

O&M Direct Deed

Stage One - East West Link

[]

State

[]

Project Co

[]

O&M Subcontractor

[]

O&M Guarantor

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O&M Direct Deed dated

Parties [] (State)
[] (Project Co)
[] (O&M Subcontractor)
[] (O&M Guarantor)

Background

- A. The background to the Project is set out in the Project Agreement.
- B. Project Co and the O&M Subcontractor are or will become parties to the O&M Subcontract.
- C. The O&M Subcontractor has agreed to grant to the State certain rights in relation to the O&M Subcontract.
- D. Project Co and the O&M Guarantor are or will become parties to the O&M Guarantee.
- E. The O&M Guarantor has agreed to grant to the State certain rights in relation to the O&M Guarantee.

Operative provisions

1. Defined terms and interpretation

1.1 Project Agreement definitions

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

1.2 Definitions

In this Deed, unless the context otherwise requires:

Additional Obligor means a company or other entity which is wholly owned by the State.

Additional Obligor Step-In Notice has the meaning given in clause 7.1(a)(iv).

Additional Obligor Step-Out Date has the meaning given in clause 7.3(d).

Agreed Amount has the meaning given in clause 13(b)(i).

Assumption Date has the meaning given in clause 7.3(a).

Authorised Representative means:

- (a) in respect of the State, the State Representative;
- (b) in respect of Project Co, the Project Co Representative; and
- (c) in respect of an O&M Party, a director, company secretary or attorney of the O&M Party, or other authorised representative notified to the other parties by the O&M Party.

Cost has the meaning given in clause 13(g).

Deed means this deed and includes all schedules, exhibits, attachments and annexures to it.

Default Event means:

- (a) any breach by Project Co of any of its obligations under an O&M Document; or
- (b) any other event or circumstance,

which alone or with the giving of notice or passage of time or both, would entitle an O&M Party to terminate, rescind, accept the repudiation of, or suspend any or all of its obligations under, the O&M Documents.

Default Event Notice has the meaning given in clause 6.2(a).

Disputing Parties has the meaning given in clause 9.1(a).

Material Adverse Effect means a material adverse effect on:

- (a) the ability of each of Project Co or an O&M Party to perform and observe their respective obligations under any Project Document to which it is a party; or
- (b) the rights of the State under any State Project Document, or the ability or capacity of the State to exercise its rights or perform its obligations under a State Project Document.

Novation Notice has the meaning given in clause 8.1(a).

Novation Notice Date means:

- (a) in relation to clause 8.3, the later of the date of the Novation Notice and the date the O&M Subcontractor consents or is deemed (in accordance with clause 8.3(d)) to have consented to the novation and assignment; and
- (b) otherwise, the date of the Novation Notice.

O&M Document means in respect of the O&M Subcontractor, the O&M Subcontract, and in respect of the O&M Guarantor, the O&M Guarantee.

O&M Guarantee means the parent guarantee dated on or about the date of this Deed granted between the O&M Guarantor and Project Co.

O&M Parties means the O&M Subcontractor and the O&M Guarantor and O&M Party means each of them.

O&M Subcontractor Associate means any:

- (a) Relevant Person in respect of the O&M Subcontractor only (excluding the Project Co Representative); and
- (b) Subcontractor, person, officer, agent, adviser, consultant, contractor or employee of the O&M Subcontractor.

O&M Subcontractor Statement has the meaning given in clause 6.4.

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

Project Co's Rights has the meaning given in clause 7.3(b)(i)A.

Receiver means a receiver or receiver and manager appointed by the State under the State Security.

Recipient has the meaning given in clause 13(b)(ii).

Representatives has the meaning given in clause 9.2(a).

Revenue has the meaning given in clause 13(f).

State Cure Notice has the meaning given in clause 6.2(c).

Statement Beneficiary means the State, an Additional Obligor or Receiver appointed under clause 7.

Step-In Period has the meaning given in clause 7.1(b).

Step-In Right has the meaning given in clause 7.1(a).

Substitute Party has the meaning given in clause 8.1(a).

Supplier has the meaning given in clause 13(b).

1.3 Interpretation

In this Deed:

- (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 Deed; and
 - (ii) a section is a reference to a section of a Schedule;
- (d) **(agreement as amended)**: a reference to this Deed or to any other deed, agreement, document or instrument includes a reference to this Deed 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 the State, means that the State can exercise that power, right or remedy in its absolute and unfettered discretion and 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 Deed which:
 - (i) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity, this Deed is deemed to refer to that other entity; or
 - (ii) ceases to exist, this Deed 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 Deed 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 Priority of documents

To the extent of any inconsistency, ambiguity or discrepancy between this Deed and an O&M Document, this Deed prevails.

1.5 State Project Documents

Each of the O&M Parties acknowledges that it has received a copy of the Project Agreement, the State Security and the Finance Direct Deed.

1.6 Relationship of the parties

Unless otherwise expressly provided, this Deed does not:

- (a) **(no additional relationship)**: creates a partnership, joint venture or fiduciary relationship between the parties; or
- (b) **(no good faith)**: impose any duty of good faith on the State.

1.7 Approvals, directions and notices in writing

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

1.8 State's rights and obligations

- (a) **(Acknowledgement)**: The parties acknowledge the substance, operation and potential effect and consequences of clause 2.12 of the Project Agreement in relation to this Deed.
- (b) **(No Claim)**: Subject to clause 1.8(c), Project Co and the O&M Parties will not be entitled to make any Claim against the State for any Liability relating to any exercise or failure of the State to exercise its executive or statutory rights or duties.
- (c) **(Liability for breach)**: Clauses 1.8(a) and (b) do not limit any Liability which the State would have had to Project Co or the O&M Parties under any State Project Document as a result of a breach by the State of a term of any State Project Document but for these clauses.

1.9 Reasonable endeavours of State

Any statement in this Deed providing that the State will use or exercise "reasonable endeavours" or "act reasonably" in relation to an outcome, means that the State:

- (a) **(relevant steps)**: will take steps to bring about the relevant outcome so far as it is reasonably able to do so, having regard to its resources and other responsibilities;
- (a) **(no guarantee)**: cannot guarantee the relevant outcome; and
- (b) **(no obligation)**: is not required to:
 - (i) exercise an executive or statutory right or duty of any Government Party, or to influence, over-ride, interfere with or direct any other Government Party in the proper exercise and performance of its executive or statutory rights and duties;
 - (ii) exercise a power or discretion in a manner that the State regards as not in the public interest;
 - (iii) develop or implement new policy; or

- (iv) procure legislation.

2. Conditions precedent

The satisfaction or waiver of the Conditions Precedent in accordance with clause 3 of the Project Agreement, is a condition precedent to the coming into operation of this Deed (other than this clause 2 and clauses 1.1, 1.2 1.6, 1.8, 1.9, 4, 9, 10, 14, 15 and 17).

3. Acknowledgments

3.1 By O&M Parties concerning the State Security

The O&M Parties each acknowledge and agree:

- (a) **(grant of security by Project Co)**: that Project Co may give a security interest in the form of the State Security, in favour of the State over all assets and undertakings of Project Co including Project Co's right, title and interest under the O&M Documents or assign Project Co's right, title and interest under the O&M Documents to the State by way of security, and the O&M Parties each consent to the State Security and any such assignment;
- (b) **(exercise of rights)**: to the State's rights under the State Security including the appointment by Project Co of the State as attorney of Project Co to do, perform and exercise all things, acts and rights under the O&M Documents on behalf of and for the account of Project Co;
- (c) **(no Default Event)**: that the grant of, or exercise by the State of its rights under the State Security will not itself contravene, or constitute a Default Event under, an O&M Document or entitle an O&M Party to exercise any right (including termination) under it;
- (d) **(Liabilities and obligations)**: that nothing in the State Security will cause the State or State Associate to assume any Liabilities or obligations under an O&M Document except as may result from its own acts or omissions in exercising rights or in performing or failing to perform obligations under an O&M Document as envisaged by this Deed;
- (e) **(notice of any other assignment)**: that with the exception of the security interests under the Finance Documents, it has not received notice of any other assignment or charge by Project Co of any right, title, interest in or benefit of Project Co under the O&M Documents; and
- (f) **(set off)**: that as of the date of this Deed, it has no knowledge of any right of set off or counterclaim which it may have against Project Co so as to diminish any money payable by it to Project Co under an O&M Document, except only where the right of set off or counterclaim is contained within the O&M Document.

3.2 By the O&M Parties concerning the State's rights

- (a) **(State's rights)**: The O&M Parties each acknowledge the State's rights under clauses 6.10, 16.3, 24.4, 36, 39, 40 and 55.2 of the Project Agreement and the other relevant clauses listed in clause 10.3(c) of the Project Agreement.
- (b) **(Facilitation of rights)**: The O&M Subcontractor must exercise its rights under the O&M Subcontract in a way that facilitates the effective exercise by the State of the rights referred to in clause 3.2(a) and will on reasonable notice permit the State or a

State Associate to have access to, and take copies of, the records, reports, documents and other papers to which the State is entitled to have access in accordance with the State's rights referred to in clause 3.2(a).

- (c) **(Continued performance):** During the period in which the State is exercising a right referred to in clause 3.2(a) the State may, in accordance with the Project Agreement and the O&M Subcontract, require the suspension or the continuation of performance by the O&M Subcontractor of its obligations under the O&M Subcontract, and if it does so, the O&M Subcontractor will comply with this requirement and with all reasonable directions of the State in relation to the performance of the O&M Subcontract by the O&M Subcontractor during such period.
- (d) **(State not liable):** The requirement of the State that the O&M Subcontractor suspend or continue to perform its obligations under the O&M Subcontract and the giving of any direction under clause 3.2(c) by the State will not be construed as an assumption by the State of any obligations of the O&M Subcontractor under the O&M Subcontract.
- (e) **(Subcontracting):** The O&M Subcontractor will not subcontract any of its obligations under the O&M Subcontract without the prior consent of the State, where so required in accordance with clause 10 of the Project Agreement.
- (f) **(Probity Investigations):** Without limiting clauses 3.2(a) to (e), the O&M Parties each acknowledge and agree that:
 - (i) in accordance with clauses 10 and 55.2 of the Project Agreement, the State may from time to time or may require Project Co to conduct Probity Investigations of the O&M Parties and Relevant Persons, or other persons in relation to any further subcontracting by the O&M Subcontractor of any of its obligations under the O&M Subcontract;
 - (ii) it will procure the consent to any Probity Investigation and, to the extent that the State is entitled to do so under the Project Agreement, such other probity and security investigations that the State may require of each Relevant Person in relation to an O&M Party in respect of whom the State advises the relevant O&M Party that it requires a Probity Investigation; and
 - (iii) it will not appoint, or retain the appointment of, and will ensure that no other person appoints, or retains the appointment of, a person to the position of a Relevant Person in relation to the management or performance of the O&M Subcontract by the O&M Subcontractor unless the State has given approval, including following a Probity Investigation and other such investigations that the State may require under clauses 10 and 55.2 of the Project Agreement.

3.3 By Project Co

Project Co is bound by, and must cooperate in the implementation of, this Deed. It acknowledges that this Deed is intended to benefit only the O&M Parties and the State and does not in any way affect any obligation of Project Co under the O&M Subcontract or under any Project Document except as expressly set out herein.

3.4 Information

Project Co and the O&M Parties each acknowledge and agree that:

- (a) **(information purpose):** any information, data and documents provided by the State:
 - (i) are provided for information purposes only and all of the State and its Associates' Intellectual Property Rights therein remain the property of the State or its Associates (as the case may be); and
 - (ii) do not form part of this Deed or constitute an invitation, offer or recommendation by or on behalf of the State or any of its Associates; and
- (b) **(no Liability):** to the extent permitted by Law neither the State nor any of its Associates will have any Liability to the O&M Parties or any O&M Subcontractor Associate, nor will the O&M Parties or any O&M Subcontractor Associate be entitled to make any Claim against the State, or seek, pursue or obtain an indemnity against or contribution to Liability from the State or any of its Associates arising in connection with:
 - (i) the provision of, or purported reliance upon, or use of any information, data and documents referred to in clause 3.4(a) by the O&M Parties or any other person to whom such information is disclosed by the O&M Parties, the O&M Subcontractor Associates or any person on the O&M Parties or any O&M Subcontractor's behalf;
 - (ii) any reference to the State in an O&M Document; or
 - (iii) any review of, comments upon, acceptance, approval or certification of the form or substance of an O&M Document by the State.

3.5 Subcontract not to affect State rights

Project Co and the O&M Parties each acknowledge and agree that:

- (a) **(rights not affected):** where the O&M Subcontract is expressed in the O&M Subcontract to have a right (or possible right) to compensation or relief which is dependent on or determined by reference to the Project Agreement or an equivalent or similar right of Project Co:
 - (i) this does not of itself expand Project Co's rights, or the State's Liability, under the Project Agreement to include the compensation or relief to which the O&M Subcontractor is or may become entitled under the O&M Subcontract; and
 - (ii) Project Co's rights, and the State's Liability, under the Project Agreement will be determined solely in accordance with the terms of the Project Agreement;
- (b) **(risk of discrepancy):** as between the State (on the one hand) and Project Co and the O&M Parties (on the other hand), Project Co and the O&M Parties accept and will bear the risk of any inconsistency, ambiguity or discrepancy between the terms of the O&M Subcontract and the Project Agreement; and

- (c) **(dealing directly with State):** notwithstanding anything to the contrary in the O&M Subcontract, neither O&M Party has any right to deal directly with the State or participate in any meeting, consultation or process (including negotiation or dispute resolution) unless:
 - (i) expressly provided to the contrary in the Project Agreement or this Deed; or
 - (ii) the State consents.

4. Representations and warranties by O&M Parties

The O&M Parties each represent and warrant for the benefit of the State that:

- (a) **(power to execute):** it has the power to execute, deliver and carry out its obligations under this Deed, the O&M Subcontract and each other Project Document to which it is a party and all necessary action has been taken to authorise that execution, delivery and performance;
- (b) **(legality):** the execution, delivery and performance of this Deed, the O&M Subcontract and each other Project Document to which it is a party does not violate any Law, document or agreement to which it is a party or which is binding on it or any of its assets;
- (c) **(validity):** this Deed, the O&M Subcontract and each other Project Document to which it is a party constitutes a valid and legally binding obligation on it in accordance with its terms;
- (d) **(registration):** it is duly registered, properly constituted and remains in existence;
- (e) **(no trust relationship):** except as stated in this Deed, it is not the trustee or Responsible Entity of any trust nor does it hold any property subject to or impressed by any trust;
- (f) **(information true and correct):** all information provided by it to the State is true and correct and no O&M Party is aware of any material facts or circumstances that have not been disclosed to the State and which might, if disclosed, materially adversely affect the decision of a prudent person considering whether or not to enter into this Deed or to consent to the entry into the O&M Subcontract;
- (g) **(litigation):** no Claim against it is current or pending or (to its knowledge) is threatened, which will or is likely to have a material adverse effect upon it or its ability to perform its financial and other obligations under this Deed, the O&M Subcontract or any other Project Document to which it is a party;
- (h) **(Insolvency Event):** no Insolvency Event has occurred in respect of it;
- (i) **(accounts):**
 - (i) its most recent consolidated audited (if the requirement for auditing is applicable) accounts give a true and fair view of its and its subsidiaries' state of affairs as at the date to which they relate and the results of its and its subsidiaries' operations for the accounting period ended on such date;
 - (ii) there has been no material adverse change in its or its subsidiaries' state of affairs since such date; and

- (iii) such accounts have been prepared in accordance with the Corporations Act and accounting principles and practices generally accepted in Australia consistently applied, except to the extent of departures from such principles and practices disclosed in such accounts;
- (j) **(no default):**
 - (i) it is not in default under any document or agreement binding on it or its assets which relates to financial indebtedness; and
 - (ii) nothing has occurred which would, with the giving of notice and/or lapse of time, constitute an event of default, cancellation, prepayment event (pursuant to a bona fide right to exercise prepayment) or similar event (whatever called) under any such document or agreement,

and which would have a Material Adverse Effect;
- (k) **(no immunity):** neither it nor any of its assets enjoys any immunity from set off, suit or execution; and
- (l) **(own investigations):** in entering into this Deed, the O&M Subcontract and any other Project Document to which it is a party it relied upon its own investigations and has not relied upon any representation or warranty about its subject matter by the State, Project Co or any other person unless in respect of Project Co or any other person, other than the State or any of its Associates, it is expressly permitted to do so in accordance with a Project Document to which it is a party.

5. Undertakings of O&M Parties

5.1 Undertakings

The O&M Parties each undertake to the State as follows:

- (a) **(notification of Default Event):** in the case of the O&M Subcontractor, it will notify the State of any Default Event promptly after it gives notice of that Default Event in accordance with clause [#insert] (*[Notice of Project Co Event of Default]*) of the O&M Subcontract;
- (b) **(documents in relation to Default Event):** in the case of the O&M Subcontractor, it will promptly give the State a copy of all documents issued by the O&M Subcontractor to Project Co in relation to a Default Event;
- (c) **(no amendment without consent):** it will not, without first obtaining the consent of the State:
 - (i) make or permit any amendment or replacement of or addition to;
 - (ii) subject to clause 6.2, terminate, surrender, rescind or accept repudiation of;
 - (iii) permit the novation, assignment or substitution of any party's rights, obligations or interest in, except when in accordance with this Deed or clause 6.6 of the Finance Direct Deed; or
 - (iv) allow any express waiver of its material rights and obligations under,

an O&M Document, provided that the State will not withhold its consent to an amendment which is an amendment to which it has consented in accordance with the Project Agreement;

- (d) **(deed of accession):** it will not novate, assign or substitute any of its rights, obligations or interest in an O&M Document without first procuring that the proposed novatee, assignee or substitute executes a deed in favour of the State (in form and substance approved by the State) pursuant to which the novatee, assignee or substitute agrees to accept and be bound by this Deed as if it were the O&M Subcontractor or O&M Guarantor (as the case may be);
- (e) **(attend meetings and inspections):** it will (when reasonably requested by the State):
 - (i) attend, where reasonable and appropriate, meetings with the State or any of its Associates;
 - (ii) provide the State, any of its Associates and authorised personnel with:
 - A. in the case of the O&M Subcontractor, full access to the Site to the extent provided in the Project Agreement and to the extent that the O&M Subcontractor is granted access under the O&M Subcontract; and
 - B. any other information, records or documents that the State or any of its Associates (acting reasonably) requires in relation to the performance of the O&M Activities or compliance with the O&M Subcontract or any information required by the State to comply with requests from the Victorian Auditor-General; and
 - (iii) to the extent provided in the Project Agreement, permit the State or any of its Associates to attend all tests and inspections to be carried out in connection with the Project in accordance with the terms of the O&M Subcontract; and
- (f) **(access to records):** in the case of the O&M Subcontractor, at the request of the State, the O&M Subcontractor will:
 - (i) permit the State or any of its Associates to inspect all records, reports, plans, programs, specifications and design documents prepared or kept by the O&M Subcontractor in relation to the O&M Activities and the Project; and
 - (ii) supply the State or any of its Associates with a copy of any such report or document which they may require from time to time.

5.2 Appointment of O&M Subcontractor as principal contractor

For the purpose of regulation 5.12 of the OHS Regulations, to the extent that the O&M Subcontractor will be carrying out "construction work" within the meaning of regulation 5.12 of the OHS Regulations in connection with the O&M Activities, and only for that purpose:

- (a) **(Principal Contractor):** the O&M Subcontractor accepts the appointment by the owner of the Site as, and complies with all the obligations of, a Principal Contractor under the OHS Legislation;

- (b) **(Control of Maintenance Site):** the O&M Subcontractor must manage or control the Maintenance Site to the extent necessary to discharge the duties of a Principal Contractor under the OHS Legislation; and
- (c) **(Change in Mandatory Requirement):** the O&M Subcontractor accepts any revised appointment as Principal Contractor that may be necessary as a result of a Change in Mandatory Requirement.

6. Right to cure before termination of O&M Subcontract

6.1 The State's cure rights

- (a) **(Provide State with notices):** The O&M Subcontractor must give the State:
 - (i) Default Event Notices; and
 - (ii) State Cure Notices,as required by clause 6.2.
- (b) **(State Cure Notice):** On receiving a State Cure Notice, and subject to the Finance Direct Deed, the State may (but is not obliged to) take steps to:
 - (i) remedy, or procure the remedy of, that Default Event; or
 - (ii) if the Default Event is not capable of remedy, commence and continue to perform the obligations of Project Co under the O&M Subcontract.

6.2 Termination or suspension with cause

The O&M Subcontractor may only exercise a right to terminate, rescind, accept the repudiation of, or (subject to clause 6.3) suspend the performance of any or all of its obligations under the O&M Subcontract if:

- (a) **(prior notice):** the O&M Subcontractor has given to the State prior notice setting out details of the Default Event giving rise to that proposed exercise in accordance with clause 6.4 **(Default Event Notice)**;
- (b) **(remedy period):** any remedy period available to the Financiers in respect of the Default Event under the O&M Consent Deed has expired without a remedy being achieved;
- (c) **(expiration of remedy period):** the O&M Subcontractor has given notice to the State **(State Cure Notice)** confirming that any remedy period available to the Financiers in respect of the Default Event under the O&M Consent Deed has expired without a remedy being achieved; and
- (d) **(Default Event remedy):** where:
 - (i) the Default Event is capable of remedy within 20 Business Days after the date on which the State received the State Cure Notice, the Default Event has not been remedied within that 20 Business Day period;
 - (ii) the Default Event is not capable of remedy within 20 Business Days after the date on which the State received the State Cure Notice but is nevertheless capable of remedy, the State (or an Additional Obligor or Receiver appointed under clause 7) has not commenced remedying the

Default Event within that 20 Business Day period and has not continued to diligently pursue that remedy;

- (iii) the Default Event is not capable of remedy and the Default Event Notice contains a claim for reasonable compensation for the Default Event, Project Co or the State (or another person on behalf of either of them) has not paid or otherwise provided that compensation to the O&M Subcontractor:
 - A. to the extent that the relevant amount of compensation has been referred to expert determination under clause 9, within 20 Business Days after that dispute is resolved; or
 - B. otherwise within 20 Business Days after the date on which the State received the State Cure Notice;
- (iv) the Default Event is not capable of remedy and the Default Event Notice does not contain a claim for reasonable compensation for the Default Event, the State (or an Additional Obligor or Receiver appointed under clause 7) does not commence and continue to perform Project Co's obligations under the O&M Subcontract within 20 Business Days after the date on which the State received the State Cure Notice; or
- (v) the State notifies the O&M Subcontractor that it elects not to remedy, or procure the remedy of, the Default Event.

6.3 Early suspension of O&M Subcontractor's obligations

If:

- (a) **(right to suspend)**: the O&M Subcontractor, but for the operation of clause 6.2, would have a right to suspend performance of its obligations under the O&M Subcontract;
- (b) **(State Cure Notice)**: the O&M Subcontractor has issued a State Cure Notice to the State with respect to that Default Event;
- (c) **(dispute, non-payment or expired period)**: either:
 - (i) the State has not undertaken to pay to the O&M Subcontractor the amounts payable under the O&M Subcontract within 20 Business Days from the date of receipt of the State Cure Notice or, if the State refers the amounts in the Default Event Notice to dispute, within 20 Business Days of the dispute being determined; or
 - (ii) the State has undertaken to pay the O&M Subcontractor such amounts for a stated period and that period has expired without being extended by the State (acting reasonably); and
- (d) **(not remedied)**: the Default Event has not otherwise been remedied,

then the O&M Subcontractor may suspend performance of its obligations under the O&M Subcontract.

6.4 O&M Subcontractor Statements

As part of any Default Event Notice, the O&M Subcontractor must include a statement of:

- (a) **(amounts due and payable)**: all amounts due and payable to the O&M Subcontractor under the O&M Subcontract on or before the date of the Default Event Notice but remaining unpaid at such date;
- (b) **(monetary claim)**: the nature and, to the best of the O&M Subcontractor's knowledge and belief, the amount of any monetary claim asserted by the O&M Subcontractor arising in connection with the O&M Subcontract against Project Co; and
- (c) **(intention to terminate)**: where the O&M Subcontractor intends to terminate the O&M Subcontract due to a default or breach of condition of a non-financial nature or intends to claim damages or to seek some other form of relief:
 - (i) the provisions of the O&M Subcontract alleged to have been breached or not fulfilled;
 - (ii) sufficient information to enable the State to identify the material facts;
 - (iii) the steps reasonably required to remedy the Default Event (if reasonably capable of remedy);
 - (iv) the time within which the specified steps can reasonably be expected to be taken;
 - (v) if applicable, the amount of damages claimed and the manner in which they have been calculated; and
 - (vi) if applicable, the other relief to be sought,(being the **O&M Subcontractor Statement**).

6.5 Warranty of accuracy and waiver

The O&M Subcontractor:

- (a) **(warranty)**: warrants to the State that each O&M Subcontractor Statement will, subject to unintended error which the O&M Subcontractor agrees to rectify, be a true, complete and accurate statement of the amounts or other relief to which the O&M Subcontractor considers itself entitled; and
- (b) **(waiver)**: waives and abandons all Claims then known or which ought reasonably to have been known to the O&M Subcontractor arising in connection with the O&M Subcontract prior to the date of the Default Event Notice other than the claims disclosed in the O&M Subcontractor Statement.

6.6 Verification of O&M Subcontractor Statements

The State may appoint one or more independent chartered accountants, technical advisers or other appropriately qualified persons to verify (at the cost of Project Co) an O&M Subcontractor Statement, and the O&M Subcontractor must, subject to such persons executing an appropriate confidentiality agreement as the O&M Subcontractor may reasonably request, permit such persons to have access to and to make copies of all records, documents, data and accounting and other information not subject to legal (including, without limitation, solicitor and own client) and other professional privilege which is reasonably required with a view to confirming the accuracy and completeness of such O&M Subcontractor Statement.

6.7 O&M Subcontractor Statements to be conclusive evidence

- (a) **(Reliance):** Each Statement Beneficiary is entitled to rely on an O&M Subcontractor Statement for the purpose of determining the extent of the matters occurring prior to a Default Event which are required to be remedied and the requirements to effect the remedy of that Default Event by a Statement Beneficiary.
- (b) **(Conclusive evidence):** An O&M Subcontractor Statement will be conclusive evidence in favour of any Statement Beneficiary that the O&M Subcontractor has waived and abandoned all Claims then known or which ought reasonably to have been known to the O&M Subcontractor arising in connection with the O&M Subcontract prior to the date of the Default Event Notice other than the Claims disclosed in the O&M Subcontractor Statement.
- (c) **(Claims against Project Co):** Clauses 6.7(a) and 6.7(b) are without prejudice to the rights of the O&M Subcontractor to pursue any Claims against Project Co following the end of the Step-In Period or termination of the O&M Subcontract.
- (d) **(Disputes):** For the avoidance of doubt, an O&M Subcontractor Statement will not prevent any Statement Beneficiary from disputing the amount of any Claim or other relief sought by the O&M Subcontractor or the existence of any default by Project Co under the O&M Subcontract. In the case of any such dispute:
 - (i) the relevant Statement Beneficiary must pay the amount or perform the obligations (if any) not in dispute in accordance with this Deed and the O&M Subcontract;
 - (ii) the dispute must be referred to dispute resolution under clauses 9 to 10; and
 - (iii) during the period of dispute resolution, all parties must continue to perform their obligations under this Deed and the Project Documents.

7. Step-In by the State

7.1 Step-In Right

- (a) **(Exercise):** Following receipt of a State Cure Notice or if the State is entitled to exercise any of the rights referred to in clause 3.2 or otherwise as permitted under any Project Document, the State may:
 - (i) if permitted under the State Security, appoint a Receiver over Project Co or any or all of its assets (including the O&M Documents);
 - (ii) itself enter into possession of any or all of the assets of Project Co;
 - (iii) take such other action as it is permitted under the terms of the Project Documents; or
 - (iv) by notice to the O&M Subcontractor (**Additional Obligor Step-In Notice**), procure that an Additional Obligor assumes jointly and severally with Project Co all of Project Co's rights and obligations under the O&M Documents,

(each a **Step-In Right**).

- (b) **(Step-In Period):** The period from the date on which the O&M Subcontractor receives notice of the exercise of any Step-In Right to the earliest of:
- (i) the Additional Obligor Step-Out Date;
 - (ii) the date on which the O&M Subcontractor terminates the O&M Subcontract;
 - (iii) the date of any transfer under clause 8;
 - (iv) the date which the State has notified the O&M Subcontractor that the State will cease to exercise its Step-In Rights; and
 - (v) any other date on which the State ceases to continue to exercise its Step-In Rights,
- is the **Step-In Period**.
- (c) **(Acknowledgment):** The O&M Parties each acknowledge that the exercise by the State of a Step-In Right will not of itself contravene the O&M Documents, or constitute a Default Event under the O&M Subcontract or entitle an O&M Party to exercise any right (including termination) under an O&M Document.

7.2 Step-In by the State

- (a) **(Rights):** Subject to the Finance Direct Deed, the State may, at any time after it has become entitled to exercise a Step-In Right, exercise all or any of its rights and carry out all or any of the obligations of Project Co in connection with the O&M Documents, as if it were Project Co to the exclusion of Project Co.
- (b) **(No Liability):** Project Co and the O&M Parties each agree that, subject to clause 7.3(b), neither the State nor any of its Associate will have any Liability, and none of Project Co and the O&M Parties will be entitled to make, continue or enforce any Claim against the State or any of its Associate, arising in connection with the O&M Documents or this Deed by reason only of the State or any of its Associate exercising any of Project Co's rights, or performing any of Project Co's obligations under the O&M Documents other than, and then only to the extent of, Liability for reckless, unlawful, malicious acts or omissions, of the State or any of its Associates.

7.3 Step-In using Additional Obligor

- (a) **(Assumption Date):** The Additional Obligor will become a party to the O&M Documents on the date on which the Additional Obligor Step-In Notice is given to the O&M Subcontractor or such later date as the O&M Subcontractor and the State may agree (**Assumption Date**).
- (b) **(Rights and obligations of Additional Obligor):** During a Step-In Period in respect of which the State has exercised a Step-In Right under clause 7.1(a)(iv):
- (i) subject to clause 7.3(b)(ii), the Additional Obligor will be jointly and severally:
 - A. entitled with Project Co to exercise the rights of Project Co under the O&M Documents (excluding any accrued rights of Project Co in respect of any damage, loss, cost, charge, expense, outgoing or payment to the extent that the rights

arose prior to the Assumption Date) (**Project Co's Rights**);
and

- B. liable with Project Co for the performance or non-performance of all Project Co's obligations under the O&M Documents arising on or after the Assumption Date except as released in accordance with clause 7.3(e);
- (ii) as between Project Co, the O&M Parties and the Additional Obligor, only the Additional Obligor is authorised to deal with the O&M Parties and to exercise Project Co's Rights;
 - (iii) Project Co acknowledges that it will be legally bound by all the acts and omissions of the Additional Obligor in so dealing with the O&M Parties and in exercising Project Co's Rights;
 - (iv) the Additional Obligor will be bound by any earlier decision, directions, approvals, notices or consents given or made prior to the Assumption Date;
 - (v) clause 14 will apply to the O&M Parties and the Additional Obligor as if the address and email address of the Additional Obligor were set out in addition to those of Project Co; and
 - (vi) the O&M Parties will owe its obligations under the O&M Documents to Project Co and the Additional Obligor jointly but the performance by an O&M Party in favour of either Project Co or the Additional Obligor will be a good discharge of the relevant obligations under the O&M Documents.
- (c) (**No Liability**): Without prejudice to the O&M Subcontractor's rights under clauses 6.2 and 6.3, the Additional Obligor will have no obligation to, and no Liability in respect of, remedying any default or breach of Project Co under the O&M Documents arising prior to the Assumption Date.
- (d) (**Additional Obligor Step-Out Date**): The Additional Obligor may at any time give the O&M Subcontractor not less than 30 days' notice terminating the Additional Obligor's rights or obligations under the O&M Documents (without affecting the continuation of Project Co's obligations or liabilities towards the O&M Parties under the O&M Documents). Such notice must specify the date on which it takes effect, which must be:
- (i) at least 30 days after the date of the notice; or
 - (ii) if a Novation Notice has been given, the Novation Notice Date,
- (**Additional Obligor Step-Out Date**).
- (e) (**Release**): On and from the Additional Obligor Step-Out Date, between the O&M Parties and the Additional Obligor, each of the O&M Parties and the Additional Obligor will be released from all obligations under the O&M Documents (except for those obligations which have arisen during the relevant Step-In Period), whether or not a Claim has been made in respect of those obligations or they have not fallen due to be performed or have not been performed.

7.4 Indemnity

Project Co must indemnify the State, its Associates and any Additional Obligor against any Claim or Liability (including any Claim made by, or Liability to, a third party) the State, any of its Associates or any Additional Obligor suffers or incurs arising in connection with taking any action under clause 7.2 or clause 7.3, except to the extent that such Claim or Liability is caused or contributed to by any of the events set out in clause 37.11 of the Project Agreement.

8. State's option to novate to the State or third party

8.1 Option

- (a) **(Novation Notice):** The State may require a novation of the O&M Documents upon the termination of the Project Agreement, by giving a notice (**Novation Notice**) to the O&M Subcontractor. The Novation Notice must specify the person to whom the State intends to novate the O&M Documents whether this be the State or another person (**Substitute Party**).
- (b) **(Effect of Novation Notice):** If the State issues a Novation Notice then, until the Novation Notice Date, the O&M Parties must continue to perform their respective obligations under the O&M Documents.
- (c) **(Acknowledgement):** The O&M Parties each acknowledge that the giving of a Novation Notice by the State will not of itself contravene, or constitute a Default Event under, an O&M Document or entitle an O&M Party to exercise any Power (including termination) under it.

8.2 Novation to Substitute Party

- (a) **(Effect of novation):** Subject to clause 8.3, with effect from the Novation Notice Date:
 - (i) the Substitute Party will (and if the Substitute Party is not the State, the State will procure that the Substitute Party does) assume:
 - A. any obligation of Project Co under the O&M Subcontract arising before the Novation Notice Date insofar as it relates to the payment of an amount of money that:
 - 1) is due and payable under the terms of the O&M Subcontract;
 - 2) is not the subject of a dispute under the O&M Subcontract (or is the subject of a dispute under the O&M Subcontract in which case the Substitute Party will, on the determination of such dispute, assume such obligations in accordance with that determination); and
 - 3) does not relate to the performance of O&M Activities for which the State has paid Project Co under the Project Agreement; and
 - B. the obligations of Project Co under the O&M Documents arising on and from the Novation Notice Date (including in relation to payment of amounts for any part of the O&M

Activities performed before the Novation Notice Date that become due and payable on or after the Novation Date notwithstanding that such amounts relate to work performed before the Novation Notice Date) subject to any amendments agreed to the O&M Documents in accordance with clause 8.2(a)(vi);

- (ii) without prejudice to any then accrued rights against Project Co (other than termination), any O&M Subcontractor's right that has been suspended by virtue of clause 6 will be of no further effect;
- (iii) the Substitute Party will have all the rights of Project Co under the O&M Documents (excluding any accrued rights of Project Co in respect of any damage, loss, cost, charge, expense, outgoing or payment to the extent that those rights arose prior to the Novation Notice Date and are the subject of any dispute referred to in clause 8.2(a)(i)A.2));
- (iv) subject to clause 8.2(a)(iii) and any amendments agreed to the O&M Documents in accordance with clause 8.2(a)(vi), the O&M Parties will be:
 - A. bound by and must comply with the provisions of the O&M Documents binding on it for the benefit of the Substitute Party as if the Substitute Party were Project Co; and
 - B. entitled to any extensions of time which accrued to the O&M Subcontractor prior to the Novation Notice Date;
- (v) Project Co is released from all of its obligations and Liabilities under the O&M Documents, excluding any accrued obligations or Liabilities of Project Co to the extent that those accrued obligations or Liabilities:
 - A. arose in connection with events occurring prior to the Novation Notice Date; and
 - B. are not obligations and Liabilities assumed by the Substitute Party under clause 8.2(a)(i); and
- (vi) the O&M Parties and the Substitute Party will promptly negotiate in good faith, any amendments to the O&M Documents that are necessary to reflect the termination of the Project Agreement.

For the avoidance of doubt, any caps on Liability in the O&M Subcontract will continue to apply, but so that any Liability of the O&M Subcontractor incurred to Project Co prior to the Novation Notice Date is taken into account in respect of any ongoing liability of the O&M Subcontractor to the Substitute Party.

- (b) **(No set off):** Neither O&M Party is entitled to exercise any right of set off, deduction, abatement or counterclaim against the Substitute Party if, and to the extent that, such right arose prior to the Novation Notice Date.
- (c) **(Novation Deed):** Subject to clause 8.3(e), Project Co, the O&M Parties and the Substitute Party must enter into an agreement in form and substance reasonably requested by the Substitute Party reflecting the novation of the O&M Documents as contemplated in clause 8.2(a) and take such other action as is required to vest in the Substitute Party full legal and equitable title to any retention account, bank

guarantee, performance bond, letter of credit or other security held by Project Co to secure the obligations of an O&M Party under the O&M Documents.

- (d) **(Attorney):** For valuable consideration, Project Co and the O&M Parties each irrevocably appoint the State, on its behalf and in its name or otherwise, as its attorney to do anything which Project Co or an O&M Party is obliged to do (but has not done within 5 Business Days of request) under clause 8.2(c). Each of Project Co and the O&M Parties ratifies and confirms and agrees to ratify and confirm whatever any such attorney lawfully does in the exercise of the power of attorney in this clause 8.2(d).

8.3 Additional requirements where Substitute Party is not the State

- (a) **(Information to be provided by the State):** If the Novation Notice specifies that the Substitute Party is a person other than the State, the State must, at the time it gives a Novation Notice, provide to the O&M Parties the following particulars of the Substitute Party:
- (i) its name, place of incorporation and identity of shareholder(s);
 - (ii) if available, its most recent published audited accounts; and
 - (iii) sufficient particulars of the finance available to the Substitute Party to enable the O&M Parties to decide whether to grant its consent to the Substitute Party.
- (b) **(Consent by O&M Parties):** A novation to a Substitute Party other than the State under this clause 8 will only be effective, and the O&M Parties will only be required to enter into a novation agreement under clause 8.2(c), if the O&M Parties each consent to that novation (such consent not to be unreasonably withheld or delayed) or are deemed to have consented in accordance with clause 8.3(d).
- (c) **(Additional information):** The State must as soon as practicable supply the O&M Parties with such additional information to that provided under clause 8.3(a) as the O&M Parties each reasonably require to enable it to decide whether to grant consent under clause 8.3(b), and the O&M Parties must each consider such information expeditiously and inform the State promptly if it requires further information.
- (d) **(Deemed consent):** Unless an O&M Party notifies the State of its earlier consent or refusal to a novation, the O&M Parties will each be deemed to have consented to a novation to a Substitute Party other than the State if it has not notified the State under clause 8.3(e)(ii) within 10 Business Days of the later of the receipt of the Novation Notice and the information required under clause 8.3(a) and clause 8.3(c).
- (e) **(Unreasonably withholding consent):** An O&M Party will be deemed to unreasonably withhold consent unless:
- (i) the grounds for refusal are reasonable and are based on:
 - A. the proposed novation deed referred to in clause 8.2(c) for the Substitute Party to assume the rights and obligations of Project Co under the O&M Documents not being effective to substitute the Substitute Party for Project Co;

- B. the Substitute Party not having the legal capacity, power and authorisation to become a party to and perform the obligations of Project Co under the O&M Documents including any necessary authorisations and consents;
 - C. the financial standing of the Substitute Party being insufficient for it to meet the obligations of Project Co under the O&M Documents; or
 - D. an O&M Party being placed in breach of any Laws by the proposed novation and assignment; and
- (ii) it has notified the State of such reason.
- (f) **(If an O&M Party withholds consent):** If either O&M Party withholds its consent to a Novation Notice under this clause 8.3, this will not prejudice the ability of the State to give one or more subsequent Novation Notices, and information under clause 8.3(a), containing changed particulars relating to the same Substitute Party or particulars relating to another Substitute Party.

8.4 Accrued obligations and liabilities

Clause 8.2 does not operate to:

- (a) **(State to assume obligations or Liabilities):** require the State to assume any obligations or Liabilities arising from, or which are required to be performed in connection with the O&M Documents prior to the Novation Notice Date unless expressly required to do so in clause 8.2; or
- (b) **(release Project Co):** release Project Co from such obligations or Liabilities unless expressly required to do so in clause 8.2.

9. Dispute Resolution

9.1 Procedure for resolving disputes

- (a) **(Disputes to be resolved):** Any dispute arising under this Deed must be resolved by the parties to that dispute (**Disputing Parties**) in accordance with this clause 9.
- (b) **(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 9.2;
 - (ii) secondly, if the dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 9.2(c)(i) the Disputing Parties may agree that the dispute be referred to an expert for determination in accordance with clauses 9.4 to 9.8 or to arbitration under clause 10; 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 9.2(c)(i) and irrespective of whether the Disputing

Parties failed to meet as required by that clause or whether having so met the parties failed 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 9.2(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 9.6(a),

then the dispute must be referred to arbitration in accordance with clause 10.

9.2 Negotiation

- (a) **(Notification):** If a dispute arises then a party may give notice to each other party requesting that the dispute be referred for resolution by negotiation between the Chief Executive Officers (or equivalent) of the Disputing Parties **(Representatives)**.
- (b) **(Contents of Notice):** A notice under clause 9.2(a) must:
 - (i) state that it is a notice under this clause 9; 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 9.2(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 9.2(a) is received (or such later date as the Disputing Parties may agree); and
 - (ii) any agreement reached between the Representatives will be reduced to writing, signed by or on behalf of each Disputing Party and will be contractually binding on the Disputing Parties.

9.3 Expert determination

If:

- (a) **(dispute unresolved by Representatives):** a dispute which has been referred to the Representatives for negotiation in accordance with clause 9.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 9.2(c)(i); and
- (b) **(referral to expert):** the Disputing Parties agree within 20 Business Days after the expiration of the period for negotiation referred to in clause 9.2(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 9.4 to 9.8. For the avoidance of doubt, a dispute may only be referred to an expert for determination by agreement of the Disputing Parties.

9.4 Selection of expert

- (a) **(Exchange of lists of 3 preferred experts):** Within 7 Business Days after the date on which the Disputing Parties agree to refer a dispute to an expert for determination under clause 9.3, the Disputing Parties must exchange lists of 3 persons (in order of preference) who, if appointed, would satisfy the requirements of clause 9.4(d), from whom the expert is to be chosen.
- (b) **(Appointment of person who appears on both lists):** Any person who appears on the list of all of the Disputing Parties exchanged under clause 9.4(a) will be appointed as the expert to determine a dispute and if more than one person appears on the list of all of the Disputing Parties, the person given the highest order of priority by the party who gave the notice under clause 9.2(a) will be appointed.
- (c) **(Appointment if no person appears on both lists):** If no person appears on the list of all of the Disputing Parties and the Disputing Parties cannot otherwise agree an expert, the party which gave the notice under clause 9.2(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 Disputing Parties under clause 9.4(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 Disputing Parties under clause 9.4(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):** No Disputing Party will be entitled to challenge the appointment of an expert under this clause 9.4 on the basis that the expert does not satisfy the requirements of clause 9.4(d).
- (f) **(Not an arbitration agreement):** Any agreement for expert determination under this Deed will not constitute an arbitration agreement for the purposes of the *Commercial Arbitration Act 2011* (Vic).
- (g) **(Agreement):** The Disputing 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.

9.5 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.

9.6 Expert finding

- (a) **(Notification):** The determination of the expert must be in writing and will be final and binding on the Disputing Parties unless, within 10 Business Days of receipt of the determination, a Disputing Party gives notice to each other Disputing Party of its dissatisfaction and intention to refer the matter to arbitration in accordance with clause 10.
- (b) **(Amendment to determination):** Upon submission by any Disputing 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.

9.7 Liability of expert

- (a) **(Liability of expert):** The Disputing 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 Claim 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 Disputing Parties will jointly engage the expert services in connection with the expert determination proceedings and each Disputing Party will seek a separate Tax Invoice equal to its share of the cost of the expert.

9.8 Costs

The Disputing 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.

10. Arbitration

10.1 Reference to Arbitration

- (a) **(Dispute):** If:
 - (i) a dispute:
 - A. which has been referred to the Representatives for negotiation in accordance with clause 9.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 9.2(c)(i); and

- B. the Disputing Parties do not agree to refer the dispute to an expert for determination; or
- (ii) in the case of a dispute which the Disputing Party agree to refer to expert determination under clause 9.3:
 - 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 9.6,then any Disputing Party may notify the other Disputing Parties that it requires the dispute to be referred to arbitration.
- (b) **(Referral)**: Upon receipt by a Disputing Party of a notice under clause 10.1(a), the dispute will be referred to arbitration.

10.2 Arbitration

- (a) **(ACICA Rules)**: Arbitration in accordance with this clause 10 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 10.
- (b) **(Seat)**: The seat of the arbitration will be Melbourne, Victoria.
- (c) **(Language)**: The language of the arbitration will be English.

10.3 Appointment of arbitrator

The Disputing Parties will endeavour to agree on the person to be appointed as arbitrator, but if no such agreement is reached within 14 Business Days of the dispute being referred to arbitration in accordance with clause 10.1(b), the arbitrator will be appointed by the Australian Centre for International Commercial Arbitration.

10.4 General Principles for conduct of arbitration

- (a) **(Conduct of arbitration)**: The Disputing 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 10 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 10.4(a)(i) and 10.4(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 10.4(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 of the Disputing Parties must give notice of those witnesses (both factual and expert) of each other Disputing 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 10.4(d)(ii);
 - (vii) a Disputing 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 Disputing Party is expected to put its case on significant issues in cross examination of a relevant witness called by the other Disputing 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 other Disputing Party may know the nature of and basis for the challenge to the witness' written evidence.
- (e) **(Experts):** Unless otherwise ordered each Disputing Party may only rely upon one expert witness in connection with any recognised area of specialisation.

10.5 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 10.5, have applied to any dispute referred to arbitration in accordance with this clause 10.

10.6 Extension of ambit of arbitration proceedings

- (a) **(Extending Disputes):** Where:
- (i) a dispute between the Disputing Parties to this Deed is referred to arbitration in accordance with this clause 10; and
 - (ii) there is some other dispute also between the Disputing Parties to and in accordance with this Deed (whenever occurring),

the arbitrator may, upon application being made to the arbitrator by one or more of the Disputing 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 10.6(a) on such terms and conditions (if any) as the arbitrator thinks fit.

10.7 Award final and binding

- (a) **(Final and binding):** Subject to clause 10.7(b), any award will be final and binding on the Disputing Parties.
- (b) **(Appeal):** Each Disputing 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 10.

10.8 Continue to perform

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

10.9 Governing law of arbitration agreement

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

10.10 Interlocutory relief

This clause 10 does not prevent a Disputing Party from seeking urgent interlocutory relief from a court of competent jurisdiction where, in that Disputing Party's reasonable opinion, that action is necessary to protect that Disputing Party's rights.

10.11 Consolidation

The parties agree that section 27C of the *Commercial Arbitration Act 2011* (Vic) will apply.

11. Termination of this Deed

- (a) **(Satisfaction of obligations under O&M Subcontract):** This Deed will terminate upon the performance and satisfaction of all of the obligations under the O&M Subcontract.
- (b) **(Does not affect rights of parties):** The termination of this Deed does not affect the rights of any party which have accrued to that party before the date of termination.

12. Insurances

- (a) **(O&M Phase Insurances):** Notwithstanding anything else, the O&M Subcontractor will:
 - (i) take out all insurances as are required to be taken out by it under the O&M Subcontract from the Date of Stage One Completion; and
 - (ii) otherwise comply with all of its obligations in relation to insurance in the O&M Subcontract.
- (b) **(Not to prejudice):** Project Co and the O&M Subcontractor must ensure that it does not do or omit to do anything or does not permit anything to be done or omitted to be done whereby any Insurance policy required under the O&M Subcontract may be prejudiced.
- (c) **(Void or Voidable):** If any default is made by the O&M Subcontractor in effecting or maintaining such Insurance policy or if any such Insurance policy becomes void or voidable, the State may (but is not obliged to) effect or maintain that Insurance policy at the cost of the O&M Subcontractor or, failing it, Project Co.
- (d) **(State to be covered):** If required by the Project Agreement, on any Insurance contract entered into by the O&M Subcontractor in accordance with clause 12(a), the O&M Subcontractor must ensure that the State and the State's Associates are specified as a person to whom the Insurance cover provided by that contract extends.
- (e) **(All documents, evidence and information):** Project Co and the O&M Subcontractor must do all things necessary and provide all documents, evidence and information necessary to enable the State to collect or recover any moneys due or to become due to the State in respect of any Insurance policy required under the O&M Subcontract at the cost of the O&M Subcontractor or, failing it, Project Co.
- (f) **(Cancellation, lapse or material change):** Without prejudice to the above requirements, neither Project Co nor the O&M Subcontractor will cause or take any steps to bring about the cancellation, lapse, material change, reduction or any rescinding of any such Insurance policy unless it has first obtained the consent of the State.
- (g) **(Notify the State):** Project Co and the O&M Subcontractor will immediately notify the State of any cancellation, lapse, material change, reduction, or any rescinding of any such Insurance policy, and of the occurrence of any event giving rise to any claim under any such Insurance policy in respect of the Project.
- (h) **(Several obligations):** Notwithstanding clause 1.3(o), but subject to the obligations of Project Co under the terms of the Project Agreement, the obligations of Project Co and the O&M Subcontractor in this clause 12 are several.

13. Goods and Services Tax (GST)

- (a) **(Amount payable):** Notwithstanding any other provision of this Deed, any amount payable for a supply made under or in connection with this Deed 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 Deed:
- (i) any amount payable or consideration to be provided in accordance with any other provision of this Deed 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 Deed or no later than the time at which the Agreed Amount for that Taxable Supply is to be provided in accordance with this Deed. The Recipient is not obliged to pay any amount in accordance with this clause 13(b) 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 Deed (incorporating any increasing adjustments or decreasing adjustments relating to that supply) varies from the additional amount it received from the Recipient under clause 13(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 in 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 13(b) or 13(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 13 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 Deed, the matters required to be taken into account by the Supplier in accordance with this clause 13 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 Deed 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 Deed 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 agrees 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 Deed, 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 Deed.
- (i) **(GST Groups):** For the purposes of this Deed, 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 13 also applies then clause 53 of the Project Agreement will apply in respect of that supply and the provisions of this clause 13 (but for this paragraph) will not apply.
- (k) **(Definitions):** In this clause 13 unless otherwise defined in this Deed, terms used have the meanings given to them in the GST Law.

14. Notices

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

- (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);

State:

Attention: [#]

Address: [#]

Email: [#]

Project Co:

Attention: [#]

Address: [#]

Email: [#]

O&M Subcontractor:

Attention: [#]

Address: [#]

Email: [#]

O&M Guarantor:

Attention: [#]

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 14(b); and
- (e) **(taken to be received)**: are taken to be received by the addressee at the address set out in clause 14(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.

15. Confidential Information and disclosure

15.1 Confidential Information and disclosure by the State

- (a) **(Public Disclosure Obligations):** The State or any Authority may disclose any information in connection with the Project (including any Confidential Information) in accordance with its Public Disclosure Obligations and the O&M Parties must use all reasonable endeavours to assist the State or an Authority in meeting its Public Disclosure Obligations.
- (b) **(Other purposes):** 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) **(State's rights):** Subject to clause 15.1(d), in meeting its Public Disclosure Obligations or as otherwise considered necessary by the State, the State may publish, disclose or make generally available each Project Document on a Victorian Government website.
- (d) **(Commercially sensitive information):** The State 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 or as required under clause 15.1(b).

15.2 Confidential Information and disclosure by Project Co and the O&M Parties

- (a) **(Confidentiality obligation):** Subject to clause 15.2(b), Project Co and the O&M Parties must treat as secret and confidential all Confidential Information in connection with this Deed and any other Project Document.
- (b) **(Disclosure of Confidential Information):** Without limiting Project Co's and the O&M Parties' obligations under clause 15.2(a) and subject to clause 15.2(c), Project Co and the O&M Parties may disclose Confidential Information to its Associates to the extent necessary for the purpose of undertaking the Project.
- (c) **(Confidentiality deed):** Before disclosing any Confidential Information, Project Co or the O&M Parties (whichever is disclosing the Confidential Information) must ensure that the person to whom the information is disclosed enters into a confidentiality deed with Project Co or the O&M Parties (whichever is disclosing the Confidential Information) on terms reasonably acceptable to the State.

15.3 Disclosure by the O&M Parties

- (a) **(The O&M Parties' disclosure obligations):** Subject to clause 15.3(b), the O&M Parties 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 the State a copy of any public disclosure, announcement or statement agreed to or approved by the State in accordance with this clause 15.3(a) or for which the State's consent or approval was not required in accordance with clause 15.3(b).
- (b) **(Permitted disclosure):** For the purposes of clause 15.3(a), the O&M Parties will not be required to obtain the State's consent or approval to the extent that any disclosure, announcement or statement is:
- (i) required by Law, provided that it:
 - A. notifies the State 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 any O&M Party 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 O&M Parties having used all reasonable endeavours to obtain the State's consent within a timeframe sufficient to allow it to meet the timeframe imposed by the relevant stock exchange.

16. Return of documents

The O&M Subcontractor must return a copy of all plans, drawings, specifications and other documents which come into its possession for the purpose of the O&M Subcontract or this Deed to the State at the expiration of the O&M Subcontract.

17. Miscellaneous

17.1 Governing Law and jurisdiction

- (a) **(Governing Law):** This Deed is governed by, and must be construed according to, the Laws of Victoria, Australia.
- (b) **(Jurisdiction):** Without limiting clauses 9 to 10, 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 which may be brought in connection with this Deed.

17.2 Entire agreement

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

- (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 of the parties.

17.3 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 Deed.

17.4 Survival of certain provisions

- (a) **(Surviving Clauses):** All provisions of this Deed which, expressly or by implication from their nature, are intended to survive the rescission, termination or expiration of this Deed will survive the rescission, termination or expiration of this Deed, including any provisions in connection with:
 - (i) the State'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 State;
 - (v) any indemnity or financial security given in accordance with this Deed;
or
 - (vi) any right or obligation arising on termination of this Deed.
- (b) **(Interpretation):** No provision of this Deed which is expressed to survive the termination of this Deed will prevent any other provision of this Deed, as a matter of interpretation, also surviving the termination of this Deed.
- (c) **(Survival of rights and obligations):** No right or obligation of any party will merge on completion of any transaction under this Deed. All rights and obligations in accordance with this Deed survive the execution and delivery of any transfer or other document which implements any transaction in accordance with this Deed.

17.5 Waiver

- (a) **(Writing):** A waiver given by a party in accordance with this Deed is only effective and binding on that party if it is given or confirmed in writing by that party.
- (b) **(No waiver):** A failure to, a delay in or the partial exercise or enforcement of a right provided by Law or in accordance with this Deed by a party 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 in accordance with this Deed.
- (c) **(No waiver of another breach):** No waiver of a breach of a term of this Deed operates as a waiver of another breach of that term or of a breach of any other term of this Deed.

17.6 Consents, approvals and directions

A consent or approval required in accordance with this Deed from the State may be given or withheld, or may be given subject to any conditions, as the State thinks fit, unless this Deed expressly provides otherwise.

17.7 Amendments

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

17.8 Expenses

Except as otherwise expressly provided in this Deed 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 Deed.

17.9 Severance

If, at any time, a provision of this Deed is or 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 Deed; or
- (b) that provision under the Law of any other jurisdiction.

17.10 Counterparts

This deed 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.

17.11 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.

17.12 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 Deed whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.
- (b) **(Rights, obligations and liabilities):** Without limiting clause 17.12(a), the rights, obligations and liabilities of the parties (including those relating to proportionate liability) are as specified in this Deed and not otherwise, whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.

17.13 Indemnity held on trust

- (a) **(Benefit of indemnities):** The State holds on trust for its Associates the benefit of:
 - (i) each indemnity, promise and release given by Project Co or the O&M Parties under this Deed in favour of the State's Associates; and
 - (ii) each right in this Deed to the extent that such right is expressly provided to be for the benefit of the State or its Associates.
- (b) **(Project Co and O&M Parties acknowledgement):** Project Co and the O&M Parties acknowledge the existence of such trusts and consents to:
 - (i) the State exercising rights in relation to, or otherwise enforcing such indemnities, releases and rights on behalf of its Associates; and
 - (ii) the State's Associates exercising rights in relation to, or otherwise enforcing the indemnities, releases and those rights as if they were a party to this Deed.
- (c) **(Consent not required):** The parties agree that the State does not require the consent of its Associate to amend or waive any provision of any Project Document.

17.14 Assignment

Except as expressly contemplated by this Deed, none of Project Co or the O&M Parties may assign or transfer any of its rights or obligations under this Deed or an O&M Document.

17.15 Set off

Without limiting the State's rights under the Project Agreement, all moneys which the State may pay or incur and for which Project Co is liable under the terms of the Project Agreement or in respect of which it is under this Deed liable to make reimbursement to or indemnify the State, may be deducted by the State from all moneys due, becoming due or to become due from it to Project Co under the Project Agreement or may be recovered from Project Co by action at Law or otherwise.

Executed as a deed.

[State Note: Execution blocks to be inserted.]