the contrary intention appears, these meanings apply:

**Deed** means this instrument of deed.

**D&C Deed** means the design and construct deed in respect of the Bridgewater Bridge project entered into between the State and the Contractor dated 19 July 2022.

**Effective Date** means the date of this Deed.

### 1.3 Interpretation

The interpretation provisions in clause 1.4 of the D&C Deed apply to this Deed (*mutatis mutandis*) unless the contrary intention is expressed in this Deed.

---

## 2 Amendments to D&C Deed

As from the Effective Date, the D&C Deed is amended as set out in Schedule 1.

---

## 3 Confirmation and acknowledgement

### 3.1 Confirmation

Each party confirms that:

- (a) except as provided in clause 2, no other amendments are to be made to the D&C Deed; and
- (b) the D&C Deed as amended by this Deed continues in full force and effect.

### 3.2 Release in relation to pre-18 November 2022 Claims and entitlements to Claim

The Contractor:

- (a) confirms that:
  - (i) as at 18 November 2022, there were no outstanding Claims for any Compensable Cause of Delay or Excusable Cause of Delay under the D&C Deed; and
  - (ii) the Contractor will not make a Claim under clause 10.4 or clause 10.7 of the D&C Deed for an extension of time or costs in relation to any Compensable Cause of Delay or Excusable Cause of

Delay under the D&C Deed in relation to delays occurring or associated costs incurred (if any) in the period up to and including 18 November 2022; and

(b) releases the State from and against any Claim referred to in clause 3.2(a),

other than in connection with notice of Claim CN-088 dated 3 November 2022 provided by the Contractor to the State in accordance with clause 19.2(a) of the D&C Deed.

### **3.3 Conflict**

If there is a conflict between the D&C Deed and this Deed, the terms of this Deed prevail.

---

## **4 Notices and other communications**

Notices and other communications in connection with this Deed must be given in the manner provided for in the D&C Deed as varied by this Deed.

---

## **5 Confidentiality**

(a) Subject to clause 5(b), the parties must:

- (i) keep confidential each provision of this Deed that is designated as a confidential provision in Schedule 2; and
- (ii) ensure that each of its officers, employees, agents and Subcontractors complies with the terms of clause 5(a)(i).

(b) Neither party is obliged to keep confidential any provision referred to in clause 5(a)(i):

- (i) which is in the public domain through no default of that party; or
- (ii) the disclosure of which is:
  - (A) required by Law;
  - (B) necessary or advisable to get a consent, authorisation, approval or licence from an Authority;
  - (C) necessary or advisable to disclose the confidential provision to a taxation or fiscal authority;
  - (D) necessary to disclose a confidential provision in answer to a question asked of a Minister in State or Federal Parliament or otherwise to comply with a State or Federal Minister's obligations to Parliament;
  - (E) given to a court in the course of proceedings to which the Contractor is a party;
  - (F) given to a person for the purpose of obtaining professional advice, subject to that person being bound by confidentiality undertakings no less favourable to the State than this clause 4; or

- (G) the parties otherwise agree in writing can be disclosed.
- (c) The parties acknowledge that subject to clauses 5(a) and 5(b), the State is required to disclose this Deed (and information concerning the terms of this Deed) under or in accordance with the “Treasurer’s Instruction C-1 Financial Management Act 2016 Contract – Disclosure and Confidentiality in Government Contracting”.
- (d) The Contractor must provide to the State any other information which the State reasonably requires to comply with its obligations under clause 5(c).
- (e) Nothing in this clause derogates from a party’s obligations under *the Personal Information Protection Act 2004* (Tas) or the *Privacy Act 1988* (Cth).

---

## 6 Miscellaneous

- (a) This Deed is governed by the Laws applying in Tasmania.
- (b) The parties submit to the non-exclusive jurisdiction of courts with jurisdiction in Tasmania, and any courts that may hear appeals from those courts, in respect of any proceedings in connection with this Deed.
- (c) If any provision of this Deed is or at any time becomes illegal, prohibited, void or unenforceable for any reason, that provision is to be read down so as to no longer be illegal, prohibited, void or unenforceable, and if not capable of being read down in such manner, severed from this Deed, and the remaining provisions of this Deed:
  - (i) continue to be enforceable; and
  - (ii) are to be construed with such additions, deletions and modifications of language as are necessary to give effect to the remaining provisions of this Deed.
- (d) This Deed may be entered into in any number of counterparts, and a party may execute this Deed by signing any counterpart, with all counterparts, taken together, constituting one instrument of deed.
- (e) Each party must bear their own costs in preparing and negotiating this Deed.
- (f) This Deed is binding on and benefits each party and, unless repugnant to the sense or context, their respective administrators, personal representatives, successors and permitted assigns.
- (g) The doctrine or principle of merger does not apply to this Deed or to anything done under or in connection with this Deed. Accordingly, no right or obligation of a party is merged in any thing done pursuant to this Deed.
- (h) Nothing in this Deed is intended to prevent, is to be taken to prevent, or prevents, the free exercise by the Governor, by any member of the Executive Council, or by any Minister of the Crown, of any duties or authorities of his or her office. Any provision of this Deed that is inconsistent with this clause is of no legal effect to the extent of the inconsistency.

# Schedule 1 Amendments

On and from the Effective Date, the D&C Deed is amended as follows:

- (a) Insert new definition in clause 1.1 as follows:

***Incentive Bonus*** means the amount payable by the State to the Contractor in accordance with clause 11.7, as calculated pursuant to clause 11.7.

- (b) The definition of "Date for Traffic on the Bridge" in clause 1.1 is amended to read as follows:

***"Date for Traffic on the Bridge*** means:

- (a) as at the date of this Deed, the relevant date specified in item 1.3 of Schedule 1; and
- (b) where an extension of time is granted by the State's Representative pursuant to clause 10.3A or allowed in any litigation or any other agreed form of dispute resolution, the date resulting therefrom."

- (c) The definition of "Design and Construct Contract Sum" in clause 1.1 is amended to read as follows:

***"Design and Construct Contract Sum*** means the sum of the Design Contract Sum, the Construction Contract Sum and the Incentive Bonus set out in Item 4 of Part A of Schedule 3, as adjusted pursuant to this Deed."

- (d) Insert new clause 10.3A as follows:

**10.3A Extension of time to Date for Traffic on the Bridge**

- (a) *If the Contractor is or will be delayed by an Act of Prevention, an Event of Force Majeure or a Change in Law in a manner which will delay it in achieving Traffic on the Bridge, the Contractor may claim an extension of time.*
- (b) *The following are conditions precedent to the Contractor's entitlement to claim an extension of time under clause 10.3A(a):*
- (i) *the Contractor must within 15 Business Days of the first day upon which the Contractor became aware or ought reasonably to have become aware of both the commencement of the cause of delay and that the relevant cause might delay the carrying out of the D&C Activities, submit a written claim to the State's Representative for an extension to the Date for Traffic on the Bridge, which:*
- (A) *gives detailed particulars of the delay and the events or circumstances giving rise to the delay; and*
- (B) *states the number of days of extension of time claimed together with the basis of calculating that*



*period, including evidence that the delay involves an activity which is critical to the maintenance of progress of the D&C Activities and which will delay it in achieving Traffic on the Bridge in the manner described in clause 10.3A(b)(iv);*

- (ii) *if the effects of the delay continue beyond the period stated in clause 10.3A(b)(i) and the Contractor wishes to claim an extension of time in respect of the further delay, the Contractor must submit a further written claim to the State's Representative:*
    - (A) *every 10 Business Days after the first written claim until 5 Business Days after the end of the effects of the delay; and*
    - (B) *containing the Information required by clause 10.3A(b)(i);*
  - (iii) *the cause of the delay was beyond the reasonable control of the Contractor;*
  - (iv) *the Contractor must have actually been, or will be, delayed in achieving Traffic on the Bridge by an Act of Prevention, an Event of Force Majeure or a Change in Law;*
  - (v) *the Contractor must have taken and must continue to take reasonable steps to mitigate the delay and the Contractor's entitlement to an extension of time shall be reduced to the extent it fails to do so; and*
  - (vi) *the Contractor has fulfilled its obligations under clause 10.2 in connection with programming.*
- (c) *If the Contractor fails to comply with the conditions precedent in clause 10.3A(b):*
- (i) *the Contractor will have no entitlement to an extension of time under this clause 10.3A;*
  - (ii) *the State will not be liable upon any Claim by the Contractor under this clause 10.3A; and*
  - (iii) *the Contractor will be absolutely barred from making any Claim against the State under this clause 10.3A,*  
*arising out of or in any way in connection with the event giving rise to the delay and the delay involved.*
- (d) *Subject to clauses 10.3A(e) and 10.6, if the conditions precedent in clause 10.3A(b) have been satisfied, the State's Representative must extend the Date for Traffic on the Bridge by:*
- (i) *if the cause of delay is an Act of Prevention that is a Change and a Change Order has been issued, any period notified in a Change Order under clause 6.2(b); or*
  - (ii) *otherwise, a reasonable period determined by the State's Representative and notified to the State and the*

*Contractor within 15 Business Days after the Contractor's last claim under clause 10.3A(b).*

(e) *In respect of each claim for an extension of time under clause 10.3A(b), the State's Representative will reduce any extension of time to the Date for Traffic on the Bridge it would otherwise have determined under this clause 10.3A to the extent that the Contractor:*

- (i) *failed to take all reasonably practicable steps necessary both to preclude the cause of the delay and to avoid or minimise the consequences of the delay; or*
- (ii) *contributed to the delay.*

(f) *When:*

- (i) *an Act of Prevention;*
- (ii) *an Event of Force Majeure; or*
- (iii) *a Change in Law,*

*overlap with a non-qualifying cause of delay, then to the extent of the overlap, the Contractor shall not be entitled to claim an extension of time.*

(g) *A failure of the State's Representative to grant:*

- (i) *a reasonable extension of time to the Date for Traffic on the Bridge; or*
- (ii) *an extension of time to the Date for Traffic on the Bridge within the time required under this Deed,*

*will not cause the Date for Traffic on the Bridge to be set at large, but nothing in this clause 10.3A(g) will prejudice any right of the Contractor to damages.*

(e) Insert new clause 11.7 as follows:

**11.7 Incentive Bonus**

(a) *The Contractor will be entitled to be paid the Incentive Bonus by the State in the circumstances and in the amount calculated in accordance with this clause 11.7.*

(b) *The maximum amount of the Incentive Bonus is \$ [REDACTED] (excluding GST), provided that such amount:*

- (i) *will be reduced in accordance with clauses 11.7(c), 11.7(d) and 11.7(f); and*
- (ii) *must not be reduced in accordance with clauses 11.7(c), 11.7(d) and 11.7(f) to an amount that is less than \$ [REDACTED] (excluding GST).*

(c) *If any Claim is, prior to the Construction Completion Date, claimed by and paid to the Contractor in accordance with:*

- (i) *clause 2.18 (COVID-19);*

- (ii) *clause 3.10 (Things of value found) (including any claim for actual direct costs incurred by the Contractor complying with a Direction of the State's Representative under clause 3.10(b)(iii) to mitigate delay arising as a result of the discovery of an Artefact or to avoid interference with or minimise impacts on an Artefact);*
- (iii) *clause 3.12 (Contamination);*
- (iv) *clause 3.13 (Native Title Application); or*
- (v) *clause 10.7 (Delay costs) (other than a claim for delay or disruption costs arising as a result of an Act of Prevention),*

*then the amount referred to in clause 11.7(b) will be reduced, subject to clause 11.7(b)(ii), by an amount equal to the amount claimed and paid.*

- (d) *If the Contractor does not achieve Traffic on the Bridge by the Date for Traffic on the Bridge, the amount of the Incentive Bonus calculated in accordance with clause 11.7(b) will be reduced, subject to clause 11.7(b)(ii), by the amount of \$[REDACTED] (excluding GST) for each day after the Date for Traffic on the Bridge until the Contractor achieves Traffic on the Bridge.*
- (e) *The Contractor will be entitled to give the State's Representative a claim for the amount of the Incentive Bonus, calculated in accordance with this clause 11.7, by no later than 20 Business Days after the date of receipt of the Certificate of Construction Completion. The Contractor's claim under this clause 11.7(e) will be a payment claim for the purposes of clause 12.3 (provided that clauses 12.3(a), 12.3(c), 12.5(a)(i), 12.5(a)(ii), 12.5(a)(iii) and 12.5(a)(iv) will not apply to that payment claim).*
- (f) *The parties agree to make further adjustments to the Incentive Bonus at Final Handover if:*
  - (i) *any amount is deducted from the Incentive Bonus in relation to a Claim referred to in clause 11.7(c) and the Claim is subsequently finally determined in a manner which increases or decreases the amount of the payment for that Claim to the Contractor; or*
  - (ii) *any Claim is, prior to the Construction Completion Date, claimed but not paid and is subsequently finally determined in accordance with:*
    - (A) *clause 2.18 (COVID-19);*
    - (B) *clause 3.10 (Things of value found) (including any claim for actual direct costs incurred by the Contractor complying with a Direction of the State's Representative under clause 3.10(b)(iii) to mitigate delay arising as a result of the discovery of an Artefact or to avoid interference with or minimise impacts on an Artefact);*
    - (C) *clause 3.12 (Contamination);*
    - (D) *clause 3.13 (Native Title Application); or*

- (E) *clause 10.7 (Delay costs) (other than a claim for delay or disruption costs arising as a result of an Act of Prevention),*

*then the amount referred to in clause 11.7(b) will be increased or decreased, subject to clause 11.7(b)(ii), by an amount equal to the amount claimed and paid.*

- (g) *Any Incentive Bonus to be paid by the State to the Contractor prior to Final Handover will be subject to the State's right of set-off under clause 18.12.*
- (h) *Notwithstanding the Incentive Bonus forming part of the Design and Construct Contract Sum, any Performance Security to be provided by the Contractor under clauses 2.7(a) or 2.8(e) will be calculated having regard to the Design and Construct Contract Sum less the Incentive Bonus.*
- (f) Amend clause 12.1(a) to insert the words "*and in accordance with clause 11.7 for the Incentive Bonus*" after the words "*progressive completion of the D&C Activities*".
- (g) Amend clause 12.3(d) to insert the words "*or clause 11.7(e)*" after the words "*payment claim under clause 12.3(a)*".
- (h) Amend clause 12.3(e) to insert the words "*or clause 11.7(e)*" after the words "*payment claim in accordance with clause 12.3(a)*".
- (i) Amend clause 12.3(j) to insert the words "*or clause 11.7(e)*" after the words "*payment claim under clause 12.3(a)*".
- (j) Amend clause 12.3(k) to insert the words "*and clause 11.7(e)*" after the words "*the times specified under clause 12.3(a)*".
- (k) Amend Part A of Schedule 3 as shown in mark-up below:

### ***Part A - Design and Construct Contract Sum***

*The Design and Construct Contract Sum is the sum of the:*

- (a) *Design Contract Sum set out in Part B to this Schedule 3; ~~and~~*
- (b) *Construction Contract Sum set out in Part C to this Schedule 3; and*
- (c) *Incentive Bonus set out in clause 11.7 of this Deed*

*as shown in the table below.*

*The Construction Contract Sum is subject to adjustment in accordance with Part D of this Schedule 3. The Incentive Bonus is subject to adjustment in accordance with clause 11.7 of this Deed.*

<b>Item No.</b>	<b>Description</b>	<b>Value (Excl. GST)</b>
1	<i>Design Contract Sum (Part B of this Schedule 3)</i>	\$ [REDACTED]
2	<i>Construction Contract Sum (Part C of this Schedule 3)</i>	\$ [REDACTED]
3	<i>Incentive Bonus (clause 11.7 of this Deed)</i>	\$ [REDACTED]
4	<i>Design and Construct Contract Sum (Sum of Part B and Part C of this Schedule 3 and the Incentive Bonus)</i>	\$ [REDACTED]

(l) Part D in Schedule 3 is deleted and the following is inserted:

**Part D – Design and Construct Contract Sum rise and fall**

**1 Definitions**

The following definitions are used in this Part D of Schedule 3:

- (a) **Adjustment Factor (F)** means 0.8.
- (b) **Base Construction Index No.** means the index number that applies in the relevant month as set out in the following table:

<b>Month</b>	<b>Index Number</b>
<b>Jul-22</b>	<b>132.30</b>
Aug-22	132.63
Sep-22	132.95
Oct-22	133.28
Nov-22	133.61
Dec-22	133.94
Jan-23	134.27
Feb-23	134.60
Mar-23	134.93
Apr-23	135.27
May-23	135.60
Jun-23	135.93
Jul-23	136.27
Aug-23	136.61
Sep-23	136.94
Oct-23	137.28
Nov-23	137.62
Dec-23	137.96
Jan-24	138.30
Feb-24	138.64

<b>Month</b>	<b>Index Number</b>
Mar-24	138.98
Apr-24	139.32
May-24	139.67
Jun-24	140.01
Jul-24	140.36
Aug-24	140.70
Sep-24	141.05
Oct-24	141.40
Nov-24	141.75
Dec-24	142.10
Jan-25	142.45
Feb-25	142.80
Mar-25	143.15
Apr-25	143.50
May-25	143.86
Jun-25	144.21
Jul-25	144.57
Aug-25	144.92
Sep-25	145.28
Oct-25	145.64
Nov-25	146.00
Dec-25	146.36
Jan-26	146.72
Feb-26	147.08
Mar-26	147.45
Apr-26	147.81
May-26	148.17
Jun-26	148.54
Jul-26	148.91

- (c) **Construction Index No.** is calculated using the index published in the Australian Bureau of Statistics (ABS) publication Catalogue No. 6427, *Producer Price Indexes, Table 17, 3101 Road and Bridge Construction Victoria (Producer Price Index)*.

For the purposes of calculating the Construction Index No., the parties agree the following:

- (i) the first ABS Producer Price Index number published by ABS, whether or not it is described as 'preliminary', will be used and no recalculation will be made on the basis of any subsequent revisions to the index number; and
- (ii) as the ABS Producer Price Index is published on a quarterly basis, a monthly equivalent will be calculated as follows:
  - (A) a linear interpolation will be created between the published quarterly indices, with a monthly scale interposed;

- (B) *the index for each of the months in the relevant quarter will be measured off the linear interpolation and calculated to two decimal points; and*
- (C) *the Construction Index No. calculated in accordance with the above method will apply across the whole of the month to which it refers.*

(d) **Current Construction Index No. means:**

- (i) *where the Project Works the subject of the rise and fall adjustment are undertaken before the Construction Completion Date, the Construction Index No. applicable during the month immediately before the date of the payment claim submitted for those Project Works pursuant to clause 12.3 of this Deed; and*
- (ii) *where the Project Works (other than the carrying out of maintenance in accordance with clause 13.1(b)(iv) of this Deed) the subject of the rise and fall adjustment are undertaken after the Construction Completion Date, the Construction Index No. applicable during the month in which the Construction Completion Date falls.*

(e) **Effective Value (EV) means, with respect to a payment claim given under clause 12.3 of this Deed to which the rise and fall adjustment applies, the value of any Work claimed in that payment claim for the previous month (excluding the Effective Value of any previous payment claims given under clause 12.3 of this Deed), less (and without double counting):**

- (i) *the value of any Work which is not subject to rise and fall adjustment in accordance with item 5 of this Part D of Schedule 3; and*
- (ii) *the value of any Work required to be calculated on the basis of actual costs incurred,*

*but disregarding any previous increase or decrease in costs assessed under this section.*

## **2 Entitlement to rise and fall adjustment**

*Subject to the Contractor's compliance with this Part D of Schedule 3, the Construction Contract Sum (and the Design and Construct Contract Sum) will be adjusted for any rise and fall in the cost of the completed Project Works calculated in accordance with item 3 of this Part D of Schedule 3.*

## **3 Calculation of rise and fall adjustment**

*Subject to item 5, each payment claim given on or from 25 July 2022 in accordance with clause 12.3 of this Deed and to which Cost Centres 1, 2, 3 and 4 of Part C of this Schedule 3 apply, will be adjusted for rise and fall in accordance with the following formula:*

$$A_1 = \frac{\text{Effective Value (EV)}}{\text{Adjustment Factor (F)}} \times \frac{\text{Current Construction Index No.} - \text{Base Construction Index No.}}{\text{Base Construction Index No.}}$$

#### **4 Payment claims subject to rise and fall adjustment**

- (a) *Subject to item 4(b) and unless otherwise agreed to by the State's Representative, a payment claim submitted by the Contractor in accordance with clause 12.3 of this Deed in respect of which the Contractor is seeking a rise and fall adjustment in accordance with item 3 must be for the full value of that part or parts of the Project Works executed up to and including the last day of the month to which the payment claim applies including any adjustments for rise and fall calculated in accordance with this Part D of Schedule 3.*
- (b) *If the Contractor is entitled to a rise and fall adjustment for a payment claim already submitted by the Contractor in accordance with clause 12.3 of this Deed, the process set out in this Part D of Schedule 3 will apply to that payment claim retrospectively such that the Contractor will still be entitled to a rise and fall adjustment calculated by the State in accordance with item 3 of this Part D of Schedule 3 for that payment claim.*

#### **5 Payments not subject to rise and fall adjustment**

- (a) *Notwithstanding any other provision of this Deed to the contrary, payments made to the Contractor in respect of the following items will not be subject to a rise and fall adjustment calculated in accordance with item 3 of this Part D of Schedule 3:*
  - (i) *any costs incurred under Part B of this Schedule 3;*
  - (ii) *any costs incurred under Discrete Construction Elements 1.2 and 1.6 of Cost Centre 1 – Preliminary and General Requirements of Part C of this Schedule 3;*
  - (iii) *any Change proposed by the Contractor under clause 6.6 of this Deed;*
  - (iv) *any Change Order, Change or deemed Change arising from any act or omission (including breach) of the Contractor;*
  - (v) *any other Change Order or occurrence which is deemed to be a Change, unless such Change is valued in accordance with paragraph (b) below;*
  - (vi) *any payment for the goods or services provided by the State to the Contractor;*
  - (vii) *any Claim under clause 6.11 of this Deed for an increase to the Design and Construct Contract Sum as a result of the direct net extra costs of the conduct of the elements of the Additional Landscape Works referred to in the Landscape Scope (Final) exceeding the Additional Landscape Amount;*
  - (viii) *any Claim for Additional Contamination Treatments in accordance with clause 3.12(e) of this Deed;*
  - (ix) *any payment made by the State to the Contractor for the Advance Payment in accordance with clause 12.2 of this Deed;*



- (x) any reduction to a monthly payment schedule as a result of a Deduction Amount in accordance with clause 12.3(d) of this Deed;
  - (xi) payment of the Incentive Bonus in accordance with clause 11.7 of this Deed; and
  - (xii) payments made as a result of rise and fall adjustments in accordance with this Part D of Schedule 3.
- (b) Despite clauses 6.4(a) and 6.4(b) of this Deed, the amount of any adjustment to the Design and Construct Contract Sum and to the Payment Schedule (**Change Amount**) as a result of any:
- (i) Change Order issued by or any Change directed by the by the State's Representative; or
  - (i) occurrence which is deemed under this Deed to be a Change,

will be calculated as follows:

$$\text{Change Amount} = \text{Base Costs} \times \frac{\text{Relevant Base Index}}{\text{Relevant Construction Index}}$$

**Where:**

**Base Costs** means the costs of the Change referred to in clauses 6.4(a) or 6.4(b) of this Deed (as applicable) valued as at the date of the Change Order or deemed Change, which amount will be increased at a rate of 3% per annum between the date of the Change Order or deemed Change until the forecast date of completion of the Works comprising the Change Order or deemed Change;

**Relevant Base Index** means the Base Construction Index No. as at the date of the Change Order or deemed Change; and

**Relevant Construction Index** means the Current Construction Index No. as at the date of the Change Order or deemed Change.

## **6 Obligation to pass on rise and fall adjustment**

- (a) Subject to item 6(b) of this Part D of Schedule 3 and unless otherwise agreed by the State's Representative in writing, the Contractor must use reasonable endeavours to ensure that, for any Subcontracts entered into before or after the date of this Deed with:
- (i) a value of \$2 million or more; and
  - (ii) a duration of 12 months or more,
- (**Significant Subcontracts**) rise and fall entitlements equivalent to those in item 3 of this Part D of Schedule 3 are passed on to the Subcontractors under those Significant Subcontracts.

- (b) *If rise and fall entitlements are unable to be passed down to a Subcontractor in accordance with item 6(a) of this Part D of Schedule 3, the Contractor must ensure that an equivalent outcome (having regard to the nature of the Significant Subcontract) is passed on to the Subcontractor under the Significant Subcontract which is approved by the State's Representative in writing.*
- (c) *In respect of each Significant Subcontract, the Contractor must provide to the State, on request, evidence acceptable to the State (acting reasonably) that rise and fall entitlements have been passed on under those Significant Subcontracts in accordance with item 6(a) or 6(b) of this Part D of Schedule 3.*

**7 Index Number Published by Australian Bureau of Statistics**

*If the indices referred to in this Part D of Schedule 3 cease to be published by the ABS, the Dispute Avoidance Board will determine an appropriate substitute published index for the calculation of rise and fall adjustments in accordance with this Part D of Schedule 3 for the remaining Project Works in consultation with the State and the Contractor.*

## Schedule 2 Confidential Provisions

In accordance with clause 5(a), the parties must keep confidential, until 3 months after the Date of Construction Completion, the dollar figures in clauses (e) and (k) of Schedule 1 to this Deed.

# Signing page

## Signing by State

Executed as a deed by **The Honourable Michael Ferguson MP** (being and as the Minister for Infrastructure and Transport) in the presence of the witness named below:

Minister's  
signature:  
→

Witness'  
signature:  
→

\*Witness  
print  
name and  
position:

\*Use BLOCK LETTERS

\*Witness  
print  
address:

## Signing by Contractor

Executed as a deed by **McConnell Dowell Constructors (Aust) Pty Ltd** in accordance with section 127(1) of the *Corporations Act 2001* (Cwlth):

Signature:  
→

Signature:  
→

\*Print  
name and  
office  
held:

\*Print  
name and  
office  
held:

\*Use BLOCK LETTERS

Note: In the case of a company that has only one director and one secretary, show the office held as 'SOLE DIRECTOR AND SOLE COMPANY SECRETARY'