



Item No: 19.2

Date: 18 October 2021

Attachments: A, B, C, D, E

Meeting:	Council
Title:	Public Lighting Pre-Action Notice Update
Responsible Manager:	Group Manager Assets & Infrastructure, Ben Clark
Author:	Group Manager Assets & Infrastructure, Ben Clark
Key Pillar:	Financial Guiding Principle 1- Finances managed responsibly
Key Focus Area:	Financial Guiding Principle 1- Finances managed responsibly
Type of Report:	Decision Required

Pursuant to Section 83(5) of the *Local Government Act 1999*, the Chief Executive Officer indicates that the matter contained in this report may, if the Council so determines, be considered in confidence pursuant to Section 90(2) of the *Local Government Act 1999* on the basis that the information contained in the attached report is information of the nature specified in subsections 90(3)(i) being potential litigation as it relates to public lighting that the Council, on advice from the lawyers representing the Local Government Association of SA, believes on reasonable grounds will take place.

Recommendation (Public)

Pursuant to s90(3)(i)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public except, Chief Executive Officer Kiki Cristol, Group Manager Assets & Infrastructure Ben Clark, Group Manager Planning, Environment & Regulatory Services Josh Bowen, Group Manager Corporate Services & Strategic Projects Scott Reardon, Manager Community Development & Engagement Fiona Decker, Communications & Marketing Manager Sarah Spencer and Council Secretariat Danielle Edwards be excluded from attendance at the meeting for Agenda Item 19.2 Public Lighting Pre-Action Notice.

The Council is satisfied that, pursuant to section 90(3)(i) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information that relates to potential litigation as it relates to public lighting that the Council, on advice from the lawyers representing the Local Government Association of SA, believes on reasonable grounds will take place.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because it could compromise Council's position if action and / or an appeal is commenced.

Recommendation (Confidential)

- 1) That Council authorises the Chief Executive Officer to enter into a Dispute Management Agreement (Attachment B) with HWL Ebsworth Lawyers to represent Council's interests in regard to TTEG's pre-action claims, noting Councils preliminary costs are in the order of \$4,000, which may alter depending on the number of Council's that sign up to the joint action.
- 2) That Council receives and notes the update provided by HWL Ebsworth as seen in Attachment A.

Recommendation (Public)

Pursuant to s.91(7)

That having considered Agenda Item 19.2 Public Lighting Pre-Action Notice in confidence under section 90(2) and (3)(i) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the minutes, report and attachments relevant to this Agenda Item be retained in confidence until the matter has been finalised excepting that Council authorises the release of the minutes to substantive party/parties to enable enactment of the resolution and that pursuant to Section 91(9)(c) of the *Local Government Act 1999* the Council delegates to the Chief Executive Officer the review and power to revoke this Order.

and

That Council resolves to end its confidential deliberations pursuant to Section 90(2) of the *Local Government Act 1999* Council and re-admit the public.

Summary

As previously reported, on 7 June 2021, Council received a Pre-Action Notice under the Court Rules from Lipman Karas on behalf of the Trans-Tasman Energy Group (**TTEG**) claiming approximately \$44,236.68 from Council. 60 other Councils and the State Government received a similar claim.

All Councils participated in a pre-action response coordinated by the LGA and HWL Ebsworth Lawyers. HWL Ebsworth advised that TTEG's claim does not have merit and should be defended. This advice was supported by an opinion of counsel.

A pre-action meeting was held with TTEG which did not result in the resolution of the dispute. As such, Council now anticipates that legal proceedings will be commenced.

The claim against each Council is, in substance, the same. As such, the LGA has offered to manage the litigation on behalf of all Councils pursuant to a Management Agreement to enable Councils to share costs and reduce the administrative burden associated with litigation. The more Councils that participate, the greater the cost efficiencies.

HWL Ebsworth will be engaged by the LGA to defend the action on behalf of Council and expert counsel will be appointed. The LGA and HWL Ebsworth similarly managed the sector-wide claim against SA Power Networks which resulted in a \$13 million refund to Councils in 2019.

Background

Overview of the TTEG Claim

- (a) Between 2011 to 2015, TTEG was engaged as a consultant by Councils and the State to negotiate reductions to public lighting tariffs with SA Power Networks (**SAPN**). TTEG was retained on a contingency fee basis under a Consultancy Agreement. Under that

arrangement, TTEG would receive 20% of all savings which TTEG achieved for Councils provided certain contractual criteria was met.

- (b) In November 2015, TTEG's contract expired without TTEG having negotiated and agreed any reduced tariffs on behalf of Councils with SAPN. At that time, Councils remained in a protracted dispute with SAPN.
- (c) In 2016, a new team of experts was appointed to act for Councils and the State in relation to the pricing dispute with SAPN. The dispute was referred to the Australian Energy Regulator (**AER**) for Determination. TTEG was not involved in this process and the arguments previously developed by TTEG were not relied on. As you may recall, in 2019, the AER ordered that SAPN repay \$13 million to Councils and the State.
- (d) TTEG is now alleging that it achieved various savings for Councils through its services and is seeking a total of \$8,573,000 from all Councils and the State. TTEG's claim against Council of \$44,236.68 is based on the proportion of public lights we hold.
- (e) While TTEG's claims have not been properly particularised, they fall into three main categories:
 - (i) TTEG claims that it achieved savings for Councils based on commercial offers made by SAPN during negotiations in the 2010-2015 pricing period, even though those offers were never accepted by Councils;
 - (ii) TTEG claims that it achieved the \$13 million repayment ordered by the AER;
 - (iii) TTEG claims that a reduction in public lighting tariffs from 1 July 2016 due to SAPN's initial public lighting assets being fully depreciated constitutes a "saving" that TTEG achieved.

Discussion/Issues for Consideration

The key terms of the Management Agreement are as follows:

- (a) The LGA is appointed as the Councils' agent to manage the litigation including giving instructions to HWL Ebsworth and incurring costs up to the Costs Limit of \$750,000 plus GST.
- (b) The Costs Limit is based on a preliminary estimate but this is likely to change as the matter progresses and the scope of work becomes clearer. Increases to the Costs Limit must be agreed by Councils by 75% majority vote based on public lighting inventory (following which all Councils who are party to the DMA will be bound).
- (c) Councils will be called on to fund the litigation costs in accordance with their proportionate share of the total public lighting inventory held by Councils participating in the managed defence. This will be based on the proportions set out in the TTEG pre-action claim and will be adjusted as appropriate. Based on the preliminary costs estimate, Council's share of defence costs will be \$3,870 plus GST. This figure assumes that all Councils participate in the coordinated defence and share costs.
- (d) The LGA will have day-to-day management of the defence without requiring instructions from Councils. The LGA will, however, be required to obtain specific instructions from Councils prior to entering into any settlement arrangements, instituting any appeals or changing solicitors.
- (e) The LGA is authorised to agree cost sharing arrangements with the State Government (for whom HWL Ebsworth are also acting) to further reduce costs.

- (f) At the conclusion of the action, a final adjustment will be undertaken to ensure that Councils have paid, or if relevant received, their proportionate share.
- (g) Councils may withdraw by giving 30 days' notice in writing. Upon withdrawal, the LGA will notify remaining Councils of the increase in their proportion of legal costs. If the LGA determines that there is not sufficient ongoing support for the coordinated defence, it may terminate the agreement.
- (h) The LGA will be paid a \$50,000 management fee (to be shared by all participating Councils) to offset the administrative cost of managing the litigation. This is appropriate as not all LGA members are parties to the litigation. Council's share of the management fee will be approximately \$258 plus GST. Again, this figure assumes that all Councils participate in the coordinated defence and share costs.
- (i) The Management Agreement will automatically terminate if a sufficient number of Councils do not sign up to the coordinated defence.

The Management Agreement has been reviewed by a legal costs expert to ensure that the proportionate cost sharing arrangements will not have implications for the recovery of costs against TTEG should Councils be successful in their defence.

Options for Consideration

Option 1

- 1) That Council authorises the Chief Executive Officer to enter into a Dispute Management Agreement (Attachment B) with HWL Ebsworth Lawyers to represent Council's interests in regard to TTEG's pre-action claims, noting Councils preliminary costs are in the order of \$4,000 which may alter depending on the number of Council's that sign up to the joint action.
- 2) That Council receives and notes the update provided by HWL Ebsworth as seen in Attachment A.

Option 2

- 1) That Council.....
- 2) That Council receives and notes the update provided by HWL Ebsworth as seen in Attachment A.

Analysis of Options

Option 1

This option ensures that Council is able to minimise the expenditure required undertake the defence of the litigation brought about by TTEG. Council will be a part of a joint action with up to 60 other council's which will ensure Council is able to access legal representation at a significantly lower cost than defending the action alone.

Option 2

This option allows Council to determine the course of action they wish to undertake regarding the defence of the litigation brought about by TTEG.

Financial Implications

The recommendation has costs associated with it in the order of \$4,000, this cost can be funded through existing budgets.

Community Implications

There are no know community implications.

Governance Implications

Council will be required to enter in to an agreement with HWL Ebsworth for the defence of the litigation claim.

Preferred Option & Reasoning

Option 1 is the preferred option. This option allows Council to defend itself against the claims in the most cost effective manner by leveraging the LGA and ability to undertake a joint defence.

Attachments

Attachment A	HWLE Advice - TTEG - Next Stage
Attachment B	Dispute Management Agreement
Attachment C	HWLE Costs Agreement
Attachment D	Media Holding Statement
Attachment E	TTEG Litigation Hold Protocol

16 September 2021

Advice - TTEG Pre-Action Notice

1. Current Status

We attended a pre-action meeting with TTEG on 9 August 2021. Lisa Teburea (LGA) and Paul Sutton (City of Charles Sturt) attended on behalf of Councils. That meeting did not result in a settlement or a narrowing of the issues in dispute.

A pre-action report will now be prepared by us and Lipman Karas in accordance with the Court Rules which outlines the results of, and the parties' compliance with, the pre-action steps. There may, of course, be disagreement as to the content of that report given Lipman Karas' approach to date. We will provide Councils with an update on this in due course.

The scope of the coordinated pre-action response funded by the LGA has now come to an end. The purpose of this report is to set out the LGA's proposal for a coordinated defence of the TTEG claim, funded by Councils, and our recommendations as to next steps.

2. Next steps

Question	Answer
<p>What will happen next?</p>	<p>We anticipate that TTEG will file proceedings in the Supreme Court of South Australia in the near future.</p> <p>If, by that time, Councils have not appointed us (or another solicitor) to act in relation to the proceedings, Councils will need to be served directly. Councils must then file a defence 28 days after proceedings are served, although we anticipate that the Court may grant an extension of time given the number of parties.</p> <p>Given the tight timeframe, we suggest that Councils make a decision as to how they wish to defend the claim as soon as possible, so that an application can be made to the Court to extend the time for filing the defence.</p> <p>Prior to proceedings being filed, it is possible that TTEG may write to Councils on an open basis in relation to its claim and release a public statement. We will prepare a holding statement for Councils should this occur.</p>
<p>What role will the LGA now</p>	<p>TTEG has indicated that the LGA will not be joined as a party to the proceedings. However, the LGA Board has agreed to manage the litigation on behalf of Councils should a sufficient number of Councils wish it to do so. A</p>

Ref KB:918377

play? key advantage of a coordinated defence is the ability for Councils to cost share.

The LGA has prepared a Dispute Management Agreement (**DMA**) setting out the terms on which it is prepared to manage the TTEG claim on behalf of Councils (**attached**). Each Council will enter into a separate DMA with LGA.

What are the key terms of the Dispute Management Agreement?

- The LGA is appointed as the Councils' agent to manage the litigation including giving instructions to our firm and incurring costs up to the Costs Limit. The Cost Limit is based on our preliminary estimate of \$750,000 plus GST but this is likely to change as the matter progresses and the scope of the work required becomes clearer.
 - Councils will be called on to fund the litigation costs in accordance with their proportionate share of the total public lighting inventory held by Councils participating in the managed defence. This will be based on the proportions set out in the TTEG pre-action claim and will be adjusted as appropriate.
 - The LGA will have day-to-day management of the defence without requiring instructions from Councils. The LGA will, however, be required to obtain specific instructions from Councils prior to entering into any settlement arrangements, instituting any appeals or changing solicitors.
 - Increases to the Costs Limit must be agreed by Councils holding more than 75% of total public lighting inventory (following which all Councils who are party to the DMA will be bound).
 - At the conclusion of the action, a final adjustment will be undertaken to ensure that Councils have paid, or received, their proportionate share of the litigation costs or costs award (as applicable).
 - If Councils holding more than 50% of total public lighting inventory do not execute a DMA within 14 days after the service of a Summons by TTEG, the DMA will automatically terminate for the Councils that have already entered into the agreement and Councils will have 14 days to instruct solicitors and file a Defence.
 - Councils may withdraw by giving 30 days' notice in writing to both the LGA and all other Councils who are a party to the DMA. Upon withdrawal, the LGA will notify remaining Councils of the increase in their proportion of legal costs. If the LGA determines that there is not sufficient ongoing support for the coordinated defence, it may terminate the DMA.
 - Each Council will be party to a separate DMA which is in uniform terms. This approach gives Councils more flexibility to enter and exit the arrangement.
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- Each Council consents to being nominated the representative defendant if appropriate. The selection of a representative defendant will be based on advice from counsel.
 - Councils will become liable to pay the LGA its share of the pre-action costs funded by the LGA but only in the event that the Council becomes entitled to recover those costs from TTEG and only to that extent. This clause has been inserted so that TTEG will be liable for the pre-action costs if it loses, as a Council cannot recover legal costs which it has no liability to pay.
 - The LGA will be paid a \$50,000 management fee to offset the administrative cost of managing the litigation. The management fee will be shared by Councils proportionately. This is appropriate as not all LGA members are parties to the litigation. The management fee may not be recoverable from TTEG pursuant to a cost order.

The DMA has been reviewed by a legal costs expert to ensure that it complies with the relevant cost rules and that the cost sharing arrangements will not have unintended consequences if we proceed to a recovery of costs from TTEG.

Councils may wish to obtain their own legal advice in relation to the terms of the DMA. The DMA is provided on an "as is" basis but there will be an opportunity for Councils to raise any specific concerns in the Q&A webinar session.

Do we need to enter into the Management Agreement now?

Given the tight timeframe for the filing of a defence, we recommend that certain preparatory work to be undertaken in anticipation of Councils being served. We anticipate these costs will be about \$35,000 plus GST.

If proceedings are not served on a particular Council, or at all, then Councils have the ability to withdraw from the DMA provided they meet the costs incurred to date.

Can Council engage its own lawyers?

Yes. Council can engage its own solicitors to defend the action by TTEG.

If fewer Councils participate, will the total estimate reduce?

Probably not. Our costs estimate is based on a defence of the issues raised by TTEG and the taking of instructions from a nominated party. As such, we do not anticipate that the costs will be materially lower if all Councils do not participate. Rather, this will reduce the ability to cost share and will increase each individual Council's proportionate share.

How will it

Similar to the public lighting dispute with SAPN, the LGA will act as a single

work practically?

point of contact for our firm and will give day to day instructions. There will, however, be times where we need direct input from Councils. Examples include document disclosure and the preparation of witness statements. The DMA also provides that no appeals will be commenced without 75% support (based on Council proportion of public lighting inventory).

Given that the SAPN public lighting dispute was coordinated by the LGA, we anticipate that the involvement of Councils will be minimal in relation to those issues. The exception is in relation to the 2015/2020 lighting period, as we understand that a number of Councils negotiated tariffs for this period with SAPN directly. Accordingly, we will need to work directly with Councils in relation to those issues to understand what tariffs were agreed with SAPN for that period and on what basis.

How will the claim be defended?

This will depend on how TTEG pleads its claim. However, we anticipate the following preliminary steps:

- if appropriate, we will bring a security for costs application (see explanation below);
- we will look at proceeding by way of a representative defendant and will ask the Court to determine the contractual interpretation issues first, in order to narrow the dispute. In short, we will look for ways to run the litigation efficiently provided that this does not compromise a robust defence;
- we will engage South Australian based junior counsel to provide local assistance to our Victorian based counsel, Tom Clarke. Tom Clarke is an expert in electricity pricing disputes. We also anticipate the engagement of South Australian senior counsel to provide high level strategic input; and
- we will apply to strike out TTEG's Statement of Claim if it is not appropriately articulated to prevent TTEG simply fishing for responses and documents through the litigation process.

What is a security for costs application?

A security for costs application is brought where there is sufficient reason to doubt that a plaintiff will be able to meet an adverse costs order if it loses. Given that TTEG will be suing 62 parties and is a proprietary limited company with only two shares on issue, we recommend that we initiate steps to obtain security for costs if proceedings are issued. This would involve:

- undertaking searches to examine TTEG's assets;
 - writing to TTEG to ask for evidence that it can satisfy an adverse costs order;
 - if TTEG fails to provide assurance, bringing an application to the Court
-

for security for costs;

- if the Court is satisfied that security for costs should be provided and TTEG fails to provide the security, the Court may stay or dismiss the proceedings; and
- if security is provided, this will usually be through the payment of funds into Court or a bank guarantee. At this stage, we anticipate we would seek security of approximately \$500,000.

Are there any pre-litigation steps Councils should take now?

While we anticipate that most documents will be held by the LGA, it is prudent for Councils to take steps to ensure that documents relating to TTEG's claim are not destroyed through routine deletion processes. We **enclose** a Litigation Hold Protocol which we recommend be implemented.

Reporting to Elected Members

We **enclose** a template report. Please ensure that agenda items and minutes are described in a manner that does not disclose the TTEG claim and that appropriate confidentiality orders are put in place. Please refer to the Privilege Protocol for further information.

Will there be another Q&A session?

An online Q&A session will be arranged to give Councils an opportunity to ask questions about the coordinated defence and DMA. The LGA will be in touch in relation to those arrangements.

What next?

Please respond by email letting us know whether your Council wishes to proceed with the DMA. We will then liaise with your Council directly. Councils may also wish to obtain their own separate advice in relation to the DMA.

Yours faithfully,



Kate Brandon
Partner
HWL Ebsworth Lawyers

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Dispute Management Agreement

The Council
and
The Local Government Association of South Australia

REPEATED

Ref KM:SS:1074914

Doc ID 875526113/v1

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Dispute Management Agreement

Date

Parties

[insert name of Council]

ABN [insert] of [insert address]

(Council)

The Local Government Association of South Australia

ABN 83 058 386 353 a body corporate pursuant to Part 2 of Schedule 1 to the Local Government Act 1999 of Ground Floor, 148 Frome Street, Adelaide SA 5000

(LGASA)

Recitals

- A. LGASA is the peak representative body for local government in South Australia.
- B. On 7 June 2021, 61 of 68 South Australian local councils (**councils**) received a Pre-Action Notice from the Trans-Tasman Energy Group Pty Ltd (**TTEG**) claiming unpaid consultancy fees from the State of South Australia (**State**) and the Participating Councils (**TTEG Claim**).
- C. The Participating Councils wholly reject the validity of the TTEG Claim.
- D. LGASA and the Participating Councils anticipate that legal proceedings will be commenced by TTEG in relation to the TTEG Claim.
- E. In anticipation of those proceedings, LGASA and the Participating Councils have agreed to enter into arrangements to authorise LGASA to retain the Solicitors on behalf of Participating Councils and to provide for the management of the Participating Councils' defence, any counterclaim and cost sharing arrangements.
- F. The Council and LGASA wish to record these arrangements in accordance with the terms of this agreement.

This agreement witnesses that in consideration of, among other things, the mutual promises contained in this agreement the parties agree as follows:

1. Definitions and interpretation clauses

1.1 Definitions

In this agreement:

- Act** means the *Local Government Act 1999* (SA).
- Action** means all and any Claims issued or arising out of or in connection with the TTEG Claim, including any action brought to enforce or recover any judgment in the court proceedings (including costs orders) and any appeal.
- Action Costs** means the aggregate of the following Costs:
- (a) solicitors fees and disbursements incurred in accordance with any engagement entered into between LGASA and the Solicitors in relation to the Action and matters consequential to the Action, including negotiating and entering into any settlement in respect of the Action;
 - (b) fees of barristers, accountants and other professionals (calculated at rates and for amounts determined by LGASA (acting reasonably)) to be acceptable or as otherwise approved on behalf of the Participating Councils (including the Council) by LGASA;
 - (c) Regulatory Fees;
 - (d) Costs associated with the provision of litigation services by the Solicitors, including the use of e-discovery platforms; and
 - (e) expert and lay witness fees and expenses.
- Action Costs Payment** has the meaning given in clause 8.2(b).
- Action Report** has the meaning given in clause 7.1.

Award	has the meaning given in clause 8.4(a).
Business Day	means any day except Saturdays, Sundays and declared public holidays in South Australia.
Claim	includes any claim, demand, remedy, suit, injury, damage, Loss, Cost, liability, action, proceeding, right of action and claim for compensation.
Cost	includes any cost, charge, expense, outgoing, payment or other expenditure of any nature (whether direct, indirect or consequential and whether accrued or paid) and, where appropriate, includes reasonable fees and disbursements payable to contractors, consultants and lawyers.
Costs Limit	means \$750,000 (exclusive of GST) or any Increased Costs Limit (if approved in accordance with clause 8.3).
Council's Share	means the proportion (expressed as a percentage) that the number of public lighting assets located within the Council's council area bears to the total number of public lighting assets located within the council areas of the Participating Councils.
councils	has the meaning given in Recital B.
Increased Costs Limit	has the meaning given in clause 8.3(c)(ii).
Instructions Notice	has the meaning given in clause 6.2(a).
Law	means any statute, rule, regulation, by-law, proclamation, ordinance or subordinate legislation in force from time to time in any jurisdiction.
Loss	includes any loss, cost, expense, damage or liability (including any fine or penalty) whether direct, indirect or consequential, present or future, fixed or unascertained, actual or contingent and whether arising under contract (including any breach of this agreement), in equity (including breach of an equitable duty, breach of confidentiality or breach of fiduciary duty), under statute (including breach of statutory duty) (to the maximum extent

possible), in tort (including for negligence or negligent misrepresentation) or otherwise (including in restitution).

Management Fee	means \$50,000.
Management Services	means the management services to be provided by LGASA as set out in clause 4.1.
Participating Councils	means all councils listed in the Schedule (including, if applicable, the Council) that enter into a dispute management agreement with LGASA on terms which are the same or substantially similar to this agreement.
Pre-Action Costs	means all Costs incurred by LGASA prior to the commencement of the Action in relation to the TTEG Claim.
Regulatory Fees	means Court or other regulatory filing fees and all other incidental court or regulatory fees.
Solicitors	means HWL Ebsworth Lawyers or such other firm or legal practitioner appointed in accordance with clause 6.
Sunset Date	means the date that is 14 days after the service of a statement of claim relating to the Action by TTEG.
Termination Notice	has the meaning given in clause 10.2(a).
TTEG	has the meaning given in the Recitals.
TTEG Claim	has the meaning given in the Recitals.

1.2 Interpretation

In this agreement, unless the contrary intention appears:

- (a) words denoting the singular include the plural and vice versa;
- (b) a reference to any gender includes all genders;

- (c) a reference to a person or entity includes a natural person, a partnership, corporation, trust, association, unincorporated body, authority or other entity;
- (d) headings and the table of contents (if any) are for convenience only and do not affect interpretation;
- (e) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (f) a reference to any document is a reference to that document (and, where applicable, any of its provisions) as amended, novated, supplemented or replaced from time to time;
- (g) a reference to a party to this agreement includes that party's executors, administrators, successors and permitted assigns;
- (h) a reference to (\$) or (Dollars) is a reference to Australian currency;
- (i) a reference to a recital, clause, schedule or annexure is to a recital, clause (including sub-clause, paragraph, sub-paragraph or further subdivision of a clause), schedule or annexure of or to this agreement and a reference to a paragraph is to a paragraph in a schedule;
- (j) a reference to any books or records or writing includes a reference to such documents or writing in all formats including electronic, disk, magnetic or written format;
- (k) a reference to any legislation or legislative provision includes any regulations or other delegated legislation or instruments made or issued under it and any consolidations, amendments, re-enactments or replacements of it and them and any of them;
- (l) the word (including) is not to be treated as a word of limitation;
- (m) a reference to time is a reference to the time in Adelaide, South Australia;
- (n) if the time prescribed or allowed by this agreement for doing any act or thing falls or expires on a day which is not a Business Day, such time is extended so as to fall or expire on the next succeeding Business Day after that day;
- (o) a reference to an agreement other than this agreement includes an undertaking, deed, agreement or legally enforceable arrangement or understanding whether or not in writing; and
- (p) a promise, agreement, representation or warranty by two or more persons binds them jointly and severally.

1.3 Schedule

The Schedule forms part of this agreement.

2. Participation

- (a) This agreement is subject to and conditional upon the councils which hold in aggregate not less than 50% of the public lighting assets of all councils becoming Participating Councils by the Sunset Date (**Condition**).
- (b) Subject to clause 2(c), within 5 Business Days of the Condition being satisfied, LGASA must give notice of that fact in writing to the Council.
- (c) If the Condition is not satisfied by the Sunset Date, this agreement will automatically terminate and will be of no further force or effect on either the Council or LGASA.
- (d) The Council acknowledges and agrees that, if this agreement terminates in accordance with clause 2(c), LGASA will have no obligation to the Council in respect of the defence of the Action.

3. Appointment as Agent and Ratification

3.1 Agency Appointment

For the purposes of section 37(b) of the Act, the Council hereby appoints LGASA as its agent, and LGASA hereby accepts such appointment as the Council's agent authorised to act on the basis set out in this agreement, in particular clause 4.

3.2 Ratification

On and from the date of this agreement, the Council undertakes, if requested by LGASA, to ratify and confirm in writing the validity of any act or exercise of power by LGASA done in good faith purportedly pursuant to clause 3.1.

4. LGASA Obligations

4.1 LGASA Services

LGASA must, subject to clause 6.1:

- (a) carry out:
 - (i) any acts or things necessary for the purposes of managing and resolving the Action in accordance with the terms of this agreement, including:
 - (A) incurring Action Costs;

- (B) providing instructions to the Solicitors in relation to the Action, including determining, the manner and extent to which the Action should be pursued and making binding decisions on behalf of the Council in relation to the Action; and
 - (C) preparing, completing, signing and lodging any document related to the Action on the Council's behalf; and
- (ii) and perform all other acts or things necessary for or incidental to the matters set out in clause 4.1(a)(i).
- (b) negotiate and, if appropriate, agree reasonable and proportionate cost sharing arrangements with the State in relation to the Action Costs;
 - (c) allocate appropriate time and resources to defend the Action in a proper, effective and efficient manner;
 - (d) enforce and recover any final judgment or settlement in the Action; and
 - (e) promptly disclose to the Council material information concerning the Action of which it becomes aware,
- (collectively, the **Management Services**).

4.2 LGASA Obligations

LGASA must:

- (a) provide the Management Services:
 - (i) in a proper, diligent and competent manner with due care and skill; and
 - (ii) in accordance with:
 - (A) applicable laws; and
 - (B) the terms of this agreement;
- (b) act at all times in good faith; and
- (c) provide the Council with a copy of the retainer agreement between LGASA and the Solicitor.

5. Council's Obligations and Acknowledgements

5.1 Council's Obligations

The Council must:

- (a) use all reasonable endeavours to:

- (i) do anything reasonably requested by LGASA and/or the Solicitors promptly and in such a manner as to avoid unnecessary cost and delay to the Action;
 - (ii) inform the Solicitors of any change in contact details or any information, circumstance or change in circumstances likely to affect any issue in the Action;
 - (iii) provide full and honest instructions to the Solicitors, if requested by LGASA to do so; and
 - (iv) accept and follow the Solicitor's reasonable legal advice, including advice as to any compromise of the Action;
- (b) keep and preserve any documents relating to the Action that the Council has in its possession, custody or control and the Council:
- (i) will provide to the Solicitors all information and documents relevant to the Action if and when so requested by the Solicitors;
 - (ii) authorises the Solicitors, without waiving privilege, to provide the information and documents referred to above to LGASA; and
 - (iii) if ordered to do so by a Court or other regulatory body in any proceedings relating to the Action or any associated Claim, authorise the Solicitors to provide the information and documents to any third party the subject of a Court order or determination of any regulatory body;
- (c) if requested by the Solicitors, procure its officers, servants and/or agents to provide a written statement in relation to the Action and give evidence and attend any hearing relevant to the Action;
- (d) not disclose to any person, other than its legal and financial advisors for the purpose of obtaining confidential legal or financial advice, or LGASA, any information:
- (i) to which privilege or obligations of confidence attach; or
 - (ii) unless the disclosure is in accordance with advice from the Solicitors and is necessary for the purposes of the prosecution of the Action,
- however, the Council may disclose information to satisfy its reporting or other statutory requirements, but such disclosure must only be to the extent reasonably necessary to meet those requirements and must be subject to appropriate confidentiality orders;
- (e) not have any communication with TTEG or any officer, servant or agent of TTEG relating to the Action, other than through the Solicitors or upon their reasonable advice; and

- (f) not seek to directly instruct the Solicitors in relation to the Action, other than with the express written consent of LGASA.

5.2 Conflicts

- (a) The Council acknowledges that LGASA may be joined by TTEG as a party to the Action.
- (b) The Council consents to:
 - (i) LGASA acting as agent for each of the other Participating Councils and continuing to act for those Participating Councils in the event the Council delivers a Termination Notice under clause 10.2(a); and
 - (ii) the appointment by LGASA of the Solicitors to act in the Action for:
 - (A) each of the other Participating Councils; and
 - (B) if joined to the Action, LGASA.

5.3 Representative Action

The Council:

- (a) acknowledges that LGASA may seek the approval of the Court to have the Action heard by appointing a representative defendant.
- (b) agrees to its nomination as the representative defendant, if deemed appropriate by LGASA acting on advice provided by the Solicitors, and will do all things necessary or desirable as the representative defendant to assist LGASA and the Solicitors to defend the Action.

6. Matters Requiring Instructions from Council

6.1 Matters Requiring Further Instructions

Further instructions will be sought from the Council prior to proceeding with any of the following steps:

- (a) entering into any settlement arrangement between the Participating Councils and the TTEG on behalf of the Participating Councils;
- (b) the termination or appointment of a Solicitor; and
- (c) the commencement of any appeal by the Participating Councils.

6.2 Obtaining Instructions from Council

- (a) LGASA must notify the Council in writing of when the Council is required to give instructions concerning the matters listed in clause 6.1 (**Instructions Notice**).
- (b) The Instructions Notice must include:
 - (i) the matter in respect of which the Council is required to instruct;
 - (ii) the date by which a response must be provided;
 - (iii) any advice provided by the Solicitor regarding the matter; and
 - (iv) the Solicitor's recommendation as to the instructions the Council should provide.
- (c) The Council must notify LGASA in writing whether it accepts or rejects the Solicitor's recommendation in the Instructions Notice within the timeframe specified therein. If the Council accepts the recommendation, the Council will be taken to have instructed the Solicitor through LGASA to proceed in accordance with its recommendation.
- (d) Other than as contemplated by clause 6.2(e):
 - (i) if the Council does not notify LGASA in accordance with clause 6.2(c), the Council will be deemed to have provided its instructions to proceed in accordance with the recommendation provided by in the Instructions Notice;
 - (ii) once 75% or more of the Participating Councils accept or are deemed to have accepted the recommendation provided in the Instructions Notice, the Solicitor will proceed on the basis of its recommendation and LGASA will notify all Participating Councils accordingly; and
 - (iii) if less than 75% of the Participating Councils accept the recommendation provided in the Instructions Notice, LGASA must convene a meeting between the chief executive officers of the Participating Councils to determine how to proceed with the Action.
- (e) LGASA:
 - (i) must obtain the consent of the Council before entering into any settlement arrangement with TTEG on behalf of the Council; and
 - (ii) may terminate the engagement of any Solicitor without the consent of the Participating Councils where the Solicitor ceases to be capable of continuing to act in the Action for any reason.

7. LGASA Reporting

7.1 Obligation to Report

LGASA :

- (a) must deliver a quarterly report regarding the status of the Action and Action Costs to Participating Councils until such time as the Action (including any appeal in relation to it) is concluded (**Action Report**); and
- (b) may also deliver a report to the Participating Councils following any key milestone in the Action.

7.2 Content of Report

The Action Report must contain the following information:

- (a) a summary of the current status of the Action, including:
 - (i) key ongoing work streams;
 - (ii) pending appearances;
 - (iii) upcoming settlement meetings or other formal negotiations with TTEG (if any);
 - (iv) any other key deadlines; and
 - (v) any change in the advice provided by the Solicitors in relation to prospects of success;
- (b) a summary of Action Costs incurred to date and estimated future Action Costs (noting that in all cases any estimate of future Action Costs is an estimate only and will not be taken to be binding on either LGASA or the Solicitors); and
- (c) a summary of any settlement offers received to date.

8. Costs Participation

8.1 Acknowledgement

- (a) The Council acknowledges that the list of Participating Councils is a list of those Participating Councils that LGASA reasonably expects will enter into an agreement on substantially the same terms as this agreement.
- (b) At any given time, the Council's Share will be determined based on:

- (i) the actual number of Participating Councils then bound by an agreement on substantially the same terms as this agreement; and
 - (ii) an estimate of the number of lighting assets held by each Participating Council.
- (c) LGASA will notify the Council of its Council's Share promptly following execution of, or as otherwise required by, this agreement.
- (d) Without limiting the operation of clause 8.4, if further information becomes available that will enable the number of lighting assets held by each Participating Council to be more accurately determined, LGASA may notify the Council of any change to the Council's Share.

8.2 Action Costs

- (a) The Council is required to pay an amount up to but not exceeding the Council's Share of the Costs Limit for the purpose of funding the Action Costs.
- (b) By providing notice in writing to the Council, LGASA may at any time request that the Council pay all or part of the Council's Share of the Action Costs (**Action Costs Payment**). Whilst the Council is liable to the Solicitor for any Action Costs Payment, payment will be effected through LGASA.
- (c) The Council must pay any Action Costs Payment to LGASA within 14 days following receipt of a notice in accordance with clause 8.2(b).
- (d) If the Council does not pay an Action Costs Payment by the due date for payment, the Action Costs Payment will immediately become a debt due and payable by the Council.
- (e) Upon expiration or termination of this agreement in accordance with clause 10 (other than clauses 10.2(a) and 10.3(b)(i)), LGASA must pay all remaining Action Costs and:
 - (i) if LGASA holds any amount collected under this agreement and any similar agreement entered into by LGASA with other Participating Councils after all Action Costs have been paid, LGASA must repay to the Council its Council's Share of that surplus amount; or
 - (ii) if the amount collected by LGASA under this agreement and any similar agreement entered into by LGASA with other Participating Councils is not sufficient to pay all remaining Action Costs, the Council must (subject to receipt of a notice in accordance with clause 8.2(b)) pay to LGASA on behalf of the Solicitor the Council's Share of the remaining Action Costs up to the its Costs Limit.
- (f) In the event that the court orders that the Action Costs or any part thereof be paid by the Participating Councils to TTEG, then subject to any contrary court order, each Participating Council in an amount proportionate to each Council's Share.

8.3 Increase to Costs Limit

- (a) The Participating Councils acknowledge that the Cost Limit is based on a preliminary pre-action estimate and is likely to change.
- (b) If it is anticipated by LGASA that the Action Costs will exceed the Costs Limit, LGASA will notify the Participating Councils and seek approval to increase the Costs Limit (**Costs Limit Notice**).
- (c) The Costs Limit Notice must set out:
 - (i) the reason why the Action Costs will likely exceed the Costs Limit; and
 - (ii) the proposed increased Costs Limit (**Increased Costs Limit**).
- (d) Within 7 days of receiving a Costs Limit Notice, the Council must notify LGASA in writing whether it accepts or rejects the Increased Costs Limit.
- (e) If the Council does not notify LGASA in accordance with clause 8.3(d), the Council will be deemed to have provided LGASA with its instructions to accept the Increased Costs Limit.
- (f) Once 75% or more of the Participating Councils accept the Increased Costs Limit, the Costs Limit will be increased to the Increased Costs Limit for all Participating Councils and LGASA will notify all Participating Councils accordingly.
- (g) If less than 75% of the Participating Councils accept the Increased Costs Limit, LGASA must convene a meeting between the chief executive officers of the Participating Councils to determine how to proceed with the Action.

8.4 Final Adjustment

- (a) If the Action results in an amount being awarded in favour of one or more Participating Councils (including in respect of costs) (**Award**), the Council's sole right upon conclusion of the Action will be to recover the Council's Share of the Award.
- (b) The Council acknowledges that any Award arising out of the Action may in fact be paid to the Council in a proportion that is greater than or less than its Council's Share.
- (c) If, at the conclusion of the Action, the proportion of the Award paid to the Council is greater than or less than the Council's Share, the Council will co-operate with LGASA to enable LGASA to undertake an audit and, if necessary, procure an adjustment to the amount received by the Council, in accordance with the principles set out in 8.4(d).

(d) LGASA will determine each Participating Council's proportionate entitlement to the Award such that:

- (i) the Action Costs paid by each Participating Council will reflect; and
- (ii) each Participating Council will receive,

that proportion of the Award which most closely reflects its entitlement based on the proportion that the number of public lighting assets located within each Participating Council's council area bears to the total number of public lighting assets located within the council areas of all Participating Councils and the Council agrees that it will take all steps reasonably necessary to give effect to that determination, including making such payments as instructed by LGASA.

9. LGASA Management Fee

9.1 Management Fee

- (a) In consideration of the provision of the Management Services, the Council must pay the Council's Share of the Management Fee to LGASA.
- (b) LGASA will issue an invoice to the Council for the Council's Share of the Management Fee (**Management Fee Invoice**) within 30 days of the date of execution of this agreement.
- (c) Payment of the Management Fee Invoice must be made within 14 days of the receipt of the Management Fee Invoice by the Council.

9.2 Pre-Action Costs

- (a) The Council acknowledges and agrees that in the event that a costs order for Pre-Action Costs is obtained against TTEG, the Council is liable to the Solicitor for the Council's Share of such costs to the extent that they are recoverable against TTEG.
- (b) If the Action results a costs award of the kind described in clause 9.2(a) in favour of the Council, the Council must reimburse LGASA the Council's Share of the Pre-Action Costs that are recovered from TTEG pursuant to that Award that have been paid by LGASA to the Solicitor on the Council's behalf.

10. Term and Termination

10.1 Term

Subject to this clause 10, this agreement:

- (a) commences and will be binding on the parties on the date that the last party signs this agreement; and
- (b) continues in operation until the Action, including any appeal in relation to it, is concluded.

10.2 Termination by the Council

- (a) The Council may elect to terminate this agreement by providing 30 days' notice in writing to LGASA and each other Participating Council (**Termination Notice**).
- (b) LGASA must ensure that each Participating Council has a corresponding obligation to give notice to LGASA and the Council of its intention to terminate any dispute management agreement to which it is a party with LGASA.

10.3 Termination by LGASA

LGASA may elect to terminate this agreement:

- (a) upon 60 days' notice in writing to the Council;
- (b) with immediate effect by notice in writing to the Council:
 - (i) if the Council breaches this agreement in a material respect and, in the reasonable opinion of the LGASA, the breach:
 - (A) cannot be remedied; or
 - (B) can be remedied, but is not remedied by the Council within 10 Business Days after LGASA gives the Council notice of the breach; or
 - (ii) if LGASA determines, acting reasonably, that a conflict of interest has arisen between LGASA and one or more of the Participating Councils regarding the provision of the Management Services; or
- (c) following receipt of a notice of the kind contemplated by clause 10.2(b), if LGASA determines that the Action will not have sufficient ongoing support from Participating Councils, LGASA may, at its election, notify the Council and all Participating Councils that this agreement and any similar agreement with any Participating Council will terminate 30 days after the date on which such notice is given.

10.4 Consequences of Termination

- (a) If this agreement is terminated in accordance with:
 - (i) clauses 10.2(a) or 10.3(b)(i), then:
 - (A) within 14 days of the date of termination, LGASA must determine and provide notice to all Participating Councils of the

effect of the termination on each Participating Council's proportionate obligation to pay Action Costs; and

- (B) the Council is not entitled to reimbursement of any Action Costs Payment (or part thereof) paid by it in accordance with clause 8.2(a) but which has not been expended by LGASA as at the date of the Council's termination; or
- (ii) clauses 10.3(a), 10.3(b)(ii) or 10.3(c), clause 8.2(e) will apply.
- (b) All obligations owed by each party to the other under this agreement cease on the date termination becomes effective, save for obligations accrued prior to that date.

11. Goods and Services Tax (GST)

11.1 Preliminary

Words or expressions used in this clause that are defined in *A New Tax System (Goods and Services Tax) Act 1999 (GST Act)* have the same meaning given to them in that Act.

11.2 GST exclusive

Unless otherwise stated, any amount specified in this agreement as the consideration payable for any taxable supply does not include any GST payable in respect of that supply.

11.3 Liability to pay GST

If a party makes a taxable supply under this agreement (**Supplier**), then the recipient of the taxable supply (**Recipient**) must also pay, in addition to the consideration for that supply, the amount of GST payable in respect of the taxable supply at the time the consideration for the taxable supply is payable.

11.4 Tax invoice

Notwithstanding the foregoing, the Recipient is not obliged under this agreement to pay the amount of any GST payable until the Supplier provides it with a valid tax invoice for the taxable supply.

11.5 Adjustment event

If an adjustment event arises in relation to a taxable supply made by a Supplier under this agreement, the amount paid or payable by the Recipient pursuant to clause 11.3 will be amended to reflect this and a payment will be made by the Recipient to the Supplier or vice versa as the case may be.

11.6 Reimbursement of expenses

If a third party makes a taxable supply and this agreement requires a party to this agreement (**the payer**) to pay for, reimburse or contribute to (**pay**) any expense or liability incurred by the other party to that third party for that taxable supply, the amount the payer must pay will be the amount of the expense or liability plus the amount of any GST payable in respect thereof but reduced by the amount of any input tax credit to which the other party is entitled in respect of the expense or liability.

11.7 Non merger

This clause does not merge on completion and will continue to apply after expiration or termination of this agreement.

12. Notices

12.1 Notice requirements

Any notice, demand, approval, consent or other communication under this agreement (**Notice**) must be in writing in English or accompanied by a certified translation into English and must be:

- (a) delivered personally;
- (b) sent by regular post (or airmail if posted to or from a place outside Australia); or
- (c) sent by email,

to a party at:

- (d) the address of the party set out in clause 12.3 (**Nominated Contact Details**); or
- (e) such other contact details as the party may from time to time notify to the other parties for the purposes of, and in accordance with, this clause.

12.2 When Notices considered given and received

A Notice given in accordance with clause 12.1 takes effect when received (or such later time as specified in it), and is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent from and to a place within Australia by regular post, at 9:00 am on the sixth Business Day after the date of posting;
- (c) if sent from a place within Australia to a place outside Australia by airmail, at 9.00 am on the tenth Business Day after the date of posting;

- (d) if sent from a place outside Australia by airmail, at 9.00 am on the twelfth Business Day after the date of posting; or
- (e) if sent by email to the email address set out in the Nominated Contact Details, when the email (including any attachment) is sent to the receiving party at that email address, unless the sending party receives a notification of delivery failure within 24 hours of the email being sent,

but if the delivery, receipt or transmission is not on a Business Day or is after 5.00 pm on a Business Day, the Notice is taken to be received at 9.00 am on the next Business Day after that delivery, receipt or transmission.

12.3 Nominated Contact Details

For the purposes of this clause 12, the Nominated Contact Details of the parties are as follows:

(a) **LGASA**

Address: Ground Floor, 148 Frome Street Adelaide SA 5000

Email: [insert]

Attention: [insert]

(b) **The Council**

The Nominated Contact Details for the Council as listed in the Schedule.

13. General

13.1 Costs

Each party must pay its own costs in connection with the negotiation, preparation and execution of this agreement.

13.2 Remedies

Other than as provided in this agreement, the rights and remedies provided under this agreement are cumulative and not exclusive of any rights or remedies provided by law or of any other such right or remedy. Any single or partial exercise of any power or right does not preclude any other or further exercise of it or the exercise of any other power or right under this agreement.

13.3 Governing Law

This agreement is governed by the law in force in South Australia. Each party submits to the non-exclusive jurisdiction of the courts of that State and the South Australia

Registry of the Federal Court of Australia in respect of all proceedings arising in connection with this agreement.

13.4 **Assignment**

No party may assign or novate any of their respective rights or obligations under this agreement without the prior written consent of all other parties.

13.5 **Counterparts**

This agreement may be executed in any number of counterparts, each signed by one or more parties. Each counterpart when so executed is deemed to be an original and all such counterparts taken together constitute one document.

13.6 **Severance**

If any part of this agreement is invalid or unenforceable for any reason, it shall be severed from the remainder of the agreement and the remainder of the agreement will continue to be valid and enforceable.

REDACTED

Schedule - Participating Councils

[TO BE INSERTED.]

REDACTED

Signing page

Executed as an Agreement

Executed for and on behalf of **Local Government Association of South Australia ABN 83 058 386 353** by its authorised representative, in the presence of:

Signature of witness

Signature of authorised representative

Full name of witness (print)

Address of witness (print)

The Common Seal of **[insert Council]** ABN **[insert ABN]** is duly affixed hereto in the pursuance of a resolution of the Council accordance with Section 38 of the *Local Government Act 1999* (SA).

Signature of Mayor

Signature of Chief Executive Officer

Full name (print)

Full name (print)

Standard Costs Agreement

Client: Each Participating Council through LGASA ('Client', 'you')
File No: 1061070
Matter: Trans-Tasman Energy Group (TTEG) – Defence of Action
Date: 2021

Unless otherwise defined herein, capitalised terms have the same meaning given in the Dispute Management Agreement.

1. Offer

This document is an offer to enter into a costs agreement with you.

2. Nature of work

The work we have been instructed to do is:

Defend the Action on behalf of the Participating Councils, and all necessary incidental and advisory work (the **Work**).

For the purposes of this agreement, a **Participating Council** is a Council that confirms that it wishes to participate in the joint defence of the Action and agrees by email to the following terms:

- (a) HWL Ebsworth is appointed to act for the Participating Council and to defend the Action in accordance with the scope of the Work;
- (b) LGASA is authorised to give, and HWL Ebsworth is authorised to accept, instructions from LGASA in relation to the defence of the Action on your behalf;
- (c) LGASA is authorised to enter into this costs agreement with us on your behalf and on behalf of other Participating Councils to formalise that engagement;
- (d) a single defence will be prepared by HWL Ebsworth on behalf of all Participating Councils; and

- (e) you acknowledge that we act for the LGASA, the State and other Participating Councils in relation to the Action. Should we cease acting for you, we may continue to act for those other parties.

3. *Legal Practitioners Act 1981 (SA) (the Act) – disclosure requirements*

The disclosure requirements, which we are required to provide you under the Act and which forms part of this document are contained in Annexure A and is entitled Standard Costs Disclosure (**Costs Disclosure**).

4. *Acceptance of offer*

4.1 If you accept this offer you will have entered into a costs agreement with us. This means you will be bound by the terms and conditions set out in this document, including being billed in accordance with it. Acceptance may be by any one of the following ways:

- (a) signing and returning a copy of this document;
- (b) giving us instructions after receiving this document; or
- (c) oral acceptance; and
- (d) email agreement as set out in clause 2.

4.2 Failure to accept our offer within seven days of dispatch of this document can result in the immediate withdrawal of our offer to act on your behalf.

5. *Termination of agreement*

5.1 **Termination by us**

We will not continue to do the Work if:

- (a) you fail to pay our bills;
- (b) you fail to provide us with adequate instructions within a reasonable time;
- (c) you give instructions that are deliberately false or intentionally misleading;
- (d) you engage another law practice to conduct this matter without our consent;
- (e) we believe, on reasonable grounds, that we may have a conflict of interest;

- (f) you indicate or it becomes apparent to us that you have lost confidence in us or we in you;
- (g) we believe, on reasonable grounds, that continuing to act for you is not in our or your best interests, provided that terminating this agreement will not breach any professional standards or obligations applicable to us as your legal advisors;
- (h) you ask us to pursue a course of action which we reasonably believe is contrary to our professional duties or is otherwise improper or may expose us to adverse costs or similar liabilities; or
- (i) we have any other just cause.

5.2 Termination by you

You may terminate this agreement at any time.

5.3 Effect of termination

If the agreement is terminated either by you or us then the following provisions will apply:

- (a) You will be required to pay our professional fees and charges for the Work done, and all expenses and disbursements incurred in connection with the Work.
- (b) For lump sum fee matters, you must pay such part of our lump sum fee as we reasonably estimate has been incurred in respect of the legal services provided to you up to the date of termination, plus charges, expenses and disbursements, subject to your right to a costs assessment.
- (c) You will be liable to pay our costs whether or not the other party to any court proceedings has to pay your costs of the proceedings.
- (d) On termination, we are entitled to retain possession of your papers and documents while there is money owing to us for our charges and expenses, or for any expenses and disbursements incurred in connection with the matter unless and until security to our satisfaction is provided for our costs and disbursements.

6. Retention of your documents

On completion of the Work, once the final bill has been rendered by us and paid by you, we will be entitled **at our option** to deal with any papers to which you are entitled, but which you leave in our possession (except documents deposited in safe custody) in one of two ways as follows:

Either

Retain such papers for no more than seven years, and to destroy the file seven years after that date.

Or

Store such papers in an electronic form only, destroy the file after completion of that process and destroy the electronic form seven years after that date.

7. Privacy

- 7.1 We collect personal information where it is necessary to provide you with legal services. Personal information we collect may also be used:
- (a) to provide individuals with information about changes to the law and our services;
 - (b) to obtain the services of third party service providers as part of our providing services to you;
 - (c) to manage and improve our legal services and client relationships;
 - (d) to take appropriate action in relation to any overdue payment;
 - (e) where we are required or authorised to do so by law; and
 - (f) otherwise, to run our business.
- 7.2 If our client is an individual and does not provide personal information we request, it may limit the services that we are able to provide and may lead to a higher cost of providing our services, but does not affect our professional obligations to our clients.
- 7.3 In addition to our obligations under the *Privacy Act 1988* (Cth) (**Privacy Act**), we are legal practitioners with strict professional obligations to our clients and the courts, including obligations of confidentiality. Also, our clients will often have legal professional privilege over records and communications in connection with our services. However, we may disclose information: where it is necessary to provide our legal services to you (such as a disclosure to third party imaging and printing service providers, within our firm, to the court, the other party or parties to dispute resolution, to barristers, valuers and/or experts); to our professional advisers and insurers; and to relevant complaints tribunals and government agencies (where we are required to do so by law). We may disclose personal information to debt collection agencies if you do not meet your obligations under this costs agreement.
- 7.4 If we do disclose your information, where it is lawful and appropriate, we ensure that the recipient is bound by an obligation of confidentiality.
- 7.5 We ordinarily do not disclose personal information overseas, but do so when it is specifically appropriate to providing our legal services for a particular client.

- 7.6 Our privacy policy sets out our approach to managing personal information. In particular, it explains how individuals can seek to access and/or correct the personal information that we hold about them, as well as how to make a complaint about a breach of our obligations under the Privacy Act, and how we will deal with complaints. You can access our privacy policy at <http://hwlebsworth.com.au/hwl-ebsworth-privacy-policy/>.

8. Payment

- (a) For so long as you remain a party to the Dispute Management Agreement, we will not bill you directly but will obtain payment through LGASA as set out in that agreement.
- (b) We acknowledge that your obligation to us is limited to your Council's Share of the Costs as is set out in Dispute Management Agreement, and that you have no liability to us for other Participating Councils' share of the Costs.

9. Authorisation to transfer money from trust account

You authorise us to:

- (a) receive directly into our trust account money for any judgment or settlement money, or money received from any source in furtherance of your Work; and
- (b) pay our costs, disbursements and expenses from any money held on your behalf in our trust account upon sending you our bill of costs requesting payment.

Signature of Kate Brandon, Partner

Date

By signing this agreement the Client and the Signatory confirm that each has been fully informed of and has understood and agreed to the terms set out in this agreement and, in particular, each gives their informed consent to:

- (a) our undertaking the Work and the proposed course of action detailed in this agreement;
- (b) the estimate of legal costs detailed in this agreement.

Name of Client: _____

Signature of the Signatory: _____

Name of Signatory: _____

Date: _____

RETRACTED

Annexure A Standard Costs Disclosure

Date: [INSERT]

To: Participating Councils('Client', 'you')

File No:

This document and the Form attached disclose information about the cost of our legal services, and your rights, as required by the *Legal Practitioners Act 1981* (SA) (**the Act**). You may negotiate and enter into a costs agreement with us based on the information contained in this document. We note that a costs agreement has been sent to you with this Costs Disclosure document.

1. GST

All rates, charges, expenses etc in this document are GST exclusive unless otherwise stated. Where the service provided is subject to GST, GST of 10% will be added and charged to you.

2. Calculation of costs

2.1 Professional fees

(a) **Kate Brandon** will be responsible for your matter, assisted where appropriate primarily by **Jessica Smith**. Their hourly rates are as follows:

Lawyer	Hourly rate	Hourly rate (incl. GST)
Kate Brandon	\$450.00	\$495.00
Emma Carnell	\$380.00	\$418.00
Jessica Smith	\$360.00	\$396.00
Simone Basso	\$210.00	\$231.00

(b) Where other fee earners are required to be involved in the Work, their time will be charged in accordance with the following hourly rates:

Lawyer's Position	Hourly Rate	Hourly Rate (incl. GST)
Partner	\$450.00	\$495.00

Lawyer's Position	Hourly Rate	Hourly Rate (incl. GST)
Consultant	\$425.00	\$467.50
Special Counsel	\$400.00	\$440.00
Senior Associate	\$380.00	\$418.00
Associate	\$360.00	\$396.00
Solicitor - Year 5 plus	\$315.00	\$346.50
Solicitor - Year 4	\$295.00	\$324.50
Solicitor - Year 3	\$275.00	\$302.50
Solicitor - Year 2	\$250.00	\$275.00
Solicitor - Year 1	\$230.00	\$253.00
Trainee Solicitor	\$210.00	\$231.00
Paralegal	\$200.00	\$220.00

- (c) We may enter into a special fee arrangement with you in writing that varies the rates set out in this agreement to take into account agreed volume discounts or increased hourly rates for specialist advice in areas such as tax and revenue law, regulatory, competition and consumer law and other specialist areas.
- (d) The rates in clauses 2.1(a) and 2.1(b) will be proportionately charged for work involving shorter periods of less than an hour. Our charges are structured in 6 minute units. For example, the time charged for an attendance of up to 6 minutes will be charged as one unit and the time charged for an attendance between 6 and 12 minutes will be charged as two units.
- (e) You may contact Kate Brandon regarding your matter and your legal costs.
- (f) Our hourly rates are different to the rates set out in the Scale of Costs under the Supreme Court Rules as amended from time to time (**Scale**). Although time charging is common, there may be other solicitors who would be prepared to act for you and charge according to the Scale. You are entitled to seek independent legal advice regarding this or any other term of this agreement.
- (g) Our rates are likely to result in a higher charge than if the Scale were used and other solicitors might well be prepared to do the work for a lesser fee.
- (h) Tom Clarke, barrister, will be engaged as counsel.

2.2 Expenses and disbursements

- (a) We may incur expenses and disbursements (being money which we pay or are liable to pay) to others on your behalf. These may include search fees, enquiry fees, court filing fees, process servers, externally hosted telephone calls, clinical records from hospitals, medical reports, experts' reports, witness expenses, travel expenses, transcripts, barristers' fees.
- (b) We will inform you of these expenses and disbursements as well as any other payments required to be made, as soon as is reasonably practicable.

3. Estimate of costs

The following estimate is based on the information available to us to date. It is an **estimate, not a quotation** and is subject to change.

We estimate the cost of the Work to be:

Professional fees (excluding GST):	\$750,000
Expenses & disbursements (excluding GST):	TBD
SUBTOTAL	\$750,000
GST	\$75,000
TOTAL (GST INCLUSIVE)	\$825,000

We will notify you if this estimate changes substantially at any stage.

These estimates are made on the information available to us at this time. They may, and probably will, change when more information is available to us. The major factors which will affect the estimates are:

- (a) increases to our scope;
- (b) TTEG's response;
- (c) level of involvement of counsel that is required;
- (d) the extent of document disclosure;
- (e) how quickly the matter can be listed for trial; and
- (f) the extent of expert and lay evidence needed.

4. Unpaid Costs

If costs remain unpaid for in excess of 60 days from the date of issue of our invoice, we reserve the right to cease work on this matter and on any other matters being conducted on your behalf until our costs are paid in full.

5. Your right to a bill of costs

You are entitled to receive a bill of costs from us. If we send you a lump sum bill you may request an itemised bill from us.

6. Billing arrangements

We will send you a bill of costs containing details of our professional fees and charges, disbursements and expenses, including GST, **either** after completion of the Work, **or** monthly, or at other times as agreed with you while the Work is in progress. However, this is subject to the Dispute Management Agreement under which payment will be effected through LGASA.

7. Interest on unpaid costs

If you do not pay our costs within 30 days of receipt by you of our bill of costs, we may charge you interest on the unpaid amount at the Reserve Bank of Australia cash rate target plus 2%.

8. Dispute as to Legal Costs

- 8.1 The Act gives you the right to apply to the Supreme Court of South Australia to have the bill of costs reviewed for its fairness and reasonableness or to have a costs agreement set aside on the basis that it is not fair, just or reasonable.
- 8.2 An application for assessment should be made within six months after the date that:
- (a) the bill was given or the request for payment was made to the client; or
 - (b) the costs were paid if neither a bill was given nor a request was made.

9. Substantial changes to disclosure

You will be informed in writing, as soon as is reasonably practicable, of any substantial changes to anything contained in this disclosure document.

10. Progress reports

- 10.1 You are entitled to request, at reasonable intervals, written progress reports on your matter. Our normal charge-out rates will apply for this service.
- 10.2 You are entitled to request a written report on the legal costs incurred to date since the last bill of costs was given to you, free of charge.

11. Engagement of other law practices

- 11.1 It may be necessary for us to engage, on your behalf, the services of another law practice to provide specialist advice or services, including advocacy services, or to act as our agent.
- 11.2 We will consult you as to the terms of that law practice's engagement, but you may be asked to enter into a costs agreement directly with that law practice. The law practice engaged by us will disclose costs in a similar manner and we will disclose those costs to you.

12. Costs in court proceedings

12.1 Costs order against other party

If court proceedings are taken on your behalf, the court may order the other party to pay your costs of the proceedings. This sum will not necessarily cover the whole of your legal costs due to us. It is possible that the court may make an order that you pay the other party's costs (if, for instance, you lose the case). These costs are payable by you to the other party in addition to the costs payable to us.

12.2 Range of costs if you are successful

If you are **successful** in any subsequent litigation the following is the range of costs that may be recovered from the other party. The sums given below are merely an **estimate**

At this pre-action stage, it is very difficult to provide a trial estimate and an amount of costs that may be recovered. However, if the matter ran to trial, and the fee maximum of \$750,000 was reached all Participating Councils might recover perhaps \$500,000. Of course, your actual recovery would be limited to your Council's Share of the costs recovered.

All amounts are GST exclusive.

12.3 Range of costs if you are unsuccessful

If you are **unsuccessful** in the litigation you may be ordered to pay the other party's costs. At this pre-action stage, it is very difficult to provide a trial estimate and an amount of costs that may be recovered by TTEG. As part of the pre-action notice, TTEG's solicitors have provided a fee estimate of \$750,000.00 for future costs including trial for the claim against all proposed respondents. In the absence of a special costs order, TTEG might recover approximately \$500,000. That amount would be shared between the Participating Councils in accordance with the provisions of the Dispute Management Agreements.

All amounts are GST exclusive.

12.4 Settlement negotiations

If **settlement** of your claim is being negotiated, we will provide you before settlement with:

- (a) a reasonable estimate of our costs payable by you on settlement; and
- (b) if applicable, a reasonable estimate of the costs you would obtain from the other party on settlement if the settlement is favourable to you; or
- (c) if applicable, a reasonable estimate of the costs you may have to pay the other party.

13. Applicable Law

13.1 The law of South Australia applies to legal costs regarding this matter.

13.2 Despite clause 13.1, you are able to enter into a costs agreement with us on the basis that the corresponding law of another State or Territory is applicable if this matter has a substantial connection with that State or Territory. In that event we will disclose costs as they are applicable in that State or Territory.

Form of disclosure of costs to clients

(Regulation 59, Legal Practitioners Regulations 2014 - Form 1)

Legal costs - your right to know

You have the right to:

- negotiate a costs agreement with us;
- receive a bill of costs from us;
- request an itemised bill of costs after you receive a lump sum bill from us;
- request written reports about the progress of your matter and the costs incurred in your matter;
- apply for costs to be adjudicated within six months if you are unhappy with our costs;
- apply for the costs agreement to be set aside;
- make a complaint to the Legal Profession Conduct Commissioner (if you believe there has been overcharging);
- accept or reject any offer we make for an interstate costs law to apply to your matter; and
- notify us that you require an interstate costs law to apply to your matter.

For more information about your rights, please read the fact sheet titled *Legal Costs – your right to know*. You can ask us for a copy, or obtain it from the Law Society of South Australia (or download it from their website).

TTEG Media Statement

1. Timing of Statement

This statement is for release only **after** proceedings are issued or TTEG has made a public statement disclosing details of the claim. If the media makes contact prior to this time, Council should indicate that it has "no comment at this time" and notify our firm. The pre-action steps are confidential and cannot be disclosed.

2. Recommended Statement

Council is aware of a potential claim by the Trans Tasman Energy Group (TTEG) alleging that it is entitled to the payment of performance fees for achieving reductions in public lighting tariffs charged by SA Power Networks. TTEG's contract with Council expired in November 2015. In Council's view, TTEG did not achieve any savings for ratepayers which would create an entitlement to payment of performance fees and, accordingly, any action by TTEG will be defended. Given that this matter will be before the Court, Council will make no further comment at this time.

3. Be mindful of legal privilege

When responding to media queries, do not disclose the content of Council's legal advice. While this may seem obvious, it can happen inadvertently. Statements such as "*we have received advice that this claim has no merit*" or "*Council has rejected this claim in accordance with its legal advice*" can waive legal privilege as the substance of the advice has been disclosed.

Litigation Hold Protocol - Claim by TTEG

Overview

1. 61 Local Councils (**Councils**) have been served with a Pre-Action Notice by the Trans Tasman Energy Group Pty Ltd (**TTEG**). TTEG's claim relates to alleged unpaid performance fees. Councils have wholly rejected TTEG's claim.
2. On 9 August 2021, the parties participated in a pre-action meeting in accordance with the Court Rules. TTEG's claim was not resolved at the meeting, and accordingly, we anticipate that TTEG will commence proceedings against the Councils in the Supreme Court of South Australia.
3. If proceedings are commenced, any documents in Councils' possession or control that relates to or discusses the matters in dispute may be discoverable. Further, Councils may hold documents which assist with its defence and any counterclaim.
4. For those reasons, we recommend that Councils implement the following Litigation Hold Protocol to ensure that all documents that may relate to TTEG's claim are preserved and not intentionally or inadvertently destroyed.

What is a Litigation Hold?

5. A litigation hold is the process used to preserve documents and data that may be relevant to proceedings. The purpose of the litigation hold is to ensure that any routine document destruction practices are suspended. A robust litigation hold process will generally involve:
 - (a) identifying the location of any relevant electronic and hard copy documents, including:
 - (i) identifying relevant employees (the **Relevant Custodians**) that may hold those documents;
 - (ii) locating relevant hard copy files;
 - (iii) locating relevant electronic files in any document management system.
 - (b) sending a notification to the Relevant Custodians instructing them not to delete or destroy any electronic or hard copy files that may relate to the proceedings; and
 - (c) adopting measures to ensure that the identified files are not inadvertently destroyed or destroyed in accordance with usual document destruction practices.
6. In relation to any electronically stored documents, it may be possible for an electronic hold to be placed over relevant files to ensure that documents and emails are not

inadvertently deleted. For example, Microsoft Office has litigation hold features that enable:

- (a) holds to be placed over mailbox items to ensure that emails are not deleted by users or automatic deletion processes; and
 - (b) electronic files matching specified criteria to be identified and retained.
7. Accordingly, we recommend that the Councils provide a copy of the proposed Litigation Hold Protocol to its IT Department to ensure appropriate measures can be implemented.

Step One: Identification of Documents to Preserve

- 8. Councils may have limited material in their possession relating to the services provided by TTEG given that this process was managed by the Local Government Association of South Australia (**LGA**) on behalf of the sector. However, it is important to ensure that any documents in Council's possession that may relate to TTEG's claim are preserved and not intentionally or inadvertently destroyed. The LGA will implement a similar protocol in relation to the documents that it holds.
- 9. It is likely that Councils will hold material in relation to the 2015-2020 period, as we understand that each Council negotiated directly with SA Power Networks (**SAPN**) in relation to public lighting charges.
- 10. Councils should take steps to identify the documents to be preserved, being all electronic and hard copy documents in its possession or control that may relate to TTEG's claim (the **Relevant Documents**).
- 11. As a first step, Councils should identify any former or current Councils employees that were involved in the matters relating to the TTEG claim that may hold hard copy or electronic documents (the **Relevant Employees**).
- 12. Councils should then take all reasonable steps to locate the Relevant Documents. Relevant Documents may be stored in hard copy files or electronically, such as on:
 - back-up tapes;
 - computer servers, networks and the cloud;
 - laptops and tablets;
 - mobile and smartphones; and
 - storage devices such as USB drives or any other external hard drives.

Accordingly, those steps may include:

- (a) speaking with current Councils employees involved in the TTEG claim to assist in locating relevant hard copy and electronic files.

- (b) searching offices of the Relevant Employees and Councils archives in order to locate hard copy files.
 - (c) with the assistance of Councils' IT Department, conducting searches of electronic management systems, including mailboxes of the Relevant Employees.
13. To assist Councils in identifying the Relevant Documents, **Annexure A** to this protocol provides further information regarding the subject matter of the Relevant Documents, examples of the types of Relevant Documents that may exist and a table of suggested key search terms.

Step Two: Notification to Employees

14. We recommend that Councils send a notification to all Relevant Employees instructing them not to delete or destroy any electronic or hard copy files that may relate to TTEG's claim. Those employees should also be instructed to implement a Privilege Protocol for communications.
15. A suggested notification is **attached** to this protocol, which also includes a Privilege Protocol for you to provide to all employees.

Step Three: Preservation Measures

16. Finally, Councils should take immediate steps to ensure that any Relevant Documents are preserved and not destroyed. Those steps may include:
- (a) review of Councils document retention policies to ensure the suspension of any routine document destruction practices in respect of hard or electronic material;
 - (b) ensuring hard copy documents (including archived files) are not shredded or disposed;
 - (c) ensuring electronic data is not deleted; and
 - (d) liaising with Councils' IT Department to put in place any further measures to prevent the intentional or inadvertent deletion of electronic material (for example by implementing Microsoft Office litigation hold features to place mailboxes of Relevant Employees on hold).

Next Steps

17. At this stage, we only ask that Councils ensure that any Relevant Documents are preserved and not destroyed. Once that has occurred, we will be in touch in relation to obtaining those documents.

Annexure A

Subject Matter of Relevant Documents

1. The Relevant Documents will include documents relating to:
 - (a) the services provided by TTEG;
 - (b) the Consultancy Agreement (Minister for Infrastructure and Transport, Local Councils, LGA and TTEG) dated 22 December 2006;
 - (c) the Consultancy Agreement (TTEG, LGA and Local Councils) dated 2 November 2011;
 - (d) the negotiation of public lighting tariffs for the 2010-2015 period with SAPN including the referral to the Australian Energy Regulator;
 - (e) the negotiation and agreement of public lighting tariffs for the 2015-2020 period including communications with SAPN; and
 - (f) communications with the LGA in relation to public lighting tariffs; and
 - (g) communications with Department of Infrastructure and Transport (**DIT**) in relation to public lighting tariffs.

2. Where Councils are unsure of the relevance of a document, it should be treated as a Relevant Document.

Types of Documents to Preserve

3. Relevant Documents include any record of information, electronic or hard copy, for example:
 - emails;
 - correspondence;
 - SMS messages or electronic messages of any kind on any platform;
 - data, files and other computer records of any kind;
 - electronic images, photographs, video;
 - voicemail recordings;
 - outlook calendar entries, diaries, meeting or appointment records of any kind;

- file notes;
 - minutes of meetings;
 - copies of documents;
 - policies; and
 - reports.
4. This is not an exhaustive list. There may be other types of documents that are identified and should be preserved.

Key Search Terms

5. To assist you with identifying any Relevant Documents, we suggest you use the key search terms. Where search terms might return a number of hits we have suggested some additional search terms to be applied to narrow results (e.g. search "Public Lighting" AND "TTEG").

Key Search Terms

Additional Search Terms (to limit search results if significant number of hits when applying key search term)

2010-2015 AND pricing

AND (if necessary apply an additional search term below to narrow results)

AER or Australian Energy Regulator, Hitchcock, Marschall, PTRM, Public Lighting, Regulatory Asset Base or RAB, SA Power Networks or SAPN, SLUOS, Tariff, Trans Tasman Energy Group or TTEG

2015-2020 AND pricing

AND (if necessary apply an additional search term below to narrow results)

AER or Australian Energy Regulator, Hitchcock, Marschall, PTRM, Public Lighting, Regulatory Asset Base or RAB, SA Power Networks or SAPN, SLUOS, Tariff, Trans Tasman Energy Group or TTEG

Bruce Mountain

bruce.mountain@cmeaustralia.com.au

AND (if necessary apply an additional search term below to narrow results)

AER or Australian Energy Regulator, Asset Life, Depreciation, ESCOSA, Hitchcock, Marschall, PTRM, Regulatory Asset Base or

	RAB, SA Power Networks or SAPN, SLUOS, Tariff, Trans Tasman Energy Group or TTEG,
Elevation Charge	This search term should be unique.
Marschall Craig Marschall cmarschall@tteg.com.au	Please identify all relevant documents containing these terms.
Public Lighting	<p>AND (if necessary apply an additional search term below to narrow results)</p> <p>AER or Australian Energy Regulator, Depreciation, ESCOSA, Hitchcock, Marschall, Mountain, Regulatory Asset Base or RAB, SA Power Networks or SAPN, SLUOS, Tariff, Trans Tasman Energy Group or TTEG</p>
Regulatory Asset Base RAB	<p>AND (if necessary apply an additional search term below to narrow results)</p> <p>AER or Australian Energy Regulator, Depreciation, ESCOSA, Hitchcock, Marschall, Mountain, PTRM, Public Lighting, SAPN or SA Power Networks, Street Lighting, Tariff, Trans Tasman Energy Group or TTEG</p>
SA Power Networks SAPN We suggest the application of a narrowing search term in all SAPN searches as we anticipate a significant number of unrelated hits.	<p>AND (if necessary apply an additional search term below to narrow results)</p> <p>AER or Australian Energy Regulator, Asset Life, Depreciation, ESCOSA, Hitchcock, Marschall, PTRM, Public Lighting, Regulatory Asset Base or RAB, Street Lighting, Tariff, Trans Tasman Energy Group or TTEG</p>
SLUOS	This search term should be unique.
Street Lighting	<p>AND (if necessary apply an additional search term below to narrow results)</p>

Depreciation, Elevation Charge, Hitchcock, Regulatory Asset Base or RAB, Hitchcock, Marschall, PTRM, SA Power Networks or SAPN, Tariff, Trans Tasman Energy Group or TTEG, Vigar

Tariff

AND (if necessary apply an additional search term below to narrow results)

AER or Australian Energy Regulator, ESCOSA, Hitchcock, Marschall, Mountain, Public Lighting, Pricing Period, SA Power Networks or SAPN, Street Lighting, SLUOS, Trans Tasman Energy Group or TTEG, Vigar

TTEG and "Trans Tasman Energy Group"

Please identify all relevant documents containing these terms.

RELEASED