

Finance Direct Deed

Stage One - East West Link

[]

State

[]

Project Co

[]

Security Trustee

[]

Agent

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Finance Direct Deed made on

Parties [] (State)
[] (Project Co)
[] (Security Trustee)
[] (Agent)

Background

- A. The background to the Project is set out in the Project Agreement.
- B. Under the Finance Documents, the Financiers have agreed to provide finance to Project Co in respect of the Project, and under the Project Agreement the State has agreed to pay the State Contributions to Project Co and granted Project Co the right to earn the Quarterly Service Payment and the Early Completion Bonus.
- C. Project Co has agreed to grant the Financiers Securities to the Security Trustee to secure the due performance of Project Co's obligations under the Finance Documents, and to grant the State Securities to the State to secure its obligations to the State under the State Project Documents.
- D. The Security Trustee, the Agent, the State, and Project Co wish to regulate the manner in which certain rights in respect of the Project are to be exercised.

Operative provisions

1. Definitions 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:

Account Bank has the meaning given in clause 6.5.

Agreed Amount has the meaning given in clause 18(b)(i).

Amendment has the meaning given in clause 10.1.

Beneficiaries means the beneficiaries from time to time under the Security Trust Deed.

Consent Deed means each of the D&C Consent Deed and the O&M Consent Deed.

Cost has the meaning given in clause 18(g).

Cure Activities means the remedy of all PA Default Events (or overcoming their effects to the reasonable satisfaction of the State).

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

Direct Deeds means:

- (a) the D&C Direct Deed; and
- (b) the O&M Direct Deed.

Disputing Parties has the meaning given in clause 16.1(a).

Enforcing Party means any agent, attorney, trustee, receiver, receiver and manager, administrator, liquidator or provisional liquidator appointed under any Security.

Finance Default means:

- (a) an event of default (however described) under the Finance Documents; or
- (b) any event which entitles any Finance Party to cease to make available any financial accommodation in respect of Project Co's financial indebtedness.

Finance Party means the Security Trustee, the Agent, each Financier and each other Beneficiary.

Financier Enforcing Party means the Security Trustee and any Enforcing Party appointed under the Financiers Securities.

Financiers' Cure Program means, at any time, the steps and actions that together comprise a program and the date or dates then specified in the program for cure of any PA Default Event, as outlined in clause 5.2(c) and as extended (if at all) in accordance with clause 5.4.

Financiers Securities means:

- (a) the deed entitled [] between [] and the Security Trustee;
- (b) each other Security (as defined in the [Security Trust Deed]); and
- (c) any other Security Interest which is at any time collateral to any of the foregoing.

[State Note: To be confirmed based on Structure of Proposal.]

Fit and Proper Person means, in respect of a person, that if that person acquired Control of Project Co by means of a Share Capital Dealing then the State would not be entitled to withhold its consent to the relevant Share Capital Dealing because in the State's reasonable opinion one or more of the criteria in clause 47.5 of the Project Agreement are satisfied.

PA Default Event means:

- (a) subject to paragraph (b), a Major Default or a Default Termination Event; and
- (b) for the purposes of clauses 5.6 and 5.7 only:
 - (i) a Major Default constituted by an Insolvency Event occurring in respect of the D&C Subcontractor, the O&M Subcontractor or the Parent Guarantors; or
 - (ii) a Default Termination Event constituted by Project Co at any time displaying an intention to wholly or substantially abandon or does permanently abandoning the D&C Activities or the O&M Activities.

Permitted Amendment has the meaning given in clause 10.2.

Project Account means the Project Account as defined in the [Security Trust Deed] and any other account of Project Co with a Finance Party (but excluding the Distributions Account as defined in the [Security Trust Deed]).

Project Agreement means the document entitled "Project Agreement Stage One - East West Link" between the State and Project Co dated on or about the date of this Deed.

Project Co Termination Payment means any Termination Payment payable by Project Co to the State.

Project Co's Rights means Project Co's rights under the Project Documents.

Receipt has the meaning given in clause 4.6.

Recipient has the meaning given in clause 18(b)(ii).

Relevant Financier has the meaning given in clause 5.7(a)(ii).

Representatives has the meaning given in clause 16.2(a).

Revenue has the meaning given in clause 18(f).

Securities means:

- (a) the State Securities; and
- (b) the Financiers Securities,

and **Security** means each or any one of them as the context requires.

Security Interest means any mortgage, charge, pledge, lien, encumbrance, assignment, hypothecation, security interest, title retention, preferential right, trust arrangement, contractual right of set-off or any other security agreement or arrangement in favour of any person including a security interest under section 12 of the *Personal Property Securities Act 2009* (Cth).

Security Trust has the meaning given in the Security Trust Deed.

Security Trustee Tripartite Rights has the meaning given in clause 9.3(a).

State Priority Moneys means any amounts owing to the State under clauses 36.4(a), 38.8 and 40.7(c) of the Project Agreement or as a result of action taken under clause 7 of a Direct Deed.

State Securities means:

- (a) the State Security; and
- (b) any other instrument or Security Interest which is at any time collateral to any of the foregoing.

Super Majority Financiers means all Financiers holding senior debt commitments other than the Relevant Financier, and holding in aggregate senior debt commitments equal to or greater than [75%] of all senior debt commitments. *[State Note: Percentage of senior debt commitments to be finally determined by the State by reference to the number of initial Financiers in the debt funding structure.]*

Supplier has the meaning given in clause 18(b).

Valid Claim means a claim by a Subcontractor (other than the D&C Subcontractor or O&M Subcontractor) for payment for works performed by that Subcontractor under its Subcontract and in respect of which the Subcontractor has become entitled to suspend work pursuant to the Security of Payment Act because of a failure by the D&C Subcontractor or O&M Subcontractor or any of their respective Associates to pay the amount claimed.

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)**: subject to clause 1(e), 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) **(consent to amendments)**: references to the D&C Subcontract, the O&M Subcontract, the Consent Deeds, the Finance Documents and the Equity Documents or any of them are references to those documents or the relevant document in the form either before the date of this Deed, or in satisfaction of the conditions outlined in clause 3 of the Project Agreement but as modified, varied, amended or replaced by the parties to those documents, with the consent of the State (as required) under clause 47.1 of the Project Agreement;
- (f) **(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;
- (g) **(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;
- (h) **(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;
- (i) **(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;
- (j) **("includes")**: "includes" will be read as if followed by the phrase "(without limitation)";

- (k) ("**or**"): the meaning of "or" will be that of the inclusive, being one, some or all of a number of possibilities;
- (l) ("**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;
- (m) ("**\$**"): a reference to "\$", AUD or dollar is to Australian currency;
- (n) ("**time**"): a reference to time is a reference to time in Melbourne, Australia;
- (o) ("**rights**"): a reference to a right includes any benefit, remedy, function, discretion, authority or power;
- (p) ("**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;
- (q) ("**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;
- (r) ("**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;
- (s) ("**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
- (t) ("**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 Business Day

If the day on or by which anything is to be done in accordance with this Deed is not a Business Day, that thing must be done:

- (a) ("**payments**"): if it involves a payment other than a payment which is due on demand, on the preceding Business Day; or
- (b) ("**otherwise**"): in all other cases, no later than the next Business Day.

1.5 Provisions limiting or excluding Liability

Any provision of this Deed which seeks, either expressly or by implication, to limit or exclude any liability of a party is to be construed as doing so only to the extent permitted by Law.

1.6 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.

1.7 Action without delay

Unless there is a provision in this Deed which specifies a period of time in which something must be done by the parties, all things must be done without undue delay.

1.8 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;
- (b) **(no guarantee)**: cannot guarantee the relevant outcome; and
- (c) **(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.

1.9 Capacity of Security Trustee

- (a) **(Capacity of Security Trustee)**: The Security Trustee enters this Deed as trustee for the Beneficiaries under the Security Trust Deed without incurring liability in any other capacity and with recourse limited to the Security Trustee's right of indemnity:
 - (i) out of the assets of the Security Trust; and/or
 - (ii) from the Beneficiaries.
- (b) **(No application)**: The provisions of this clause 1.9 will not apply to any obligation or liability of the Security Trustee to the extent that it is not satisfied because there is a reduction in the extent, or an extinguishment, of the Security Trustee's indemnification out of the trust assets under the Security Trust Deed, because the Security Trustee has been guilty of fraud, wilful misconduct or gross negligence.
- (c) **(Role of Security Trustee)**: Each party acknowledges that the Security Trustee holds the benefit of this Deed for the benefit of the Beneficiaries and, as between the Security Trustee and the Beneficiaries:

- (i) is bound to act on the instructions of the Beneficiaries in accordance with the terms of the Security Trust Deed; and
- (ii) in the absence of such instructions from the Beneficiaries, the Security Trustee is not bound to act,

in each case without derogating from the rights of the State under this Deed arising from any act or failure to act.

- (d) **(Obligations limited):** The Security Trustee's obligations, duties and responsibilities are limited to those expressly set out in the Security Trust Deed and this Deed.
- (e) **(Appointment):** Each other party to this Deed may assume that the Security Trustee has been duly appointed, that its appointment has not been terminated or suspended (or the terms of its appointment materially amended) and that it is authorised to give any instruction, notice, consent or direction which it purports to give under this Deed

1.10 Replacement of Security Trustee

- (a) **(Assignment or novation):** If the Security Trustee is replaced as trustee under the Security Trust Deed, then the Security Trustee may assign, novate or otherwise transfer its rights and obligations under this Deed to the replacement trustee.
- (b) **(Novation deed):** Each party agrees that it will enter into a novation deed with any replacement security trustee that is appointed under the Security Trust Deed (in a form reasonably acceptable to the Security Trustee and the replacement security trustee).

1.11 Capacity of Agent

The Agent enters into this Deed in the capacity as agent for each of the Financiers. The rights and obligations of the Agent under this Deed at any time are the rights and obligations of the Financiers at that time. The Agent holds the benefit of this Deed for the benefit of each of the Financiers and is bound to act in accordance with the Finance Documents. No party to this Deed is obliged to enquire whether an exercise by the Agent of any right is within the Agent's authority as agent of the Financiers.

1.12 Inconsistency between State Project Documents

Where there is an inconsistency, ambiguity or discrepancy between this Deed and any other State Project Document, or within or between any of the State Project Documents (excluding the Project Agreement), then the following order of precedence applies:

- (a) this Deed;
- (b) the Project Agreement; and
- (c) the remaining State Project Documents.

1.13 Project Documents

The Security Trustee and the Agent each acknowledge that they have received a copy of the Project Documents.

1.14 Finance Documents

Project Co represents and warrants to the State that:

- (a) **(Full disclosure)**: before the date of this Deed, it has fully disclosed to the State the terms of the Finance Documents; and
- (b) **(Documents governing and creating Project Co financial indebtedness)**: those Finance Documents (together with the Equity Documents) are, on the date of this Deed, the only documents governing or creating Project Co's financial indebtedness.

1.15 Continuance of rights

- (a) **(Rights not affected)**: This Deed does not affect the rights or obligations of a party under a Project Document, except to the extent expressly provided in this Deed.
- (b) **(Liability not affected)**: The failure by a party (other than Project Co) to comply with the provisions of this Deed does not affect the liability of Project Co under any other Project Document.

1.16 Representations and warranties

Each party represents and warrants to each other party that:

- (a) **(power)**: it has power to enter into this Deed and perform its obligations under or as contemplated by this Deed and all necessary action has been taken to authorise its execution, delivery and performance;
- (b) **(valid and binding)**: this Deed constitutes its valid and binding obligations enforceable against it in accordance with its terms, subject to applicable bankruptcy, reorganisation, insolvency, moratorium or similar laws affecting creditors' rights generally and subject to the availability of equitable remedies; and
- (c) **(execution)**: the execution by it of, the performance by it of its obligations under, and the compliance by it with the provisions of this Deed does not and will not contravene any existing Law to which it is subject.

1.17 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 1.17(c), Project Co, the Agent and the Security Trustee 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 1.17(a) and (b) do not limit any Liability which the State would have had to Project Co, the Agent or the Security Trustee 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.

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 to 1.3 1.8, 1.16, 14, 16, 17, 19 and 20).

3. Consent to Securities

3.1 Consent by the State

- (a) **(Consent):** The State consents to the Financiers Securities.
- (b) **(Permitted Encumbrance):** The State acknowledges that each of the Security Interests created under the Financiers Securities is a "Permitted Encumbrance" for the purposes of the State Security.

3.2 Consent by Security Trustee and Agent

- (a) **(Consent):** The Security Trustee and the Agent each consent to the State Securities.
- (b) **(Permitted Security Interests):** The Security Trustee and the Agent each acknowledge that the State Securities are ["Permitted Security Interests"] for the purposes of the Finance Documents.

3.3 Nature of consents

Neither the State, the Agent nor the Security Trustee by their respective consents given in clauses 3.1 and 3.2, will be deemed to have:

- (a) **(approved):** approved the terms of any document;
- (b) **(agreed):** agreed, affirmed, represented or warranted the validity or enforceability or binding nature of any document; or
- (c) **(consented):** consented to any document granting or creating any interest in any right, title or property other than as set out in this Deed.

4. Order of priorities

4.1 Priority of Securities

Subject to clause 4.3, the parties agree that the order of priority of the Financiers Securities and the State Securities is, at any time:

- (a) **(State Securities):** firstly, the State Securities for any State Priority Moneys and any Project Co Termination Payment at that time;
- (b) **(Financiers Securities):** secondly, the Financiers Securities for the aggregate of:
 - (i) the Project Debt at that time; and
 - (ii) any fees, costs or expenses then due from Project Co under a Finance Document at that time including because of its breach of a Finance Document, including default interest;

- (c) **(other State Securities)**: thirdly, the State Securities for any amounts secured by them at that time, other than the State Priority Moneys and any Project Co Termination Payment; and
- (d) **(other Financiers Securities)**: fourthly, the Financiers Securities for any amount secured by them at that time other than those to which clause 4.1(b) applies.

4.2 Provisions apply despite anything to the contrary

Clause 4.1 applies notwithstanding:

- (a) **(Contents of Financiers Securities and State Securities)**: anything contained in the Financiers Securities or the State Securities;
- (b) **(Date or order of the Securities)**: the date or order of execution or registration of any of the Securities;
- (c) **(Order)**: the order in which any moneys may be or may have been advanced or deemed to be or have been advanced or become or became payable or secured under the respective Securities;
- (d) **(Payment and repayment)**: the payment or repayment in whole or in part from time to time of the money secured by the Financiers Securities or the State Securities;
- (e) **(Fluctuation in secured amounts)**: any fluctuation in the amount secured by the Financiers Securities or the State Securities from time to time;
- (f) **(Date)**: the respective dates on which anything is done or omitted to be done under or in relation to the Financiers Securities or the State Securities;
- (g) **(Contingent payment or moneys not due for payment)**: the moneys secured by the Financiers Securities or the State Securities being contingently payable or not due for payment; or
- (h) **(Contrary rule of law or equity)**: any rule of law or equity to the contrary.

4.3 Application of payments on enforcement

To give effect to the agreed order of priority under clause 4.1, the parties agree that any moneys received by the State, the Security Trustee or any Enforcing Party on enforcement of a Financiers Security or a State Security, as the case may be, will be applied in the following order of priority:

- (a) **(reasonable costs)**: first, *pari passu* towards the reasonable costs, charges and expenses of the State, the Security Trustee and any Enforcing Party appointed under a Security incurred in the enforcement of a Security in accordance with this Deed;
- (b) **(remuneration)**: secondly, towards the remuneration of any such Enforcing Party;
- (c) **(priorities)**: thirdly, to the State and the Security Trustee in accordance with the priorities set out in clause 4.1; and
- (d) **(surplus amount)**: fourthly, any surplus amount is to be paid to an account in the name of Project Co with any bank nominated by Project Co. That surplus will not carry interest while held by the State, the Security Trustee or the Enforcing Party.

4.4 Contingent liabilities

If a Security secures contingent liabilities to the State or the Security Trustee then, until the State or the Security Trustee (as the case may be) is satisfied that the contingent liability has been extinguished, the State or the Security Trustee may retain from the proceeds of a realisation of the Security an amount consistent with the order and amount of priority established under clause 4.1 which they reasonably estimate to be the amount of the contingent liability.

4.5 Enforcement by the State

(a) **(No enforcement without consent):** Subject to the provisions of this Deed, for so long as there is Actual Debt secured by the Finance Documents, the State must not:

- (i) take any action in or towards exercising any right under or in respect of the State Securities; or
- (ii) petition for (or vote in favour of any resolution for) or initiate or support or take steps with a view to any insolvency, liquidation, reorganisation, administration, or dissolution proceedings or any voluntary arrangement or assignment for the benefit of creditors or the termination or dissolution of Project Co,

without first obtaining the consent of the Security Trustee, which consent must not be unreasonably withheld or delayed.

(b) **(Priority of enforcement action):** Subject to clause 4.5(c):

- (i) any enforcement action under the Financiers Securities by a Financier Enforcing Party will take precedence over any enforcement action by the State or an Enforcing Party appointed under the State Securities; and
- (ii) if an Enforcing Party is appointed in relation to any property under any of the Financiers Securities, the Enforcing Party may (if it notifies the State of its desire to do so) assume possession and control of that property from any Enforcing Party in possession and control of that property under any State Securities and the State Securities will not preclude or restrict the free dealing with the property by such an Enforcing Party, notwithstanding the security created by or any provision of any State Securities to the contrary.

(c) **(State's superior rights under Project Documents):** Clauses 4.5(a) and 4.5(b) do not:

- (i) prevent the State from exercising its rights at any time under the State Securities to the extent necessary to allow the State to exercise its rights and give effect to Project Co's obligations under clauses 27, 36 and 40 of the Project Agreement;
- (ii) affect the State's right to set off under clause 31.8 of the Project Agreement;
- (iii) prevent the State from enforcing the State Securities upon the appointment of an administrator to Project Co by any person under part 5.3A of the Corporations Act before or during the decision period (as defined in section 9 of the Corporations Act) provided that if the

Security Trustee is enforcing or subsequently enforces its claim over all or substantially all of Project Co's property (except to the extent that the State is entitled to exercise its rights under this clause 4.5(c)), the State agrees that it will instruct any Enforcing Party to comply with clause 4.5(b)); or

- (iv) limit the rights of the State in relation to any third party.
- (d) **(Financier Enforcing Parties to co-operate):** Without limiting clause 4.5(c), if the State appoints an Enforcing Party in the circumstances referred to in clause 4.5(c)(i), then the Security Trustee must procure that any Financier Enforcing Party will promptly and fully cooperate with the Enforcing Party appointed by the State to the extent that the State reasonably requires and not do anything to prevent or hinder the Enforcing Party appointed by the State.

4.6 Receipts

If a party receives any payment in cash or in kind or recovers any amount (including by way of set off or combination of accounts) (**Receipt**) which:

- (a) is not a payment required under any Project Document (provided that a payment required to be made following enforcement of a Security is not considered to be a required payment for the purposes of this clause); or
- (b) is a payment required under a Project Document but is not made in the manner and to the person prescribed in the relevant Project Document,

and a Security is enforced, then the party will immediately pay the amount of the Receipt to the other party for distribution in accordance with clauses 4.1 and 4.3.

4.7 Registration and notice

The State and the Security Trustee must co-operate with a view to reflecting the priority of the Securities set out in this Deed in any register or with any filing or registration authority and in giving notice to insurers and debtors liable for obligations covered by the Securities.

4.8 Priority for all moneys

Subject to clause 4.5(c), the order and amount of priority established under this clause 4 operates in respect of all amounts received or realised by way of set off by the State or the Security Trustee on a realisation of any of the Securities.

4.9 Marshalling of securities

Neither the State nor the Security Trustee is obliged to marshal in favour of the other. If any of the Securities becomes unenforceable, each of the State and the Security Trustee may determine the extent (if any) to which it will have recourse to any of its Securities.

4.10 Claims against the Financiers' Certifier

If:

- (a) **(Claim by State):** a Claim has been brought by the State against the Financiers' Certifier; and

- (b) **(Claim by Project Co etc)**: a Claim is also brought against the Financiers' Certifier by or on behalf of Project Co, the Agent, the Security Trustee, a Financier or an Enforcing Party,

the parties agree that the State's Claim will rank in priority to all other Claims, and that accordingly:

- (c) **(payable to State first)**: no amount will be payable to a party other than the State in respect of a Claim against the Financiers' Certifier whilst any Claim by the State remains outstanding;
- (d) **(State to recover amounts first)**: to the extent that the State is successful in a Claim against the Financiers' Certifier, the State will be entitled to recover amounts owing by the Financiers' Certifier in respect of that Claim, including from the proceeds of any insurance maintained by the Financiers' Certifier, before any amount is payable by the Financiers' Certifier (or its insurers) to a party other than the State in respect of a Claim by that other party; and
- (e) **(held on trust for State)**: to the extent that any party other than the State receives or recovers any amount from the Financiers' Certifier (or its insurers) whilst the State has any Claim outstanding, it will hold such amount on trust for the State until such time as it is to be applied in accordance with clause 4.10(d) or the State confirms that it has no further Claims against the Financiers' Certifier.

5. PA Default Events

5.1 Notice of PA Default Events

The State agrees with the Security Trustee that it will give the Security Trustee a copy of any notice given by the State to Project Co in respect of a PA Default Event at or about the same time as the notice is given to Project Co.

5.2 Security Trustee's right to remedy

- (a) **(Security Trustee's right to remedy)**: The Security Trustee may (but is not obliged to), upon providing the State with notice within the timeframe set out in clause 5.5(a) of its intention to do so, take steps to remedy or procure the remedy of a PA Default Event by developing a Financiers' Cure Program in accordance with this clause 5.2.
- (b) **(Additional Right)**: The right to develop a Financiers' Cure Program is in addition to Project Co's right to remedy a Major Default under the Project Agreement. Any remedy of a PA Default Event effected by the Security Trustee or an Enforcing Party will (as between Project Co and the State) be effective as a remedy of the PA Default Event by Project Co.
- (c) **(Financiers' Cure Program)**: If the Security Trustee gives a notice to the State under clause 5.2(a), the State and the Security Trustee must meet as soon as reasonably practicable to agree in good faith a program for the Security Trustee or the Enforcing Party appointed by the Security Trustee (or both) to undertake the Cure Activities and a date by which the relevant PA Default Event must be remedied or its effects overcome (**Financiers' Cure Program**). If the Security Trustee and the State fail to agree on a Financiers' Cure Program, then either party may refer the matter for resolution in accordance with clause 16. The program agreed or determined in accordance with clause 16 will be the Financiers' Cure Program.

- (d) **(Provision of access and information):** Upon a PA Default Event occurring, the State must, to the extent reasonably requested by a Financier Enforcing Party, and provided it is in accordance with the Financiers' Cure Program:
 - (i) provide reasonable assistance to allow any Financier Enforcing Party all necessary access to the Works and the Site, subject to the terms of the State Project Documents; and
 - (ii) promptly provide that Financier Enforcing Party with all material information in its possession relevant to the PA Default Event.
- (e) **(Security Trustee Acknowledgement):** Without limiting any rights the Security Trustee can exercise in accordance with this clause 5.2 or clause 6.1, but subject to the acknowledgements in clause 9.1, the Security Trustee acknowledges and agrees that neither it nor any other Enforcing Party will in any way interfere with the performance by the D&C Subcontractor or the O&M Subcontractor (as the case may be) of its obligations under the relevant Subcontract, without obtaining the State's prior consent, unless such action is permitted by the terms of the D&C Subcontract or the O&M Subcontract (as the case may be) or in accordance with the terms of the D&C Consent Deed or the O&M Consent Deed.

5.3 Information regarding action to cure PA Default Event

- (a) **(Obligations of Security Trustee):** After the State notifies the Security Trustee of a PA Default Event, the Security Trustee must:
 - (i) in accordance with the Financiers' Cure Program and whenever reasonably requested by the State; and
 - (ii) in any event, at least every month,

update and advise the State of the Security Trustee's plans in relation to the PA Default Event including providing details of:
 - (iii) material changes to its Financiers' Cure Program from time to time and progress being made in the implementation of the Financiers' Cure Program, where a Financiers' Cure Program has been agreed; or
 - (iv) alternative courses of action it is considering in respect of the PA Default Event and its estimates of the timing of such courses of action, where a Financier Cure Program has not been agreed,and must expand upon any such details when reasonably requested by the State.
- (b) **(Provision of details):** Details of the plans of the Security Trustee must, when time and circumstances make it appropriate to do so, or when the State so requests, be provided by the Security Trustee in writing.

5.4 Extension of Financiers' Cure Program

- (a) **(When extensions to be given):** If a Financier Enforcing Party:
 - (i) reasonably considers that the date specified for the Cure Activities in respect of a PA Default Event under the Financiers' Cure Program is no longer appropriate; and

- (ii) is and has been diligently pursuing the Cure Activities in respect of the PA Default Event and complying with the Financiers' Cure Program,

it may submit an extension request no later than 10 Business Days before the end of the Financiers' Cure Program requesting one extension to that Financiers' Cure Program. Such request must provide evidence why, notwithstanding diligent pursuit, it has been unable to remedy or overcome the effects of the PA Default Event in accordance with the Financiers' Cure Program. If the State is reasonably satisfied with such evidence and that the Financiers' Cure Program has been and continues to be diligently pursued then it will not unreasonably refuse to grant one extension to the date specified in the Financiers' Cure Program for the Cure Activities in respect of that PA Default Event by such period as the State determines is reasonably required to enable the Financier Enforcing Party to remedy the PA Default Event or overcome its effects.

- (b) **(Date for remedy):** Any date set for remedy (or overcoming the effects) of a PA Default Event under the Financiers' Cure Program, and any change to that date in accordance with this clause 5.4, must be consistent with the period reasonably required by the Security Trustee or any other Enforcing Party to remedy (or overcome the effects of) the PA Default Event assuming that the Security Trustee or other Enforcing Party (as applicable) were diligently pursuing the remedy or overcoming its effects.
- (c) **(Negotiation):** If the Security Trustee reasonably considers that the extension determined by the State in accordance with clause 5.4(a) is not sufficient, the Security Trustee:
 - (i) may (provided that the Security Trustee or other Enforcing Party has been diligently pursuing the Cure Activities) refer the matter for resolution in accordance with clause 16; and
 - (ii) whilst the matter is being determined, must continue to diligently pursue or procure that a Financier Enforcing Party continues to diligently pursue the Cure Activities,

and, subject to clause 5.5(b)(ii), the State must not terminate the Project Agreement until such dispute is resolved.

- (d) **(Suspension of Financiers' Cure Program):** Where a Financier Enforcing Party has taken action under a Financiers Security, on and from the date on which the State exercises its rights under clause 36 of the Project Agreement, the Financiers' Cure Program (and any related cure period) will be suspended to the extent that the State's exercise of those rights prevents the Financiers' Cure Program from being performed, unless the exercise of those rights was caused by an act or omission of the Financier Enforcing Party.
- (e) **(Diligent Pursuit):** The Security Trustee must itself diligently pursue and must ensure that each other Financier Enforcing Party is diligently pursuing any Cure Activities at all relevant times and is complying with the applicable Financiers' Cure Program, and for the purposes of this Deed, in assessing what can be achieved by diligent pursuit and in assessing whether there has been a failure to diligently pursue the Cure Activities, regard is required to be had to the time necessary to enforce the D&C Subcontract or the O&M Subcontract, or to engage a substitute D&C Subcontractor, O&M Subcontractor, D&C Guarantor or O&M Guarantor, if to do so would be consistent with the required steps and actions being diligently

pursued, recognising that the Security Trustee is not a D&C Subcontractor or O&M Subcontractor (as applicable).

5.5 Termination of Project Agreement

The State agrees that it will not terminate, rescind or treat as repudiated the Project Agreement unless it first notifies the Security Trustee of its intention to do so in accordance with clause 5.1 and:

- (a) **(no response)**: the Security Trustee has not responded to the notice from the State within 15 Business Days of receipt or has responded that it does not intend to remedy or overcome the effects of the PA Default Event; or
- (b) **(notice given)**: the Security Trustee gives a notice to the State under clause 5.2(a) within 15 Business Days of receipt of the notice from the State under clause 5.1 and:
 - (i) the PA Default Event has not been remedied (or its effects overcome) by the earlier of the date set out in the Financiers' Cure Program and the date which is 24 months from the date of the first notice given by the State to Project Co in respect of the PA Default Event (a copy of which will be provided by the State to the Security Trustee under clause 5.1); or
 - (ii) a Financier Enforcing Party is not:
 - A. diligently pursuing the Cure Activities; or
 - B. following the opening of Stage One, continuing to operate the Stage One and keep Stage One open (to the extent that, in all the circumstances, it is safely able to do so) and maintain and repair the Maintained Off-Freeway Facilities, in each case in accordance with the provisions of the Project Agreement,

provided, however, that the State may not terminate, rescind or treat as repudiated the Project Agreement due to a failure to which clause 5.5(b)(ii) applies, unless it has given the Security Trustee notice of the failure described in clause 5.5(b)(ii)A or 5.5(b)(ii)B and such failure has not been remedied within 15 Business Days of receipt of such notice by the Security Trustee.

5.6 Payments to Subcontractors on PA Default Event

- (a) **(Details of Valid Claims)**: Without limiting clause 10.6 of the Project Agreement, if a PA Default Event has occurred and is subsisting, Project Co must, immediately upon request by the State, provide to the State details of any Valid Claims then outstanding.
- (b) **(Application of funds)**: If:
 - (i) a PA Default Event has occurred and is subsisting;
 - (ii) there are Valid Claims that have not been paid and which, if a remedy program under clause 39.2 of the Project Agreement is in place and specifies when such Valid Claims are to be paid, have not been paid in accordance with the remedy program; and
 - (iii) there are funds standing to the credit of a Project Account at the relevant time,

the State may from time to time give a notice to Project Co, the Agent or the Security Trustee requiring Project Co, the Agent or the Security Trustee (as the case may be) to apply funds standing to the credit of a Project Account in or towards payment of any one or more of the Valid Claims specified in that notice subject to the Subcontractor entering into a deed of release and subrogation in respect of such Valid Claims in form and substance satisfactory to the State, acting reasonably.

- (c) **(Compliance by Project Co and Security Trustee):** Each of Project Co, the Agent and the Security Trustee (as applicable) must comply with a notice issued by the State under clause 5.6(b) within 5 Business Days of receipt.
- (d) **(Compliance by other Financier Enforcing Party):** The Security Trustee and the Agent will ensure that any other Financier Enforcing Party complies with each notice issued by the State under clause 5.6(b) within 5 Business Days of receipt.
- (e) **(Payments from Project Account):** Project Co:
 - (i) consents to the Security Trustee and the Agent (and/or any Financier Enforcing Party) making any payments from time to time from the Project Account that they are required to make in order to comply with a notice issued by the State under clause 5.6(b); and
 - (ii) agrees that any such payment will be taken to have been made at the request of Project Co and the [Secured Moneys (as defined in the Security Trust Deed)] will not be taken to be reduced to the extent of any such payment.
- (f) **(Contrary to law):** No party is required to make any payment under this clause 5.6 if to do so would be contrary to any law.

5.7 Super Majority Financiers

- (a) **(No consent by Relevant Financier):** If:
 - (i) a PA Default Event has occurred and is subsisting; and
 - (ii) a Financier (**Relevant Financier**) refuses to grant its consent to any amendment, consent or waiver under a Project Document sought by the State or Project Co to which the Super Majority Financiers have consented or would otherwise have consented (including any amendment, consent or waiver for the provision of additional debt financing and the subordination of the existing senior debt) which requires (but has not then received) the consent of all Financiers,then Project Co, the State and the Super Majority Financiers may proceed with such consent, amendment or waiver without the consent of the Relevant Financier.
- (b) **(No obligation or reduction):** Nothing in clause 5.7(a):
 - (i) imposes an obligation on any Financier to pay or advance an amount which is more than the amount which it has committed to pay or advance under the Finance Documents; or
 - (ii) enables the reduction of any amount payable to a Financier under the Finance Documents,without that Financier's agreement.

6. Enforcement by Security Trustee

6.1 Enforcement by Security Trustee

Without limiting the actions which the Security Trustee may be entitled to take following the occurrence of a PA Default Event (whether in accordance with the Finance Documents or otherwise), a Financier Enforcing Party may:

- (a) exercise some or all of Project Co's Rights;
- (b) engage one or more other persons to exercise some or all of Project Co's Rights; and
- (c) assign, novate, transfer or otherwise dispose of all or any of Project Co's Rights,

subject to the terms of those documents, this Deed and the rights and duties of the Financier Enforcing Party under the Financiers Securities and at Law.

6.2 No liability

- (a) **(No liability):** Without limiting the liability of Project Co (which, subject to clause 6.2(b), continues to be responsible for the performance of its obligations under the Project Documents), none of the Finance Parties nor any Financier Enforcing Party is or will be liable for any obligation or liability of Project Co under the Project Documents by reason only of the Financiers Securities or the exercise, in accordance with the Financiers Securities, of any of their rights under the Financiers Securities.
- (b) **(Obligations remain effective):** The State acknowledges that all money expended by the Finance Parties or any Financier Enforcing Party and all acts, matters or things done or effected by them which would satisfy (had they been expended, done or effected by Project Co) any of the obligations of Project Co under the Project Documents will be effective, as between the State and Project Co, to fully satisfy and discharge the obligations of Project Co, in respect of which such payment has been made or act, matter or thing has been done or effected.

6.3 Restriction on set off by Financiers

Without limiting the operation of clause 4, each of the Security Trustee and the Agent agrees on its own behalf and on behalf of each Finance Party that it and none of them will exercise:

- (a) **(set off):** any right of set off or combination of accounts in relation to the Project Account; or
- (b) **(other right):** any other right in relation to any of those accounts the effect of which would be to apply money standing to the credit of the account in a way inconsistent with clause 38.10 of the Project Agreement and clause 8.

6.4 Security Trustee not to hinder State under Project Documents

The Security Trustee must not knowingly exercise (and must procure that any other Financier Enforcing Party will not exercise) any rights (whether arising under a Financiers Security or otherwise) in any manner which interferes with, or restricts in any way, the proper and lawful exercise by the State of the State's rights under clauses 27, 31.8 or 36 of the Project Agreement, the State Securities, the Direct Deeds, this Deed or any other Direct Deed entered into by the State and Project Co, among others, in relation to the Project.

6.5 Third party account bank

Project Co must ensure that no Project Account is held with a party (**Account Bank**) other than the Security Trustee or a Finance Party unless Project Co first procures that the Account Bank undertakes to the State in form and substance reasonably satisfactory to the State, to be bound by clause 6.3 in the same terms as the Security Trustee.

6.6 Replacement of D&C Subcontractor or O&M Subcontractor

- (a) **(No replacement without consent):** If, at any time, the Security Trustee proposes to remedy a PA Default Event or a Finance Default by appointing a new Subcontractor to replace either the D&C Subcontractor or the O&M Subcontractor, or by novating the D&C Subcontract or the O&M Subcontract (and other relevant Project Documents) to a replacement Subcontractor, then the Security Trustee must first obtain the State's prior consent, which must not be unreasonably withheld if the State is satisfied the matters set out in clause 6.6(b) are satisfied.
- (b) **(When consent must be given):** The State must not unreasonably withhold its consent if it is satisfied (acting reasonably) that:
- (i) the State has been provided with written details of the proposed replacement Subcontractor and the terms and conditions on which the proposed replacement Subcontractor is to be engaged;
 - (ii) were the same appointment made by Project Co, the appointment and the replacement Subcontractor would comply with the Project Agreement in all respects, including the satisfaction of the State's probity requirements and the financial capacity, experience and capability to perform the obligations of the Subcontractor being replaced;
 - (iii) except as otherwise agreed by the State, the proposed terms and conditions of the replacement Subcontractor's engagement are not less onerous from the perspective of the Subcontractor than those which apply to the current Subcontractor and include a requirement to perform such of the obligations of the current Subcontractor under the relevant Project Document which remain unsatisfied;
 - (iv) the proposed replacement Subcontractor has agreed to be bound by the terms of the relevant Project Documents (including a relevant Direct Deed) or such other terms as agreed to by the State; and
 - (v) a person other than the State bears all of the State's reasonable costs and expenses (including legal costs and expenses) of and incidental to:
 - A. any enquiries which the State may make for the purposes of determining whether to consent to the replacement Subcontractor;
 - B. the procurement of a replacement Subcontractor; and
 - C. the preparation, negotiation and execution of any relevant documentation and any stamp duty or similar charges in relation to such documentation.
- (c) **(Facilitation of appointment of replacement Subcontractor by State and Security Trustee):** To the extent that the appointment of a replacement

Subcontractor in accordance with this clause 6 involves the novation of a Project Document:

- (i) each of the State and the Security Trustee will release those of the Securities as it is necessary to release (but only to the extent necessary) to facilitate the novation; and
- (ii) each party to this Deed and party to the Project Document consents to that novation,

but without prejudice to any rights and claims against the replaced Subcontractor accrued at the time of novation.

- (d) **(Release):** To the extent that the release of a Security is necessary under clause 6.6(c), each party will use reasonable endeavours to ensure that the Project Document (as novated) becomes subject to a Security Interest in favour of the party who granted the release, on terms substantially similar to those of the released Security.

6.7 Disposal of Project Co's interest

- (a) **(No disposal without consent):** If a Financier Enforcing Party proposes to remedy a PA Default Event or a Finance Default by assigning, novating, transferring or otherwise disposing of an interest in Project Co or Project Co's interest in, or obligations under, the Project Documents in accordance with the Enforcing Party's rights or the Financiers' rights under the Finance Documents, the Security Trustee must first obtain the State's prior consent, which must not be unreasonably withheld if the State is satisfied the matters set out in clause 6.7(b) are satisfied.
- (b) **(When consent must be given):** The State must not unreasonably withhold its consent if it is satisfied (acting reasonably) that:
 - (i) the State has been provided with written details of the proposed purchaser and the terms and conditions of the proposed disposal;
 - (ii) either:
 - A. the proposed disposal is by way of a Permitted Share Capital Dealing;
 - B. the State is not permitted to withhold its consent to the proposed disposal under clause 47.5 of the Project Agreement; or
 - C. the proposed purchaser:
 - 1) is a Fit and Proper Person (and each person who Controls that person is a Fit and Proper Person);
 - 2) has the necessary financial, commercial and technical capacity, and contractual and financing arrangements with third parties in place, to perform or procure the performance of Project Co's obligations under the State Project Documents;

- (iii) the proposed disposal would not result in there being any adverse effect on the rights of, or increase in the Liabilities or obligations of, the State under the State Project Documents than if the relevant interests or obligations were not disposed of;
- (iv) the proposed purchaser has agreed to be bound by the terms of the relevant Project Documents; and
- (v) a person other than the State bears all of the State's reasonable costs and expenses (including legal costs and expenses) of and incidental to:
 - A. any enquiries which the State may make for the purposes of determining whether to consent to the disposal;
 - B. the procurement of a purchaser; and
 - C. the preparation, negotiation and execution of any relevant documentation and any stamp duty or similar charges in relation to such documentation.

6.8 Appointment of Enforcing Party

- (a) **(Appointment):** Without derogating from any other rights the Security Trustee may have under this Deed, the State agrees that:
 - (i) if the Security Trustee appoints an Enforcing Party under the Financiers Securities:
 - A. that appointment will not constitute a PA Default Event; and
 - B. in respect of an appointment in relation to Project Co, that appointment will be taken to remedy any PA Default Event constituted by:
 - 1) the occurrence prior to that appointment of an Insolvency Event in relation to Project Co; or
 - 2) an event that would restrict or cancel, or entitle a Financier to restrict or cancel, the obligation to provide finance in accordance with the Finance Documents,but this does not prevent a PA Default Event from arising if the Enforcing Party does not otherwise perform or procure the performance of the obligations of Project Co under the Project Documents;
 - (ii) any:
 - A. enforcement action taken by a Financier Enforcing Party in accordance with clause 6.1;
 - B. replacement of a D&C Subcontractor or the O&M Subcontractor in accordance with clause 6.6; or
 - C. disposal of an interest in Project Co or Project Co's interest in the Project Documents in accordance with clause 6.7,

will not, by itself, provide the State with the right to terminate any State Project Document.

- (b) **(Fit and Proper Person)**: The Security Trustee acknowledges and agrees that it will not appoint any Financier Enforcing Party unless:
 - (i) the proposed Enforcing Party is a Fit and Proper Person (and each person who Controls that person is a Fit and Proper Person); and
 - (ii) the appointment is otherwise in accordance with this Deed.
- (c) **(Notice)**: The Security Trustee will not, and will ensure that a Financier Enforcing Party does not, exercise or purport to exercise Project Co's Rights without first notifying the State.
- (d) **(Minimising disruption)**: The Security Trustee must minimise, and must ensure that a Financier Enforcing Party will minimise, any disruption that may result from it exercising Project Co's Rights.

6.9 Documentation

If the State consents to the replacement of the D&C Subcontractor or the O&M Subcontractor, or the disposal of Project Co's interest in the Project Documents, in accordance with clause 6.6 or 6.7 respectively, the State, the Financier Enforcing Party and the replacement Subcontractor or purchaser (as the case may be) will execute such documents as are reasonably necessary to give effect to the replacement, novation, assignment, transfer or disposal.

7. Finance Default

7.1 Notice of Finance Default

The Security Trustee and the Agent must each provide notice to the State promptly after it gives notice of a Finance Default to Project Co, setting out:

- (a) **(details)**: comprehensive details of the Finance Default; and
- (b) **(exercise of rights)**: whether it intends to exercise its rights under the Finance Documents, and if so, the proposed date for, and proposed method of, such exercise.

7.2 Notice of enforcement action

The Security Trustee must not declare any moneys secured under the Finance Documents due and payable, or take any action to enforce the Financiers Securities or recover any moneys secured under the Financiers Securities, unless the Security Trustee has first provided to the State:

- (a) **(24 hours' prior notice)**: in the case of the appointment of a Financier Enforcing Party where the Security Trustee is of the reasonable opinion that any delay in such appointment would materially adversely affect the Financiers, no less than 24 hours' prior notice; or
- (b) **(10 days prior notice)**: in all other cases, no less than 10 days' prior notice.

7.3 Information to the State

Upon the occurrence of a Finance Default:

- (a) **(all correspondence)**: the Security Trustee and the Agent must each provide to the State copies of all correspondence and documents issued by it to Project Co relating to the Finance Default;
- (b) **(measures to remedy Finance Default)**: if the Finance Default is capable of remedy, Project Co must keep the State informed of all measures taken or intended to be taken to remedy the Finance Default; and
- (c) **(all measures taken in consequence of Finance Default)**: in any case, Project Co, the Agent and the Security Trustee must keep the State informed of all measures taken or intended to be taken by it in consequence of the Finance Default (including details of any action taken by the Security Trustee to enforce the Financiers Securities).

7.4 Payments by State

The parties acknowledge that the State will not be liable for any costs incurred by a party to this Deed in attempting to remedy (or overcome the effects) of a Finance Default or in exercising rights under the Finance Documents.

8. Insurance proceeds

- (a) **(Deposit)**: All Insurance proceeds received, which (were they to have been received by Project Co) would have been required to have been deposited into the Insurance Proceeds Account under the Project Agreement, must be deposited in the Insurance Proceeds Account.
- (b) **(Application)**: The Security Trustee and the Agent each acknowledge and agree with the State that the Insurance proceeds paid or payable in connection with the Project must be applied in accordance with clause 38 of the Project Agreement.
- (c) **(Operation of account)**: Without limiting the Finance Parties' rights under clause 6.3, Project Co, the Agent and the Security Trustee must not make any payment (and must take all reasonable and proper steps to ensure that no payment is made) out of the Insurance Proceeds Account except in accordance with the provisions of the Project Agreement and this Deed.
- (d) **(Assistance)**: The Security Trustee and the Agent each acknowledge and agree with the State that Project Co will be permitted, and the Security Trustee and the Agent will each use reasonable endeavours to assist Project Co, to take any action as contemplated by clause 38 of the Project Agreement.

9. Recognition of rights

9.1 Recognition of the State's step-in rights

- (a) **(State Rights)**: The Security Trustee and the Agent each recognise and acknowledge the rights available to the State under:
 - (i) clause 27 of the Project Agreement;
 - (ii) clause 36 of the Project Agreement; and

- (iii) subject to clause 9.1(c), the Direct Deeds,
including to require an assignment of the D&C Subcontract and/or the O&M Subcontract if it becomes entitled to terminate the Project Agreement.
- (b) **(Security Trustee and Agent to facilitate):** The Security Trustee and the Agent will each use reasonable endeavours to ensure that rights under the Finance Documents are exercised in a way which facilitates the effective exercise by the State of the rights referred to in clause 9.1(a). To the extent that the exercise of any such rights involves the assignment of the D&C Subcontract or the O&M Subcontract, the Security Trustee will release the D&C Subcontract or O&M Subcontract (as applicable) from the Financiers Securities to facilitate the assignment. Nothing in this clause 9.1 or the Direct Deeds requires the Security Trustee or the Agent to release or forgo any rights or claims against Project Co.
- (c) **(When State may exercise rights):** The State acknowledges and agrees that it will not exercise its rights under clause 6.1 or 7 of a Direct Deed unless:
 - (i) a circumstance which entitles the State to appoint an Enforcing Party under the State Securities subsists; or
 - (ii) the State is entitled to exercise its rights under clause 36 of the Project Agreement.

9.2 Release of Security

- (a) **(Obligation to release):** Subject to clause 9.2(b), to the extent that Project Co is required to handover, surrender, transfer, pay or otherwise dispose of property (including rights to Insurance proceeds) to the State or its nominee under the Project Agreement and that property is in whole or part the subject of any Security Interest in favour of the Security Trustee or any Finance Party (including any Security Interest under the Financiers Securities), the Security Trustee will promptly ensure that the Security Interest is released in respect of that property and will do all things including registering documents as the State may reasonably require or as may be necessary or desirable to give effect to that release.
- (b) **(Security over payment obligation):** Nothing in clauses 9.2(a) or 6.4 requires the Security Trustee to release a Security Interest over the right of Project Co to be paid a Termination Payment.

9.3 Recognition of Security Trustee rights

- (a) **(Rights):** The State acknowledges the right of the Security Trustee under each Consent Deed (**Security Trustee Tripartite Rights**).
- (b) **(State not to hinder Security Trustee):** The State and the Security Trustee agree that if the Security Trustee appoints an Enforcing Party and exercises its rights to step in under any applicable Consent Deed, then subject to the rights of the State under clauses 4.5(c) and 9.1, the Security Trustee Tripartite Rights will take precedence over the rights of the State under the Direct Deeds and the State must not exercise its rights under a Direct Deed in such a manner as to prevent or hinder the Security Trustee in its exercise of the Security Trustee Tripartite Rights. For the avoidance of doubt nothing in this clause limits the State in performing or procuring the normal operation of Stage One.

- (c) **(Keep informed):** The Security Trustee must keep the State informed of all measures taken and intended to be taken in exercising the Security Trustee Tripartite Rights.

9.4 Novation of Finance Documents

The Security Trustee and the Agent each acknowledge the rights of the State under clause 40.8 of the Project Agreement to elect to assume some or all of the obligations of Project Co in respect of Actual Debt, consents to Project Co procuring the novation of such Actual Debt obligations, and will do all things reasonably required by the State to effect such novation.

9.5 State dealings with the Security Trustee and Agent

- (a) **(State may raise queries):** The State may at any time and from time to time raise with the Security Trustee or the Agent any concerns or questions that the State may have regarding Project Co, the performance by Project Co of its obligations under the Project Documents or Finance Documents, or the Project generally.
- (b) **(Disclosure):** To the extent required, Project Co authorises each of the State, the Agent and the Security Trustee to disclose to the others such information relating to the matters referred to in clause 9.5(a) as the State, the Agent or the Security Trustee may consider necessary or appropriate in the context of any discussions or other correspondence contemplated in clause 9.5(a).

9.6 No role for Independent Reviewer

Each of the Security Trustee and the Agent acknowledges and agrees:

- (a) **(Independent Reviewer):** that Project Co is required under clause 9.6(a) of the Project Agreement to ensure that the Financiers do not appoint the Independent Reviewer to act in any role in connection with the Finance Documents, without the prior consent of the State Representative and on such terms approved by the State Representative; and
- (b) **(prior consent):** that they will not agree to any appointment of the Independent Reviewer by the Financiers without the prior consent of the State Representative.

10. Amendments to Finance Documents

10.1 No amendments without consent

Subject to clause 10.2, each of the Security Trustee and the Agent undertakes to the State that it will not agree to or permit any variation, amendment, waiver or replacement (**Amendment**) of any Finance Document without the State's prior consent, which consent must not be unreasonably withheld.

10.2 Permitted Amendments

The prior consent of the State is not required for an Amendment that:

- (a) **(novation, assignment or substitution):** is a novation, assignment or substitution of a Financier or any of the rights or obligations of a Financier if:
 - (i) the novatee, assignee or substitute is a Financier or has a credit rating of at least BBB+ by Standard and Poor's (Australia) Pty Limited or Baa1 by Moody's Investors Services, Inc; or

- (ii) that Financier has fully funded its commitment under the Finance Documents;
 - (b) **(State consent)**: the State has consented to as part of giving its consent to a refinancing under clause 35.1 of the Project Agreement;
 - (c) **(Modification)**: is an Amendment that solely gives effect to Project Co's obligation to proceed with a Modification in accordance with a notice that has been accepted by the State under clause 33 of the Project Agreement;
 - (d) **(novation or assignment)**: is a novation or assignment under clause 13.1;
 - (e) **(consent)**: has otherwise been consented to by the State under the Project Agreement,
- (each a **Permitted Amendment**).

10.3 Notice of Permitted Amendment

Each of Project Co, the Agent and the Security Trustee must:

- (a) **(notice)**: give notice to the State of any Permitted Amendment within 5 Business Days after that Permitted Amendment is made, including details of the reasons for the Permitted Amendment and copies of any documents relevant to the Permitted Amendment; and
- (b) **(further information)**: provide any further information reasonably requested by the State regarding the Permitted Amendment within 10 Business Days of receipt of a request from the State.

10.4 Notice of intended Amendment (other than a Permitted Amendment)

In seeking prior consent to an Amendment under clause 10.1, Project Co must give notice to the State of the intended Amendment including:

- (a) **(details)**: full details of:
 - (i) the terms of the Amendment and the reasons for the Amendment;
 - (ii) the responses or anticipated response of any other party to the relevant documents regarding the Amendment;
 - (iii) the response or anticipated response of any assignee of, or person holding a Security Interest in, the documents relevant to the Amendment; and
 - (iv) the impact or potential impact of the Amendment on:
 - A. delivery of the Project by Project Co;
 - B. performance of, and the capacity of Project Co to perform its obligations under, the Project Documents;
 - C. the financial structure or business of Project Co;
 - D. the State's interest under or in respect of the Project Documents; and

E. Equity IRR or Distributions; and

- (b) **(copies of Documentation)**: copies of all draft contractual and security documentation relevant to the Amendment.

10.5 Consent to Amendments

Unless the State is a party to the relevant Finance Document, the State must advise Project Co, the Agent and the Security Trustee within 20 Business Days (or such longer period as the State reasonably requests given the nature of the Amendment) of receiving the notice under clause 10.1, that:

- (a) **(consents)**: it consents to the Amendment;
- (b) **(unacceptable)**: the Amendment is unacceptable to it and the reasons why the Amendment is unacceptable; or
- (c) **(further information)**: it requires further information regarding the Amendment. If so, the other parties must provide the additional information sought by the State within a further period of 10 Business Days after which the State must respond in terms of clauses 10.5(a) and 10.5(b) within 10 Business Days of receipt of the additional information.

10.6 No restriction on exercise of existing rights

Subject to clause 10.7, nothing in this clause 10 or clause 47.1 of the Project Agreement prevents or restricts any person exercising any rights they have under the Finance Documents.

10.7 Consequences of Amending without consent

If any Amendment is made to a Finance Document otherwise than in accordance with this clause 10:

- (a) **(not effective)**: the Amendment will not be effective as between the parties to that Finance Document (and any agreement at any time between any of them which purports to limit the operation of this clause 10.7, including any provision that a Finance Document prevail over this Deed, will be ineffective); and
- (b) **(State liable)**: the State will only be liable under the Project Documents to the extent it would have been had there been no such Amendment.

11. State Contributions

11.1 State O&M Phase Contribution

- (a) **(Payment of State O&M Phase Contribution)**: The Security Trustee, the Agent and Project Co each acknowledge and agree:
- (i) that the State O&M Phase Contribution, when paid by the State into the account specified in a SOPC Notice, will be, and will be taken to be, applied towards mandatory prepayment of Actual Debt outstanding;
- (ii) without limiting clause 11.1(a)(i), that upon payment of the State O&M Phase Contribution into the account specified in a SOPC Notice, the amount of Actual Debt for the purposes of the Project Documents will be reduced by the amount of such payment; and

- (iii) that upon prepayment of the Actual Debt in accordance with clause 11.1(a)(i), the relevant facilities under the Finance Documents will be cancelled to the extent of the prepayment and that such prepaid amounts will not be available for redrawing, other than as permitted in clause 11.1(c).
- (b) **(Receipt of State O&M Phase Contribution):** The Security Trustee and the Agent must notify the State promptly upon receipt of the State O&M Phase Contribution into the relevant account, and confirm in that notice each of the matters referred to in clause 11.1(a).
- (c) **(Redraw):** Project Co may redraw the amount of any Actual Debt prepaid utilising the State O&M Phase Contribution provided that:
 - (i) the amount, pricing and tenor of any amounts so redrawn do not exceed those set out in the Financial Model; and
 - (ii) for the avoidance of doubt, if any Amendment is proposed to be made at the time of the redraw, such Amendment will require the consent of the State under clause 10.

11.2 State Construction Contribution

- (a) **(No prepayments):** Prior to the Date of Stage One Completion, Project Co must not make, and the Agent and Security Trustee must each not permit Project Co to make, a prepayment of the Construction Facility, except with the prior consent of the State.
- (b) **(Insurance proceeds):** If, notwithstanding clauses 8 and 11.2(a), the Security Trustee applies the amount of any Insurance proceeds to the payment or repayment of Actual Debt, other than as permitted under the Project Agreement, the State will not be required to pay any further State Construction Contributions.
- (c) **(Equity Proceeds):** The parties agree that prior to the Expiry Date, all amounts of [Equity Contributions] [(as defined in the Facility Agreement)] and any drawings under the [Equity LC Support] (as defined in the Facility Agreement) must be deposited in the Construction Proceeds Account (as required under the Finance Documents).

11.3 State Construction Contribution Withdrawals

[State Note: This clause will be reviewed by the State and the State may wish to refer to additional protections or processes from debt finance term sheets contained in Proposals.]

- (a) **(No waiver of withdrawal conditions):** Unless the State gives its prior consent to an amendment or waiver of such conditions:
 - (i) Project Co must ensure that withdrawals are only made from the Construction Proceeds Account on the conditions set out in the Finance Documents having been satisfied; and
 - (ii) the Agent must not consent to an amendment or waiver of any such conditions to withdrawal from the Construction Proceeds Account.

- (b) **(State consent):** Without limiting the State's discretion under clause 11.3(a), the State will not be obliged to consider a request for its consent under clause 11.3(a) unless:
- (i) the Agent and Project Co have provided the State with such information as the State reasonably requires concerning the requested consent, including in the case of the Agent, engaging in a good faith consultation with the State as to why the Financiers propose to give their consent to the amendment or waiver;
 - (ii) the State has received confirmation from the Agent that the Agent will consent to the proposed amendment or waiver if the State will give its consent, together with any conditions in favour of both the State and the Agent that will be imposed;
 - (iii) to the extent that the amendment or waiver relates to a failure to satisfy the [Cost to Complete Test] (as defined in the Facility Agreement), the State is satisfied that either sufficient funding sources are nevertheless reasonably likely to be available to enable the Project to achieve Stage One Completion or the shortfall is otherwise reasonably likely to be corrected prior to the Date of Stage One Completion;
 - (iv) to the extent that the amendment or waiver relates to a default under the Finance Documents, Project Co commits to, and the Agent approves, arrangements to ensure that default is remedied or its consequences are overcome;
 - (v) the amounts to be withdrawn from the Construction Proceeds Account will not be used directly or indirectly to pay or repay principal, interest, fees, charges or hedge break costs under the Finance Documents which are not provided for in the Financial Model; and
 - (vi) the amounts to be withdrawn from the Construction Proceeds Account will not be used to pay any Distributions.
- (c) **(Application of State Construction Contribution):** The Agent acknowledges that Project Co may only use amounts withdrawn from the Construction Proceeds Account after the date on which the first State Construction Contribution is paid into the Construction Proceeds Account for the payment of SCC Project Costs in accordance with clause 28.3(d) of the Project Agreement.
- (d) **(Simultaneous withdrawals):** Subject to this clause 11, it is the intention of the State and the Agent that withdrawals from the Construction Proceeds Account in respect of Actual Debt and State Construction Contributions will occur simultaneously and only in circumstances where all withdrawal conditions under the Finance Documents and the State Project Documents are satisfied. To the extent that a condition under any such document remains unsatisfied or the balance of the Construction Proceeds Account is or would be insufficient to meet the amount required to be withdrawn, then the Agent must not permit a withdrawal unless and until that condition is satisfied or the account balance is sufficient (as applicable).
- (e) **(No amendment by the State):** The State will not agree to any amendment to the State Construction Contribution Schedule without the prior consent of the Agent.

- (f) **(No amendment by the Agent):** The Agent agrees that, notwithstanding clause 10.1, any consent to an amendment to the [Drawdown Schedule] under and as defined in the [Facility Agreement] may be given or withheld by the State in its absolute discretion.
- (g) **(Provision of information):** The State:
 - (i) may from time to time request from the Agent or Project Co, any information or analyses prepared by the Financiers in relation to the manner in which Project Co has applied or may apply funds withdrawn from the Construction Proceeds Account, over and above any information provided in a State Construction Contribution Notice, and the Agent or Project Co (as applicable) will promptly comply with any such request where it is reasonable to do so; and
 - (ii) acknowledges that any information or analysis provided under clause 11.3(g)(i) is, unless expressly agreed otherwise, provided on a non-reliance basis, and may be subject to such other conditions (including as to confidentiality) as the disclosing party may reasonably require, and the State may not bring any Claim against Project Co, the Agent, or a Financier in relation to any such information or analysis.

12. Construction Bond

- (a) **(Default by D&C Subcontractor):** Where any obligation of Project Co to pay the State under the Project Agreement has arisen by reason of default by the D&C Subcontractor under the D&C Subcontract, and that obligation is not satisfied within 5 Business Days of the payment becoming due and payable, Project Co, the Agent and the Security Trustee agree with the State that:
 - (i) to the extent that Project Co has a right to set off or deduct an amount owing by the D&C Subcontractor arising from the relevant default from a claim for payment by the D&C Subcontractor due under the D&C Subcontract, which Project Co would otherwise be entitled to draw under the Finance Documents, Project Co will set off that amount, draw down the equivalent amount and pay it to the State at the time set off is exercised; and
 - (ii) to the extent that Project Co does not have a right of set off or deduction as described in clause 12(a)(i) it will comply with:
 - A. clause 12(b)(i) in relation to the period prior to Stage One Completion; and
 - B. clause 12(b)(ii) in relation to the 24 month period commencing on the Date of Stage One Completion.
- (b) **(Construction Bond):** Project Co will as and when required under clause 23 of the Project Agreement (and without limiting the State's rights under that clause), claim the amount owing to the State as referred to in clause 12(a) from the Construction Bond to the extent of funds then available from the Construction Bond and up to an amount no greater than:
 - (i) in the period prior to Stage One Completion, 5% of the D&C Subcontract Price; and

- (ii) in the 24 month period commencing on the Date of Stage One Completion, 2.5% of the D&C Subcontract Price,

and pay that amount to the State, and if not so claimed by Project Co under the Construction Bond and paid to the State, the Security Trustee agrees to waive priority under clause 4 over the Construction Bond in favour of the State to the extent that the proceeds of the Construction Bond to which Project Co is entitled (up to an amount no greater than as set out above in this clause 12(b)) are used by the State to pay to itself the amount owing by Project Co to the State under the Project Agreement.

- (c) **(Security Trustee to inform):** The Security Trustee must promptly inform the State when it makes a demand under the Construction Bond.
- (d) **(No surrender of Construction Bond):** Other than in accordance with the D&C Subcontract, the Security Trustee must not surrender the original of the Construction Bond except when making demands under the Construction Bond or with the State's consent.
- (e) **(Application of Construction Bond proceeds):** The State, Project Co and the Security Trustee agree that, upon termination of the Project Agreement, and without limiting clause 4.1:
 - (i) the proceeds of the Construction Bond are to be applied in accordance with clause 4.1; and
 - (ii) upon payment of any relevant Termination Payment to the Security Trustee or where a Project Co Termination Payment is payable, the Security Trustee waives any priority over (and each of Project Co and the Security Trustee must assign to the State) any right under and benefit of any Construction Bond issued in favour of Project Co or the Security Trustee in each case for an amount no greater than as set out in clause 23 of the Project Agreement.
- (f) **(State to provide notice):** Without limiting the rights of the State under any Project Document in any way, the State agrees with the Security Trustee that it will provide to the Security Trustee a copy of any notice delivered by the State to the entity which issued the Construction Bond to effect an assignment to the State of Project Co's and the Security Trustee's rights under and benefits from the Construction Bond under clause 12(e) at the same time as the State gives such notice to that issuing entity.

13. Assignment

13.1 No assignment without consent

Subject to clauses 13.2 and 13.3, no party may assign, novate or otherwise transfer any of its rights or obligations under this Deed without the prior written consent of each other party, which consent must not be unreasonably withheld.

13.2 Assignment by the Security Trustee or Agent

No party will withhold its consent to any assignment or transfer by the Security Trustee or the Agent if:

- (a) **(right, title and interest)**: it is related to all its right, title and interest in this Deed and in the Finance Documents (in its capacity as Security Trustee or Agent);
- (b) **(Finance Documents)**: it occurs consequent upon the implementation of provisions in a Finance Document providing for the replacement of the Security Trustee or Agent;
- (c) **(solvent and reputable replacement)**: it relates to a replacement Security Trustee or Agent which is a solvent and reputable financial institution or trustee corporation; and
- (d) **(accession deed)**: the replacement Security Trustee or Agent has executed an accession deed under which it agrees to be bound by the provisions of this Deed.

13.3 Assignment by the State

Nothing will prevent the assignment, novation or transfer by the State to an assignee, novatee or transferee of the State's rights and obligations under the Project Agreement made in accordance with clause 47.10 of the Project Agreement, provided the proposed assignee, novatee or transferee agrees to execute a deed in favour of the Security Trustee (in such form as the Security Trustee reasonably requires) under which the assignee, novatee or transferee agrees to be bound by this Deed as if it were the State.

14. Confidential Information and disclosure

14.1 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 Subcontractor 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 14.1(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 in accordance with clauses 14.1(b).

14.2 Confidential Information and disclosure by Project Co and the Security Trustee

- (a) **(Confidentiality obligation):** Subject to clause 14.2(b), Project Co, the Agent and the Security Trustee 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, the Agent's and the Security Trustee's obligation under clause 14.1(a) and subject to clause 14.2(c), Project Co, the Agent and the Security Trustee may disclose Confidential Information to:
 - (i) its Associates to the extent necessary for the purpose of undertaking the Project; or
 - (ii) any prospective financier or equity investor of the Project, subject to the State having carried out any Probity Investigation that the State considers necessary.
- (c) **(Confidentiality deed):** Before disclosing any Confidential Information, Project Co, the Agent or the Security Trustee (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, the Agent or the Security Trustee (whichever is disclosing the Confidential Information) on terms reasonably acceptable to the State.

14.3 Disclosure by the Agent and the Security Trustee

- (a) **(The Agent's and the Security Trustee's disclosure obligations):** Subject to clause 14.3(b), the Agent and the Security Trustee must each:
 - (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 14.3(a) or for which the State's consent or approval was not required in accordance with clause 14.3(b).
- (b) **(Permitted disclosure):** For the purposes of clause 14.3(a), the Agent and the Security Trustee 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 it 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 an of its Associates' involvement in the Project;
and
 - B. the Agent or the Security Trustee (as applicable) 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.

15. Termination

- (a) **(Termination)**: This Deed will terminate if the parties so agree in writing.
- (b) **(Accrued rights)**: The termination of this Deed does not affect the rights of any party which have accrued to that party before the date of termination.

16. Dispute Resolution

16.1 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 16.
- (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 16.2;
 - (ii) secondly, if the dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 16.2(c)(i) the Disputing Parties may agree that the dispute will be referred to an expert for determination in accordance with clauses 16.4 to 16.8 (inclusive) or to arbitration under 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 16.2(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 16.2(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 16.6(a),

then the dispute must be referred to arbitration in accordance with clause 17.

16.2 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 16.2(a) must:
 - (i) state that it is a notice under this clause 16; 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 16.2(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 16.2(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.

16.3 Expert determination

If:

- (a) **(dispute unresolved):** a dispute which has been referred to the Representatives for negotiation in accordance with clause 16.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 16.2(c)(i); and
- (b) **(Disputing Parties agree):** the Disputing Parties agree within 20 Business Days after the expiration of the period for negotiation referred to in clause 16.2(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 16.4 to 16.8. For the avoidance of doubt, a dispute may only be referred to an expert for determination by agreement of the Disputing Parties.

16.4 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 16.3, the Disputing Parties must exchange lists of 3 persons (in order of preference) who, if appointed, would satisfy the requirements of clause 16.4(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 16.4(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 16.3(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 16.3(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 16.3(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 16.4(a).
- (d) **(Appropriate skills):** It is the intention of the Disputing 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 16.4 on the basis that the expert does not satisfy the requirements of clause 16.4(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.

16.5 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.

16.6 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 17.
- (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.

16.7 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 costs of the expert.

16.8 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.

17. Arbitration

17.1 Reference to Arbitration

- (a) **(Dispute):** If:
 - (i) a dispute:
 - A. which has been referred to the Representatives for negotiation in accordance with clause 16.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 16.2(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 Parties agree to refer to expert determination under clause 16.3:
 - 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 16.6,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 17.1(a), the dispute will be referred to arbitration.

17.2 Arbitration

- (a) **(ACICA Rules):** Arbitration in accordance with this clause 17 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 17.
- (b) **(Seat):** The seat of the arbitration will be Melbourne, Victoria.
- (c) **(Language):** The language of the arbitration will be English.

17.3 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 17.1(b), the arbitrator will be appointed by the Australian Centre for International Commercial Arbitration.

17.4 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 17 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 17.4(a)(i) and 17.4(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 17.4(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 17.4(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.

17.5 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 17.5, have applied to any dispute referred to arbitration in accordance with this clause 17.

17.6 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 17; 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 17.6(a) on such terms and conditions (if any) as the arbitrator thinks fit.

17.7 Award final and binding

- (a) **(Final and binding):** Subject to clause 17.7(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 17.

17.8 Continue to perform

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

17.9 Governing law of arbitration agreement

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

17.10 Interlocutory relief

This clause 17 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.

17.11 Consolidation

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

18. 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 Taxable 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 connection with this Deed. The Recipient is not obliged to pay any amount in accordance with this clause 18(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 18(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 18(b) or 18(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 connection with this clause 18 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 connection with this clause 18 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 under or 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 connection with a Taxable Supply to which this clause 18 also applies then clause 53 of the Project Agreement will apply in connection with that supply and the provisions of this clause 18 (but for this paragraph) will not apply.
- (k) **(Definitions):** In this clause 18, unless otherwise defined in or for the purposes of this Deed, terms used have the meanings given to them in the GST Law.

19. Notices

All communications (including approvals, consents, directions, requirements, requests, claims, notices, agreements and demands) under or 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: [#]

Agent:

Attention: [#]
Address: [#]
Email: [#]

Security Trustee:

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, in accordance with clause 19(b); and
- (e) **(taken to be received)**: are taken to be received by the addressee at the address set out in clause 19(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.

20. Miscellaneous

20.1 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 16 to 17, 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.

20.2 Entire agreement

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

- (a) **(entire understanding)**: embody the entire understanding of the parties, and constitute the entire terms agreed by the parties; and
- (b) **(supersedes prior agreements)**: supersede any prior agreement of the parties.

20.3 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 that party) required by Law or reasonably requested by another party to give effect to this Deed.

20.4 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 and provision 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.

20.5 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.

20.6 Consents

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.

20.7 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.

20.8 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.

20.9 Severance

If, at any time, any 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.

20.10 Counterparts

This Deed may be executed in any number of counterparts and by the parties on 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.

20.11 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.

20.12 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 20.12(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.

20.13 No representation or reliance

- (a) **(No representation):** Each party acknowledges that no party (nor any person acting on a party's behalf) has made any representation or other inducement to it to enter into this Deed, except for representations or inducements expressly set out in this Deed.
- (b) **(No reliance):** Each party acknowledges and confirms that it does not enter into this Deed in reliance on any representation or other inducement by or on behalf of any other party, except for representations or inducements expressly set out in this Deed.

20.14 Indemnities

- (a) **(Continuing Indemnity):** Each indemnity in this Deed is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this Deed.
- (b) **(Expense):** It is not necessary for a party to incur expense or to make any payment before enforcing a right of indemnity conferred by this Deed.

20.15 Relationship of the parties

Unless otherwise expressly provided, neither this Deed nor any other Project Document:

- (a) creates a partnership, joint venture or fiduciary relationship between the parties; or
- (b) imposes any duty of good faith on the State.

Stage One - East West Link
Finance Direct Deed

Commercial in Confidence

Executed as a deed.

[State Note: Execution blocks to be inserted.]