

Proactive Release

This document is proactively released by Te Manatū Waka the Ministry of Transport.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

Listed below are the most commonly used grounds from the OIA.

<u>Section</u>	<u>Description of ground</u>
6(a)	as release would be likely to prejudice the security or defence of New Zealand or the international relations of the New Zealand Government
6(b)	as release would be likely to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by <ul style="list-style-type: none"> (i) the Government of any other country or any agency of such a Government; or (ii) any international organisation
6(c)	prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial
9(2)(a)	to protect the privacy of natural persons
9(2)(b)(ii)	to protect information where the making available of the information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information
9(2)(ba)(i)	to protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public
9(2)(ba)(ii)	to protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information would be likely otherwise to damage the public interest
9(2)(f)(ii)	to maintain the constitutional conventions for the time being which protect collective and individual ministerial responsibility
9(2)(f)(iv)	to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials
9(2)(g)(i)	to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any public service agency or organisation in the course of their duty
9(2)(h)	to maintain legal professional privilege
9(2)(i)	to enable a Minister of the Crown or any public service agency or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities
9(2)(j)	to enable a Minister of the Crown or any public service agency or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations)

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30 September 2022

OC220841

Hon Michael Wood
Minister of Transport

Action required by:
Wednesday, 5 October 2022

Hon Grant Robertson
Minister of Finance

Hon Dr Megan Woods
Minister of Housing

AUCKLAND LIGHT RAIL LIMITED ESTABLISHMENT – INTERIM PROJECT ALLIANCE AGREEMENT (IPAA)

Purpose

Seeks Shareholding Ministers' approval for either Auckland Light Rail Limited or the Ministry of Transport to enter into the Interim Project Alliance Agreement.

Key points

- The Auckland Light Rail Unit has identified its preferred suppliers to deliver on the Interim Project Alliance Agreement (IPAA). The work under this agreement will build the alliance and develop the scope for the more substantive Project Alliance Agreement, which will progress the ALR Project through the detailed planning phase.
- The IPAA is a significant agreement both in terms of success for the project and in value. The Project Planning and Funding Agreement requires Shareholding Ministers' approval for Auckland Light Rail Limited (ALRL) to enter into the IPAA.
- The IPAA needs to be entered into by 10 October. There is some uncertainty that ALRL will be operational by that date. Therefore two processes are being simultaneously run to ensure the IPAA can be entered into, either by ALRL or the Ministry of Transport on behalf of the current ALR Board.

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Recommendations

We recommend you:

	Minister of Transport	Minister of Finance	Minister of Housing
1 note that ALRL intends to sign an Interim Project Alliance Agreement with Arup New Zealand Limited and Aurecon New Zealand Limited on or before 10 October 2022	Yes / No	Yes / No	Yes / No
2 note that due to the uncertainty of when ALRL will be added to the Crown Entities Act 2004, a parallel contract sign-off process is being used that could see either the Ministry of Transport (on behalf of the ALR Unit) or ALRL enter into the Interim Project Alliance Agreement.	Yes / No	Yes / No	Yes / No
3 sign (if Auckland Light Rail Limited enters into the Interim Project Alliance Agreement) the attached shareholder major transaction resolution (Appendix A) to allow ALRL to enter into the Interim Project Alliance Agreement, subject to certain preconditions being met	Yes / No	Yes / No	Yes / No
4 approve (if the Ministry of Transport enters into the Interim Project Alliance Agreement) the content of the attached letter (Appendix B) to the Acting Chief Executive and Secretary for Transport seeking approval for the Ministry to enter into the Interim Project Alliance Agreement, subject to certain preconditions being met	Yes / No	Yes / No	Yes / No
5 note that before the Interim Project Alliance Agreement is signed by ALRL or the Ministry, ALRL must provide a copy of the final form of the IPAA, a letter from a director of ALRL confirming, in relation to the Interim Project Alliance Agreement, the matters required by clause 9.2(b)(i)(cc) of the PPA, and confirmation that the conditions set out in the shareholders resolution/Minister's letter have been satisfied	Yes / No	Yes / No	Yes / No
6 authorise (if the Ministry of Transport enters into the Interim Project Alliance Agreement) the Minister of Transport to sign the letter in the form set out in		Yes / No	Yes / No

	Minister of Transport	Minister of Finance	Minister of Housing
Appendix B to the Acting Chief Executive and Secretary for Transport			
7 send the signed letter in the form set out in Appendix B to the Acting Chief Executive and Secretary for Transport	Yes / No		
8 approve (if Auckland Light Rail Limited enters into the Interim Project Alliance Agreement) under section 160(1)(b) of the Crown Entities Act 2004 Auckland Light Rail Limited giving the indemnities described in this Briefing to the Participants under the Interim Project Alliance Agreement	Yes / No	Yes / No	Yes / No
9 note that under section 160(3) of the Crown Entities Act 2004, the Minister of Finance must notify in the Gazette an approval given under section 160(1)(b) of the Crown Entities Act 2004	Yes / No	Yes / No	Yes / No
10 note the officials will notify the section 160(1)(b) Crown Entities Act 2004 approval in the Gazette		Yes / No	
11 give on behalf of the Crown (if the Ministry of Transport enters into the Interim Project Alliance Agreement) the indemnities described in this Briefing to the Participants under the Interim Project Alliance Agreement, on the basis that it appears to you to be necessary or expedient in the public interest to do so under section 65ZD of the Public Finance Act 1989		Yes / No	



Gareth Fairweather
Director, Auckland Light Rail, Ministry
of Transport

30/09/2022

Hon Michael Wood
Minister of Transport

..... / /

Hon Grant Robertson
Minister of Finance

..... / /

Hon Dr Megan Woods
Minister of Housing

..... / /

Minister's office to complete:

- Approved Declined
 Seen by Minister Not seen by Minister
 Overtaken by events

Comments

Contacts

Name	Telephone	First contact
Gareth Fairweather, Director, Auckland Light Rail, Ministry of Transport	s 9(2)(a)	
Chris Gulik, Acting Associate Director, Auckland Light Rail, Ministry of Transport		✓
Ben Wells, Principal Adviser, the Treasury		
Mary Barton, Senior Advisor, Ministry of Housing and Urban Development		
Annelies McClure, Senior Solicitor, Ministry of Transport		

AUCKLAND LIGHT RAIL LTD ESTABLISHMENT – NEXT STEPS

Interim Project Alliance Agreement

- 1 In June 2022, the ALR Establishment Unit issued a Request for Proposal for suitably qualified parties to form an Urban, Engineering and Planning Professional Services Alliance for the pre-construction planning phase for the Auckland Light Rail project. Following the completion of an evaluation process, two companies with established links in New Zealand, Arup New Zealand Limited and Aurecon NZ Limited (the Participants), have been selected to form the alliance, subject to the Participants agreeing on the terms of an Interim Project Alliance Agreement (IPAA) and the Board receiving an assurance from independent auditors that the Participants are solvent and have the financial capability to enter into and deliver the services required by the IPAA.
- 2 The IPAA is a preliminary agreement under which the Participants undertake the work required to establish the full scope and costs for a Project Alliance Agreement (PAA). The PAA is the definitive document that governs the alliance, once fully established. It is anticipated that the PAA will be entered into by late February 2023. However, ALRL must inform Ministers if the IPPA phase is likely to be extended beyond late February 2023.
- 3 The base document for the IPAA is the model used by Waka Kotahi on its construction and professional services alliances. It is well known and generally accepted by the planning and engineering sector. The IPAA is intended to be entered into by the Board of ALRL (or the Ministry of Transport) and the Participants on or before 10 October 2022.
- 4 The cost of the IPAA phase is capped. At this stage, the ALR Unit's estimate of the cost of the IPAA is s.9(2)(b)(ii). This estimate will be confirmed with the Participants.
- 5 The key deliverable of the IPAA is the development of the costs to deliver the alliance services (total outturn cost or TOC). This will involve undertaking sufficient work to inform the scope of work required during the PAA phase, quantify the risks to delivering that scope and build up costs on an open book basis. The initial TOC will only include the scope of works up to the point of lodgement of the Notices of Requirement to designate the route. A second TOC development phase will follow once the preferred option is confirmed, and subsequent work can be accurately priced.
- 6 The IPAA has been drafted on the basis that additional (substantive) services can be provided, where agreed by the Interim Project Alliance Board (IPA Board) (ALRL will be represented on IPA Board). Some or all of those additional services will be included within the cost cap but may only be undertaken if agreed by the IPA Board. Similarly, additional services that fall outside the cost cap would be undertaken on terms agreed by the IPA Board at the time. These additional services may require Sponsor approval, depending on the value of the additional services and the thresholds of the 'Permitted Variations' regime under the PPA.

- 7 Planned investigations are also required to provide information critical to determining design and assessing the effects of the Project. The current planned investigations (s 9(2)(b)(ii)) are geotechnical and utilities. These services do not form part of the capped costs of the IPAA and will be required to be funded separately. To facilitate these works, ALRL will enter into a consultant services contract with one of the Participants, directing that Participant to select and contract a supplier to undertake the investigation works, with the output of that work being provided to the Alliance to review. The PPA will require ALRL to inform sponsor agencies of these arrangements.
- 8 Further key details of the IPAA are set out in Annex A of the Shareholders Resolution annexed as Appendix A, and in Annex A of the Minister's letter annexed as Appendix B.

Auckland Light Rail Limited must be operational before it can enter into the IPAA

- 9 ALRL was incorporated as a limited liability company under the Companies Act 1993 (Companies Act) on 22 September 2022. The Sponsoring Ministers are equal shareholders in ALRL. A constitution conforming with the requirements of the Crown Entities Act 2004 (CEA) and the Companies Act has been approved by shareholders and has been adopted. The existing Board members appointed to the ALR Board comprise the Board of ALRL.
- 10 Even though ALRL has now been incorporated, Sponsoring Ministers have agreed that ALRL cannot become operational until:
- 10.1 the company is added to Schedule 2 of the CEA and a notice is published in the Gazette;
 - 10.2 a Project Planning and Funding Agreement (PPA) is signed between the Crown, Auckland Council and ALRL; and
 - 10.3 the Sponsoring Ministers receive satisfactory assurance from the ALR Board that ALRL has the systems, policies, and processes in place to take on its responsibilities and obligations.
- 11 The IPAA has been drafted with the Ministry of Transport as the initial counterparty, with provision for the IPAA to be novated to ALRL at a later date. However, if all the preconditions listed above are satisfied on or before 10 October 2022, when the IPAA is due to be signed, ALRL will enter into the IPAA instead of the Ministry of Transport.
- 12 Both eventualities have been planned for. This requires a different approach to the approval of the material contract and its indemnities. Both approaches and the necessary recommendations for either eventuality are provided for in this briefing.

- 13 We have received legal advice ^{s 9(2)(h)} [REDACTED]
[REDACTED] We are progressing conditional shareholder approval at this stage, noting that we have not seen the final IPAA as it is still being negotiated by the ALR Unit and the Participants. However, we will be requiring the ALRL Board to provide confirmation that the conditions listed in the shareholders resolution and the Minister's letter have been satisfied before entry into the IPAA.
- 14 Given the IPAA is about setting the scope and cost of the PAA, we consider the level of detail that we have, coupled with the conditions in the shareholders' resolution/Minister's letter imposed on the entry by ALRL into the IPAA, is sufficient to enable matters to be progressed.

Shareholder resolution

- 15 If ALRL is operational, approval to enter the IPAA will be via shareholder resolution. A resolution is a requirement in the PPA because of the significance of the contract for the success of the ALR project and from a value perspective.
- 16 The shareholders resolution (**Appendix A**) sets out the conditions that must be met before the shareholders can confirm the IPAA and the entry by ALRL into the IPAA.
- 17 These are:
- 17.1 the Participants entering into the IPAA remain as those identified in Annex A to the Director Resolutions;
 - 17.2 any amendment or variation to the IPAA prior to ALRL entering into the IPAA constitutes a 'Permitted Variation' for the purposes of the draft PPA (or has otherwise been approved by the shareholders in writing);
 - 17.3 the description of the scope of services to be performed under the IPAA, as described in Annex A of the Director Resolutions, is not materially amended or supplemented prior to ALRL entering into the IPAA (without the shareholders' prior written approval);
 - 17.4 the capped cost for the initial IPAA services is not increased beyond the amount specified in Annex A to the Director Resolutions prior to ALRL entering into the IPAA (without the shareholders' prior written approval);
 - 17.5 the indemnities given by ALRL under the IPAA are not amended and no additional indemnities are given by ALRL (without the shareholders' prior approval in accordance with the requirements of the CEA);
 - 17.6 for the avoidance of doubt:
 - 17.6.1 ALRL, the Alliance or any Alliance Participant may enter into an agreement for physical works or services in relation to or under the IPAA, including (without limitation) for geotechnical and utilities services investigations, in accordance with, and subject to the requirements, of the PPA; and

17.6.2 the shareholders have not given, and do not by the special resolution give or intend to give, approval for ALRL to:

17.6.2.1 progress early (construction and utilities) works or procurement of materials that require capital expenditure; and/or

17.6.2.2 enter into the PAA.

18 In addition, the Shareholding Ministers must have received:

18.1 A copy of the final form of the IPAA; and

18.2 a letter from a director of ALRL confirming, in relation to the IPAA, the matters required by clause 9.2(b)(i)(cc) of the PPA; and

18.3 confirmation that the conditions set out in the shareholders resolution/Minister's letter have been satisfied.

19 In our earlier Briefing to Ministers [OC220796 / T2022/2061 / HUD2022-000891 refers], we asked Ministers to sign the Shareholders Resolution attached to that briefing. At that stage, this request was premature, as all the information required to complete the Shareholders Resolution (such as the identity of the Participants) was not then to hand. The Shareholders Resolution in Appendix A is now in a form that Ministers can sign.

20 Officials will advise Ministers when the documents referred to in paragraph 18 have been received. ^{s 9(2)(h)}

If the preconditions are not met, the Ministry of Transport will need to sign the IPAA

21 If ALRL is not established at the time the IPAA needs to be entered into, the Ministry of Transport will sign the IPAA. The Acting Chief Executive and Secretary for Transport has the delegation to sign the IPAA. It is appropriate that the same approval from Shareholding Ministers is given to the Acting Chief Executive and Secretary of Transport, as would be given to ALRL if the Board were signing the IPAA. This is for the same reasons of significance and value of the IPAA. In addition, if the Ministry of Transport signs the IPAA, this contract will be novated to ALRL on its establishment at which point Shareholding Ministers will be accountable for the IPAA.

22 A letter from Shareholding Ministers to the Acting Chief Executive of the Ministry of Transport for this purpose is at Appendix B. This letter requires the same conditions to be met before the Chief Executive can enter into the IPAA.

Indemnities

The IPAA includes two indemnities

- 23 The first is an intellectual property indemnity in clause 6.1.9. Intellectual property developed during the IPAA phase vests in ALRL, and it is granted a licence to use certain background intellectual property of the Participants. ALRL indemnifies the Participants against all losses incurred by the Participants from any use by ALRL of any intellectual property rights vested in or licensed to ALRL from the Participants under the IPAA. This only applies if the IPAA is terminated, does not result in a PAA, or the relevant Participant withdraws or is excluded from the IPAA phase.
- 24 The second is a reciprocal indemnity under which the Participants and ALRL indemnify each other for claims against each other in relation to loss or damage to physical property or personal injury, disease, illness or death (clause 7.5). This only applies to the extent that the underlying event was reasonably foreseeable and was caused by (i) any breach of the IPAA by the indemnifying party or (ii) any negligent act, error or omission of the Indemnifier arising out of, or in connection with, the performance of the IPAA by the indemnifying party.
- 25 As already noted, the value of the IPAA phase is likely to be s 9(2)(b)(ii). The duration of the IPAA is not fixed, but the intention is for it to be superseded by the PAA by late February 2023. From the time at which the PAA is entered into, the parties will have no liability to each other under the IPAA and liability will be solely governed by the PAA.
- 26 The PAA will have separate indemnities for intellectual property and for certain losses associated with breach of the PAA. Approval for the giving of these PAA indemnities will need to be sought from you separately.

ALRL is restricted from giving indemnities under the CEA and needs Ministerial approval

- 27 ALRL is subject to section 163 of the CEA, which provides that a Crown entity must not indemnify another person, other than as provided in section 160 of the Act.
- 28 Section 160(1)(b) of the CEA provides that section 163 applies, subject to any approval given by the entity's responsible Ministers and the Minister of Finance. Section 160(3) provides that the Minister of Finance must notify in the Gazette an approval given under section 160(1)(b). If approved, officials will arrange for this approval to be gazetted.
- 29 ALRL has considered whether the indemnities in the IPAA could be entered into in reliance on regulation 14 of the Crown Entities (Financial Powers) Regulations 2005 as being (i) in the ordinary course of its operations and (ii) a contract for the procurement of services under clause 14(2)(g) of those Regulations. On balance, ALRL considers, having taken legal advice, that the Regulations should not be relied on, and seeking a section 160(1)(b) approval is appropriate.

30 Section 160(1)(b) does not specify the matters Ministers should take into account in providing approval to the giving of indemnities, s 9(2)(h)

officials put a number of questions to the ALR Unit. The responses to these questions are set out in **Appendix C**.

31 ALRL will need to maintain a Register of Contingent Liabilities where the nature of the indemnities will need to be disclosed, and in addition, those liabilities will be required to be disclosed to ALRL's Responsible Ministers. Further, steps will need to be taken by ALRL to ensure staff are educated about and aware of risks attendant on the use of Participants' intellectual property.

32 The Shareholders' Resolution requires a number of conditions to be met before the ALRL can enter into the IPAA, including a requirement that the indemnities at clauses 6.1.9 and 7.5.1 of the IPAA are not amended and no additional indemnities are given by ALRL (without prior approval).

33 Having had regard to the responses to the questions and the required disclosure obligations, s 9(2)(h)

34 Officials therefore recommend that Ministers approve, under section 160(1)(b) of the CEA, that ALRL gives the indemnities in the IPAA described above.

If the preconditions aren't met, the Ministry of Transport will need to sign the IPAA

35 If the IPAA is entered into by the Ministry of Transport, the approval of the Minister of Finance under section 65ZD of the Public Finance Act 1989 (PFA) to the grant of the indemnities will be required, as the indemnities do not fall within the excepted classes of indemnities that can be given by Departments under the Public Finance (Departmental Guarantees and Indemnities) Regulations 2007.

36 Under section 65ZD of the PFA the Minister of Finance, on behalf of the Crown, may give an indemnity or guarantee if it appears to the Minister that such action is "necessary or expedient in the public interest". There is no legislative definition or case law for determining whether an indemnity or guarantee is necessary or expedient in the public interest under the PFA and this will need to be determined on a case-by-case basis.

The public interest test under section 65ZD

37 Even though the risk of loss may be considered low, an indemnity must not be entered into unless it appears to the Minister to be necessary or expedient in the public interest. s 9(2)(h)

s 9(2)(h)

38 The ALR Unit has advised that the indemnities proposed to be given are customarily covered by indemnities during the IPAA phase. As noted above:

38.1 The intellectual property indemnity is to cover the scenario where intellectual property has been provided by a Participant and is used by the Ministry and causes a loss to or claim against the Participant, but the PAA (and its fuller set of intellectual property arrangements) has not come into force.

38.2 The damage/injury/death indemnity is included as the parties are not protected by the 'no sue' provisions and project-specific insurance policies that will apply during the PAA phase and tie in with the parties' typical requirements under their own insurance arrangements that will apply during the IPAA phase. There is also no ability for PCBUs to contract out of health and safety obligations.

39 There will be fiscal management procedures in place to monitor the risks of the indemnity. The Ministry of Transport will need to maintain a Register of Contingent Liabilities where the nature of the indemnities will need to be disclosed, and in addition, those liabilities will be required to be disclosed to the Responsible Minister (the Minister of Transport). Further, steps will be taken by the Ministry to ensure staff are aware of the risks attendant on the intellectual property indemnity.

40 The letter from Ministers to the Acting Chief Executive of the Ministry of Transport requires a number of conditions to be met before the Chief Executive can enter into the IPAA, including a requirement that the indemnities at clauses 6.1.9 and 7.5.1 of the IPAA are not amended and no additional indemnities are given by the Ministry (without the prior approval, having regard to the requirements of the PFA).

Giving the indemnity is necessary or expedient in the public interest

41 When considering whether it is necessary or expedient in the public interest regard must be given to the particular circumstances. s 9(2)(h)

42 s 9(2)(h)

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- 43 We therefore recommend that under section 65ZD of the PFA that the Minister of Finance, on behalf of the Crown, give an indemnity or guarantee if it appears to the Minister that such action is “necessary or expedient in the public interest”.

The contingent liability of the indemnities is under \$10 million

- 44 Where the Minister of Finance gives an indemnity on behalf of the Crown and the contingent liability under that indemnity or guarantee exceeds \$10 million, the Minister of Finance must, as soon as practicable after the indemnity is given a publish in the New Zealand Gazette a statement that the indemnity has been given and present the statement to the House of Representatives.
- 45 In this case, the ALR Unit has confirmed that the contingent liability under the indemnities is under the \$10 million threshold.

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TE MANATŪ WAKA MINISTRY OF TRANSPORT

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APPENDIX A

Shareholder major transaction resolution

PROACTIVELY RELEASED BY
TE MANATŪ WAKA MINISTRY OF TRANSPORT

**Auckland Light Rail Limited
(Company)**

Special resolutions of the shareholders of the Company

Authorisation of Company's entry into Interim Project Alliance Agreement (as a major transaction)

(Section 129 of the Companies Act 1993 (Act))

The undersigned, being all of the shareholders of the Company, confirm the details below and adopt and approve the following resolutions:

Background

- A. The Company proposes to form an Urban, Engineering and Planning Professional Services Alliance for the pre-construction planning phase for the Auckland Light Rail project (**Transaction**).
- B. In connection with the Transaction, it is proposed that the Company enter into the agreement specified in Annex A (**Transaction Document**).
- C. Entry by the Company into the Transaction Document and performance of the Transaction constitutes a major transaction for the purposes of section 129 of the Act. Accordingly, approval has been sought from the shareholders of the Company, by special resolution.
- D. These are resolutions in writing pursuant to section 122 of the Act (and clause 6.3 of the Company's constitution).

1. Resolutions

1.1 The Transaction and the Transaction Document are confirmed, approved and ratified for the purposes of section 129 of the Act, subject to the following conditions:

- (a) prior to execution of the Transaction Document, the shareholders have received:
 - (i) a copy of the final form of the Transaction Document, including all attachments and a summary of the key commercial terms (including contract price, summary of scope and how it relates to the ALR Programme Outcomes and any contingency), in accordance with clause 9.2(b)(i)(aa) of the draft Project Planning Agreement; and
 - (ii) a letter from a director of the Company confirming, in relation to the Transaction Document, the matters required by clause 9.2(b)(i)(cc) of the draft Project Planning Agreement;
- (b) the non-owner participants entering into the Transaction Document are those identified in Annex A to these resolutions;
- (c) the description of the scope of services to be performed under the Transaction Document, as set out in Annex A to these resolutions, is not materially amended or supplemented prior to the Company entering into the Transaction Document (without the shareholders' prior written approval);

- (d) the capped cost for the initial IPAA services is not increased beyond the amount specified in Annex A to these resolutions prior to the Company entering into the Transaction Document (without the shareholders' prior written approval);
 - (e) the Company must inform the shareholders if the IPAA phase is likely to be extended beyond the planned IPAA phase as described in Annex A to these resolutions;
 - (f) the indemnities given by the Company at clauses 6.1.9 and 7.5.1 of the Transaction Document are not amended and no additional indemnities are given by the Company (without the shareholders' prior approval in accordance with the requirements of the Crown Entities Act 2004);
 - (g) for the avoidance of doubt:
 - (i) the Company, the Alliance or any Alliance participant may only proceed to enter into an agreement for physical works or services in relation or pursuant to the Transaction Document, including (without limitation) for geotechnical and utilities services investigations, in accordance with and subject to the requirements of the Project Planning Agreement; and
 - (ii) the shareholders have not given, and do not by this special resolution give or intend to give, approval for the Company to:
 - (aa) progress early (construction and utilities) works or procurement of materials that require capital expenditure; and/or
 - (bb) enter into the project alliance agreement in relation to the Transaction.
- 1.2 Subject to the Transaction and the Transaction Document meeting the conditions set out in paragraph 1.1, the directors of the Company are authorised to do or cause to be done all such further acts and things as they consider in their absolute discretion necessary or desirable to effect or carry out the above resolutions and otherwise give effect to the Transaction and the Transaction Document, including completing any blanks or other options that may be contained in the Transaction Document.

Dated _____ 2022

Signed by all the shareholders of the Company:

Minister of Finance

Minister of Transport

Minister of Housing

PROACTIVELY RELEASED BY
TE MANATŪ WAKA MINISTRY OF TRANSPORT

Annex A

Transaction Document

Document

Interim Project Alliance Agreement (**IPAA**)

Key Details

Description

A preliminary agreement under which the non-owner participants of the Alliance undertake the work required to establish the full scope and costs for the subsequent project alliance agreement (**PAA**).

Parties

- Auckland Light Rail Limited (as 'Owner')
- Arup New Zealand Limited
- Aurecon New Zealand Limited

Scope

During the IPAA phase, the Alliance will perform the 'Interim Alliance Services' (as defined in the IPAA), including to:

- undertake sufficient work to understand and define the scope of work required during the PAA phase and quantify the risks associated with performing that work, including in particular to confirm the consenting strategy for the Project which will have a direct impact on pricing;
- develop an open book estimate of the initial target outturn cost (**TOC**) up to lodgement of the notices of requirement to achieve the required designations for the route, on the basis of the intended scope of work for the PAA phase (as above);
- develop the Alliance culture, obtain insurances for the PAA phase and establish the Alliance as a fully functioning virtual organisation (from the time that the PAA is signed); and
- additional services, subject to the prior approval of the Interim Project Alliance Board (and, to the extent such additional services are not Permitted Variations for the purposes of the Project Planning Agreement, the Company's shareholders).

s 9(2)(b)(ii)

Programme

The IPAA is planned to be executed by no later than 10 October 2022.

The IPAA phase is planned to be concluded, and the PAA executed, by the end of February 2023.

Company indemnities

The Company (as Owner) indemnifies each Participant:

- against all costs, losses, damages and Claims sustained or incurred by the Participant to the extent arising from any use by the Owner, or by its agents, employees or contractors, of any of the Intellectual Property Rights vested in or licensed to the Owner from the Participant under clause 6 of the IPAA (clause 6.1.9); and
- in respect of Claims by any person against any Participant in respect of:
 - loss of or damage to any physical property; and
 - personal injury, disease, illness or death,

to the extent that such loss, damage, injury, disease, illness, death or Claim was reasonably foreseeable and was caused by any breach of the IPAA by the Owner or by any negligent act, error or omission of the Owner or its employees, agents or Subcontractors arising out of, or in connection with, the performance of the IPAA by the Owner or its employees, agents or Subcontractors (clause 7.5.1).

PROACTIVELY RELEASED BY
TE MANATŪ WAKA MINISTRY OF TRANSPORT

APPENDIX B

Minister's letter to the Acting Chief Executive of the Ministry of Transport approving his entry into the IPAA on behalf of the Ministry of Transport

PROACTIVELY RELEASED BY
TE MANATŪ WAKA MINISTRY OF TRANSPORT

Hon Michael Wood

MP for Mt Roskill

Minister of Immigration

Minister of Transport

Minister for Workplace Relations and Safety



Bryn Gandy
Acting Chief Executive and Secretary for Transport
Ministry of Transport
3 Queens Wharf
Wellington 6011
b.gandy@transport.govt.nz

Dear Bryn

AUCKLAND LIGHT RAIL – APPROVAL FOR ENTRY INTO INTERIM PROJECT ALLIANCE AGREEMENT

The ALR Unit proposes to form an Urban, Engineering and Planning Professional Services Alliance for the pre-construction planning phase for the Auckland Light Rail project (**Alliance**).

In order to set up the Alliance, and prior to Auckland Light Rail Limited being named as a Crown entity company, it is proposed that the Ministry of Transport (**MoT**) enter into the Interim Project Alliance Agreement, as further described in Annex A (**the IPAA**). Once Auckland Light Rail Limited is named as a Crown entity company and the Project Planning Agreement is effective, the IPAA will be novated from MoT to Auckland Light Rail Limited.

In recognition of the importance of the IPAA, both to the success of this phase of the Auckland Light Rail project and from a value perspective, you have sought my approval for you to enter into, on behalf of MoT, the IPAA.

I confirm my approval of your entry into the IPAA on behalf of MoT, subject to the following conditions:

- (a) prior to execution of the IPAA, I have received:
 - i) a copy of the final form of the IPAA, including all attachments and a summary of the key commercial terms (including contract price, summary of scope and how it relates to the ALR Programme Outcomes and any contingency), in accordance with clause 9.2(b)(i)(aa) of the draft Project Planning Agreement; and
 - ii) a letter from a member of the ALR Board confirming, in relation to the IPAA, the matters required by clause 9.2(b)(i)(cc) of the draft Project Planning Agreement;
- (b) the non-owner participants entering into the IPAA are those identified in Annex A to this letter;
- (c) the description of the scope of services to be performed under IPAA, as set out in Annex A, is not materially amended or supplemented prior to execution of the IPAA (without my prior written approval);

- (d) the capped cost for the initial IPAA services is not increased beyond the amount specified in Annex A prior to execution of the IPAA (without my prior written approval);
- (e) the Company must inform the shareholders if the IPAA phase is likely to be extended beyond the planned IPAA phase as described in Annex A;
- (f) the indemnities given by MoT at clauses 6.1.9 and 7.5.1 of the IPAA are not amended and no additional indemnities are given by the Ministry (without my prior approval, having regard to the requirements of the Public Finance Act 1989);
- (g) for the avoidance of doubt:
 - i) MoT, Auckland Light Rail Limited, the Alliance, or any Alliance participant may only proceed to enter into an agreement for physical works or services in relation or pursuant to the IPAA, including (without limitation) for geotechnical and utilities services investigations, in accordance with and subject to the requirements of the Project Planning Agreement; and
 - ii) I have not given, and do not by this letter give or intend to give, approval for MoT or Auckland Light Rail Limited (or any other party on behalf of MoT, Auckland Light Rail Limited or the ALR Unit) to:
 - (aa) progress early (construction and utilities) works or procurement of materials that require capital expenditure; and/or
 - (bb) enter into the project alliance agreement in relation to the Alliance.

Subject to the IPAA meeting the conditions set out in paragraph 2.1, you are authorised to do or cause to be done all such further acts and things as you consider in your absolute discretion necessary or desirable to enter into and give effect to the IPAA, including completing any blanks or other options that may be contained in the IPAA.

Yours sincerely

Hon Michael Wood
Minister of Transport

Annex A

Interim Project Alliance Agreement

Key Details

Description

A preliminary agreement under which the non-owner participants of the Alliance undertake the work required to establish the full scope and costs for the subsequent project alliance agreement (**PAA**).

Parties

- Ministry of Transport (as 'Owner'), with provision for the IPAA to be novated from the Ministry of Transport to Auckland Light Rail Limited on or about the date of the PPA
- Arup New Zealand Limited
- Aurecon New Zealand Limited

Scope

During the IPAA phase, the Alliance will perform the 'Interim Alliance Services' (as defined in the IPAA), including to:

- undertake sufficient work to understand and define the scope of work required during the PAA phase and quantify the risks associated with performing that work, including in particular to confirm the consenting strategy for the Project which will have a direct impact on pricing;
- develop an open book estimate of the initial target outturn cost (**TOC**) up to lodgement of the notices of requirement to achieve the required designations for the route, on the basis of the intended scope of work for the PAA phase (as above);
- develop the Alliance culture, obtain insurances for the PAA phase and establish the Alliance as a fully functioning virtual organisation (from the time that the PAA is signed); and
- provide additional services, subject to the prior approval of the Interim Project Alliance Board.

s 9(2)(b)(ii)

Programme

The IPAA is planned to be executed by no later than 10 October 2022.

The IPAA phase is planned to be concluded, and the PAA executed, by the end of February 2023.

Owner indemnities

The Owner indemnifies each Participant:

- against all costs, losses, damages and Claims sustained or incurred by the Participant to the extent arising from any use by the Owner, or by its agents, employees or contractors, of any of the Intellectual Property Rights vested in or licensed to the Owner from the Participant under clause 6 of the IPAA (clause 6.1.9); and
- in respect of Claims by any person against any Participant in respect of:
 - loss of or damage to any physical property; and
 - personal injury, disease, illness or death,

to the extent that such loss, damage, injury, disease, illness, death or Claim was reasonably foreseeable and was caused by any breach of the IPAA by the Owner or by any negligent act, error or omission of the Owner or its employees, agents or Subcontractors arising out of, or in connection with, the performance of the IPAA by the Owner or its employees, agents or Subcontractors (clause 7.5.1).

APPENDIX C

IPAA indemnities – Responses to questions

Note: references to the “Owner” below are references to ALRL or to the Ministry of Transport (as the case may be).

Why are the indemnities being given?

- 1 The ALR Unit has advised that the risks are customarily covered by indemnities during the IPAA phase.
 - 1.1 The intellectual property indemnity is to cover the scenario where intellectual property has been provided by a Participant and is used by the Owner and causes a loss to or claim against the Participant, but the PAA (and its fuller set of intellectual property arrangements) has not come into force.
 - 1.2 The damage/injury/death indemnity is included as the parties are not protected by the ‘no sue’ provisions and project-specific insurance policies that will apply during the PAA phase and tie in with the parties’ typical requirements under their own insurance arrangements that will apply during the IPAA phase.

Is there an ability to terminate the arrangement?

- 2 The ALR Unit has advised that the arrangement is intended to be short term and will terminate on completion of the IPAA phase (intended to be late February 2023).

Can the exposure be limited (in scope, amount or duration)?

- 3 The ALR Unit has advised that the indemnities are uncapped. However, the Unit advises that the scope is narrow from a contractual perspective and very remote from a practical perspective – there is very limited actual risk of the indemnities being called on given the scope of services during this phase is largely a desktop exercise. While it is not certain that the PAA will be entered into at completion of the IPAA phase (which terminates the indemnities) it is highly likely that the parties will reach agreement given the time and cost invested in the procurement to date.

Is there a clause to ensure the indemnity doesn’t cover losses resulting from acts by the indemnified person which are malicious, fraudulent, wilful, illegal or reckless?

- 4 The ALR Unit advises that there is no such clause, due to the very limited scope of the indemnities:
 - 4.1 the intellectual property indemnity can only be triggered by the actions of the Owner following termination of the IPAA or termination of the relevant Participant – so it is difficult to see how Participant action could influence this; and
 - 4.2 the damage/injury indemnity only applies to the extent reasonably foreseeable and triggered by the Owner’s negligence or breach of contract – this formulation excludes losses caused by Participants of malicious, fraudulent, wilful, illegal or reckless acts.

Does the arrangement ensure that the party who has the benefit of the indemnity takes reasonable care to minimise or mitigate any loss (including having adequate insurance)?

- 5 There is no express mitigation obligation, but all Participants are required to hold public liability insurance for at least \$10m which is required to cover injury, death and property damage.

What risk management processes will be put in place to manage the contingent liability associated with the indemnity?

- 6 There will be typical corporate risk management policies in place both within ALRL and the Alliance itself (both at a project specific level and at the corporate level for the Participants. If a potential issue arises it will be managed through the IPA Board in the first instance. The Owner will also have separate reporting obligations to the Crown and the Sponsors and will be required to notify those parties if a material issue arises.

Is there a clause which enables ALRL to participate in (or take over) defending a claim against the indemnified party, or that requires the indemnified party to co-operate in any proceedings?

- 7 No, but this is not considered necessary given the limited time and scope of these indemnities.

Is there a clause requiring timely notification of any claim against the indemnity?

- 8 No, but this is naturally limited by the short duration of the IPAA (likely to be less than 6 months) and the PAA then managing liability between the parties.

If the initial counterparty is the Ministry of Transport, is there any residual liability under the indemnities following novation to ALRL?

- 9 Yes, the novation provisions have been drafted so that the exiting party is responsible up to the date of exit, and the entering party (ALRL) is responsible for future liabilities on or after the date the date the IPAA is novated.