

Schedule 10 - Utilities Schedule

Utility Agreement

Stage One - East West Link

[ ]

LMA

[ ]

Utility

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## Utility Agreement made on

**Parties** [ ] (LMA)  
[ ] (Utility)

## Background

- A. LMA is the project authority under the Relevant Legislation, to facilitate the delivery of the East West Link Works for and on behalf of the State of Victoria.
- B. The Utility is an entity which owns, operates or controls Utility Infrastructure which will be affected by the East West Link Works.
- C. The Parties agree that their respective rights and obligations, in respect of Utility Infrastructure which is affected by the East West Link Works, will be governed in accordance with the terms of this Agreement.

## Operative provisions

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### 1. Definitions and interpretations

#### 1.1 Project Agreement definitions

Unless otherwise expressly defined, expressions used in this Agreement have the meanings given to them in or for the purposes of the Project Agreement.

#### 1.2 Definitions

In this Agreement, unless the context otherwise requires:

**Agreed Amount** has the meaning given in clause 19(b).

**Agreement** means this agreement and includes all schedules, exhibits, attachments and annexures to it.

**Approval** includes allocations, approvals, licences, permits, consents, easements, authorisations or clearances.

**Authority** means:

- (a) any government or any governmental, semi-governmental or local government authority, local council, administrative or judicial body or tribunal, department, commission, public authority, agency, minister, statutory corporation or instrumentality; and
- (b) any person having jurisdiction over, or ownership of, the Utility Infrastructure Works.

**Claim** includes any claim, action, demand or proceeding whether for the payment of money (including damages) or any other relief or remedy:

- (a) under, arising out of, or in connection with, this Agreement; or
- (b) arising out of, or in connection with, the East West Link Works or Utility Works or any party's conduct prior to the date of this agreement; or

- (c) otherwise at Law or in equity, including:
  - (i) by statute;
  - (ii) in tort for negligence or otherwise, including negligent misrepresentation; or
  - (iii) for restitution, including restitution based on unjust enrichment.

**Commencement Date** means, subject to clause 3, the date on which this Agreement has been executed by all of the Parties to it.

**Controller** has the meaning given to it in the Corporations Act.

**Consequential Loss** means:

- (a) pure economic loss;
- (b) loss of profit;
- (c) loss of revenue;
- (d) loss of opportunity;
- (e) anticipated savings; and
- (f) change to goodwill or reputation,

and excludes loss arising from:

- (g) personal injury, nervous shock or death;
- (h) property damage;
- (i) third party liability claims in respect of property damage, personal injury, nervous shock or death; and
- (j) criminal acts or fraud,

and excludes all costs of the type described in sections 233(8) and 234(7) of the Relevant Legislation incurred by LMA or Project Co as a result of a delay in carrying out the Utility Works.

**Cost** has the meaning given in clause 19(g).

**Deed of Accession** means the document set out in Annexure A.

**Disclosure Party** has the meaning given in clause 17.2.

**East West Link Works** means the physical things and works which Project Co must design, construct, commission or complete under the Project Agreement.

**Expiry Date** means the date 6 years from the Commencement Date.

**Financial Close** occurs when the last condition expressed to be a condition precedent under the Project Agreement has been satisfied (or is waived), in accordance with the Project Agreement.

**Force Majeure Event** means each of the following events:

- (a) earthquake, tropical cyclone, natural disaster, landslide, seismic activity, , tsunami and mudslide;
- (b) a flood which might, at the date of this Agreement, be expected to occur less frequently than once in every 100 years;
- (c) war, act of a public enemy (whether war is declared or not), civil war, rebellion, revolution, military, usurped power, military insurrection, military commotion or other like hostilities;
- (d) chemical, nuclear or biological contamination;
- (e) ionising radiation or contamination by radioactivity; or
- (f) explosion caused by events referred to in paragraph (a) or (c),

which:

- (g) occurs at or directly in the vicinity of the Land; and
- (h) prevents either party from carrying out all or substantially all of its obligations in accordance with this Agreement.

**Insolvency Event** means any of the following events:

- (a) in relation to a corporation:
  - (i) **(liquidator, administrator or receiver appointed)**: a liquidator, administrator, trustee in bankruptcy, receiver or receiver and manager or similar officer is appointed in respect of the corporation or any asset of the corporation;
  - (ii) **(distress or execution)**: a distress, attachment or other execution is levied or enforced upon or against any assets of the corporation and in the case of a writ of execution or other order or process requiring payment, it is not withdrawn or dismissed within 10 Business Days;
  - (iii) **(winding up)**: an order is made for the administration, dissolution or winding up of the corporation, or a resolution is passed for the administration or winding up of the corporation other than for the purposes of a solvent reconstruction or amalgamation on terms approved by LMA;
  - (iv) **(cessation of business)**: the corporation ceases, or threatens to cease, to carry on its business or payment of its debts generally, other than for the purposes of a solvent reconstruction or amalgamation on terms approved by LMA;
  - (v) **(arrangement or compensation)**: the corporation enters, or resolves to enter into any scheme of arrangement or composition with its creditors generally, or any class of its creditors, other than for the purposes of a solvent reconstruction or amalgamation on terms approved by LMA;
  - (vi) **(inspector)**: an inspector is appointed under any companies legislation to investigate all or any part of the affairs of the corporation in relation to

a possible contravention by the corporation of that legislation and the appointment:

- A. is not withdrawn within 10 Business Days; and
  - B. in the reasonable opinion of LMA, may have a material adverse effect;
- (vii) **(insolvency)**: the corporation is unable to pay its debts when they fall due, or is deemed unable to pay its debts under any applicable Law (other than as a result of a failure to pay a debt or claim which is the subject of a good faith dispute); or
- (viii) **(deregistration)**: for a registered corporation under the Corporations Act, a step taken under section 601AA, 601AB or 601AC of the Corporations Act to cancel its registration; or
- (b) in relation to a trust:
- (i) **(application to court)**: an application or order is sought or made (and is not stayed or dismissed within 20 Business Days after being sought or made) in any court for the property of the trust to be brought into court or administered by the court or brought under its control; or
  - (ii) **(assets insufficient)**: the assets of the trust are not sufficient to satisfy the trustee's debts as and when they become due and payable in respect of which it has a right to be indemnified out of the assets of the trust.

**Land** means the land designated by the Planning Minister as the area of land for which the declared project relates, which is published in the Government Gazette in accordance with section 95(2) of the Relevant Legislation.

**Party** means either the Utility, LMA or any other person who has executed the Deed of Accession and **Parties** means each of them.

**Project Agreement** means the document entitled "Project Agreement Stage One - East West Link" between the State and Project Co dated [#insert date].

**Project Co** means the Project Co appointed under the Project Agreement.

**Public Disclosure Obligations** has the meaning given in clause 18.3(a).

**Recipient** has the meaning given in clause 19(b)(ii).

**Renewed Term** means a period of 2 years, commencing on the Expiry Date.

**Representatives** has the meaning given in clause 15.2.

**Revenue** has the meaning given in clause 19(f).

**Supplier** has the meaning given in clause 19(b).

**State** means the Crown in right of the State of Victoria.

**Term** means the period referred to under clause 4.1 or as otherwise extended in accordance with clause 4.2.

**Unnotified Utility Infrastructure** has the meaning given to it in section 209 of the Relevant Legislation.

**Utility Infrastructure** means the infrastructure referred to in Schedule 1.

**Utility Works** means any works required to be performed in respect of:

- (a) Utility Infrastructure; or
- (b) Unnotified Utility Infrastructure,

as a direct result of the East West Link Works.

**Utility Works Objectives** means minimising the:

- (a) impact of the Utility Works on the performance of the East West Link Works;
- (b) scope, cost and duration of any Utility Works performed by the Utility; and
- (c) disruption to services provided by the Utility Infrastructure.

**Utility Works Order** means the document in Schedule 4.

**Utility Works Proposal** means the document in Schedule 2.

**Utility Works Response** means the document in Schedule 3.

### **1.3 Interpretation**

In this Agreement:

- (a) **(headings)**: headings (including any heading at the beginning of any subclause) are for convenience only and do not affect interpretation;

and unless the context otherwise requires:

- (b) **(count and gender)**: a word importing the singular includes the plural and vice versa, a word indicating a gender includes every other gender;
- (c) **(Agreement and Schedule references)**: a reference to:
  - (i) a party, clause, Schedule, Exhibit, or Annexure is a reference to a party, clause, Schedule, Exhibit or Annexure of or to this Agreement; and
  - (ii) a section is a reference to a section of a Schedule;
- (d) **(Agreement as amended)**: a reference to this Agreement or to any other deed, agreement, document or instrument includes a reference to this Agreement or such other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (e) **(party)**: a reference to a party includes that party's legal representatives, trustees, executors, administrators, successors and permitted substitutes and assigns, including any persons taking part by way of novation;
- (f) **(person)**: a reference to a person includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;

- (g) (**legislation**): a reference to legislation includes its delegated legislation and a reference to such legislation or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (h) (**definitions**): if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (i) (**"includes"**): "includes" will be read as if followed by the phrase "(without limitation)";
- (j) (**"or"**): the meaning of "or" will be that of the inclusive, being one, some or all of a number of possibilities;
- (k) (**information**): a reference to information includes information, representations, statements, data, samples, calculations, assumptions, deductions, determinations, drawings, design specifications, models, plans and other documents in all forms including the electronic form in which it was generated;
- (l) (**"\$"**): a reference to "\$", AUD or dollar is to Australian currency;
- (m) (**time**): a reference to time is a reference to time in Melbourne, Australia;
- (n) (**rights**): a reference to a right includes any benefit, remedy, function, discretion, authority or power;
- (o) (**obligations and liabilities**): a reference to an obligation or a liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;
- (p) (**"may"**): the term "may", when used in the context of a power, right or remedy exercisable by LMA or the State, means that LMA or the State can exercise that power, right or remedy in its absolute and unfettered discretion and LMA or the State has no obligation to do so;
- (q) (**construction**): where there is a reference to an Authority, institute or association or other body referred to in this Agreement which:
  - (i) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity, this Agreement is deemed to refer to that other entity; or
  - (ii) ceases to exist, this Agreement is deemed to refer to that new entity which serves substantially the same purpose or object as the former entity;
- (r) (**remedy**): the use of the word "remedy" or any form of it in this Agreement means that the event to be remedied must be cured or its effects overcome; and
- (s) (**contra proferentem rule not to apply**): each provision will be interpreted without disadvantage to the party who (or whose representative) drafted or proffered that provision.

#### **1.4 Approvals, directions and notices in writing**

Unless otherwise expressly provided in this Agreement or agreed between the parties, all approvals, consents, directions, requirements, requests, claims, notices, agreements and demands must be given in writing.

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## 2. Acknowledgment

The Parties acknowledge that this Agreement is a utility agreement for the purposes of section 210 of the Relevant Legislation.

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## 3. Conditions Precedent

- (a) **(Commencement Date):** Subject to clause 3(b), this Agreement will commence on the later of:
  - (i) the date of this Agreement; and
  - (ii) the date of Financial Close.
- (b) **(Conditions Precedent):** If the date of this Agreement is before the date of Financial Close, clause 3 and clauses 1.1, 1.2, 1.3, 15, 16, 18, 20 and 21, will commence on the date of this Agreement with the remainder of the provisions commencing on Financial Close.
- (c) **(Notification):** Upon becoming aware that Financial Close has occurred, LMA must notify the Utility in writing, in which case this Agreement will commence on the date on which LMA notifies the Utility in accordance with this clause 3(c).

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## 4. Term

### 4.1 Term of Agreement

This Agreement commences on the Commencement Date and will terminate on the Expiry Date.

### 4.2 Renewal option

If LMA:

- (a) **(renewal):** wishes to renew this Agreement for the Renewed Term to commence immediately after the Expiry Date; and
- (b) **(written notice):** gives notice to the Utility not less than 1 month before the Expiry Date,

this Agreement will be extended for the Renewed Term on the same terms, except that this clause 4.2 will not apply.

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## 5. Role of the Parties

The Parties acknowledge and agree that:

- (a) **(Project Co responsibility):** under the Project Agreement, Project Co will be responsible for:
  - (i) the design, construction and commissioning of the East West Link Works, in accordance with the Project Agreement; and
  - (ii) making all arrangements in respect of the performance of the Utility Works;

- (b) **(Deed of Accession)**: if requested by either the State or LMA, Project Co must execute the Deed of Accession within 10 Business Days of being requested to do so; and
- (c) **(Project Co to assume obligations and liabilities)**: upon execution of the Deed of Accession, this Agreement will be deemed to be read as if a reference to LMA is followed by a reference to "or Project Co" and subject to clause 13.5 of the Project Agreement, the obligations and liabilities assumed by and the rights conferred on LMA and Project Co will bind and benefit them jointly and severally.

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## 6. Utility Works

### 6.1 Utility Works Proposal

Unless otherwise agreed by the Parties in writing and subject to clause 6.6, prior to commencing any Utility Works, LMA must issue the Utility with an Utility Works Proposal, which must set out:

- (a) **(details of affected Utility Infrastructure)**: details of the Utility Infrastructure which is (or is likely to be) affected by the East West Link Works;
- (b) **(nature of Utility Works)**: the nature of any Utility Works required to be performed as a result of the East West Link Works;
- (c) **(timing)**: the proposed timing of the Utility Works;
- (d) **(standards)**: the proposed standards to which the Utility Works are to be performed;
- (e) **(method)**: the proposed method for carrying out (including the entity which will carry out) the Utility Works;
- (f) **(estimate of costs)**: if the Utility is to carry out all or part of the Utility Works, the proposed estimate of costs for the Utility Works to be performed by the Utility;
- (g) **(minimise disruption)**: the means by which disruption to services provided by the Utility Infrastructure will be minimised; and
- (h) **(method of certifying)**: the proposed method for certification of the Utility Works,

having regard to the Utility Works Objectives.

### 6.2 Response to Utility Works Proposal

Within 10 Business Days of the receipt of a Utility Works Proposal, the Utility must issue LMA with the Utility Works Response, which must:

- (a) **(agreement)**: confirm those aspects of the Utility Works Proposal with which it agrees (acting reasonably);
- (b) **(alternative proposal)**: in respect of each aspect of the Utility Works Proposal with which the Utility does not agree, set out an alternative proposal, which must set out in detail:
  - (i) the reasons why the Utility does not so agree; and
  - (ii) the reasons why its alternative proposal is preferable,

having regard to the Utility Works Objectives; and

- (c) **(additional information):** without limiting clauses 6.2(a) or 6.2(b), set out:
  - (i) the extent to which the Utility proposes to have a role in performing the Utility Works;
  - (ii) the proposed reasonable cost of any Utility Works to be performed by the Utility; and
  - (iii) the method of payment of the proposed reasonable cost referred to in clause 6.2(c)(ii).

### 6.3 Alternative proposals

If:

- (a) **(negotiate in good faith):** the Utility submits an alternative proposal in accordance with clause 6.2(b), LMA and the Utility must undertake genuine good faith negotiations to agree and document each of the matters set out in the Utility's alternative proposal within 10 Business Days, having regard to the Utility Works Objectives; and
- (b) **(dispute resolution):** LMA and the Utility are unable to agree each of the matters set out in the Utility's alternative proposal within 10 Business Days of the receipt of the alternative proposal, then a Party may refer the matter for resolution in accordance with clause 15.

### 6.4 Utility Works Order

If:

- (a) **(agreement):** LMA and the Utility are able to agree "with" or "on" the matters set out in the:
  - (i) Utility Works Proposal; or
  - (ii) Utility's alternative proposal in its Utility Works Response;
- (b) **(no Utility Works Proposal):** the Utility Works need to be performed but LMA and the Utility have agreed that LMA does not need to issue a Utility Works Proposal, in accordance with clause 6.1; or
- (c) **(unable to agree):** LMA and the Utility are unable to agree the matters referred to in clause 6.4(a), but the matters are determined in accordance with clause 15,

then the Parties must promptly (and in any event, within 10 Business Days of the agreement or determination) prepare and each sign the Utility Works Order recording the terms on which the Utility Works will be performed, as agreed or determined.

### 6.5 Performance of and payment for Utility Works

- (a) **(Utility Works Order):** After the Utility Works Order has been signed under clause 6.4:
  - (i) LMA and the Utility must perform the Utility Works in accordance with the Utility Works Order and this Agreement; and

- (ii) if applicable, the Utility will be paid for performing the Utility Works in accordance with the Utility Works Order and clause 6.7 of this Agreement.
- (b) **(obligations):** LMA and the Utility must, in undertaking the Utility Works:
  - (i) ensure that the Utility Works are carried out in a sound and workmanlike manner with due care and skill;
  - (ii) comply with all authorisations necessary in order to undertake the Utility Works;
  - (iii) undertake the Utility Works in a manner consistent with the manner in which the Utility Works would be undertaken by a prudent, efficient and experienced utility provider and infrastructure manager;
  - (iv) ensure that the Utility Works are undertaken with due expedition and without unreasonable or unnecessary delay;
  - (v) comply with all regulatory and mandatory standards imposed by Law, together with all standards which a prudent, efficient and experienced utility infrastructure manager, construction manager or project manager (as the case may be) exercising due care, skill and diligence would comply with, having regard to the nature of the Utility Works; and
  - (vi) ensure that the Utility Works are fit for their intended purpose as identified in or reasonably inferred from the Utility Works Order.

## 6.6 Unnotified Utility Infrastructure

- (a) **(Unnotified Utility Works notice):** Upon becoming aware of any Unnotified Utility Infrastructure, LMA must issue the Utility with a notice, which must:
  - (i) identify and describe; and
  - (ii) specify the location of,  
the Unnotified Utility Infrastructure;
  - (iii) state that:
    - A. LMA intends to remove, relocate or protect the infrastructure (as the case may be); and
    - B. the Utility has 5 Business Days within which to either agree to LMA carrying out the Utility Works required to remove, relocate or protect the Unnotified Utility Infrastructure, or to carry out the Utility Works required to remove, relocate or protect the Unnotified Utility Infrastructure itself; and
  - (iv) set out details of the proposed:
    - A. estimate of costs for any Utility Works required to remove, relocate or protect the Unnotified Utility Infrastructure, which are to be performed by the Utility; and

- B. method for certification of the Utility Works required to remove, relocate or protect the Unnotified Utility Infrastructure.
- (b) **(Unnotified Utility Works response):** Within 5 Business Days of the receipt of the notice under clause 6.6(a), the Utility must issue LMA with a notice, which sets out whether the Utility:
- (i) agrees to allow LMA to carry out the Utility Works; or
  - (ii) proposes to carry out the Utility Works itself and the date by which it expects to complete the Utility Works,
- required to remove, relocate or protect the Unnotified Utility Infrastructure.
- (c) **(Performance of the Utility Works):** If the Utility:
- (i) agrees to allow LMA to carry out the Utility Works, then LMA may immediately commence carrying out the Utility Works;
  - (ii) agrees, in its notice given under clause 6.6(b) to itself carry out the Utility Works required to remove, relocate or protect the Unnotified Utility Infrastructure, then it:
    - A. must immediately carry out and complete the Utility Works as soon as reasonably practicable; and
    - B. will be paid for performing the Utility Works in accordance with clause 6.7; or
  - (iii) fails to:
    - A. respond to the notice given by LMA under clause 6.6(a) within 5 Business Days;
    - B. carry out the Utility Works in accordance with its notice given under clause 6.6(b) within 5 Business Days; or
    - C. agree as to the Utility Works to be carried out to remove, relocate or protect the Unnotified Utility Infrastructure within 5 Business Days,then:
    - D. LMA may carry out the Utility Works required to remove, relocate or protect the Unnotified Utility Infrastructure; and
    - E. the Utility indemnifies and will keep LMA indemnified against any action, suit, claim, demand, Liability, cost or expense arising out of or in connection with the exercise by LMA of its rights under this clause 6.6(c)(iii).

## **6.7 Cost of Utility Works to be performed by the Utility**

Where the Utility performs Utility Works in accordance with this clause 6, it will be entitled to be paid:

- (a) **(arm's length)**: a reasonable, competitive, arm's length market price for doing so, which will comprise all of its reasonable direct and overhead costs and will be calculated on a fully open book basis under which the Utility provides LMA with all such information and documents as LMA may reasonably require to ensure that those costs represent a reasonable, competitive, arm's length market price for the Utility Works; and
- (b) **(margin)**: a margin of 10%.

## 6.8 Insurances

Each Party who performs Utility Works in connection with this Agreement must effect and maintain (or cause to be effected and maintained) at all times during which it performs those works, the Insurances specified in the Insurance Schedule and such other insurances that a prudent and experienced contractor would obtain and maintain for works similar to the Utility Works.

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## 7. Access to the Land

### 7.1 Grant of licence

Subject to clauses 7.2 and 8.2 and agreeing the relevant Utility Works Order, LMA grants to the Utility, including its employees, agents, contractors and nominated representatives, a licence to access, occupy and use the Land (at no charge) for the purposes of performing the Utility Works.

### 7.2 Non-exclusive access

Subject to clause 7.3, the grant of the licence to the Utility under this clause 7:

- (a) **(access for LMA and Associates)**: does not prevent LMA, any of its Associates and nominated representatives from accessing and using the Land for any other purpose; and
- (b) **(licence)**: is subject to the licence granted to Project Co to access, occupy and use the Land for the purposes of the East West Link Works.

### 7.3 Non-interference

- (a) **(written authorisation)**: LMA must not, and must ensure that its employees, agents, contractors and nominated representatives do not, under any circumstances, interfere with, disrupt or damage the Utility Infrastructure without authorisation from the Utility, except in the event of an emergency which in the reasonable opinion of LMA:
  - (i) poses an imminent threat to public or environmental safety; or
  - (ii) is likely to result in damage to the:
    - A. Utility Infrastructure; or
    - B. East West Link Works.
- (b) **(obligations)**: The Utility must, in undertaking any Utility Works:

- (i) not cause any damage to the Land or any other infrastructure, plant, equipment, machinery, services, fixtures or other items on the Land;
- (ii) only access and use the Land for the purpose of implementing the Utility Works;
- (iii) without limiting any of its obligations under this Agreement, at all times comply with all reasonable site access and safety protocols made known to the Utility by LMA from time to time;
- (iv) minimise nuisance and prevent unreasonable noise, dust, vibration and disturbance; and
- (v) remove all rubbish and debris from the Land caused or created by it undertaking the Utility Works.

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## 8. Personnel

### 8.1 Qualified persons

LMA and the Utility must ensure that its personnel (including its employees, agents, contractors and nominated representatives) who carry out Utility Works under this Agreement:

- (a) **(personnel to be properly trained and qualified)**: are properly trained and qualified and adequately experienced to perform the duties allocated to them, and exhibit a high standard of work and conduct; and
- (b) **(regular training)**: are provided with regular training to ensure that their skills and qualifications are maintained to the then current industry standards applicable to the provision of the Utility Works.

### 8.2 Access to the Land

Whenever the Utility's personnel (including its employees, agents, contractors and nominated representatives) access the Land under clause 7.1, the Utility will ensure that those personnel:

- (a) **(training and induction)**: attend any training or induction program required by LMA;
- (b) **(compliance with health and safety obligations)**: are acquainted with and comply with the OHS Legislation, all OHS Regulations and any other relevant health and safety legislation;
- (c) **(standards)**: are made aware of the importance that LMA places on establishing and maintaining high standards in relation to workplace health and safety and protection of the environment;
- (d) **(compliance)**: comply with reasonable directions, procedures and policies made known to the Utility (including those of the "principal contractor" under the OHS Legislation, OHS Regulations and any other relevant health and safety legislation);
- (e) **(responsible and businesslike manner)**: act in a responsible and businesslike manner on and around the Land;
- (f) **(avoid interference)**: carry out the Utility Works so as to avoid interfering with, disrupting, damaging or delaying the East West Link Works; and

- (g) **(emergency response plan)**: give LMA a copy of the emergency response plan in relation to any Utility Infrastructure erected or installed on the Land during any access to the Land by the Utility.

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## 9. Payment

- (a) **(Invoicing)**: When providing an invoice under this Agreement, the Utility or LMA (the **Payee**) must invoice the other Party (the **Payer**) for the performance of the Utility Works in accordance with the terms of payment agreed in the relevant Utility Works Order for the relevant Utility Works under clause 6.4.
- (b) **(Payment)**: The Payer must pay a correctly rendered invoice within 20 Business Days of receipt of that invoice, except when it disputes all or part of that invoice in which case it will pay the undisputed portion of the invoice. The Payee will immediately credit the portion of the invoice in dispute and the matter must be referred for resolution in accordance with clause 15.

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## 10. Records, access and audits

### 10.1 Records

The Utility must keep full, true, auditable and up to date books of account, records and documentation relating:

- (a) **(performance of Utility Work)**: to the Utility Works performed in accordance with this Agreement; and
- (b) **(amounts payable)**: to amounts payable by LMA in respect of the performance of Utility Works by the Utility, including complete and accurate records of and supporting documentation for all invoices submitted to LMA and all payments made by LMA under this Agreement, including the amount and manner of calculation of any amounts proposed by the Utility under clause 6.7 or agreed or determined to be payable under clause 6.4.

### 10.2 Audit

LMA may conduct an audit of the Utility for the purpose of auditing the Utility's compliance with its obligations under this Agreement, including the amount and manner of calculation of any amounts payable by LMA in respect of the performance of Utility Works.

### 10.3 Incorrect invoicing

Without limiting or otherwise affecting LMA's rights, where any invoice rendered by the Utility under clause 9 is found to have been incorrect after payment has been made by LMA, the overpayment will be recovered from the Utility by payment to LMA or offset against a subsequent invoice.

### 10.4 Documentation to be provided following completion of Utility Works

Where LMA or the Utility undertakes any Utility Works, it must, as soon as reasonably practicable, but in any event no later than 10 Business Days after receipt of payment in respect of the Utility Works, provide LMA or the Utility with all data, drawings, information, records, plans and other material relating to those Utility Works.

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## 11. Step In

### 11.1 Step In

If the Utility:

- (a) **(default by Utility)**: is in default of a material term of this Agreement and fails to remedy that default within 10 Business Days after its receipt of a notice of default from LMA (or such other period the Parties may agree in writing); or
- (b) **(Utility subject to Insolvency Event)**: commits, suffers or is the subject of an Insolvency Event,

then LMA may by further notice to the Utility, elect to:

- (c) **(management and control by LMA of Utility)**: temporarily or permanently assume total or partial management and control of the whole or part of the Utility Works; and
- (d) **(take steps to perform Utility Works)**: take such other steps as are necessary in the reasonable opinion of LMA to perform the Utility Works.

### 11.2 No Claim

The Utility will have no Claim, action, demand or entitlement to institute any proceedings against LMA, whether for the payment of money or any other relief or remedy, arising out of or in connection with the exercise by LMA of its step-in rights under clause 11.1.

### 11.3 Indemnity

The Utility indemnifies and will keep LMA indemnified against any action, suit, Claim, demand, Liability, cost or expense arising out of or in connection with the exercise by LMA of its step-in rights under clause 11.1.

### 11.4 Utilities to assist LMA

The Utility must provide LMA with all necessary assistance in a timely manner to enable it to exercise its step-in rights under clause 11.1 effectively and expeditiously.

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## 12. Force Majeure Events

### 12.1 Non performance excused

Non performance by LMA or the Utility of any obligation or condition required by this Agreement to be performed, will be excused during the time and to the extent that such performance is prevented, wholly or in part, by a Force Majeure Event.

### 12.2 Notification and diligence

- (a) **(Force Majeure Event)**: Where LMA or the Utility is, by reason of a Force Majeure Event, unable to perform any obligation or condition required by this Agreement to be performed, it must:
  - (i) notify LMA or the Utility as the case may be, as soon as practical after becoming aware of the Force Majeure Event, of:

- A. reasonably full particulars of the event or circumstance of Force Majeure Event;
  - B. where possible, an estimate of the period of time required to enable it to resume full performance of its obligations; and
  - C. where possible, the means proposed to be adopted to remedy or abate the Force Majeure Event;
- (ii) use all reasonable diligence and employ all reasonable means to remedy or abate the Force Majeure Event as expeditiously as possible; and
  - (iii) notify LMA or the Utility (as the case may be) when the Force Majeure Event has terminated or abated to an extent which permits resumption of performance to occur.
- (b) **(Effect):** No Party will, by virtue of this clause 12, be required against its will to:
- (i) adjust or settle any strike, lockout, ban or other industrial disturbance; or
  - (ii) make payment of, or otherwise provide compensation in response to, or as a consequence or in settlement of, any native title or cultural heritage claim by or on behalf of indigenous peoples.
- (c) **(Lack of funds):** No Party may claim lack of funds as a Force Majeure Event in accordance with this clause 12 or withhold moneys due and payable whether or not a Force Majeure Event exists.

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## 13. Effect of Force Majeure

The period of time during which performance of any obligation or condition is prevented by a Force Majeure Event will not be added to the time provided in this Agreement for the performance of that obligation or condition nor to the time required for the performance of any act dependent thereon.

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## 14. Limitation of liability and indemnities

### 14.1 Liability and indemnities

- (a) **(Indemnity):** Subject to clause 14.1(b), each of LMA and the Utility indemnifies and will keep each other indemnified against any action, suit, Claim, demand, Liability, cost or expense arising out of or in connection with any failure by LMA or the Utility as the case may be to comply with:
- (i) any applicable Law; or
  - (ii) the terms of this Agreement.
- (b) **(Proportionate liability):** The liability of LMA or the Utility (as the case may be) will be reduced proportionately to the extent to which the liability is caused or contributed to by LMA or the Utility (respectively).

### 14.2 Limitation of liability

Notwithstanding any other provision in this Agreement, LMA and the Utility will not be liable to each other for any Consequential Loss.

### 14.3 Survival of indemnities

Each indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations of the Parties and survives termination of this Agreement.

### 14.4 Release

- (a) **(Utility Works performed by LMA):** Upon certification of Utility Works which have been performed by LMA, the Utility releases LMA from any action, suit, claim, demand, Liability, cost or expense in respect of any fact, matter or thing arising out of, or in any way in connection with, the Utility Infrastructure or the Utility Works.
- (b) **(Utility Works performed by the Utility):** Upon receipt of payment in respect of Utility Works which have been performed by the Utility, the Utility releases LMA from any action, suit, claim, demand, Liability, cost or expense in respect of any fact, matter or thing arising out of, or in any way in connection with, the Utility Infrastructure or the Utility Works, except for any claim included in the invoice under clause 9 to which the Utility Works relates, which is given to LMA within the time required by, and in accordance with the terms of, clause 9.

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## 15. Dispute Resolution

### 15.1 Procedure for resolving disputes

- (a) **(Disputes to be resolved):** Any dispute between the Parties arising under this Agreement must be resolved in accordance with this clause 15.
- (b) **(Dispute resolution procedure):** The procedure that is to be followed to resolve a dispute is as follows:
  - (i) firstly, the dispute must be the subject of negotiation as required by clause 15.2;
  - (ii) secondly, if the dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 15.2(c)(i) the parties may agree that the dispute must be referred to an expert for determination in accordance with clauses 15.4 to 15.8 (inclusive) or to arbitration in accordance clause 16; and
  - (iii) thirdly, if:
    - A. the dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 15.2(c)(i) and irrespective of whether the parties failed to meet as required by that clause or whether having so met the parties fail to agree whether the dispute should be referred to an expert or to arbitration within 20 Business Days after the expiration of the period for negotiation referred to in clause 15.2(c)(i);
    - B. the dispute has been referred to expert determination and a determination is not made by the expert within 30 days after the expert's acceptance of appointment; or

- C. the dispute is referred to expert determination and a notice of dissatisfaction is given in accordance with clause 15.6(a),
- then the dispute must be referred to arbitration in accordance with clause 16.

## 15.2 Negotiation

- (a) **(Notification):** If a dispute arises then a Party may give notice to the other Party requesting that the dispute be referred for resolution by negotiation between the Chief Executive Officers (or equivalent) of both Parties (**Representatives**).
- (b) **(Contents of Notice):** A notice under clause 15.2(a) must:
- (i) state that it is a notice under this clause 15; and
  - (ii) include or be accompanied by particulars of the matters the subject of the dispute.
- (c) **(Attempt to resolve Dispute):** If a dispute is referred for resolution by negotiation under clause 15.2(a), then:
- (i) the Representatives must meet and attempt in good faith to resolve the dispute (in whole or in part) within 10 Business Days of the date on which the notice under clause 15.2(a) is received (or such later date as the Parties may agree); and
  - (ii) any agreement reached between the Representatives will be reduced to writing, signed by or on behalf of each Party and will be contractually binding on the Parties.

## 15.3 Expert determination

If:

- (a) **(dispute unresolved by Representatives):** a dispute which has been referred to the Representatives for negotiation in accordance with to clause 15.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 15.2(c)(i); and
- (b) **(referral to expert):** the Parties agree within 20 Business Days after the expiration of the period for negotiation referred to in clause 15.2(c)(i), that the dispute be referred to an expert for determination,

then those parts of the dispute which remain unresolved will be referred to an expert for determination under clauses 15.4 to 15.8. For the avoidance of doubt, a dispute may only be referred to an expert for determination by agreement of the Parties.

## 15.4 Selection of expert

- (a) **(Exchange of lists of 3 preferred experts):** Within 7 Business Days after the date on which the Parties agree to refer a dispute to an expert for determination under clause 15.3, the Parties must exchange lists of 3 persons (in order of preference) who, if appointed, would satisfy the requirements of clause 15.4(d), from whom the expert is to be chosen.

- (b) **(Appointment of person who appears on both lists):** Any person that appears on both lists under clause 15.4(a) will be appointed as the expert to determine a dispute and if more than one person appears on both lists the person given the highest order of priority by the party that gave the notice under clause 15.2(a) will be appointed.
- (c) **(Appointment if no person appears on both lists):** If no person appears on both lists, the party which gave the notice under clause 15.2(a) must procure:
  - (i) the president (or the senior non-executive officer, howsoever described) of the institute or governing body for the technical or professional discipline the subject of the relevant dispute to nominate the expert, having regard to, but not being bound by, those persons proposed by the Parties under clause 15.4(a); or
  - (ii) if there is no governing body for the technical or professional discipline the subject of the relevant dispute or such governing body advises that it will not nominate an expert, the President of the Australian Centre for International Commercial Arbitration to nominate a person to act as the expert, having regard to, but not being bound by, those persons proposed by the Parties under clause 15.4(a).
- (d) **(Appropriate skills):** It is the intention of the Parties that the expert appointed to determine a dispute will be an independent person with appropriate skills having regard to the nature of the matters in dispute.
- (e) **(No entitlement to challenge appointment):** Neither Party will be entitled to challenge the appointment of an expert under this clause 15.4 on the basis that the expert does not satisfy the requirements of clause 15.4(d).
- (f) **(Not an arbitration agreement):** Any agreement for expert determination under this Agreement will not constitute an arbitration agreement for the purposes of the *Commercial Arbitration Act 2011* (Vic).
- (g) **(Agreement):** The Parties must enter into an agreement with the expert on the terms of the Expert Determination Agreement or such other reasonable terms as the expert may require.

## 15.5 Rules of expert determination

The expert determination process will be administered, and the expert will be required to act, under the terms of the Expert Determination Agreement.

## 15.6 Expert finding

- (a) **(Notification):** The determination of the expert must be in writing and will be final and binding on the Parties unless, within 10 Business Days of receipt of the determination, a Party gives notice to each other Party of its dissatisfaction and intention to refer the matter to arbitration under clause 16.
- (b) **(Amendment to determination):** Upon submission by any Party, the expert may amend the determination to correct:
  - (i) a clerical mistake;
  - (ii) an error from an accidental slip or omission;

- (iii) a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or
- (iv) a defect in form.

## 15.7 Liability of expert

- (a) **(Liability of expert):** The Parties agree:
  - (i) that the expert will not be liable in connection with the expert determination, except in the case of fraud on the part of the expert; and
  - (ii) to indemnify the expert against any Claims or Liability in connection with the determination, except in the case of fraud on the part of the expert, which may be made against him or her by any person in connection with the expert's appointment to determine the dispute.
- (b) **(Engagement):** The Parties will jointly engage the expert services in connection with the expert determination proceedings and each party will seek a separate Tax Invoice equal to its share of the costs of the expert.

## 15.8 Costs

The Parties must:

- (a) bear their own costs in connection with the expert determination proceedings; and
- (b) pay an equal portion of the costs of the expert.

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## 16. Arbitration

### 16.1 Reference to Arbitration

- (a) **(Dispute):** If:
  - (i) a dispute:
    - A. which has been referred to the Representatives for negotiation in accordance with to clause 15.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 15.2(c)(i); and
    - B. the Parties do not agree to refer the dispute to an expert for determination; or
  - (ii) in the case of a dispute which the Parties agree to refer to expert determination under clause 15.3:
    - A. a determination is not made within 30 days of the expert's acceptance of the appointment; or
    - B. a notice of dissatisfaction is given in accordance with clause 15.6,

then either Party may notify the other that it requires the dispute to be referred to arbitration.

- (b) **(Referral):** Upon receipt by the other Party of a notice under clause 16.1(a), the dispute will be referred to arbitration.

## **16.2 Arbitration**

- (a) **(ACICA Rules):** Arbitration in accordance with to this clause 16 will be conducted in accordance with the arbitration rules of the Australian Centre for International Commercial Arbitration (known as the ACICA Rules) and as otherwise set out in this clause 16.
- (b) **(Seat):** The seat of the arbitration will be Melbourne, Victoria.
- (c) **(Language):** The language of the arbitration will be English.

## **16.3 Appointment of arbitrator**

The Parties will endeavour to agree on the person to be appointed as arbitrator, but if no such agreement is reached within 15 Business Days of the dispute being referred to arbitration in accordance with clause 16.1(b), the arbitrator will be appointed by the Australian Centre for International Commercial Arbitration.

## **16.4 General Principles for conduct of arbitration**

- (a) **(Conduct of arbitration):** The Parties agree that:
  - (i) they have chosen arbitration for the purposes of achieving a just, quick and cost-effective resolution of any Dispute;
  - (ii) any arbitration conducted in accordance with this clause 16 will not necessarily mimic court proceedings of the seat of the arbitration or the place where hearings take place (if different), and the practices of those courts will not regulate the conduct of the proceedings before the arbitrator; and
  - (iii) in conducting the arbitration, the arbitrator must take into account the matters set out in clauses 16.4(a)(i) and 16.4(a)(ii).
- (b) **(Evidence in writing):** All evidence in chief must be in writing unless otherwise ordered by the arbitrator.
- (c) **(Evidence and discovery):** The rules for evidence and discovery will be the IBA Rules on the Taking of Evidence in International Arbitration current at the date of arbitration.
- (d) **(Oral hearing):** The oral hearing must be conducted as follows:
  - (i) any oral hearing must take place in Melbourne, Victoria and all outstanding issues must be addressed at the oral hearing;
  - (ii) the date and duration of the oral hearing must be fixed by the arbitrator at the first preliminary conference. The arbitrator must have regard to the principles set out in clause 16.4(a) when determining the duration of the oral hearing;
  - (iii) oral evidence in chief at the hearing will be permitted only with the permission of the arbitrator for good cause;

- (iv) the oral hearing must be conducted on a stop clock basis with the effect that the time available to the Parties must be split equally between the Parties so that each Party has the same time to conduct its case unless, in the opinion of the arbitrator, such a split would breach the rules of natural justice or is otherwise unfair to one of the Parties;
  - (v) not less than 28 days prior to the date fixed for oral hearing each Party must give notice of those witnesses (both factual and expert) of the other Party that it wishes to attend the hearing for cross examination;
  - (vi) in exceptional circumstances the arbitrator may amend the date of hearing and extend the time for the oral hearing set in accordance with clause 16.4(d)(ii);
  - (vii) a Party will not be bound to accept the written evidence of a witness submitted on behalf of the opposing party which is not challenged in cross examination; and
  - (viii) each Party is expected to put its case on significant issues in cross examination of a relevant witness called by the opposing Party or, where it seeks to challenge the evidence of a witness not called for cross-examination by reference to other evidence, to identify that evidence in its written opening submissions so that the opposing Party may know the nature of and basis for the challenge to the witness' written evidence.
- (e) **(Experts):** Unless otherwise ordered each Party may only rely upon one expert witness in connection with any recognised area of specialisation.

## **16.5 Proportional liability**

To the extent permitted by Law, the arbitrator will have no power to apply or to have regard to the provisions of any proportional liability legislation which might, in the absence of this clause 16.5, have applied to any dispute referred to arbitration in accordance with this clause 16.

## **16.6 Extension of ambit of arbitration proceedings**

- (a) **(Extending Disputes):** Where:
- (i) a dispute between the Parties to this Agreement is referred to arbitration in accordance with this clause 16; and
  - (ii) there is some other dispute also between the Parties to and in accordance with this Agreement (whenever occurring),
- the arbitrator may, upon application being made to the arbitrator by one or both of the Parties at any time before a final award is made in relation to the first-mentioned dispute, make an order directing that the arbitration be extended so as to include the other dispute.
- (b) **(Arbitrator's order):** An arbitrator may make an order in accordance with clause 16.6(a) on such terms and conditions (if any) as the arbitrator thinks fit.

## 16.7 Award final and binding

- (a) **(Final and binding):** Subject to clause 16.7(b), any award will be final and binding on the Parties.
- (b) **(Appeal):** Each Party consents to any appeal to a court where that appeal is made under the *Commercial Arbitration Act 2011* (Vic) on a question of law arising in connection with an arbitral award made in accordance with this clause 16.

## 16.8 Continue to perform

Notwithstanding the existence of a dispute, each Party must continue to carry out its obligations in accordance with this Agreement.

## 16.9 Governing law of arbitration agreement

The Law governing this arbitration agreement is the law of Victoria, Australia.

## 16.10 Interlocutory relief

This clause 16 does not prevent a Party from seeking urgent interlocutory relief from a court of competent jurisdiction where, in that Party's reasonable opinion, that action is necessary to protect that Party's rights.

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## 17. Assignment

### 17.1 No assignment

- (a) **(No assignment):** Subject to clause 17.2, LMA and the Utility must not assign or otherwise deal with this Agreement or any right or obligation under this Agreement except in accordance with a security interest granted in favour of a financier or with the prior consent of the other Party, which consent will not be unreasonably withheld or delayed provided that:
  - (i) the assignee has agreed in writing to be bound by the terms of this Agreement by an appropriate deed of assignment in a form reasonably acceptable to LMA or the Utility as the case may be; and
  - (ii) LMA or the Utility as the case may be has demonstrated to the reasonable satisfaction of the other that the assignee is reputable, of good financial standing and is capable of fulfilling all the obligations of LMA or the Utility under this Agreement for the Term.
- (b) **(Consent):** Consent to an assignment will not prejudice or in any way reduce any right that LMA and the Utility may have as against the other (whether positive or negative) which had accrued to the benefit of one Party in so far as it relates to the other, prior to the date of the assignment.

### 17.2 Assignment by LMA

LMA may assign, transfer or otherwise dispose of its rights and obligations under this Agreement where:

- (a) **(details of transferee):** it has provided details of the proposed transferee and the terms and conditions of the proposed transferee to the Utility;

- (b) **(nature of the transferee)**: the proposed transferee is an agent of, or the obligations of which are supported by the Crown in the right of the State of Victoria; and
- (c) **(agreement to be bound)**: the proposed transferee has agreed to be bound by this Agreement.

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## 18. Confidential Information and disclosure

### 18.1 Confidential Information and disclosure by LMA

- (a) **(Public Disclosure Obligations)**: LMA may disclose any information in connection with the Project (including any Confidential Information):  
  
and the Utility must use all reasonable endeavours to assist LMA in meeting its Public Disclosure Obligations.
- (b) **(Other purposes)**: LMA, the State or any Authority may disclose any information in connection with the Project (including any Confidential Information) in connection with:
  - (i) the State selling, transferring, assigning or otherwise disposing of its interest in any Tolling Revenue or Tolling Collection Contractor or procuring any Tolling Collection Contractor; and
  - (ii) the requirements of the State Project Documents (including any tender process required to be conducted under the Termination Payments Schedule, or Change Compensation Principles).
- (c) **(LMA's rights)**: Subject to clause 18.1(d), in meeting its Public Disclosure Obligations or as otherwise considered necessary by the State, LMA or the State may publish, disclose or make generally available each Project Document on a Victorian Government website.
- (d) **(Commercially sensitive information)**: LMA will not publish, disclose or otherwise make generally available the information which is specified in the Confidential Information Schedule (including the Financial Model), except if required to do so to comply with the Public Disclosure Obligations in accordance with clauses 18.1(b).

### 18.2 Confidential Information and disclosure by the Utility

- (a) **(Confidentiality obligation)**: Subject to clause 18.2(b), the Utility must treat as secret and confidential all Confidential Information in connection with this Agreement and any other State Project Document.
- (b) **(Disclosure of Confidential Information)**: Without limiting the Utility's obligation under clause 18.2(a) and subject to clause 18.2(c), the Utility may disclose Confidential Information to its Associates to the extent necessary for the purpose of its obligations in accordance with this Agreement.
- (c) **(Confidentiality deed)**: Before disclosing any Confidential Information, the Utility must ensure that the person to whom the information is disclosed enters into a confidentiality deed with the Utility on terms reasonably acceptable to LMA.

### 18.3 Disclosure by the Utility

- (a) **(Project Co's disclosure obligations):** Subject to clause 18.3(b), the Utility must:
- (i) not make any public disclosures, announcements or statements in relation to the Project or the State's or any of the State's Associates' involvement in the Project without the State's prior consent;
  - (ii) comply with any terms and conditions the State imposes and must use all reasonable endeavours to agree with the State the wording and timing of all public disclosures, announcements or statements by it or any of its Associates relating to the Project or the State's or any of the State's Associates' involvement in the Project before the relevant disclosure, announcement or statement is made; and
  - (iii) as soon as practicable, give to LMA a copy of any public disclosure, announcement or statement agreed to or approved by LMA in accordance with this clause 18.3(a) or for which LMA's consent or approval was not required in accordance with clause 18.3(b).
- (b) **(Permitted disclosure):** For the purposes of clause 18.3(a), the Utility will not be required to obtain LMA's consent or approval to the extent that any disclosure, announcement or statement is:
- (i) required by Law, provided that it:
    - A. notifies LMA of the requirement to make that disclosure; and
    - B. takes all reasonable steps to minimise the extent of the disclosure and to ensure the information is disclosed on a basis that the recipient agrees to maintain the confidentiality of the information;
  - (ii) required to obtain legal or other advice from its advisers;
  - (iii) required to be made to a court in the course of proceedings to which the Utility is a party; or
  - (iv) required by a relevant stock exchange, subject to:
    - A. such disclosure, announcement or statement not referring to the State's or any of its Associates' involvement in the Project; and
    - B. the Utility having used all reasonable endeavours to obtain the LMA's consent within a timeframe sufficient to allow it to meet the timeframe imposed by the relevant stock exchange.

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### 19. GST General

- (a) **(Amount payable):** Notwithstanding any other provision of this Agreement, any amount payable for a supply made under or in connection with this Agreement which is calculated by reference to a cost, expense or other amount paid or incurred by a Party will be reduced by an amount equal to any input tax credits which that Party is entitled to in connection with that cost, expense or other amount.

- (b) **(GST payable by Supplier):** If GST becomes payable on any Taxable Supply made by a Party (**Supplier**) under or in connection with this Agreement:
- (i) any amount payable or consideration to be provided in accordance with any other provision of this Agreement for that supply (**Agreed Amount**) is exclusive of GST;
  - (ii) an additional amount will be payable by the Party which is the recipient of the Taxable Supply (**Recipient**), equal to the amount of GST payable on that Taxable Supply as calculated by the Supplier in accordance with the GST Law, which will be payable at the same time and in the same manner as for the Agreed Amount; and
  - (iii) the Supplier will provide a Tax Invoice to the Recipient in connection with that supply, either at the time expressly set out in any other provision of this Agreement or no later than the time at which the Agreed Amount for that Taxable Supply is to be provided in accordance with this Agreement. The Recipient is not obliged to pay any amount in accordance with this clause 19 unless and until a Tax Invoice is received by the Recipient in connection with the Taxable Supply except where the Recipient is required to issue the Tax Invoice.
- (c) **(Variation in GST payable):** If for any reason, the GST payable by the Supplier in connection with a supply it makes under or in connection with this Agreement (incorporating any increasing adjustments or decreasing adjustments relating to that supply) varies from the additional amount it received from the Recipient under clause 19(b) in connection with that supply, the Supplier will provide a refund or credit to, or will be entitled to receive from, the Recipient (as appropriate) the amount of this variation. Where an adjustment event occurs in relation to a supply and except where the Recipient is required to issue the Adjustment Note:
- (i) the Supplier will issue an Adjustment Note to the Recipient connection with that supply within 14 days after becoming aware of that adjustment event occurring; and
  - (ii) no additional amount will be payable by the Recipient unless and until an Adjustment Note is received by the Recipient.
- (d) **(GST ceasing to be payable):** No amount is payable by a party in accordance with clause 19(b) or 19(c) to the extent that the GST to which the amount relates has ceased to be payable by or refundable to the Supplier by the Commissioner of Taxation under the GST Law.
- (e) **(Expert Determination):** If the Recipient is dissatisfied with any calculation to be made by the Supplier in accordance with this clause 19 the recipient may, at its own expense and after notifying the Supplier accordingly, refer the matter to an independent expert nominated by the President of the Institute of Chartered Accountants for expert determination, which will be final and binding on all parties (except in the case of manifest error on the face of the expert determination). The expert will act as an expert and not as an arbitrator and must take into account the terms of this Agreement, the matters required to be taken into account by the Supplier in accordance with this clause 19 and any other matter considered by the expert to be relevant to the determination. The Parties release the expert from any liability in acting as an expert, except in the case of fraud on the part of the expert.

- (f) **(Revenue net of GST):** Any reference in this Agreement or any Project Document to price, value, sales, revenue, profit or a similar amount (**Revenue**), is a reference to the GST exclusive component of that Revenue, unless the contrary intention is expressed.
- (g) **(Cost net of GST):** Any reference in this Agreement or any Project Document to cost, expense, liability or other similar amount (**Cost**) of a party, is a reference to that Cost reduced by the Input Tax Credits to which the party is entitled in respect of such Cost, unless the contrary intention is expressed.
- (h) **(General obligation):** Each Party agree to do all things, including providing Tax Invoices and other documentation, that may be necessary or desirable to enable or assist the other Party in determining its GST payable on any supply made by that other Party in connection with this Agreement, or any input tax credits, adjustments or refunds in relation to any amount of GST paid or payable in connection with any supply made in connection with this Agreement.
- (i) **(GST Groups):** For the purposes of this Agreement, a reference to GST payable on a Taxable Supply made by a Party includes any corresponding GST payable by the representative member of any GST group of which that Party is a member and a reference to an input tax credit entitlement of a Party includes any corresponding input tax credit entitlement of the representative member of any GST group of which that Party is a member.
- (j) **(Project Agreement to prevail):** If clause 53 of the Project Agreement would apply in respect of a Taxable Supply to which this clause 19 also applies then clause 53 of the Project Agreement will apply in respect of that supply and the provisions of this clause 19 (but for this paragraph) will not apply.
- (k) **(Definitions):** In this clause 19, unless otherwise defined in this Agreement, terms used have the meanings given to them in the GST Law.

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## 20. Notices

All communications (including approvals, consents, directions, requirements, requests, claims, notices, agreements and demands) in connection with this Agreement:

- (a) **(in writing):** must be in writing;
- (b) **(addressed):** must be addressed as set out below (or as otherwise notified by that party to each other party from time to time);

### Utility:

Attention: [#]

Name: [#]

Address: [#]

Email [#]

### LMA:

Attention: [#]

Name: [#]

Address: [#]

Email [#]

- (c) **(signed)**: must be signed by the Party making the communication or by the solicitor for, or any attorney, director, secretary or authorised agent of, that Party on its behalf;
- (d) **(form of delivery)**: must be delivered by hand or posted by prepaid post to the address, or emailed (in the form agreed by both Parties) to the email address of the addressee set out in clause 20(b); and
- (e) **(taken to be received)**: are taken to be received by the addressee at the address set out in clause 20(b):
  - (i) in the case of delivery by hand, on delivery at the address of the addressee, unless that delivery is outside Business Hours, in which case that communication is taken to be received at 9.00 am on the next Business Day;
  - (ii) in the case of prepaid post, on the third Business Day after the date of posting to an address within Australia and on the fifth Business Day after the date of posting by airmail to an address outside Australia; and
  - (iii) in the case of email, the first to occur of:
    - A. receipt by the sender of any email acknowledgement from the addressee's information system showing that the communication has been delivered to the email address of that addressee;
    - B. the time that the communication enters an information system which is under the control of the addressee; or
    - C. the time that the communication is first opened or read by the addressee,

unless the result is that the communication would be taken to be given or made at a time which is outside Business Hours at the local time in the place of receipt of the email, in which case that communication is taken to be received at 9.00 am on the next Business Day.

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## 21. Miscellaneous

### 21.1 Governing Law and jurisdiction

- (a) **(Governing Law)**: This Agreement is governed by, and must be construed according to, the Laws of Victoria, Australia.
- (b) **(Jurisdiction)**: Subject to clauses 15 to 16, each Party irrevocably submits to the non-exclusive jurisdiction of the courts of Victoria, and the courts competent to determine appeals from those aforementioned courts, with respect to any proceedings that may be brought in connection with this Agreement.

## 21.2 Entire agreement

To the extent permitted by Law and in relation to its subject matter, this Agreement:

- (a) **(entire understanding)**: embodies the entire understanding of the Parties, and constitutes the entire terms agreed by the Parties; and
- (b) **(prior agreements)**: supersedes any prior Agreement between the Parties.

## 21.3 Further acts and documents

Each party must promptly do all further acts and execute and deliver all further documents (in such form and content reasonably satisfactory to both parties) required by Law or reasonably requested by another party to give effect to this Agreement.

## 21.4 Survival of certain provisions

- (a) **(Surviving clauses)**: All provisions of this Agreement which, expressly or by implication from their nature, are intended to survive the rescission, termination or expiration of this Agreement will survive the rescission, termination or expiration of this Agreement, including any provision in connection with:
  - (i) the LMA's rights to set-off and recover money;
  - (ii) confidentiality or privacy;
  - (iii) Intellectual Property Rights;
  - (iv) any obligation to make any Records available to the LMA;
  - (v) any indemnity or financial security given in accordance with this Agreement; or
  - (vi) any right or obligation arising on termination of this Agreement.
- (b) **(Interpretation)**: No provision of this Agreement which is expressed to survive the termination of this Agreement will prevent any other provision of this Agreement, as a matter of interpretation, also surviving the termination of this Agreement.
- (c) **(Survival of rights and obligations)**: No right or obligation of any party will merge on completion of any transaction in accordance with this Agreement. All rights and obligations in accordance with this Agreement survive the execution and delivery of any transfer or other document which implements any transaction in accordance with this Agreement.

## 21.5 Waiver

- (a) **(No waiver)**: Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of a right provided by law or under this Agreement by LMA or the Utility does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right provided by Law or under this Agreement.
- (b) **(Writing)**: A waiver or consent given by LMA or the Utility under this Agreement is only effective and binding if it is given or confirmed in writing by LMA or the Utility.

- (c) **(No waiver of another breach):** No waiver of a breach of a term of this Agreement operates as a waiver of another breach of that term or of a breach of any other term of this Agreement.

## 21.6 Consents, approvals and directions

- (a) **(LMA):** A consent or approval required in accordance with this Agreement from the LMA may be given or withheld, or may be given subject to any conditions, as the LMA thinks fit, unless this Agreement expressly provides otherwise.
- (b) **(Utility):** A consent or approval required in accordance with this Agreement from Utility may not be unreasonably withheld or delayed, unless this Agreement expressly provides otherwise.

## 21.7 Amendments

Except as otherwise expressly provided in this Agreement, this Agreement may only be varied by a deed executed by or on behalf of each party.

## 21.8 Expenses

Except as otherwise expressly provided in this Agreement or (as between the State and Project Co) the Project Agreement, each party must pay its own costs and expenses in connection with negotiating, preparing, executing and performing this Agreement.

## 21.9 Severance

If, at any time, a provision of this Agreement becomes illegal, invalid or unenforceable in any respect under the Law of any jurisdiction, that will not affect or impair the legality, validity or enforceability of:

- (a) any other provision of this Agreement; or
- (b) that provision under the Law of any other jurisdiction.

## 21.10 Counterparts

This Agreement may be executed in any number of counterparts and by the parties in separate counterparts. Each counterpart constitutes the deed of each party who has executed and delivered that counterpart. All such counterparts taken together will be deemed to constitute one and the same Agreement.

## 21.11 Moratorium legislation

Unless application is mandatory by Law, any Law will not apply to any State Project Document so as to abrogate or otherwise prejudicially affect any rights given or accruing to the State.

## 21.12 Proportionate liability

- (a) **(Excluded operation of Wrongs Act):** The operation of Part IVAA of the *Wrongs Act 1958* (Vic) is excluded in relation to all and any rights, obligations or liabilities of either party under this Agreement whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.
- (b) **(Rights, obligations and liabilities):** Without limiting clause 21.12(a), the rights, obligations and liabilities of the parties (including those relating to proportionate

liability) are as specified in this Agreement and not otherwise, whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.

**Schedule 1 - Utility Infrastructure**

*[State Note: To be inserted.]*

## Schedule 2 - Utility Works Proposal

### UTILITY WORKS PROPOSAL

To: *[#insert name of Utility]* (Utility)

This is a Utility Works Proposal issued under clause 6.1 of the Utility Agreement between LMA, *[#insert name of other parties]* dated *[#insert date]*. Unless otherwise expressly defined, expressions used in this Utility Works Proposal have the meanings given to them in or for the purposes of the Project Agreement.

*[LMA/Project Co]* note the following, in respect of Utility Infrastructure that has been (or is likely to be) affected by the East West Link Works:

1. Description of the Utility Infrastructure which is (or is likely to be) affected by the East West Link Works:

*[#insert]*

Description of the nature of any Utility Works required to be performed as a result of the East West Link Works:

*[#insert]*

Article I. Proposed timing of the Utility Works:

*[#insert]*

Article II. Proposed standards to which the Utility Works are to be performed:

*[#insert]*

Article III. Proposed method for carrying out (including the entity which will carry out) the Utility Works:

*[#insert]*

Article IV. If the Utility is to carry out all or part of the Utility Works, the proposed budget for the Utility Works to be performed by the Utility:

*[#insert]*

Article V. Description of the means by which disruption to services provided by the Utility Infrastructure will be minimized by the Utility:

*[#insert]*

Article VI. Proposed method for final certification of the Utility Works:

*[#insert]*

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

**[LMA/PROJECT CO]**

### Schedule 3 - Utility Works Response

## UTILITY WORKS RESPONSE

To: [LMA/Project Co] (LMA/Project Co)

This is a Utility Works Response issued under clause 6.2 of the Utility Agreement between LMA, [insert name of other parties] dated [insert date]. Unless otherwise expressly defined, expressions used in this Utility Works Response have the meanings given to them in or for the purposes of the Project Agreement.

[insert name of Utility] (Utility) notes the following, in respect of Utility Works Response issued under clause 3.1 of the Project Agreement:

1. Description of those aspects of the Utility Works Proposal with which the Utility agrees:

[insert]

Article I. In respect of all aspects of the Utility Works Proposal with which the Utility does not agree, a description (having regard to the Utility Works Objectives) of the Utility's alternative proposal, including the reasons why the Utility does not so agree and the reasons why its alternative proposal is preferable:

[insert]

Article II. If Utility has submitted an alternative proposal, the extent to which the Utility proposes to have a role in performing the Utility Works and, if it is intended that the Utility will perform part or all of the Utility Works, the proposed reasonable cost of any Utility Works to be performed by the Utility.

[insert]

Signed: \_\_\_\_\_ Date: \_\_\_\_\_

Utility

## Schedule 4 - Utility Works Order

### UTILITY WORKS ORDER

This is a Utility Works Order issued under clause 6.4 of the Utility Agreement between LMA, [*#insert name of other parties*] dated [*#insert date*]. Unless otherwise expressly defined, expressions used in this Utility Works Order have the meanings given to them in or for the purposes of the Project Agreement.

The Parties have agreed the following (or alternatively, it has been determined by an expert in accordance with clause 14 of the Project Agreement), in respect of Utility Infrastructure that has been (or is likely to be) affected by the East West Link Works:

1. Description of the Utility Infrastructure which is (or is likely to be) affected by the East West Link Works:

[*#insert*]

Article I. Description of the nature of any Utility Works required to be performed as a result of the East West Link Works:

[*#insert*]

Article II. Proposed timing of the Utility Works:

[*#insert*]

Article III. Proposed standards to which the Utility Works are to be performed:

[*#insert*]

Article IV. Proposed method for carrying out (including the entity which will carry out) the Utility Works:

[*#insert*]

Article V. To the extent that the Utility will carry out all or part of the Utility Works, the amount payable to the Utility in respect of the performance of the Utility Works:

[*#insert*]

Article VI. Description of the means by which disruption to services provided by the Utility Infrastructure will be minimized by the Utility:

[*#insert*]

Article VII. Proposed method for final certification of the Utility Works:

[*#insert*]

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

Utility

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

[LMA/PROJECT CO]

**Annexure A - Deed of Accession**

*[State Note: Refer to separate document.]*

Stage One - East West Link  
Schedule 10 - Utility Agreement

*Commercial in Confidence*

**Signed** as an Agreement.

*[State Note: Execution blocks to be inserted.]*