

Memorandum of Understanding
between
North East Link Authority
and
City of Yarra

Memorandum of Understanding

1. Purpose

- (a) The North East Link Authority (**NELA**) has been established to develop and deliver the North East Link Project (**Project**) on behalf of the State of Victoria.
- (b) The City of Yarra (**Council**) is a municipal council established under the *Local Government Act 1989* (Vic).
- (c) The Project will be partially constructed within the municipal district under the local government of the Council.
- (d) The Project Team acknowledges the unique position of the Council in relation to the Project, particularly as the Council does not support the Project. Notwithstanding, the Council has committed to working cooperatively with the Project Team in order to achieve the best possible outcome within the municipal district under the local government of the Council.
- (e) Interface and cooperation between the Project Team and the Council will be required to assist in achieving the successful design, planning, assessment, procurement and delivery of the Project.
- (f) This Memorandum of Understanding sets out the co-operation, co-ordination and support that the North East Link Project Team comprising a specialist team of representatives from the NELA and Victorian government agencies and departments (**Project Team**) and Council have committed to provide in relation to the Project.

2. Definitions

In this Memorandum of Understanding, unless expressed or implied to the contrary:

- (a) **Business Day** means Monday to Friday excluding public holidays in Victoria.
- (b) **Commencement Date** means the date specified in item 1 of Schedule 1.
- (c) **Council's Representative** means the person nominated by the Council in writing from time to time, initially being the person named in item 3 of Schedule 1.
- (d) **Individual Confidentiality Undertaking** means the confidentiality undertaking in the form attached in Schedule 2.
- (e) **Intellectual Property** means all copyright, patents and all rights in relation to inventions, registered and unregistered trademarks (including services marks) and registered designs trade secrets and know-how, all rights under the *Circuit Layouts Act 1989* (Cth), and all other intellectual or intangible property.
- (f) **NELA's Representative** means the person nominated by the NELA in writing from time to time, initially being the person holding the position specified in item 2 of Schedule 1.
- (g) **Memorandum of Understanding** means this document, including any Schedules, Annexures and documents incorporated by reference.
- (h) **Term** means the period specified in clause 3 or such lesser period if this Memorandum of Understanding is terminated earlier pursuant to clause 17.

3. Term

This Memorandum of Understanding commences on the Commencement Date and ends on 31 December 2019 (**Expiry Date**) unless terminated in accordance with clause 17 or extended by agreement between the parties.

4. Nature of relationship

The parties acknowledge and agree that:

- (a) this Memorandum of Understanding does not create a relationship of employment or partnership between them; and
- (b) it is the express intention of the parties that any relationship of partnership or employment between them is denied.

5. Roles and responsibility of each party in relation to the Project

- (a) Project Team responsibilities will include:
 - (i) to cooperate and work with the Council to achieve the successful delivery of the Project;
 - (ii) to arrange and attend planning and co-ordination meetings with the Council;
 - (iii) to manage and maintain interaction with the Council and other stakeholders regarding the broader development and implementation of the Project;
 - (iv) where required, attend co-ordination meetings with any nominated advisers or consultants; and
 - (v) to make all payments required to be made to the Council in accordance with the Memorandum of Understanding.
- (b) The Council's responsibilities will include:
 - (i) in consultation with the Project Team, to manage the Project's interface with the business as usual activities and responsibilities of the Council;
 - (ii) to attend planning and co-ordination meetings with the Project Team and, where requested by the Project Team, with other stakeholders;
 - (iii) to monitor, manage and co-ordinate the integration of its activities related to the Project with the Project Team and, where relevant, other stakeholders; and
 - (iv) cooperating and working with the Project Team; and
 - (v) keeping the Project Team informed in relation to any activity proposed to be carried out by the Council which may have a direct or indirect impact on the Project.
- (c) Each of the Project Team and the Council must, to the extent that it is reasonable:
 - (i) co-operate and work together in good faith to assist in achieving the successful design, planning, assessment and procurement of the Project (as applicable);

- (ii) share information relevant to the Project openly, honestly, efficiently and proactively;
 - (iii) perform its respective obligations under the Memorandum of Understanding and any further agreements related to the Project in a diligent and prompt manner; and
 - (iv) co-operate and work together to develop a culture of collaboration, transparency in dealings, innovation and outstanding performance.
- (d) Nothing in the Memorandum of Understanding is intended to derogate from or limit:
- (i) either party's ability to exercise or fulfil its statutory or other legal functions, powers or obligations including in relation to the assessment and approval of the Project; and
 - (ii) any other memorandum of understandings entered into by the Council with a Victorian government department, agency or body in relation to any other project.

6. Project Delivery Objectives

- (a) The Project delivery objectives in relation to the design, planning, assessment, procurement and delivery of the Project are:
- (i) **Best for Project Outcome** - acting in a manner that makes a positive contribution to the successful delivery of the Project;
 - (ii) **Quality and Functionality** - ensuring that the Project delivers the appropriate functional outcome for the metropolitan transport network and a high quality urban design outcome;
 - (iii) **Value for Money** - ensuring cost effective solutions, including competitive pricing with a high degree of cost certainty;
 - (iv) **Minimising Disruption** - to the extent practicable, minimising disruption to existing transport networks, commuters and the local community;
 - (v) **Council and Community Relations** - creating positive relations and communications with stakeholders and the community;
 - (vi) **Time** - delivery of the Project in accordance with the Project Team's procurement timeline; and
 - (vii) **Net Benefit** – using reasonable endeavours to deliver the best possible outcomes for the community and minimising negative community impacts arising from the Project having regard to the achievement of the other Project delivery objectives outlined above,
- (Project Delivery Objectives).**
- (b) To the extent reasonable, the Project Team and the Council agree to perform their obligations and any activities related to the Project in a manner which is consistent with:
- (i) the Project Delivery Objectives; and
 - (ii) the level of care, skill and diligence required, having regard to the nature of the roles and responsibilities under the Memorandum of Understanding.

7. Parties Representative

- (a) The parties will each appoint a representative, as specified in Schedule 1, to exercise the duties, discretions and powers vested in the parties arising out of or in any way connected with this Memorandum of Understanding.
- (b) Both parties' representatives will be available at all reasonable times for consultation in connection with any matter arising under this Memorandum of Understanding.
- (c) Either party may at any time replace its representative, in which event that party will appoint another person as its representative and notify the other party of that appointment.
- (d) Nothing in this clause 7 limits either party's right to exercise any of its, or its representative's, powers or functions under this Memorandum of Understanding.

8. Review Process

- (a) The Project Team may from time to time provide the Council with documents and material for review and comment.
- (b) Where provided with documents or material by the Project Team for review and comment, the Council must review and provide comment to the Project Team within 10 Business Days' of receipt (or such other agreed timeframe).
- (c) The Project Team will endeavour to provide the Council with reasonable notice of when the Project Team expects it will provide documents and other material to the Council for review and comment, in order to give the Council sufficient time to adequately plan and manage its resources.

9. Council Project impacts

Where an activity proposed to be carried out by the Council may have a direct or indirect impact on the Project, the Council agrees to:

- (a) provide the Project Team with timely notice of the proposed activity;
- (b) provide any information that the Project Team may reasonably require from the Council in relation to the activity and in such reasonable detail that the Project Team may advise the Council; and
- (c) consult with the Project Team and give the Project Team a reasonable opportunity to have input into the proposed activity to ensure that the activity is not carried out in a manner which is inconsistent with the Project Delivery Objectives and the Project Team's decisions in relation to the design and implementation of the Project.

10. Resourcing requirements for the Project

- (a) The Project Team may request the Council to appoint a dedicated resource or dedicated resources to support the design development, assessment, approval and procurement of the Project (**Dedicated Resource**).
- (b) Where the Project Team issues the Council with a request for a Dedicated Resource, the Council must provide a written proposal to the Project Team setting out the following:
 - (i) the name(s) of the Dedicated Resource;

- (ii) the proposed scope of the Dedicated Resource's responsibilities;
- (iii) the proposed remuneration for the Dedicated Resource; and
- (iv) the term of the Dedicated Resource,

(Dedicated Resource Proposal).

- (c) Upon receipt of a Dedicated Resource Proposal from the Council, the Project Team must confirm in writing whether the Project Team approves or rejects the terms of the Dedicated Resource Proposal.
- (d) Where the Project Team:
 - (i) approves the Dedicated Resource Proposal, the Council may utilise such Dedicated Resource and will be reimbursed in accordance with clauses 11(a)(ii) and 11(e); or
 - (ii) rejects the Dedicated Resource Proposal, the Council may issue the Project Team with an alternative Dedicated Resource Proposal and clauses 10(b) and 10(c) will apply again.

11. Cost reimbursement

- (a) The Project Team will reimburse the Council for:
 - (i) subject to clauses 11(b) to 11(d), specified categories of preliminary and administrative costs to be incurred by the Council during the design development, assessment, approval and procurement of the Project; and
 - (ii) cost identified in the Dedicated Resource Proposal approved by the Project Team subject to an agreed cost cap.
- (b) Before incurring any costs described in clause 11(a)(i), the Council must provide the Project Team with a written proposal setting out details of the proposed cost item (**Cost Proposal**).
- (c) The Project Team must confirm in writing whether it approves or rejects the Cost Proposal (**Cost Proposal Response**).
- (d) Where the Project Team:
 - (i) approves a Cost Proposal, the Project Team will reimburse the Council those costs; or
 - (ii) rejects a Cost Proposal, the Council may issue the Project Team with an alternative cost proposal and clauses 11(b) to 11(d) will apply again.
- (e) The Project Team will only be required to pay costs, in accordance with this clause 11, which have been reasonably, directly and actually incurred by the Council upon receipt of an appropriate tax invoice.

12. Intellectual Property

- (a) The parties acknowledge and agree that the ownership of all Intellectual Property created specifically and exclusively in relation to the Project (**Project Intellectual Property**) vests in the NELA upon creation.
- (b) Clause 12(a) does not apply to Background Intellectual Property belonging to the Council, the NELA, the Project Team or others employed in relation to the Project.

- (c) For the purposes of this clause 12, "Background Intellectual Property" means Intellectual Property owned or controlled by a party, including but not limited to Intellectual Property developed prior to or independently of this Memorandum of Understanding, which the party determines, in its sole discretion, to make available for the design, planning, assessment, procurement and delivery of the Project.
- (d) The Council warrants to the NELA that any Intellectual Property provided by the Council and embodied in or used in connection with the Project is the sole property of the NELA or the NELA is legally entitled to use the Intellectual Property for the purposes of the Project.
- (e) Intellectual Property in all documents, materials, manuals, drawings, computer programs and other information provided to the Council by the NELA or the Project Team for reproduction or guidance in relation to the Project remains vested in the NELA. This information must not be used or reproduced for any other purpose without the prior written approval of NELA's Representative.
- (f) The Council must procure from any of its employees or agents that produce or contribute to the production of any document any moral rights consents required by the NELA.
- (g) The Council must ensure that any consent it obtains pursuant to clause 12(f) is given genuinely and is not obtained by duress or as a result of a false or misleading statement.
- (h) The Council's obligations pursuant to this clause 12 survive the suspension, expiration or termination of this Memorandum of Understanding.

13. Confidentiality

- (a) To promote effective consultation and cooperation regarding the Project between the Project Team and the Council, there will be a need to share and have access to each other's confidential information, being information (whether written, electronic, graphic or some other form) that is not in the public domain which is either directly or indirectly disclosed, provided or made available by or on behalf of the:
 - (i) Project Team to Council; or
 - (ii) Council to the Project Team,in the course of, in respect of, or in connection with the Project (**Confidential Information**).
- (b) The Project Team and Council each agree that they will, and to procure that any person who has access to Confidential Information will:
 - (i) only use the Confidential Information for purposes in relation to the design, preparation, planning, assessment, procurement and delivery of the Project (**Permitted Purpose**);
 - (ii) restrict access to Confidential Information to those people who need to know for the Permitted Purpose;
 - (iii) treat all Confidential Information as confidential except to the extent it is otherwise required to disclose the whole or part of the Confidential Information in accordance with:
 - A. the *Freedom of Information Act 1982* (Vic), the *Ombudsman Act 1973* (Vic) or as otherwise required by law;
 - B. the requirements of Parliamentary accountability;
 - C. the disclosure requirements of the Victorian Auditor General;

- D. in the case of any Minister of the Crown, to fulfil his or her duties of office;
 - E. the requirement to satisfy public accountability or transparency of obligations of a government agency or the requirements of government policy (including concerning Partnerships Victoria projects); or
 - F. the requirement to satisfy any conditions of a funding agreement with the Commonwealth Government or any other disclosure requirements of the Commonwealth Government or Infrastructure Australia;
- (iv) unless the prior written consent of the other party is obtained, not copy, produce or disclose Confidential Information (or any part of it) except as required for the Permitted Purpose;
 - (v) take all necessary steps to prevent unauthorised persons gaining access to or copying Confidential Information;
 - (vi) promptly notify and consult with each other in respect of any requests received under the *Freedom of Information Act 1982 (Vic)* that may relate to the Confidential Information; and
 - (vii) immediately notify each other upon becoming aware of any breach of these Confidentiality provisions or any unauthorised access to the Confidential Information,

(Confidentiality Protocols).

- (c) The Council must ensure that prior to any of its servants, employees, agents or contractors obtaining access to any information relating to or arising from this Memorandum of Understanding those servants, employees, agents or contractors have executed an Individual Confidentiality Undertaking in the form attached in Schedule 2.
- (d) The Council acknowledges and agrees that, for the purpose of clause 13(b)(ii), the Project Team may need to provide Confidential Information to tenderers for the Project, NELA's professional advisors for the Project, Victorian government agencies or departments, and utilities companies for the Permitted Purpose.
- (e) The Project Team acknowledges that Council staff have a duty to brief elected representatives of the Council (**Councillors**). Without limiting the Confidentiality provisions contained in this Memorandum of Understanding, the Council must:
 - (i) consult with the Project Team regarding the scope and content of any Confidential Information which it intends to use to brief any Councillors; and
 - (ii) obtain the prior written approval of the Project Team before undertaking any briefing to any Councillors which contains any Confidential Information.
- (f) The Council's obligations pursuant to this clause 13 survive the expiration or termination of this Memorandum of Understanding.

14. Community and public relations material

Each of NELA and the Council agree that their respective communications teams will, to the extent that it is reasonable and practicable:

- (a) collaborate with each other regarding proposed community and public relations materials, including public announcements, promotional material or media statements, in relation to the Project; and
- (b) share all relevant information, documentation and assistance to manage community and public relations in relation to the Project.

15. Issue resolution

- (a) Any dispute, difference or issue (**Issue**) between the parties in connection with this Memorandum of Understanding, must be resolved in accordance with the process set out in this clause 15.
- (b) Where an Issue arises, it must first be referred to NELA's Representative and Council's Representative, who must meet and use all reasonable endeavours to resolve the Issue as soon as practicable.
- (c) If any Issue fails to be resolved within 14 days from the date the Issue is referred for resolution in accordance with clause 15(b), the Issue must then be referred to NELA's Director, Technical and Council's [insert], who must meet and use all reasonable endeavours to resolve the Issue as soon as practicable.
- (d) If any Issue referred to NELA's Director, Technical and Council's [insert] in accordance with clause 15(c) fails to be resolved within 14 days from the date the Issue is referred, NELA's Director, Technical and Council's [insert] must refer the issues to the NELA Chief Executive Officer and Council Chief Executive Officer, who must meet and use all reasonable endeavours to resolve the Issue as soon as practicable.

16. Variation

This Memorandum of Understanding may only be varied or replaced by written agreement duly executed by the parties.

17. Termination

- (a) Either party may terminate this Memorandum of Understanding at any time before the end of the Term by giving the other party 20 Business Days' notice in writing of its intention to terminate this Memorandum of Understanding, after which this Memorandum of Understanding is at an end.
- (b) Where this Memorandum of Understanding is terminated pursuant to clause 17(a), Council acknowledges and agrees that its sole entitlement will be the payment of Approved Dedicated Resource Proposal costs and Approved Cost Proposal costs which have been reasonably, directly and actually incurred by Council prior to the date of termination.

18. Contact details

The address and email address of each party is:

- (a) the address and email address set out below; or
- (b) where the intended recipient notifies the sender of another address or email address, the last address or number so notified by that recipient to the sender.

Project Team

Attention:

Address: North East Link Authority, Level 14, 121 Exhibition St, Melbourne VIC 3000

Email:

Council

Attention:

Address:

Email:

19. General

- (a) This Memorandum of Understanding contains the entire understanding between the parties as to the subject matter contained in it. All previous agreements, representations, warranties, explanations and commitments, expressed or implied, affecting this subject matter are superseded by this Memorandum of Understanding and have no effect.
- (b) Each party must pay its own legal costs and expenses in relation to the negotiation, preparation and execution of this Memorandum of Understanding and other documents referred to in it, unless expressly stated otherwise.
- (c) No party to this Memorandum of Understanding has the power to obligate or bind any other party. Nothing in this Memorandum of Understanding will be deemed to authorise or empower any of the parties to act as agent for or with any other party.
- (d) In the interpretation of this Memorandum of Understanding, no rule of construction applies to the disadvantage of the party preparing the Memorandum of Understanding on the basis that it put forward this Memorandum of Understanding or any part of it.
- (e) This Memorandum of Understanding may be executed in any number of counterparts all of which taken together constitute one instrument.
- (f) This Memorandum of Understanding is binding on the parties on the exchange of counterparts. A copy of a counterpart sent by email:
 - (i) must be treated as an original counterpart;
 - (ii) is sufficient evidence of the execution of the original; and
 - (iii) may be produced in evidence for all purposes in place of the original.
- (g) Each party irrevocably submits to the non-exclusive jurisdiction of the courts of Victoria, and the Courts competent to determine appeals from those Courts, with respect to any proceedings which may be brought at any time relating in any way to this Memorandum of Understanding.

Executed as a Memorandum of Understanding

Executed by)
a duly authorised officer of the North East)
Link Authority, an administrative office of)
the Department of Economic
Development, Jobs, Transport and
Resources, for and on behalf of the
Crown in right of the State of Victoria,
in the presence of:

.....
Signature of witness

.....
Signature of duly authorised officer

.....
Full name of witness (print)

.....
Full name of duly authorised officer (print)

Date:

Signed for and on behalf of **[full name in**)
bold] by its duly authorised officer in the)
presence of:)

.....
Signature of witness

.....
Signature of duly authorised officer

.....
Full name of witness (print)

.....
Full name of duly authorised officer (print)

Date:

Schedule 1 – Details

Details

1. **Commencement Date:** The date of signature of the last party to sign this Memorandum of Understanding.
2. **NELA's Representative:**
Stuart Beaton
Project Director
Level 14, 121 Exhibition Street, Melbourne, 3000
Email: stuart.y.beaton@northeastlink.vic.gov.au
3. **Council's Representative:**
[Name]
[Position]
[Address]
Mobile: [mobile]
Email: [email]

Schedule 2 – Individual Confidentiality Undertaking

THIS DEED is made the _____ day of _____ 2018.

BY

_____ of
_____ (the “Covenantor”)

TO

**NORTH EAST LINK AUTHORITY; THE DEPARTMENT OF ECONOMIC DEVELOPMENT, JOBS,
TRANSPORT AND RESOURCES FOR AND ON BEHALF OF THE CROWN IN RIGHT OF THE STATE
OF VICTORIA (“NELA”)**

WHEREAS

- A. The Covenantor is or shall be involved in performing various duties and/or providing services (“**Project Services**”) in relation to the North East Link Project (the “**Project**”).
- B. In the course of undertaking various duties and/or services the Covenantor shall have access to Confidential Information.
- C. NELA will allow the Covenantor access to that Confidential Information provided that confidentiality can be maintained and the Covenantor has entered into this Deed in order to acknowledge the conditions under which access to the Confidential Information will be granted.

IT IS AGREED AS FOLLOWS:

1. Undertakings by the Covenantor

The Covenantor shall-

- (i) treat as secret and confidential all Confidential Information to which he or she has access and which is disclosed to him or her before or during the course of carrying out the Project Services;
- (ii) only use the Confidential Information for the purpose of providing the Project Services and not disclose or suffer or allow access to the Confidential Information or any part of it to any person, other than to a person authorised for the purpose of the relevant Project to receive it or as required by law;
- (iii) except as may be reasonably necessary for the purposes of the provision of Project Services or as required by law, not copy, produce or disclose Confidential Information (in whole or in part) without the written permission of NELA;
- (iv) take all necessary precautions to prevent unauthorised persons from gaining access to, or copying Confidential Information;
- (v) immediately notify NELA if the Covenantor is aware of any breach of this Deed or of any unauthorised person gaining access to Confidential Information;
- (vi) deliver up to NELA upon completion or earlier termination of the Project Services or upon receipt by the Covenantor of any demand to do so made by NELA, all Confidential Information which is in the possession or under the power or control of the Covenantor.

2. Survival of obligations

This Deed shall survive termination of the Project Services and shall remain in force in respect of each part of the Confidential Information until that part of the Confidential Information becomes part of the public domain.

3. Retention of Property and Relief

3.1 All Confidential Information shall remain the property of NELA.

3.2 NELA shall be entitled (in addition to any entitlement to damages) to an injunction or other equitable relief with respect to any actual or threatened breach by the Covenantor of the Deed and without the need of NELA (as the case requires) to prove any special damage.

4. Jurisdiction

The Deed shall be governed by the laws of Victoria and the parties submit to the non-exclusive jurisdiction of the courts of the State of Victoria.

5. Variation

This Deed may only be varied by the written agreement of the Covenantor and NELA.

6. Interpretation

6.1 In this Deed:

"Confidential Information" means any Information which is not in the public domain and which-

- (i) is either directly or indirectly disclosed provided or made available by or on behalf of NELA to the Covenantor, (whether orally, electronically, in writing or by any other means) in the course of, in respect of, or in connection with the Project Services, whether before or after the signing of this Deed; and
- (ii) pertains to or is connected in any way with a Project, including but not limited to:
 - (a) Information about NELA or those involved in the activities of the NELA;
 - (b) information relating to the internal management and structure of NELA, or the clients, client lists, client identities and contacts of NELA;
 - (c) information concerning documentation, systems, technology and affairs, operations, processes, plans or inventions and product information (whether customers, suppliers or otherwise);
 - (d) financial, technological, strategic or business information, concepts, plans, strategies, directions or systems;
 - (e) research, development, operational, legal, marketing or accounting information, concepts, plans, strategies, directions or systems;
 - (f) technology, source and object codes for computer software;
 - (g) information comprised in or relating to any intellectual property rights of NELA, or a client of NELA or third parties to whom NELA owes a legal obligation;
 - (h) know-how relating to computer software, financial techniques and products of NELA;

"Information" includes information or data, whether:

- (i) written, graphical, electronic, oral or in any other form, irrespective of the form in which it was originally provided;
- (ii) provided in writing, graphically, electronically, orally or in any other way; or
- (iii) denoted as Confidential Information or not.

6.2 In this Deed, unless the context otherwise requires or a contrary intention appears:

- (i) the singular includes the plural and vice versa and words importing a gender include other genders;
- (ii) terms importing natural persons include partnerships and bodies corporate;
- (iii) other grammatical forms of defined words or phrases have corresponding meanings;
- (iv) where a party comprises two or more persons provisions of this Deed that bind that party shall bind those persons jointly and severally; and
- (iv) a reference to a person includes its successors and permitted assigns.

Executed as a Deed on the date set out at the commencement of this Deed.

SIGNED SEALED and DELIVERED

By:

PRINT NAME OF CONVENANTOR:

Signature of Covenantor

in the presence of:

PRINT NAME OF WITNESS:

Signature of Witness