

State Security

Stage One - East West Link

[]

State

[]

Grantor

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State Security dated

Parties [] (State)
[] (Grantor)

Background

- A. The background to the Project is set out in the Project Agreement.
- B. This Deed sets out the terms on which the Grantor grants a first ranking charge to the State over its entire assets and undertakings as security for the performance of its obligations under each State Project Document.

Operative provisions

1. Defined terms and interpretation

1.1 Project Agreement definitions

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

1.2 Definitions

In this Deed, unless the context otherwise requires:

Authorised Representative means:

- (a) in respect of the State, the State Representative; and
- (b) in respect of the Grantor, the Project Co Representative.

Capital means the uncalled and called but unpaid nominal or premium capital of the Grantor.

Charged Debts means all debts whether actual or contingent at any time owing to the Grantor together with all books or documents of account or records evidencing or recording such debts, including:

- (a) any accounts that arise from the Grantor granting a right, or providing services, in the ordinary course of its business whether or not the Grantor is the person to whom the right is granted or the services are provided;
- (b) any accounts that are proceeds of inventory; and
- (c) any other accounts (as defined in the PPSA).

Collateral means all present and after acquired property, interests, rights and proceeds in respect of which the Grantor has at any time sufficient rights to grant a Security Interest or a charge, including all of the following:

- (a) the assets, undertaking and goodwill of the business of the Grantor; and
- (b) the Capital.

Deal means sell, convey, assign, transfer, lease, licence or otherwise dispose or part with possession of, make any bailment over, grant any option over or create or permit to exist any other interest in any part of the Collateral.

Debt Proceeds means the proceeds of realisation of the Charged Debts.

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

Encumbrance means a mortgage, charge, pledge, lien, encumbrance, 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 and includes any Security Interest.

Enforcement Event means the occurrence of any of the following events:

- (a) the State has elected, by notice under clause 40 of the Project Agreement to terminate the Project Agreement in connection with a Major Default or a Default Termination Event; or
- (b) the State has elected to exercise a Step-In Right in accordance with the Project Agreement and Project Co has failed to comply with any of its obligations under clause 36 of the Project Agreement.

Insolvency Provisions means any Law relating to insolvency, sequestration, liquidation or bankruptcy (including any Law relating to the avoidance of conveyances in fraud of creditors or beneficiaries of trusts or any Law of preferences, and any Law under which a liquidator or trustee in bankruptcy may set aside or avoid transactions), and any provision of any agreement, arrangement or scheme, formal or informal, relating to the administration of any of the assets of any person.

Marketable Securities has the meaning given to it in section 9 of the Corporations Act.

Non PPSA Property means property:

- (a) which is not personal property as defined in the PPSA; or
- (b) to which the PPSA does not apply.

Obligations means all the liabilities and obligations of the Grantor to the State in connection with any State Project Document to which it is a party, and includes any liabilities or obligations that:

- (a) are liquidated or unliquidated;
- (b) are present, prospective or contingent;
- (c) are in existence before or come into existence upon or after the date of this Deed;
- (d) relate to the payment of money or the performance or omission of any act;
- (e) sound in damages only; or
- (f) accrue as a result of any Major Default or Default Termination Event,

and irrespective of:

- (g) whether the Grantor is liable or obligated solely, jointly or jointly and severally with another person;

- (h) the circumstances in which the State comes to be owed each liability or obligation and in which each liability or obligation comes to be secured by this Deed, including any assignment of any liability or obligation or of this Deed; or
- (i) the capacity in which the State or the Grantor comes to owe or be owed such liability or obligation.

Permitted Encumbrance means:

- (a) a lien arising solely by operation of Law and in the ordinary course of the Grantor's ordinary business, provided the Grantor is not in default in payment to the licensee on the due date;
- (b) an Encumbrance to which the State has given its prior consent, but only to the extent it secures financial indebtedness in amounts to which the State has given consent; and
- (c) each Financier's Security (as defined in the Finance Direct Deed).

Power of Attorney means each power of attorney created under clause 9.3.

PPSA means the *Personal Property Securities Act 2009* (Cth).

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

Receiver means a receiver or receiver and manager appointed by the State under this Deed, and, if more than one, then each of them, and also any servant, agent or delegate of any of them.

Revolving Asset means any part of the Collateral:

- (a) which is:
 - (i) inventory;
 - (ii) a negotiable instrument;
 - (iii) machinery, plant or equipment which is not inventory and has a value of less than \$1,000 or its equivalent;
 - (iv) money (including money withdrawn or transferred to a third party from an account of the Grantor with a bank or other financial institution); and
- (b) in respect of which the Grantor has a current licence to Deal under clause 4.2.

Secured Money means, at any time, all money the payment or repayment of which then forms part of the Obligations.

Security Interest has the meaning given to that term in section 12 of the PPSA.

Serial Numbered Property means Collateral that may or must be described by serial number in a financing statement under the PPSA.

Step-In Right means any right of the State to step in under clause 36 of the Project Agreement.

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) **(deed as amended)**: a reference to this Deed or to any other deed, agreement, document or instrument includes a reference to this Deed or such other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time;
 - (e) **(party)**: a reference to a party includes that party's legal representatives, trustees, executors, administrators, successors and permitted substitutes and assigns, including any persons taking part by way of novation;
 - (f) **(person)**: a reference to a person includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
 - (g) **(legislation)**: a reference to legislation includes its delegated legislation and a reference to such legislation or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
 - (h) **(definitions)**: if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
 - (i) **("includes")**: "includes" will be read as if followed by the phrase "(without limitation)";
 - (j) **("or")**: the meaning of "or" will be that of the inclusive, being one, some or all of a number of possibilities;
 - (k) **(information)**: a reference to information includes information, representations, statements, data, samples, calculations, assumptions, deductions, determinations, drawings, design specifications, models, plans and other documents in all forms including the electronic form in which it was generated;
 - (l) **("\$")**: a reference to "\$", AUD or dollar is to Australian currency;
 - (m) **(time)**: a reference to time is a reference to time in Melbourne, Australia;
 - (n) **(rights)**: a reference to a right includes any benefit, remedy, function, discretion, authority or power;

- (o) **(obligations and liabilities)**: a reference to an obligation or a liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;
- (p) **("may")**: the term "may", when used in the context of a power, right or remedy exercisable by the State, means that the State can exercise that power, right or remedy in its absolute and unfettered discretion and the State has no obligation to do so;
- (q) **(construction)**: where there is a reference to an Authority, institute or association or other body referred to in this Deed which:
 - (i) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity, this Deed is deemed to refer to that other entity; or
 - (ii) ceases to exist, this Deed is deemed to refer to that new entity which serves substantially the same purpose or object as the former entity;
- (r) **(remedy)**: the use of the word "remedy" or any form of it in this Deed means that the event to be remedied must be cured or its effects overcome;
- (s) **(contra proferentem rule not to apply)**: each provision will be interpreted without disadvantage to the party who (or whose representative) drafted or proffered that provision;
- (t) **(more than one Grantor)** if more than one person is identified as the Grantor, that expression refers to them, and the obligations of the Grantor under this Deed bind them, jointly and severally;
- (u) **(assets)**: a reference to an asset includes any real or personal, present or future, tangible or intangible, property or asset (including intellectual property) and any right, interest, revenue or benefit in, under or derived, from the property or asset; and
- (v) **(PPSA)**: each of the terms "personal property", "purchase money security interest", "financing statement", "financing change statement", "chattel paper" and "verification statement" have the meanings given to them in the PPSA.

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 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 Relationship of the parties

Unless otherwise expressly provided, this Deed does not:

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

1.10 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 1.10(c), the Grantor 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 1.10(a) and 1.10(b) do not limit any Liability which the State would have had to the Grantor under any State Project Document as a result of a breach by the State of a term of this Deed 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, 1.2, 1.3, 1.8 to 1.10, 5 and 16 to 19,).

3. Security Interest

3.1 Creation

- (a) **(Security interest):** The Grantor grants a security interest in the Collateral to the State to secure the satisfaction of the Obligations and the payment of the Secured Money.
- (b) **(Nature):** This security interest is:
 - (i) a transfer by way of security of Collateral consisting of:
 - A. accounts or chattel paper which are not, or cease to be, Revolving Assets; or
 - B. a Project Document; and
 - (ii) a charge of the Collateral not so transferred.
- (c) **(Further action):** If any law governing this Deed requires that some action be taken or some consent be obtained before a valid security interest can be granted by the Grantor over any part of the Collateral, then this security interest will only apply to that part of the Collateral once such action is taken or consent is obtained but will at all times apply to the relevant proceeds from that Collateral. The Grantor agrees to promptly do anything necessary to ensure that the relevant action is taken or consent is obtained and remains in force.

3.2 Nature of security interest over Non PPSA Property

To the extent that any Non PPSA Property subject to this security interest consists of a Revolving Asset, this security interest will operate as a floating charge in respect of that property until it ceases to be a Revolving Asset. This security interest will otherwise operate as a fixed charge over all Non PPSA Property.

3.3 Priority

Subject to the Finance Direct Deed, this security interest is a first ranking security and takes priority over all other Encumbrances given by the Grantor.

3.4 State assumes no obligations

The State will not be deemed by virtue of this Deed to have assumed any obligation of the Grantor under any Law.

4. Dealing with Collateral

4.1 Dealing restrictions

The Grantor will not without the State's prior consent or as expressly permitted in any other State Project Document:

- (a) **(no encumbrances):** create, purport or attempt to create or permit to exist any Encumbrance over the Collateral other than a Permitted Encumbrance;
- (b) **(no dealing):** subject to clause 4.2, Deal with any part of the Collateral; or

- (c) **(not to prejudice)**: do, fail to do or consent to any act, omission or thing as a result of which the Collateral becomes or could become liable to surrender, forfeiture or cancellation, or becomes or could become prejudiced in any manner, or the value to the State of any Encumbrance under this Deed becomes or could become materially lessened.

4.2 Licence to Deal

Subject to clause 4.3, the Grantor may Deal with (but not grant any Encumbrance other than a Permitted Encumbrance over) any Revolving Asset in the ordinary course of its ordinary business.

4.3 Termination of licence to Deal

- (a) **(End of licence)**: The Grantor's licence to Deal with any Revolving Assets under clause 4.2 will come to an end if:
 - (i) the Grantor breaches clause 4.1 or takes any steps which would result in a breach of that clause;
 - (ii) an Authority takes a step (including signing a notice or direction) which may result in Taxes ranking ahead of the security interest under this Deed;
 - (iii) an Insolvency Event occurs in relation to the Grantor; or
 - (iv) an Enforcement Event occurs.
- (b) **(Reinstatement of licence)**: The grantor's licence to Deal may be reinstated by the State giving the Grantor a notice stating that, from a date specified in the notice, the Collateral specified in the notice is again subject to the licence to Deal.

4.4 Notice to debtor or contractual counterparty

The Grantor authorises the State to give notice to any debtor or contractual counterparty under any:

- (a) account or chattel paper which is not, or ceases to be, a Revolving Asset; or
- (b) Project Document transferred under clause 3.1(b)(i).

4.5 Control of inventory

Any inventory which is not, or ceases to be, a Revolving Asset is specifically appropriated to the Security Interest under this Deed. The Grantor may not remove it without obtaining the specific and express authority of the State to do so.

4.6 Finance Direct Deed

Despite any other provision in this Deed, the State's rights in accordance with this Deed, including the exercise of any power by the State, a receiver or an attorney, are subject to the Finance Direct Deed.

5. Representations and warranties by the Grantor

5.1 Representations and warranties

The Grantor represents and warrants for the benefit of the State that:

- (a) **(good title)**: it has good right and title to grant a security interest in the Collateral in the manner provided in this Deed;
- (b) **(no Encumbrances)**: the Collateral is free of all Encumbrances other than in favour of the State or Permitted Encumbrances; and
- (c) **(information for financing statement)**: the State has received from the Grantor all information reasonably requested by the State to complete the financing statement (or financing change statement if necessary) for this Deed and that information is true and correct in all respects.

5.2 Repetition of representations and warranties

The representations and warranties of the Grantor under clause 5.1 are made and given on the date of this Deed and each of them is taken to be repeated on the first Business Day of each Quarter commencing after the date of this Deed whilst any Secured Money remains outstanding or any Obligation remains unfulfilled (whether or not then due for payment or fulfilment, respectively), with reference to the facts and circumstances then subsisting at those dates.

6. General Undertakings

6.1 Performance of Obligations by the Grantor

The Grantor must punctually perform, observe and fulfil the Obligations and pay the Secured Money relating to it in the manner provided in any State Project Document.

6.2 Grantor details

The Grantor will notify the State before:

- (a) it changes its name or any trust in respect of which it is a trustee (if applicable) changes its name;
- (b) any ABN, ARBN or ARSN allocated to it changes, is cancelled or ceases to apply to it;
- (c) any ABN, ARBN or ARSN is allocated to it where it did not previously have one;
or
- (d) it becomes the trustee of any trust not specified in this Deed.

6.3 Collateral generally

- (a) **(Obligations of Grantor)**: The Grantor will:
 - (i) except to the extent otherwise agreed in the Finance Direct Deed, lodge with the State all certificates, scrip and other indicia of the Grantor's title or interest in any Marketable Securities, all negotiable instruments other than cheques, all chattel paper forming part of the Collateral and all other

documents of title to the whole or part of the Collateral, immediately on receipt of the same;

- (ii) take all steps reasonably necessary to ensure that all Security Interests which it holds are attached, enforceable and continuously perfected under the PPSA until the obligations they secure are satisfied or they are released for value;
 - (iii) at the request of the State, effect all registrations that the State, acting reasonably, considers necessary or desirable for the preservation, protection or recovery of the Collateral;
 - (iv) as and when reasonably requested by the State, provide the State with written details of any property in which it has rights that is, or is capable of being, subject to a purchase money security interest in favour of any third party and the amount secured;
 - (v) not permit the Collateral, or any part of the Collateral to become:
 - A. commingled with any asset that is not subject to the Security Interest under this Deed, except in the ordinary course of the Grantor's business;
 - B. an accession to or affixed to any asset that is not subject to the Security Interest under this Deed; and
 - (vi) immediately notify the State if it becomes aware of the acquisition of any Serial Numbered Property which forms part of the Collateral and, in respect of that Serial Numbered Property, all the details required by the PPSA to be entered in a financing statement.
- (b) **(Nominee):** The Grantor irrevocably and unconditionally appoints, for the purposes of section 153 of the PPSA, the State as its nominee and authorises the State to act on its behalf in connection with any Security Interest granted in favour of the Grantor that:
- (i) is evidenced or created by any chattel paper or Project Document which has been, or will be, transferred in favour of the State under this Deed; and
 - (ii) has been perfected by registration under the PPSA.

7. Rights to demand payment and exercise powers

If an Enforcement Event occurs then, during any period it subsists, at the option of the State and notwithstanding any delay or previous waiver of the right to exercise that option:

- (a) **(demand):** the Secured Money becomes immediately due and payable on demand from the State;
- (b) **(powers):** all rights not previously exercisable become exercisable; and
- (c) **(rights):** any right of the Grantor to Deal with the Collateral (other than through a Receiver appointed under this Deed) immediately cease.

8. Receivers: Appointment and rights

8.1 Appointment

While an Enforcement Event subsists, the State may appoint any person or persons to be the Receiver of the whole or part of the Collateral.

8.2 Removal

- (a) **(Right to remove):** The State may at any time withdraw the appointment of the Receiver appointed under clause 8.1 as to the whole or part of the Collateral. In case of the removal, retirement or death of any Receiver, the State, subject to clause 8.2(b), may appoint another person or persons in the Receiver's place.
- (b) **(Obligation to remove):** Unless the State is otherwise entitled to appoint a Receiver under clause 8.1, the State must withdraw the appointment of the Receiver appointed as a result of an Enforcement Event as soon as practicable after the State ceases to exercise its Step-In Rights.

8.3 More than one Receiver

If more than one person is appointed as the Receiver, the State may at its option specify whether the appointment and the rights of each appointee will be joint, or joint and several. If no specification is made, the appointment and the rights of each appointee will be joint and several.

8.4 Remuneration of Receiver

The State may fix the rate of remuneration of any Receiver, which rate will not exceed the standard hourly rate from time to time charged by the firm of which the Receiver is a member for work of the level conducted by the Receiver.

8.5 Agent of Grantor

Every Receiver will be the agent of the Grantor and, subject to all applicable Laws, the Grantor will be solely responsible for all acts and omissions by, and the remuneration of, the Receiver.

8.6 Indemnity

The State may give such indemnities to any Receiver concerning the performance of the Receiver's duties as are permitted by Law. If the State is obliged to pay any money under any indemnity, that money will become part of the Secured Money.

8.7 Rights of Receiver

In addition to powers conferred by statute and any other rights, and without the need for any consent from the Grantor or any other person, the Receiver will have all of the following rights in relation to the Collateral with respect to which the Receiver has been appointed:

- (a) **(Section 420):** all of the powers granted to a receiver of property of a corporation under section 420 of the Corporations Act;
- (b) **(to take possession):** to take possession or control of, or to make use of, the whole or any part of the Collateral, or to relinquish such possession or control;

- (c) **(to convert to money)**: to convert, liquidate and reduce the whole or any part of the Collateral into money;
- (d) **(to lease)**: whether or not the Receiver has taken possession, to lease or licence in the name of the Grantor or otherwise the whole or any part of the Collateral for any period and on any terms, or to vary or terminate a lease or licence;
- (e) **(to carry on business)**: to carry on or concur in carrying on any business then conducted by the Grantor, and to effect all Insurances required to be taken out or maintained under the Project Agreement and do all acts which the Grantor might do in the ordinary conduct of such business for the protection or improvement of the whole or part of the Collateral;
- (f) **(to employ)**: to employ consultants, professional advisers, sub-contractors, agents and employees (including any person associated with a firm or company in which the Receiver is a member or in which the Receiver is interested, and that person may charge for his or her services as if he or she had been independently retained at such salaries or remuneration as the Receiver thinks fit), and to act on any advice given by that person;
- (g) **(to conduct works)**: to repair, renew, replace, renovate or clean the Collateral, to erect any new buildings or make any improvements to any land forming part of the Collateral, and to demolish, alter, rebuild or extend any existing improvements on the Collateral. All outlays and expenses paid or incurred by the Receiver in this regard will be deemed to form part of the Secured Money;
- (h) **(to sell property)**: whether or not the Receiver has taken possession, to sell or concur in selling all or any of the Collateral by public auction, private treaty or tender, for cash or on credit, in one lot or in parcels, with or without special conditions or stipulations as to title, or the time and the mode of payment of purchase money, and on such other terms as the Receiver thinks fit, with power to allow deferred payment of any part of the purchase money, whether or not secured by an Encumbrance from the purchaser and with full power to buy in and to rescind or vary any contract for sale, and to resell without being responsible for loss including a right to require that the purchaser assume all or any obligations of the Grantor under the Project Documents, whether those obligations are present or future, actual or contingent;
- (i) **(contracts for sale)**: to exercise all or any rights of the Grantor under any contract for sale, and to execute those contracts, any applications for transfer, transfers, assignments and assurances of all or any part of the Collateral in the name and on behalf of the Grantor or otherwise, and to do all other acts and things for implementing and completing any sale that the Receiver deems necessary;
- (j) **(to sever and sell fixtures)**: to sever fixtures belonging to the Grantor and to sell those separately from any other part of the Collateral;
- (k) **(to invest proceeds against contingencies)**: if any part of the Secured Money is contingent, to invest, deposit or hold any part of the Collateral in a form or mode of investment for the time being as the Receiver in its absolute discretion thinks fit, with like power to vary, transpose or re-invest the investments or deposits from time to time until such part of the Secured Money ceases to be contingent;
- (l) **(to enter into contracts)**: to enter into any contract or arrangement with any person for any purpose connected with this Deed or the whole or any part of the Collateral or in furtherance of any right (other than a contract for borrowing or

raising of funds), on such terms and conditions as the Receiver in its absolute discretion thinks fit including granting or conferring options to, in favour of or exercisable by, any person for the purpose of or in connection with the sale, purchase, leasing, hiring or other dealing with, the whole or any part of the Collateral;

- (m) **(to perform contracts)**: to perform, observe and carry out, enforce specific performance of, exercise or refrain from exercising, obtain the benefit of, and to vary or rescind, the Grantor's rights under all contracts and rights forming part of the Collateral or entered into in the exercise of any right;
- (n) **(to take proceedings)**: to institute, conduct or defend any proceedings in Law, equity or bankruptcy, and to submit to arbitration, mediation or conciliation in the name of the Grantor or otherwise and on any terms, any proceeding, claim, question or dispute in connection with the Collateral or otherwise;
- (o) **(to compromise)**: to make any settlement, arrangement or compromise regarding any action or dispute arising in connection with the Collateral, and to grant to any person involved in any action or dispute or other indulgence, and to execute, such releases or discharges in connection with any action or dispute as the Receiver thinks expedient in the interests of the State;
- (p) **(to appeal)**: to appeal against or to enforce any judgment or order;
- (q) **(to bankrupt debtors and wind-up companies)**: to make debtors bankrupt and to wind-up companies and to do all things in connection with any bankruptcy or winding up which the Receiver thinks is necessary for the recovery or protection of the whole or part of the Collateral, or for the security or other benefit of the State;
- (r) **(to delegate)**: with the consent of the State, to delegate to any person for such time or times as the State approves, any of the rights, including this power of delegation;
- (s) **(to file)**: to file all certificates, registrations and other documents and to take any and all action on behalf of the Grantor which the State or Receiver believes is necessary to protect, preserve or improve any or all of the Collateral and the rights of the Grantor and the State in respect of any agreement for sale, and to obtain for the State all of the benefits of this Deed and any Project Document, and, in particular, the placing of the Grantor into liquidation or the appointment of a Receiver will be deemed to be an event against which the State may protect its rights;
- (t) **(to make calls on Capital)**: to call and get in Capital;
- (u) **(to operate bank accounts)**: to open or operate any bank account in the name of the Grantor whether alone or jointly to the exclusion of the Grantor, and to deposit or withdraw any money to the credit of that account, and to sign and endorse or to authorise others to sign and endorse in the name of the Grantor cheques, promissory notes bills of exchange and other negotiable instruments;
- (v) **(to do all other things necessary)**: to do all things necessary to perform, observe and fulfil any of the covenants on the part of the Grantor contained in this Deed; and
- (w) **(Receiver's discretion)**: subject to duties owed by the Receiver to the Grantor and its creditors at Law which may not be excluded by contract, to do all other acts and

things without limitation as the Receiver thinks expedient in the interests of the State,

and any further powers and discretions as the State confers on the Receiver by notice to the Receiver for the purposes referred to in this clause 8.7.

9. State's powers

9.1 Exercise of rights

- (a) **(State's rights):** Subject to clause 9.1(b), while an Enforcement Event subsists the State may without notice and whether or not a Receiver has been appointed:
 - (i) exercise all or any of the rights conferred on a Receiver or which would be conferred on a Receiver if appointed, as if those rights had been expressly conferred on the State;
 - (ii) exercise all other rights; and
 - (iii) appoint an agent or joint and several agents and delegate such powers to it or them (in which case clauses 8.1, 8.4 and 8.6 will apply as if it or they were appointed as the Receiver).
- (b) **(Withdrawal):** If the State must withdraw the appointment of the Receiver in accordance with clause 8.2(b), the State must as soon as practicable cease to exercise rights under this clause 9.1.

9.2 Act jointly

The State or the Receiver may exercise any of the rights in conjunction with the exercise of similar powers by any other holder of an Encumbrance of the whole or part of the Collateral or by any Receiver appointed by that other holder of an Encumbrance, and may enter into and give effect to agreements and arrangements with that other holder of an Encumbrance or receiver as the State or the Receiver thinks fit.

9.3 Power of attorney

- (a) **(Acts requested by State):** As from the date of this Deed, for the purpose of doing any act which the Grantor is required to do under this Deed, the Grantor irrevocably appoints the State, and each agent and attorney from time to time of the State, and any Receiver appointed under this Deed, severally, as attorney of the Grantor, with power to:
 - (i) do all acts which are required to be done by the Grantor under this Deed and which the Grantor has failed to do within 20 Business Days of being requested by notice to do so by the State; and
 - (ii) appoint (and remove at will) at any time any person as a substitute for an attorney.
- (b) **(Acts while certain circumstances subsist):** The Grantor irrevocably appoints the State, each agent from time to time of the State, and any Receiver appointed under this Deed, severally, as attorney of the Grantor, with power while an Enforcement Event subsists to:

- (i) do all acts which are required to be done by the Grantor under this Deed or another Project Document or to exercise any right;
 - (ii) take further action and to execute further instruments which are, or are in the reasonable opinion of the State, necessary to perfect the Encumbrance created by this Deed; and
 - (iii) appoint (and remove at will) at any time any person as a substitute for an attorney.
- (c) **(Ratification and confirmation):** The Grantor ratifies and confirms now and for the future all actions lawfully undertaken by or on behalf of its attorney under this Power of Attorney.
- (d) **(Duration):** The Grantor declares that this Power of Attorney will continue until the discharge of this Deed.

9.4 Exclusion of PPSA provisions

To the extent permitted by law, and in respect of each Security Interest created by this Deed:

- (a) **(contracting out):** the parties contract out of sections 95, 121(4), 125, 130, 132(3)(d), 132(4), 135, 142 and 143 of the PPSA (to the extent, if any, mentioned in section 115(1) of the PPSA);
- (b) **(waiver under PPSA):** the Grantor waives its rights to receive any information under section 275 of the PPSA and agrees not to make any request under that section or to take any action which would otherwise require the State to make a disclosure under that section; and
- (c) **(waiver of verification statement):** the Grantor irrevocably and unconditionally waives its right to receive any notice of any verification statement in respect of any financing statement or financing change statement relating to this Deed.

9.5 Exercise of rights

If the State exercises a right in connection with this Deed, that exercise will be taken to be an exercise of the right under the general law unless the right is only available under the PPSA or the State states otherwise at the time of exercise.

10. Time periods

10.1 Exclusion of time periods

Neither the State nor any Receiver need give the Grantor any notice or demand or allow time to elapse before exercising a right under this Deed or conferred by Law (including a right to sell) unless the notice, demand or lapse of time is required by Law and cannot be excluded, or is otherwise expressly required by this Deed.

10.2 Mandatory notice period

If the Law requires that a period of notice must be given or a lapse of time must occur or be permitted before a right under this Deed or conferred by Law may be exercised, then:

- (a) **(mandatory period)**: when a period of notice or lapse of time is mandatory, that period of notice must be given or that lapse of time must occur or be permitted by the State; or
- (b) **(fixed period)**: when the Law provides that a period of notice or lapse of time may be stipulated or fixed by this Deed, then one day is stipulated and fixed as that period of notice or lapse of time including (if applicable) as the period of notice or lapse of time during which:
 - (i) default must continue before a notice is given or requirement otherwise made for payment of the Secured Money or the observance of other obligations under this Deed; and
 - (ii) a notice or request for payment of the Secured Money or the observance of other obligations under this Deed must remain not complied with before the State or a Receiver may exercise its rights.

11. Application of money

11.1 Priority of payments

Subject to the Finance Direct Deed, all money received by the State or by the Receiver as a result of the exercise of the rights may be applied:

- (a) **(incidental to exercise of rights)**: in payment of all fees, costs, charges, expenses and disbursements incurred in or incidental to the exercise or performance or attempted exercise or performance of any of the rights;
- (b) **(outgoings)**: in payment of any other outgoings as the State or the Receiver thinks fit;
- (c) **(payment of prior encumbrances)**: in payment of other Encumbrances of which the State is aware to the extent to which they have priority to this Deed, in the order of their priority;
- (d) **(payment of Secured Money)**: in payment of the Secured Money then owing or contingently or prospectively owing, whether or not due and payable;
- (e) **(subsequent encumbrances)**: in payment of subsequent Encumbrances of which the State is aware to the extent to which they have priority after this Deed, in the order of their priority; and
- (f) **(surplus)**: if there is any surplus (which will belong to the Grantor but will not carry interest), in payment to the Grantor.

11.2 Money received

In applying any money towards satisfaction of the Secured Money, the Grantor will be credited only with so much of the money available for that purpose as will be actually received by the State or the Receiver in relation to the relevant Collateral and not required for whatever reason to be disgorged, any credit to be dated from the time of receipt. It is acknowledged that the amount of money actually received in relation to relevant Collateral may be a function of the amount attributed to the Collateral by the State or the Receiver.

11.3 Application of payments or credits

Each of the State and the Receiver has an absolute discretion to apply any payment or credit received by it under this Deed (and, to the extent relevant, attributed to the Secured Money) in reduction of any part or parts of the Secured Money, whenever and on whatever account the Secured Money became secured, notwithstanding any principle or presumption of Law to the contrary or any direction given at the time of receipt, and without the need to communicate its election to any person.

11.4 Reliance on certificate

In making any payment to any other holder of an Encumbrance under clause 11.1, the State and the Receiver may rely on a certificate from that holder of an Encumbrance as to the amount secured, and are not bound to enquire as to the accuracy of the certificate or whether the amount referred to is validly secured by the Encumbrance.

12. Liability and release

12.1 Continuing obligation

Subject to clause 12.5, this Deed constitutes a continuing obligation regardless of any settlement of account, intervening payment, express or implied revocation, or any other matter or thing. Without limiting the generality of the foregoing, each indemnity in this Deed is a separate additional and continuing obligation and will survive the discharge of this Deed. Unless otherwise agreed, payment by the State will not be a pre-condition to liability under any indemnity.

12.2 Personal liability

No grant of full or partial satisfaction of or discharge from this Deed by the State will, unless it expressly provides otherwise, release the Grantor from personal liability under this Deed or under any other State Project Document until none of the Secured Money is owing (whether actually, contingently or prospectively) and it is not reasonably foreseeable that there could be any Secured Money owing in the future.

12.3 Settlement conditional

(a) **(Conditions on settlement):** Any settlement or discharge between the State and the Grantor is conditional on any security or payment given or made to the State by the Grantor or any other person in relation to the Obligations relating to the Grantor not being avoided, repaid or reduced by virtue of any Insolvency Provision. If the security or payment is avoided, repaid or reduced, the State is entitled to recover the value or amount of such security or payment avoided, repaid or reduced from the Grantor subsequently as if that settlement or discharge had not occurred.

(b) **(Consequences of settlement):** If:

(i) the State has at any time released or discharged:

A. the Grantor from its Obligations; or

B. any assets of the Grantor from this Deed,

in either case in reliance on a payment, receipt or other transaction to or in favour of the State; or

- (ii) any payment, receipt or other transaction to or in favour of the State has the effect of releasing or discharging:
 - A. the Grantor from its Obligations; or
 - B. any assets of the Grantor from this Deed; and
- (iii) that payment, receipt or other transaction is subsequently claimed by any person to be void, voidable or capable of being set aside for any reason, including under an Insolvency Provision or under any other law; and
- (iv) that claim is upheld or is conceded or compromised by the State,
then:
 - (v) the State will immediately become entitled against the Grantor to all rights as it had immediately before that release or discharge; and
 - (vi) the Grantor must, to the extent permitted by law:
 - A. immediately do all things and execute all documents as the State, acting reasonably, may require to restore to the State all those rights; and
 - B. indemnify the State against all costs, damages, claims, demands and actions suffered or incurred by it or in connection with any negotiations or proceedings relating to the claim or as a result of the upholding, concession or compromise of the claim.

12.4 Grantor's liability not affected

This Deed and the Liability and responsibility of the Grantor and the State's rights against the Grantor under this Deed or otherwise according to Law, will not be affected or discharged by any of the following:

- (a) (**indulgence**): the granting to the Grantor or to any other person of any time or other indulgence or consideration;
- (b) (**Project Documents**): the State failing or neglecting to recover by the realisation of any Project Documents, other Encumbrance or otherwise any of the Secured Money relating to the Grantor;
- (c) (**laches**): any other laches, acquiescence, delay, act, omission or mistake on the part of the State or any other person;
- (d) (**release**): the release, discharge, abandonment or transfer, whether wholly or partially and with or without consideration, of any Project Document, other Encumbrance, judgment or negotiable instrument held from time to time or recovered by the State from or against the Grantor or any other person; or
- (e) (**any other thing**): any other matter or thing.

12.5 Release of Collateral

The State will, upon application by the Grantor, grant a release of the Collateral from this Deed, if at the time the release is to be provided, the State is satisfied that none of the Secured

Money is owing (whether actually, contingently or prospectively) and none of the Obligations remain to be performed.

13. Liability and indemnity

13.1 Waiver by Grantor

To the extent permitted by Law, the Grantor waives in favour of the State:

- (a) any requirement that the State take any action or exhaust any right against any other person before enforcing this Deed against the Grantor;
- (b) all rights against the State and any other person, estate or assets as far as is necessary to give effect to any provision of this Deed;
- (c) promptness and diligence on the part of the State; and
- (d) all rights inconsistent with the provisions of this Deed.

13.2 No liability for loss

To the extent permitted by Law, neither the State, nor any Receiver will have any Liability for any omission, delay or mistake or any loss or irregularity in or about the exercise or attempted exercise, non-exercise or purported exercise of any right, except for fraud or wilful act or omission.

13.3 No liability to account

To the extent permitted by Law, neither the State nor any Receiver will, by reason of the State or the Receiver entering into possession of the whole or part of the Collateral, be liable to account as mortgagee or secured party in possession, or for anything except actual receipts (and, if relevant, attributed to the Collateral), or be liable for any loss on realisation or for any default, omission, delay or mistake for which a mortgagee or secured party in possession might be liable.

13.4 No conflict

The State and any Receiver may exercise any right notwithstanding that the exercise of that right involves a conflict between any duty owed to the Grantor by the State or that Receiver and any duty owed by the State or that Receiver to any other person, or the interests of the State or that Receiver. No contract will be void or voidable by virtue of any such conflict of duty or interest, nor will the State or any Receiver be liable to account to the Grantor or any other person for any money or property as a result of such conflict.

13.5 No notice or enforcement

The State need not give any notice of the security created by this Deed to any debtor of the Grantor, or to any purchaser, or to any other person, or to enforce payment of any money payable to the Grantor, or realise any of the Collateral, or to take any steps or proceedings for that purpose.

13.6 Indemnity

The Grantor bears all risks with respect to and must indemnify the State and the Receiver on demand against any Claim or Liability (including any Claim made by, or Liability to, a third

party) which the State or any Receiver suffers or incurs arising out of or in respect of or in connection with:

- (a) **(exercise of right)**: the exercise, attempted exercise or non-exercise of any right under this Deed, including (without limitation) those consequent on any mistake, oversight, error of judgment or want of prudence on the part of the State or any Receiver, unless the same is due to fraud or wilful act or omission;
- (b) **(Enforcement Event)**: a consequence of the occurrence of an Enforcement Event; and
- (c) **(act or omission)**: any act or omission for which the State or any Receiver is exonerated by this Deed.

13.7 Protection of persons dealing with State or Receiver

No person acquiring any money or asset from, or paying or handing over any money or asset to, or otherwise dealing with, the State, the Receiver or any attorney appointed under this Deed, or to whom is tendered for registration an instrument executed by the State, the Receiver or any attorney appointed under this Deed, will be:

- (a) **(inquiries)**: bound to inquire:
 - (i) whether the State or the Receiver has the right to dispose of any money or asset;
 - (ii) whether an Enforcement Event has occurred;
 - (iii) whether any of the Secured Money is owing or payable;
 - (iv) whether the Receiver or an attorney has been properly appointed;
 - (v) as to the propriety or regularity of the exercise or purported exercise of any right; or
 - (vi) as to any other matter or thing;
- (b) **(actual or constructive notice)**: affected by actual or constructive notice that any transaction, document or other dealing is unnecessary or improper; or
- (c) **(application of money or asset)**: concerned to see to the application of any money or asset, or be answerable or accountable for any loss or misapplication of any money or asset,

and the irregular, improper or unnecessary exercise of any right will be, as regards the protection of any such person, deemed to be authorised by the Grantor and valid.

14. Payments

14.1 Money repayable as agreed or on demand

Unless otherwise provided in the Project Agreement, the Secured Money will be payable by the Grantor to the State in Australian dollars on the due date (or if no date is specified immediately on demand by the State).

14.2 Payment of interest

The Grantor will pay interest on the Secured Money which is due and payable to the State but unpaid in accordance with any State Project Document or, in the absence of any relevant provision, at the Overdue Rate calculated daily from, but excluding, the date upon which or the expiration of the period within which they should have been paid to, and including, the date upon which the moneys are paid.

14.3 Capitalisation of interest

The State may capitalise any interest which has become due and owing in accordance with any State Project Document or, in the absence of any relevant provision, then at such periods of not less than one calendar month and from such dates as the State elects. The accumulation of capitalised interest may continue until the Secured Money has been paid in full notwithstanding any composition, compromise judgment or order in respect of any person or any other thing.

14.4 Merger

If the liability of the Grantor to pay to the State any of the Secured Money becomes merged in any judgment or order, as an independent obligation the Grantor will pay interest at the rate which is the higher of that payable under this Deed and that fixed by or payable under that judgment or order.

14.5 No deduction for taxes and no set off or counterclaim

All payments by the Grantor under any State Project Document, whether of principal, interest or other amounts, will (except as provided for in a Project Document) be:

- (a) **(no set off or counterclaim)**: free of any set off or counterclaim; and
- (b) **(no deduction or withholding)**: without deduction or withholding for any present or future Tax unless the Grantor is compelled by law to deduct or withhold the same, in which case the Grantor will pay to the State any additional amounts necessary to enable the State to receive, after all deductions and withholding for such Tax, a net amount equal to the full amount which would otherwise have been payable had no such deduction or withholding been required to be made.

15. Termination of this Deed

- (a) **(Termination)**: This Deed will terminate on the latest of:
 - (i) performance and satisfaction of all of the Obligations; and
 - (ii) the date on which all Secured Money has been repaid in full.
- (b) **(Effect of termination)**: 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. Notices

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

- (a) **(in writing)**: must be in writing;

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

State:

Attention: [#]

Address: [#]

Email: [#]

Grantor:

Attention: [#]

Address: [#]

Email: [#]

- (c) **(signed)**: must be signed by the party making the communication or by the solicitor for, or any attorney, director, secretary or authorised agent of, that party on its behalf;

- (d) **(form of delivery)**: must be delivered by hand or posted by prepaid post to the address or emailed (in the form agreed by both parties) to the email address of the addressee set out in clause 16(b); and

- (e) **(taken to be received)**: are taken to be received by the addressee at the address set out in clause 16(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.

17. Dispute resolution

17.1 Procedure for resolving disputes

- (a) **(Procedure):** Any dispute between the parties arising under this Deed must be resolved in accordance with this clause 17.
- (b) **(Dispute resolution procedure):** The procedure that is to be followed to resolve a dispute is as follows:
 - (i) firstly, the dispute must be the subject of negotiation as required by clause 17.2;
 - (ii) secondly, if the dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 17.2(c)(i) the parties may agree that the dispute will be referred to an expert for determination in accordance with clauses 17.4 to 17.8 (inclusive) or to arbitration under clause 18; and
 - (iii) thirdly, if:
 - A. the dispute remains unresolved (in whole or in part) and has not been referred to expert determination after the expiration of the period for negotiation referred to in clause 17.2(c)(i) and irrespective of whether the parties failed to meet as required by that clause or whether having so met the parties fail to agree whether the dispute should be referred to an expert or to arbitration within 20 Business Days after the expiration of the period for negotiation referred to in clause 17.2(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 17.6(a),
 - (iv) then the dispute must be referred to arbitration in accordance with clause 18.

17.2 Negotiation

- (a) **(Notification):** If a dispute arises then a party may give notice to the other party requesting that the dispute be referred for resolution by negotiation between the Chief Executive Officers (or equivalent) of both parties (**Representatives**).
- (b) **(Contents of Notice):** A notice under clause 17.2(a) must:
 - (i) state that it is a notice under this clause 17; 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 17.2(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 17.2(a) is received (or such later date as the parties may agree); and
- (ii) any agreement reached between the Representatives will be reduced to writing, signed by or on behalf of each party and will be contractually binding on the parties.

17.3 Expert determination

If:

- (a) **(dispute unresolved by Representatives):** a dispute which has been referred to the Representatives for negotiation in accordance with clause 17.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 17.2(c)(i); and
- (b) **(referral to expert):** the parties agree within 20 Business Days after the expiration of the period for negotiation referred to in clause 17.2(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 17.4 to 17.8. For the avoidance of doubt, a dispute may only be referred to an expert for determination by agreement of the parties.

17.4 Selection of expert

- (a) **(Exchange of lists of 3 preferred experts):** Within 7 Business Days after the date on which the parties agree to refer a dispute to an expert for determination under clause 17.3(a), the parties must exchange lists of 3 persons (in order of preference) who, if appointed, would satisfy the requirements of clause 17.4(d), from whom the expert is to be chosen.
- (b) **(Appointment of person who appears on both lists):** Any person that appears on both lists under clause 17.4(a) will be appointed as the expert to determine a dispute and if more than one person appears on both lists the person given the highest order of priority by the party that gave the notice under clause 17.2(a) will be appointed.
- (c) **(Appointment if no person appears on both lists):** If no person appears on both lists, the party which gave the notice under clause 17.2(a) must procure:
 - (i) the president (or the senior non-executive officer, howsoever described) of the institute or governing body for the technical or professional discipline the subject of the relevant dispute to nominate the expert, having regard to, but not being bound by, those persons proposed by the parties under clause 17.4(a); or
 - (ii) if there is no governing body for the technical or professional discipline the subject of the relevant dispute or such governing body advises that it will not nominate an expert, the President of the Australian Centre for International Commercial Arbitration to nominate a person to act as the expert, having regard to, but not being bound by, those persons proposed by the parties under clause 17.4(a).

- (d) **(Appropriate skills):** It is the intention of the parties that the expert appointed to determine a dispute will be an independent person with appropriate skills having regard to the nature of the matters in dispute.
- (e) **(No entitlement to challenge appointment):** Neither party will be entitled to challenge the appointment of an expert under this clause 17.4 on the basis that the expert does not satisfy the requirements of clause 17.4(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 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.

17.5 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.

17.6 Expert finding

- (a) **(Notification):** The determination of the expert must be in writing and will be final and binding on the parties unless, within 10 Business Days of receipt of the determination, a party gives notice to each other party of its dissatisfaction and intention to refer the matter to arbitration in accordance with clause 18.
- (b) **(Amendment to determination):** Upon submission by any party, the expert may amend the determination to correct:
 - (i) a clerical mistake;
 - (ii) an error from an accidental slip or omission;
 - (iii) a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or
 - (iv) a defect in form.

17.7 Liability of expert

- (a) **(Liability of expert):** The parties agree:
 - (i) that the expert will not be liable in connection with the expert determination, except in the case of fraud on the part of the expert; and
 - (ii) to indemnify the expert against any 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 parties will jointly engage the expert services in connection with the expert determination proceedings and each party will seek a separate Tax Invoice equal to its share of the costs of the expert.

17.8 Costs

The parties must:

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

18. Arbitration

18.1 Reference to Arbitration

- (a) **(Dispute):** If:
 - (i) a dispute:
 - A. which has been referred to the Representatives for negotiation in accordance with clause 17.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 17.2(c)(i); and
 - B. the parties do not agree to refer the dispute to an expert for determination; or
 - (ii) in the case of a dispute which the parties agree to refer to expert determination under clause 17.3:
 - 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 17.6,

then either party may notify the other that it requires the dispute to be referred to arbitration.
- (b) **(Referral):** Upon receipt by the other party of a notice under clause 18.1(a), the dispute will be referred to arbitration.

18.2 Arbitration

- (a) **(ACICA Rules):** Arbitration in accordance with this clause 18 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 18.
- (b) **(Seat):** The seat of the arbitration will be Melbourne, Victoria.
- (c) **(Language):** The language of the arbitration will be English.

18.3 Appointment of arbitrator

The parties will endeavour to agree on the person to be appointed as arbitrator, but if no such agreement is reached within 15 Business Days of the dispute being referred to arbitration in accordance with clause 18.1(b), the arbitrator will be appointed by the Australian Centre for International Commercial Arbitration.

18.4 General Principles for conduct of arbitration

- (a) **(Conduct of arbitration):** The parties agree that:
 - (i) they have chosen arbitration for the purposes of achieving a just, quick and cost-effective resolution of any Dispute;
 - (ii) any arbitration conducted in accordance with this clause 18 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 18.4(a)(i) and 18.4(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 18.4(a) when determining the duration of the oral hearing;
 - (iii) oral evidence in chief at the hearing will be permitted only with the permission of the arbitrator for good cause;
 - (iv) the oral hearing must be conducted on a stop clock basis with the effect that the time available to the parties must be split equally between the parties so that each party has the same time to conduct its case unless, in the opinion of the arbitrator, such a split would breach the rules of natural justice or is otherwise unfair to one of the parties;
 - (v) not less than 28 days prior to the date fixed for oral hearing each party must give notice of those witnesses (both factual and expert) of the other party that it wishes to attend the hearing for cross examination;
 - (vi) in exceptional circumstances the arbitrator may amend the date of hearing and extend the time for the oral hearing set in accordance with clause 18.4(d)(ii);
 - (vii) a party will not be bound to accept the written evidence of a witness submitted on behalf of the opposing party which is not challenged in cross examination; and
 - (viii) each party is expected to put its case on significant issues in cross examination of a relevant witness called by the opposing party or, where it seeks to challenge the evidence of a witness not called for cross-

examination by reference to other evidence, to identify that evidence in its written opening submissions so that the opposing party may know the nature of and basis for the challenge to the witness' written evidence.

- (e) **(Experts):** Unless otherwise ordered each party may only rely upon one expert witness in connection with any recognised area of specialisation.

18.5 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 18.5, have applied to any dispute referred to arbitration in accordance with this clause 18.

18.6 Extension of ambit of arbitration proceedings

- (a) **(Extending Disputes):** Where:

- (i) a dispute between the parties to this Deed is referred to arbitration in accordance with this clause 18; and
- (ii) there is some other dispute also between the parties to and in accordance with this Deed (whenever occurring),

the arbitrator may, upon application being made to the arbitrator by one or both of the parties at any time before a final award is made in relation to the first-mentioned dispute, make an order directing that the arbitration be extended so as to include the other dispute.

- (b) **(Arbitrator's order):** An arbitrator may make an order in accordance with clause 18.6(a) on such terms and conditions (if any) as the arbitrator thinks fit.

18.7 Award final and binding

- (a) **(Final and binding):** Subject to clause 18.7(b), any award will be final and binding on the Parties.
- (b) **(Appeal):** Each party consents to any appeal to a court where that appeal is made under the *Commercial Arbitration Act 2011* (Vic) on a question of law arising in connection with an arbitral award made in accordance with this clause 18.

18.8 Continue to perform

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

18.9 Governing law of arbitration agreement

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

18.10 Interlocutory relief

This clause 18 does not prevent a party from seeking urgent interlocutory relief from a court of competent jurisdiction where, in that party's reasonable opinion, that action is necessary to protect that party's rights.

19. Miscellaneous

19.1 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 17 to 18, each party irrevocably submits to the non-exclusive jurisdiction of the courts of Victoria, and the courts competent to determine appeals from those courts, with respect to any proceedings which may be brought in connection with this Deed.

19.2 Entire agreement

To the extent permitted by Law, and in relation to their 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) **(prior agreements):** supersede any prior agreement of the parties.

19.3 Further acts and documents

- (a) **(Give effect to this Deed):** Each party must promptly do all further acts and execute and deliver all further documents (in such form and content reasonably satisfactory to both parties) required by Law or reasonably requested by another party to give effect to this Deed.
- (b) **(Security Interest):** Without limiting clause 19.3(a) if the State determines that a State Project Document (or a transaction related to a State Project Document) is or contains a Security Interest, the Grantor agrees to promptly do anything (including amending any Project Document or executing any new document) which the State reasonably requires for the purposes of:
 - (i) ensuring that the Security Interest is enforceable, perfected (including, where possible, by control in addition to registration) and otherwise effective;
 - (ii) enabling the State to apply for registration, or give any notification, in connection with the Security Interest so that the Security Interest has the priority required by the State; or
 - (iii) enabling the State to exercise rights in connection with the Security Interest.

19.4 Survival of certain provisions

- (a) **(Surviving clauses):** All provisions of this Deed which, expressly or by implication from their nature, are intended to survive the rescission, termination or expiration of this Deed will survive the rescission, termination or expiration of this Deed, including any 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 in accordance with 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.

19.5 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.

19.6 Consents, approvals and directions

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

19.7 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.

19.8 Expenses

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

19.9 Severance

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

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

19.10 Counterparts

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

19.11 Moratorium legislation

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

19.12 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 19.12(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.

19.13 Indemnity held on trust

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

19.14 Registration

The State may register this Deed, or any financing statement or financing change statement relating to this Deed, in the manner prescribed by law to ensure the full efficacy of this Deed as an Encumbrance to the State in all relevant jurisdictions.

19.15 Confidentiality

- (a) **(Confidential):** Subject to clause 19.15(b), if the Grantor is a debtor as defined in the PPSA, the parties agree to keep all information of the kind mentioned in section 275(1) of the PPSA confidential and not to disclose that information to anyone.
- (b) **(Exceptions):** Clause 19.15(a) does not apply to any disclosure of information or documents:
- (i) in any proceeding arising out of or in connection with this Deed to the extent that the disclosure is deemed by the disclosing party necessary to protect its interests;
 - (ii) where the information is in the public domain other than as a result of a breach by that disclosing party of this clause 19.15;
 - (iii) if required to do so under a binding order of any Authority or any procedure for discovery in any proceedings;
 - (iv) if the disclosing party reasonably believes it is required to do so by any law or stock exchange (except that this paragraph does not permit the State to disclose any information of the kind referred to in section 275(1) of the PPSA, to the extent that disclosure can be resisted under subsection 275(6) of the PPSA);
 - (v) otherwise as required or permitted by any State Project Document;
 - (vi) to a disclosing party's Related Bodies Corporate, its legal advisors and its consultants as long as it advises them of the confidential nature of the information or documents or that nature is clear from the circumstances of the disclosure;
 - (vii) by the State to a proposed assignee or transferee of any rights or obligations under any Project Document or to any sub-participant or other person with whom any other transaction may be entered into under which payments may be made by reference to any Project Document or the Grantor;
 - (viii) by the State with the Grantor's prior consent;
 - (ix) by the Grantor with the State's prior consent.
- (c) **(Authority to disclose):** Each party authorises disclosures made by the other party in accordance with clause 19.15(b)(i) to 19.15(b)(vii) provided that the disclosure is not otherwise prohibited under any State Project Document.

Executed as a deed.

[State Note: Execution blocks to be inserted.]