

Lease

Stage One - East West Link

[]

State

[]

Project Co

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Lease dated

Parties [] (State)
[] (Project Co)

Background

- A. The background to the Project is set out in the Project Agreement.
- B. As part of the development and implementation of the Project, the State has agreed to grant, and Project Co has agreed to accept, a lease of the Leased Area on the terms and conditions contained in this Lease.
- C. The State has the power to grant this Lease.

Operative provisions

1. Definitions and interpretation

1.1 Project Agreement definitions

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

1.2 Definitions

In this Lease, unless the context otherwise requires:

Agreed Amount has the meaning given in clause 8(b)(i).

Commencement Date means the Date of Stage One Completion.

Cost has the meaning given in clause 8(g).

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

Dispute has the meaning given in clause 15.1(a).

Expiry Date means the date the Project Agreement is terminated.

Lease means this lease and includes all Schedules, Exhibits, Attachments and Annexures to it.

Leased Area means the area delineated on the plan attached as Annexure A.

Permitted Use means:

- (a) the performance of the Project Activities in accordance with the Project Agreement and this Lease;
- (b) the storage and location of any plant, equipment, machinery, facilities and vehicles necessary for the carrying out of the Project Activities; and
- (c) any other purpose permitted by the Project Agreement or otherwise agreed by the State.

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

Recipient has the meaning given in clause 8(b)(ii).

Rent means [#]. *[State Note: To be completed based on Proposals, including any proposal in relation to the securitised lease structure.]*

Rent Payment Date means [#]. *[State Note: To be completed based on Proposals, including any proposal in relation to the securitised lease structure.]*

Representative has the meaning given in clause 15.2.

Reserved Minerals has the meaning given to it in clause 3.1(a).

Revenue has the meaning given in clause 8(f).

Services includes electricity, gas, water, drainage, sewerage and communications services or utilities.

Supplier has the meaning given in clause 8(b).

Term means the term of this Lease commencing on the Commencement Date and ending on the Expiry Date.

1.3 Interpretation

In this Lease:

- (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) **(Lease and Schedule references)**: a reference to:
- (i) a party, clause, Schedule, Exhibit, Attachment or Annexure is a reference to a party, clause, Schedule, Exhibit, Attachment or Annexure of or to this Lease; and
 - (ii) a section is a reference to a section of a Schedule;
- (d) **(Lease as amended)**: a reference to this Lease or to any other deed, agreement, document or instrument includes a reference to this Lease 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 Lease which:
 - (i) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity, this Lease is deemed to refer to that other entity; or
 - (ii) ceases to exist, this Lease 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 Lease means that the event to be remedied must be cured or its effects overcome; and
- (s) ("**contra proferentem rule not to apply**"): each provision will be interpreted without disadvantage to the party who (or whose representative) drafted or proffered that provision.

1.4 Inconsistency

If there is any conflict or inconsistency between this Lease and the Project Agreement, the provisions of the Project Agreement will prevail.

1.5 Business Day

If the day on or by which anything is to be done in accordance with this Lease is not a Business Day, that thing must be done no later than the next Business Day.

1.6 Certification

For the purposes of this Lease, a copy of a document will be regarded as duly certified by Project Co if it is certified as a true copy by a director, secretary or general manager of Project Co. *[State Note: Subject to the structure of the Successful Respondent.]*

1.7 Provisions limiting or excluding liability

Any provision of this Lease which seeks to limit or exclude a Liability of a party is to be construed as doing so only to the extent permitted by Law.

2. Delegation

2.1 Right to delegate

Project Co acknowledges that the State may exercise any right, statutory or otherwise, it has to appoint a person as a delegate to perform any of its rights under this Lease.

2.2 Notice of delegation

The State will give Project Co notice of:

- (a) **(delegate)**: any delegate so appointed, setting out the delegated rights and including a copy of the relevant instrument of appointment; and
- (b) **(revocation or change)**: any revocation or change or delegation contemplated by clause 2.3.

2.3 Revocation or amendment of delegation

Any delegation in accordance with clause 2.2 may be revoked, changed, delegated, limited or made subject to such conditions as the State determines from time to time.

2.4 No limitation of State obligations

The appointment of a delegate to perform some or all of the rights of the State under this Lease does not limit the rights or obligations of the State under this Lease.

2.5 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 2.5(c), Project Co 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 2.5(a) and 2.5(b) do not limit any Liability which the State would have had to Project Co under any State Project Document as a result of a breach by the State of a term of this Lease but for these clauses.
- (d) **(Appointment)**: LMA has been appointed the project authority for the Project under the Relevant Legislation. The State has appointed LMA to exercise the rights and carry out the obligations set out in the *Transport Integration Act 2010* (Vic) and the Relevant Legislation with respect to the Project.
- (e) **(No limitation)**: The appointment of LMA (or any authority appointed to replace LMA under clause 2.5(f)) does not limit the rights or obligations of the State under this Lease.
- (f) **(Replacement)**: The State, at any time by notice to Project Co, may appoint another Authority to exercise similar rights and carry out similar obligations to that of LMA under clause 2.5(d).

3. Reservations

3.1 Reservations in respect of minerals

- (a) **(Reserved Minerals):** This Lease is granted subject to the reservation to the Crown in respect of the Leased Area and every part of it of all minerals within the meaning of the *Mineral Resources (Sustainable Development) Act 1990* (Vic) and petroleum within the meaning of the *Petroleum Act 1998* (Vic) **(Reserved Minerals)**.
- (b) **(Exercise of rights by the State for the Term):** For the Term, the State will not exercise any right in respect of the Reserved Minerals.

3.2 Reservations in respect of adjoining land

Project Co acknowledges and agrees that the State has reserved the right for the State, its Associates and any other persons authorised by the State to enter upon the Leased Area to construct, maintain, operate, develop and manage all adjoining land to the Leased Area, including for service connection of adjoining land to Utility Infrastructure located on the Leased Area.

3.3 Reservations in relation to Utility Infrastructure and other assets of the State, the State's Associates, Authorities and Government Parties

Project Co acknowledges and agrees that, subject to the Road Management Act:

- (a) **(reservation of infrastructure):** the State has reserved the right of Utility Infrastructure, non-road infrastructure (as defined in the Road Management Act) and any other assets of the State, its Associates, Authorities and Government Parties to remain or be constructed or installed in, on, under, over or through the Leased Area; and
- (b) **(reservation for relevant parties):** for the purpose of exercising the rights referred to in clause 3.3(a) and for the purpose of operating, repairing or maintaining the infrastructure and assets referred to in clause 3.3(a), the State has reserved the right for the State, its Associates, Authorities and Government Parties to enter upon the Leased Area (with or without vehicles or machinery).

3.4 Conditions in reservations - Provisions of Project Agreement apply

- (a) **(Proximate State Work):** Subject to clause 3.4(b), the parties acknowledge and agree that the provisions of clause 25.2 of the Project Agreement apply to an exercise of any of the rights referred to in clauses 3.2 to 3.3, except to the extent the rights are being exercised by a Direct Interface Party in accordance with a Direct Interface Agreement or Direct Interface Requirement.
- (b) **(No limitation):** Clause 3.4(a) does not apply so as to limit or detract from any powers, functions or duties granted to the State or an Authority under the:
 - (i) Road Management Act; or
 - (ii) Relevant Legislation or other equivalent legislation.

4. Lease and restrictions, functions and duties

4.1 Grant of Lease

The State grants to Project Co as tenant a lease of the Leased Area for the Term on the terms and conditions set out in this Lease.

4.2 Project Co's acknowledgment

Project Co acknowledges this Lease and Project Co's rights in respect of the Leased Area are subject to:

- (a) **(Project Agreement)**: the provisions of the Project Agreement;
- (b) **(all interests, rights, Easements and reservations)**: all interests, rights, Easements and reservations affecting the Leased Area;
- (c) **(defects)**: any defects, whether latent or patent, in the Leased Area; and
- (d) **(rights reserved under Project Agreement)**: the rights reserved by the State under the Project Agreement, including the step-in rights contained in clause 36 of the Project Agreement.

5. Negation of representations and warranties

The State makes no representations (express or implied) and gives no warranties (express or implied):

- (a) **(suitability for purposes)**: that the Leased Area or any other land is now or will remain suitable or adequate for all or any of the purposes contemplated in this Lease or the Project Agreement; and
- (b) **(Project Agreement representations)**: as to the matters specified in clause 45.1 of the Project Agreement,

and all warranties (if any) and representations (if any) implied by Law are expressly negated.

6. Use of the Leased Area

6.1 Permitted use

Project Co must only use the Leased Area for the Permitted Use.

6.2 Compliance with Laws and Approvals

Project Co must comply with all Laws and Approvals from time to time applicable to the Leased Area or the use or occupation of the Leased Area.

6.3 Compliance with notices

Project Co must at its own cost and expense comply with all notices, orders and directions issued or given by an Authority which affect or relate to the Leased Area and the use or occupation of the Leased Area, regardless of whether the notice, order or direction is addressed to or requires compliance by either or both of the State, Project Co or any other person.

6.4 Notices

A party which receives a notice, order or direction from an Authority which affects or relates to the Leased Area or the use or occupation of the Leased Area must promptly give a copy of that notice, order or direction to the other party.

6.5 No nuisance

During the Term, Project Co warrants that it will comply with the all Environmental Requirements and the PSR and will not, and agrees not to:

- (a) **(noxious or offensive):** use, exercise or carry on or permit to be used, exercised or carried on in or upon the Leased Area any noxious or offensive act, trade, business or occupation; or
- (b) **(annoyance, nuisance, grievance):** do or permit or omit to be done in or upon the Leased Area anything which is or may be to the annoyance, nuisance, grievance, damage or disturbance of the State or persons otherwise lawfully on the Leased Area or occupiers or owners of any adjacent land or land within the vicinity of the Leased Area,

except where this is required or expressly permitted by the Project Agreement or is an unavoidable consequence of the performance of the Project Activities in accordance with the Project Agreement.

7. Rent and outgoings

7.1 Payment of Rent

- (a) **(Rent payable in advance):** Project Co must, on each Rent Payment Date, pay the Rent to the State, or to such other party as the State may from time to time direct, without demand from the State.
- (b) **(Rent not to abate):** The payment of Rent by Project Co will not abate during the Term for any reason.
- (c) **(Non-payment of Rent):** The State acknowledges that, if the Rent is not received in full, or at all, on any Rent Payment Date, such non-payment is not in and of itself a breach in the performance or observance of Project Co's obligations under the State Project Documents.
- (d) **(Debt due and payable):** Without limiting paragraph (c), the parties acknowledge and agree that any Rent that is not received in full, or at all, on any Rent Payment Date will be a debt due and payable from Project Co to the State.

7.2 Charges for Services

Project Co must pay all charges (including service charges) for Services to or from the Leased Area, together with any costs charged or levied by the service provider in respect of the provision or maintenance of the infrastructure, which provides or supplies those Services exclusively to the Leased Area.

7.3 Separate metering

Project Co must install, or arrange for the installation of, meters at Project Co's own cost and expense for the recording or metering of any of the Services or substances provided or supplied to the Leased Area.

7.4 Shared Services

- (a) **(Apportionment of cost):** Where:
 - (i) the infrastructure referred to in clause 7.2 provides or supplies Services not only to part of the Leased Area, but also to other land which is owned by, or leased or licensed to, the State or any Authority; and
 - (ii) no separate meter can be installed for recording or metering of any of those Services under clause 7.3,

Project Co must pay or reimburse the State (as the case may be), a proportion of any costs charged or levied by the service provider in respect of the provision or maintenance of that infrastructure, in accordance with clause 7.4(b).

- (b) **(Calculation of apportionment):** The proportion of the costs referred to in clause 7.4(a), for which Project Co will be liable, will be:
- (i) subject to clause 7.4(b)(ii), in respect of the infrastructure relating to the provision or supply of Services, calculated by reference to the number of outlets for the applicable Service within that part of the Leased Area serviced by that infrastructure, as compared to the total number of outlets for that Service which is serviced by that infrastructure; and
 - (ii) in respect of drainage, calculated by reference to the area of that part of the Leased Area which is serviced by the relevant drain, as compared to the total area of the land which is serviced by that drain.
- (c) **(Certificate of cost):** A certificate from the State stating the amount Project Co must pay or reimburse the State (as the case may be) under this clause 7.4 is conclusive evidence of the amount owing at the date of the certificate except in the case of manifest error.

7.5 Payment by State

If Project Co defaults in the payment of any of the costs or charges referred to in clauses 7.2 or 7.4, the State may (without limiting any other rights and remedies of the State) pay the costs or charges, and any amount paid by the State will be a debt due and payable from Project Co to the State.

8. GST General

- (a) **(Amount payable):** Notwithstanding any other provision of this Lease, any amount payable for a supply made under or in connection with this Lease 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 Lease:
- (i) any amount payable or consideration to be provided in accordance with any other provision of this Lease for that supply (**Agreed Amount**) is exclusive of GST;
 - (ii) an additional amount will be payable by the party which is the recipient of the Taxable Supply (**Recipient**), equal to the amount of GST payable on that Taxable Supply as calculated by the Supplier in accordance with the GST Law, which will be payable at the same time and in the same manner as for the Agreed Amount; and
 - (iii) the Supplier will provide a Tax Invoice to the Recipient in connection with that supply, either at the time expressly set out in any other provision of this Lease or no later than the time at which the Agreed Amount for that Taxable Supply is to be provided in accordance with this Lease. The Recipient is not obliged to pay any amount in accordance with this clause 8(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 the Agreement (incorporating any increasing adjustments or decreasing adjustments relating to that supply) varies from the additional amount it received from the Recipient under clause 8(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 8(b) or 8(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 GST Law.
- (e) **(Expert Determination):** If the Recipient is dissatisfied with any calculation to be made by the Supplier in accordance with this clause 8 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 Lease, the matters required to be taken into account by the Supplier in accordance with this clause 8 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 Lease or any Project Document to price, value, sales, revenue, profit or a similar amount (**Revenue**), is a reference to the GST exclusive component of that Revenue, unless the contrary intention is expressed.
- (g) **(Cost net of GST):** Any reference in this Lease or any Project Document to cost, expense, liability or other similar amount (**Cost**) of a party, is a reference to that Cost reduced by the Input Tax Credits to which the party is entitled in respect of such Cost, unless the contrary intention is expressed.
- (h) **(General obligation):** Each party 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 Lease, or any input tax credits, adjustments or refunds in relation to any amount of GST paid or payable in connection with any supply made in connection with this Lease.
- (i) **(GST Groups):** For the purposes of this Lease, a reference to GST payable on a Taxable Supply made by a party includes any corresponding GST payable by the representative member of any GST group of which that party is a member and a reference to an input tax credit entitlement of a party includes any corresponding input tax credit entitlement of the representative member of any GST group of which that party is a member.
- (j) **(Project Agreement to prevail):** If clause 53 of the Project Agreement would apply in respect of a Taxable Supply to which this clause 8 also applies then clause

53 of the Project Agreement will apply in respect of that supply and the provisions of this clause 8 (but for this paragraph) will not apply.

- (k) **(Definitions):** In this clause 8 unless otherwise defined in or for the purposes of this Lease, terms used in this clause have the meanings given to them in the GST Law.

9. Maintenance and works

9.1 Maintenance

Project Co must maintain the Leased Area and the Relevant Infrastructure in accordance with Project Co's obligations under the Project Agreement.

9.2 Works

- (a) **(Under Project Agreement):** Project Co may undertake works on or to the Leased Area to the extent that those works form part of or are associated with the Relevant Infrastructure or the Project Activities or are otherwise required or permitted under the Project Agreement.
- (b) **(Other works):** Except as provided for in clause 9.2(a), Project Co must not undertake works on or to the Leased Area without the State's prior consent.

10. Harm minimisation

Project Co must:

- (a) **(reasonable measures):** take all reasonable measures to avoid obstructing access to, overloading or otherwise interfering with, obstructing or damaging the Utility Infrastructure or non-road infrastructure (as defined in the Road Management Act);
- (b) **(rights or obligations):** not, otherwise than in accordance with its rights or obligations under the Project Agreement, damage or destroy anything on the Leased Area; and
- (c) **(inflammable, explosive or volatile):** not without the State's approval, keep or use inflammable, explosive or volatile materials on the Leased Area.

11. Access

11.1 State's right of access

When and so often as the State reasonably requires during the Term, the State, its Associates or any other persons authorised by the State may enter the Leased Area (with or without vehicles and equipment), including to:

- (a) **(reasonable investigations):** make reasonable investigations as the State, its Associates or those authorised by the State deem necessary for the purpose of ascertaining whether or not there has been any breach of any of the terms, covenants or conditions expressed or implied in this Lease or any other Project Document;
- (b) **(repairs, alterations and additions):** carry out any repairs, alterations, additions or other work necessary to comply with the State's obligations under this Lease, at Law or under the exercise by the State of any statutory functions;
- (c) **(rights under clauses 3.2 or 3.3):** exercise any rights under clauses 3.2 or 3.3, and access any works undertaken under those rights once completed;

- (d) **(other powers and rights):** exercise any other powers and rights of the State under this Lease or any other Project Document; or
- (e) **(step-in rights):** exercise the step-in rights contained in clause 36 of the Project Agreement.

11.2 Exercise of rights

In exercising its rights under clause 11.1, except in the case of an exercise of the step-in rights contained in clause 36 of the Project Agreement, the State must comply with clause 13.3 of the Project Agreement.

12. Quiet enjoyment

Other than as a result of the exercise by the State, any of its Associates, Government Parties, an Authority or any other person, of any right of the State, any of its Associates, Government Parties, the Authority or that other person which is expressly or impliedly conferred upon it (including the State's rights contained in clauses 13.3 and 36 of the Project Agreement):

- (a) by this Lease;
- (b) under any other Project Document; or
- (c) otherwise at Law,

Project Co will and may peaceably possess and enjoy the Leased Area for the Term without any interruption or disturbance from the State or any other person or persons lawfully claiming by, from or under the State.

13. Risk

Except as otherwise expressly provided in the Project Documents, as between the State and Project Co, Project Co accepts all risks (and the cost of such risks) in connection with the use and occupation of the Leased Area.

14. Termination

14.1 Termination of Lease

This Lease will automatically terminate on the Expiry Date but may not otherwise be terminated.

14.2 Consequences of termination

Upon termination of this Lease, the rights and obligations of the parties under this Lease will cease, except for:

- (a) **(accrued rights or obligations):** any accrued rights or obligations under this Lease; and
- (b) **(continuing rights or obligations):** any rights or obligations which are expressed (either in this Lease or in any other State Project Document) to continue after termination of this Lease or any other State Project Document.

14.3 Waiver

If this Lease is lawfully terminated in accordance with clause 14.1, Project Co waives any right it might otherwise have to pursue a Claim of restitution of any kind, including a Claim of

unjust enrichment or quantum meruit, but this clause 14.3 does not affect Project Co's rights under clause 40 of the Project Agreement.

15. Dispute resolution

15.1 Procedure for resolving disputes

- (a) **(Procedure):** Any dispute between the parties arising under this Lease (**Dispute**) must be resolved in accordance with this clause 15.
- (b) **(Dispute resolution process):** The procedure that is to be followed to resolve a Dispute is as follows:
 - (i) firstly, the Dispute must be the subject of negotiation as required by clause 15.2;
 - (ii) secondly, if the Dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 15.2(c)(i) the parties may agree that the Dispute be referred to an expert for determination under clauses 15.4 to 15.8 (inclusive) or to arbitration in accordance with clause 16; and
 - (iii) thirdly, if:
 - A. the Dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 15.2(c)(i) and irrespective of whether the parties failed to meet as required by that clause or whether having so met the parties fail to agree whether the Dispute should be referred to an expert or to arbitration within 20 Business Days after the expiration of the period for negotiation referred to in clause 15.2(c)(i);
 - B. the Dispute has been referred to expert determination and a determination is not made by the expert within 30 days after the expert's acceptance of appointment; or
 - C. the Dispute is referred to expert determination and a notice of dissatisfaction is given in accordance with clause 15.6(a),then the Dispute must be referred to arbitration in accordance with clause 16.

15.2 Negotiation

- (a) **(Notification):** If a Dispute arises then a party may give notice to the other party requesting that the Dispute be referred for resolution by negotiation between the Chief Executive Officers (or equivalent) of the State and Project Co (**Representatives**).
- (b) **(Contents of Notice):** A notice under clause 15.2(a) must:
 - (i) state that it is a notice under this clause 15; and
 - (ii) include or be accompanied by particulars of the matters the subject of the Dispute.
- (c) **(Attempt to resolve Dispute):** If a Dispute is referred for resolution by negotiation under clause 15.2(a), then:

- (i) the Representatives must meet and attempt in good faith to resolve the Dispute (in whole or in part) within 10 Business Days of the date on which the notice under clause 15.2(a) is received (or such later date as the parties may agree); and
- (ii) any agreement reached between the Representatives will be reduced to writing, signed by or on behalf of each party and will be contractually binding on the parties.

15.3 Expert determination

If:

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

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

15.4 Selection of expert

- (a) **(Exchange of lists of 3 preferred experts):** Within 7 Business Days after the date on which the parties agree to refer a Dispute to an expert for determination under clause 15.3, the State and Project Co must exchange lists of 3 persons (in order of preference) who, if appointed, would satisfy the requirements of clause 15.4(d), from whom the expert is to be chosen.
- (b) **(Appointment of person who appears on both lists):** Any person that appears on both lists under clause 15.4(a) will be appointed as the expert to determine a Dispute and if more than one person appears on both lists the person given the highest order of priority by the party that gave the notice under clause 15.2(a) will be appointed.
- (c) **(Appointment if no person appears on both lists):** If no person appears on both lists, the party which gave the notice under clause 15.2(a) must procure:
 - (i) the president (or the senior non-executive officer, howsoever described) of the institute or governing body for the technical or professional discipline the subject of the relevant Dispute to nominate the expert, having regard to, but not being bound by, those persons proposed by the parties under clause 15.4(a); or
 - (ii) if there is no governing body for the technical or professional discipline the subject of the relevant Dispute or such governing body advises that it will not nominate an expert, the President of the Australian Centre for International Commercial Arbitration to nominate a person to act as the expert, having regard to, but not being bound by, those persons proposed by the parties under clause 15.4(a).
- (d) **(Appropriate skills):** It is the intention of the parties that the expert appointed to determine a Dispute must be an independent person with appropriate skills having regard to the nature of the matters in dispute.

- (e) **(No entitlement to challenge appointment):** Neither party will be entitled to challenge the appointment of an expert under this clause 15.4 on the basis that the expert does not satisfy the requirements of clause 15.4(d).
- (f) **(Not an arbitration agreement):** Any agreement for expert determination under this Lease will not constitute an arbitration agreement for the purposes of the *Commercial Arbitration Act 2011* (Vic).
- (g) **(Agreement):** The State and Project Co must enter into an agreement with the expert on the terms of the Expert Determination Agreement or such other reasonable terms as the expert may require.

15.5 Rules of expert determination

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

15.6 Expert finding

- (a) **(Notification):** The determination of the expert must be in writing and will be final and binding on the State and Project Co 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 16.
- (b) **(Amendment to determination):** Upon submission by any party, the expert may amend the determination to correct:
 - (i) a clerical mistake;
 - (ii) an error from an accidental slip or omission;
 - (iii) a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or
 - (iv) a defect in form.

15.7 Liability of expert

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

15.8 Costs

The State and Project Co 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.

16. Arbitration

16.1 Reference to Arbitration

- (a) **(Dispute):** If:
- (i) a Dispute:
 - A. which has been referred to the Representatives for negotiation in accordance with clause 15.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 15.2(c)(i); and
 - B. the parties do not agree to refer the Dispute to an expert for determination before the expiration of the period for the appointment of an expert referred to in clause 15.3(b); or
 - (ii) in the case of a Dispute which the parties agree to refer to expert determination under clause 15.3:
 - A. a determination is not made within 30 days of the expert's acceptance of the appointment; or
 - B. a notice of dissatisfaction is given in accordance with clause 15.6,
- then the State or Project Co may notify the other that it requires the Dispute to be referred to arbitration.
- (b) **(Referral):** Upon receipt by the other party of a notice under clause 16.1(a), the Dispute will be referred to arbitration.

16.2 Arbitration

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

16.3 Appointment of arbitrator

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

16.4 General Principles for conduct of arbitration

- (a) **(Conduct of arbitration):** The parties agree that:
- (i) they have chosen arbitration for the purposes of achieving a just, quick and cost-effective resolution of any Dispute;
 - (ii) any arbitration conducted in accordance with this clause 16 will not necessarily mimic court proceedings of the seat of the arbitration or the place where hearings take place (if different), and the practices of those

courts will not regulate the conduct of the proceedings before the arbitrator; and

- (iii) in conducting the arbitration, the arbitrator must take into account the matters set out in clauses 16.4(a)(i) and 16.4(a)(ii).
- (b) **(Evidence in writing):** All evidence in chief must be in writing unless otherwise ordered by the arbitrator.
- (c) **(Evidence and discovery):** The rules for evidence and discovery will be the IBA Rules on the Taking of Evidence in International Arbitration current at the date of arbitration.
- (d) **(Oral hearing):** The oral hearing must be conducted as follows:
 - (i) any oral hearing must take place in Melbourne, Victoria and all outstanding issues must be addressed at the oral hearing;
 - (ii) the date and duration of the oral hearing must be fixed by the arbitrator at the first preliminary conference. The arbitrator must have regard to the principles set out in clause 16.4(a) when determining the duration of the oral hearing;
 - (iii) oral evidence in chief at the hearing will be permitted only with the permission of the arbitrator for good cause;
 - (iv) the oral hearing must be conducted on a stop clock basis with the effect that the time available to the parties must be split equally between the parties so that each party has the same time to conduct its case unless, in the opinion of the arbitrator, such a split would breach the rules of natural justice or is otherwise unfair to one of the parties;
 - (v) not less than 28 days prior to the date fixed for oral hearing each party must give notice of those witnesses (both factual and expert) of the other party that it wishes to attend the hearing for cross examination;
 - (vi) in exceptional circumstances the arbitrator may amend the date of hearing and extend the time for the oral hearing set in accordance with clause 16.4(d)(ii);
 - (vii) a party will not be bound to accept the written evidence of a witness submitted on behalf of the opposing party which is not challenged in cross examination; and
 - (viii) each party is expected to put its case on significant issues in cross examination of a relevant witness called by the opposing party or, where it seeks to challenge the evidence of a witness not called for cross-examination by reference to other evidence, to identify that evidence in its written opening submissions so that the opposing party may know the nature of and basis for the challenge to the witness' written evidence.
- (e) **(Experts):** Unless otherwise ordered each party may only rely upon one expert witness in connection with any recognised area of specialisation.

16.5 Proportional liability

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

16.6 Extension of ambit of arbitration proceedings

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

16.7 Award final and binding

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

16.8 Continue to perform

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

16.9 Governing law of arbitration agreement

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

16.10 Interlocutory relief

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

17. Assignment and subletting

17.1 Restrictions on assignment

Other than in accordance with clause 47 of the Project Agreement, Project Co must not:

- (a) **(interest in Lease):** assign, novate, transfer, mortgage, charge or otherwise deal with its interest in this Lease;
- (b) **(Leased Area):** grant leases, subleases and licences over parts of the Leased Area; or
- (c) **(rights or obligations):** assign, transfer, dispose of, part with possession of, create or allow any interest in, or otherwise deal with any of its rights or obligations under this Lease,

without the prior consent of the State.

17.2 Transfer of interest

If Project Co assigns, transfers, disposes of, parts with possession of, creates or allows any interest in, or otherwise deals with its interest in this Lease:

- (a) **(transferee to comply with and be bound by Lease)**: Project Co must, at its own cost, obtain a warranty by deed, from the transferee and any other person nominated by the State, in favour of the State, that the transferee will comply with and be bound by the provisions of this Lease in form and substance approved by the State; and
- (b) **(deed to be executed prior)**: the deed must be executed and delivered to the State before the transfer or other dealing takes effect.

17.3 Access to contractors and others

The State acknowledges that Project Co may grant access to the Leased Area to the D&C Subcontractor, the O&M Subcontractor and each of their Subcontractors (and any of their employees, servants, agents and contractors) for the Permitted Use.

18. Notices

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

- (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: [#]

- (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 18(b); and
- (e) **(taken to be received)**: are taken to be received by the addressee at the address set out in clause 18(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.

19. Miscellaneous

19.1 Governing law and jurisdiction

- (a) **(Governing Law):** This Lease is governed by, and must be construed according to, the Laws of Victoria, Australia.
- (b) **(Jurisdiction):** Without limiting clauses 15 to 16, each party irrevocably submits to the non-exclusive jurisdiction of the courts of Victoria, and the courts competent to determine appeals from those aforementioned courts, with respect to any proceedings which may be brought in connection with this Lease.

19.2 Entire agreement

To the extent permitted by Law, and in relation to their subject matter, this Lease 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

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 Lease.

19.4 Surviving provisions

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

19.5 Waiver

- (a) **(Writing):** A waiver given by a party in accordance with this Lease 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, power or remedy provided by Law or in accordance with this Lease 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, power or remedy provided by Law or in accordance with this Lease.
- (c) **(No waiver of another breach):** No waiver of a breach of a term of this Lease operates as a waiver of another breach of that term or of a breach of any other term of this Lease.

19.6 Consents, approvals and directions

- (d) **(State):** A consent or approval required in accordance with this Lease from the State may be given or withheld, or may be given subject to any conditions, as the State thinks fit, unless this Lease expressly provides otherwise.
- (e) **(Project Co):** A consent or approval required under this Lease from Project Co may not be unreasonably withheld or delayed, unless this Lease expressly provides otherwise.

19.7 Amendments

- (a) **(Agreement):** Except as otherwise expressly provided in this Lease, this Lease may only be varied by a deed executed by or on behalf of each party.
- (b) **(Other State Project Documents):** Except as otherwise expressly provided in the State Project Documents, no amendment to any other State Project Document is valid or binding on a party unless made in writing and executed by the State and all other parties to the relevant State Project Document.

19.8 Expenses

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

19.9 Severance

If, at any time, a provision of this Lease or any other State Project Document 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 Lease or any other relevant State Project Document; or
- (b) that provision under the Law of any other jurisdiction.

19.10 Counterparts

This Lease 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 Document 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 Lease 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 Lease and not otherwise, whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.

19.13 No partnership or joint venture

Except as expressly provided in this Lease nothing contained or implied in this Lease or any other State Project Document will:

- (a) constitute or be deemed to constitute a party as a partner, joint venturer, agent or legal representative of any other party for any purpose; or
- (b) create or be deemed to create any partnership, joint venture, agency or trust between the parties or any of them.

19.14 No agency

Except as expressly permitted or contemplated by this Lease, Project Co must not, in connection with the Project or otherwise, directly or indirectly hold out or permit to be held out to any person any statement, act, agreement, matter or thing indicating that the Project are being carried on or managed or supervised by the State nor may Project Co act as or represent itself to be the servant or agent of the State.

19.15 Indemnities

- (a) **(Continuing liability):** Each indemnity in this Lease is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this Lease.
- (b) **(Expense not necessary):** It is not necessary for a party to incur expense or to make any payment before enforcing a right of indemnity conferred by this Lease.
- (c) **(Payable on demand):** A party must pay on demand any amount it must pay under an indemnity in this Lease.
- (d) **(Indemnity held on trust):** The State and Project Co acknowledge and agree that:
 - (i) each indemnity or promise referred to in this Lease in favour of any of the State's Associates is held on trust by the State for the benefit of any of the State's Associates from the date of this Lease; and
 - (ii) the consent of the State's Associates referred to in clause 19.15(d)(i) will not be required for any amendment to, or waiver of rights under this Lease.

19.16 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 Lease, except for representations or inducements expressly set out in this Lease.
- (b) **(No reliance):** Each party acknowledges and confirms that it does not enter into this Lease 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 Lease.

19.17 Exclusion of express and implied covenants, powers and provisions

- (a) **(Transfer of Land Act 1958 (Vic) not to apply):** The covenants and powers implied by the *Transfer of Land Act 1958 (Vic)* do not apply and will not be implied in this Lease except to the extent those covenants and powers are included in the covenants and powers contained in this Lease.
- (b) **(Property Law Act 1958 (Vic) not to apply):** The provisions of section 144 of the *Property Law Act 1958 (Vic)* do not apply and will not be implied in this Lease.

Executed as an agreement.

[State Note: Execution blocks to be inserted.]

Annexure A - Leased Area