

Maintenance Licence

Stage One - East West Link

[]
LMA

[]
Project Co

Contents

1.	Definitions and interpretation	1
1.1	Project Agreement definitions	1
1.2	Definitions	1
1.3	Interpretation.....	2
1.4	Inconsistency	3
1.5	Business Day	4
1.6	Certification.....	4
1.7	Provisions limiting or excluding liability	4
2.	Delegation	4
2.1	Right to delegate.....	4
2.2	Notice of delegation	4
2.3	Revocation or amendment of delegation	4
2.4	No limitation of the LMA's obligations	4
2.5	State and LMA's rights and obligations.....	4
3.	Negation of representations or warranties	5
4.	Grant of Maintenance Licence	5
4.1	Licensed Maintenance Areas	5
4.2	Licence over the Licensed Maintenance Areas	6
4.3	Nature of interest	6
5.	Licence Fee	6
6.	Term of Maintenance Licence	6
7.	Harm minimisation	7
8.	Removal of materials and make good	7
9.	GST General.....	7
10.	Dispute Resolution.....	9
10.1	Procedure for resolving disputes	9
10.2	Negotiation.....	10
10.3	Expert determination.....	10
10.4	Selection of expert	11
10.5	Rules of expert determination	12
10.6	Expert finding.....	12
10.7	Liability of expert.....	12
10.8	Costs.....	12
11.	Arbitration	12
11.1	Reference to Arbitration	12
11.2	Arbitration	13
11.3	Appointment of arbitrator	13
11.4	General Principles for conduct of arbitration.....	13
11.5	Proportional liability.....	14
11.6	Extension of ambit of arbitration proceedings.....	14
11.7	Award final and binding	15
11.8	Continue to perform	15
11.9	Governing law of arbitration agreement.....	15
11.10	Interlocutory relief	15
12.	Notices.....	15

- 13. Miscellaneous16**
 - 13.1 Governing Law and jurisdiction.....16
 - 13.2 Entire agreement17
 - 13.3 Further acts and documents17
 - 13.4 Surviving provisions17
 - 13.5 Waiver17
 - 13.6 Consents, approvals and directions.....17
 - 13.7 Amendments.....18
 - 13.8 Expenses18
 - 13.9 Severance.....18
 - 13.10 Counterparts18
 - 13.11 Moratorium legislation.....18
 - 13.12 Proportionate liability18
 - 13.13 No partnership or joint venture18
 - 13.14 No agency.....19
 - 13.15 No merger19
 - 13.16 No representation or reliance19
- Annexure A - Licensed Maintenance Area Plan20**

Maintenance Licence dated

Parties [] LMA
[] 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, LMA has agreed to grant, and Project Co has agreed to accept, a licence in respect of the Licensed Maintenance Areas on the terms and conditions contained in this Maintenance Licence.
- C. LMA has the power to grant this Maintenance Licence under section 173 of the Relevant Legislation.

Operative provisions

1. Definitions and interpretation

1.1 Project Agreement definitions

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

1.2 Definitions

In this Maintenance Licence, unless the context otherwise requires:

Agreed Amount has the meaning given in clause 9(b)(i).

Amended Licensed Maintenance Area Plan has the meaning given in clause 4.1(b).

Cost has the meaning given in clause 9(g).

Dispute has the meaning given in clause 10.1(a).

Licence Commencement Date means the [Date of Stage One Completion].

Licence Fee means \$10.00.

Licensed Maintenance Area Plan has the meaning given in clause 4.1(a) and includes any Amended LCA Plan.

Licensed Maintenance Areas means that part of the subdivided stratum (limited in height and depth) which is identified in the Licensed Maintenance Area Plan.

Maintenance Licence means this maintenance licence and includes all Schedules, Exhibits, Attachments and Annexures to it.

Permitted Use means:

- (a) to perform the O&M Activities that relate to the Maintained Off-Freeway Facilities which are within the Licensed Maintenance Areas;

- (b) the storage and location of any equipment, vehicles and machinery necessary for the carrying out of the O&M Activities that relate to the Maintained Off-Freeway Facilities which are within the Licensed Maintenance Areas, unless otherwise specified by LMA; and
- (c) any other purpose agreed by LMA.

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 9(b)(ii).

Representative has the meaning given in clause 10.2(a).

Revenue has the meaning given in clause 9(f).

Supplier has the meaning given in clause 9(b).

Term has the meaning given in clause 6.

1.3 Interpretation

In this Maintenance Licence:

- (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) **(Maintenance Licence 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 Maintenance Licence; and
 - (ii) a section is a reference to a section of a Schedule;
- (d) **(Maintenance Licence as amended)**: a reference to this Maintenance Licence or to any other deed, agreement, document or instrument includes a reference to this Maintenance Licence 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, duty, obligation, Liability, interest, entitlement, title, 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 or LMA, means that the State or LMA can exercise that power, right or remedy in its absolute and unfettered discretion and the State or LMA 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 Maintenance Licence which:
 - (i) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity, this Maintenance Licence is deemed to refer to that other entity; or
 - (ii) ceases to exist, this Maintenance Licence 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 Maintenance Licence 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 Maintenance Licence 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 Maintenance Licence 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 Maintenance Licence, 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 Maintenance Licence 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 LMA may exercise any right, statutory or otherwise, it has to appoint a person as a delegate to perform any of its rights under this Maintenance Licence.

2.2 Notice of delegation

LMA 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 of any delegation contemplated by clause 2.3.

2.3 Revocation or amendment of delegation

Any such delegation may be revoked, changed, delegated, limited or made subject to such conditions as LMA determines from time to time.

2.4 No limitation of the LMA's obligations

The appointment of a delegate to perform some or all of the rights of LMA under this Maintenance Licence does not limit the rights or obligations of LMA under this Maintenance Licence.

2.5 State and LMA's rights and obligations

- (a) **(State and LMA's rights and obligations)**: Notwithstanding anything expressly provided or implied in this Maintenance Licence to the contrary (including the use of "may" when used in the context of a right of the State or LMA), the parties agree that the State and LMA:
 - (i) are not obliged to exercise any executive or statutory right or duty of a Government Party, or to influence, over-ride, interfere with or direct any other Government Party in the proper exercise and performance of its executive and statutory rights and duties; and

- (ii) can exercise or not exercise any executive or statutory right or duty in its absolute or unfettered discretion and in such time and subject to such conditions as it sees fit.
- (b) **(No Claim)**: Subject to clause 2.5(c), Project Co will not be entitled to make any Claim against the State or LMA for any Liability relating to any exercise or failure of the State or LMA 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 or LMA would have to Project Co under any State Project Document as a result of a breach by LMA or the State of a term of this Maintenance Licence 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 undertake 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 Maintenance Licence.
- (f) **(Replacement)**: The State, at any time by notice to Project Co, may appoint another Authority to exercise similar rights and undertakes similar obligations to that of LMA under clause 2.5(d).

3. Negation of representations or warranties

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

- (a) **(suitability of purposes)**: that the Licensed Maintenance Areas or any other land is now or will remain suitable or adequate for all or any of the purposes contemplated in this Maintenance Licence 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.

4. Grant of Maintenance Licence

4.1 Licensed Maintenance Areas

- (a) **(Licensed Maintenance Areas at the Licence Commencement Date)**: At the Licence Commencement Date, the Licensed Maintenance Areas will, for the purposes of this Maintenance Licence, be comprised of the land identified in the plan set out in Annexure A (**Licensed Maintenance Plan**).
- (b) **(Amendment of the Licensed Maintenance Areas)**: If, at any time during the Term, the parties to this Maintenance Licence wish to vary, for the purposes of this Maintenance Licence, the land which comprises the Licensed Maintenance Areas, then:
 - (i) LMA must prepare and provide Project Co with an amended version of the Licensed Maintenance Area Plan (**Amended Licensed Maintenance**

Area Plan), which identifies any amendments to Licensed Maintenance Areas; and

- (ii) both parties must sign the Amended Licensed Maintenance Area Plan as an acknowledgement of their agreement to the variation of the Licensed Maintenance Areas,

and from the date on which the Amended Licensed Maintenance Area Plan has been signed by both parties:

- (iii) the Amended Licensed Maintenance Area Plan will be deemed to have replaced the Licensed Maintenance Area Plan; and
- (iv) the Licensed Maintenance Areas will, for the purposes of this Maintenance Licence, be deemed to be the areas shown on the Amended Licensed Maintenance Area Plan.

4.2 Licence over the Licensed Maintenance Areas

- (a) **(Grant of Maintenance Licence):** LMA grants to Project Co for the Term a non-exclusive licence to use the Licensed Maintenance Areas for the Permitted Use on the terms of this Maintenance Licence.
- (b) **(Project Co only to remain on Licensed Maintenance Areas for minimum period):** Project Co must only remain on the Licensed Maintenance Areas for the minimum period(s) as is reasonably necessary for the Permitted Use.

4.3 Nature of interest

- (a) **(Contractual Maintenance Licence):** The rights conferred on Project Co by this Maintenance Licence rest in contract only and do not confer a proprietary interest on Project Co.
- (b) **(Restrictions on Maintenance Licence):** Without limiting the generality of clause 4.3(a):
 - (i) ownership and control of the Licensed Maintenance Areas remains vested in the relevant owner of the land at all times;
 - (ii) the Maintenance Licence does not grant Project Co ownership, control or legal entitlement to exclusive possession of the Licensed Maintenance Areas nor does it extend to Project Co an entitlement to rents or profits in respect of the Licensed Maintenance Areas; and
 - (iii) Project Co and its Associates can access the Licensed Maintenance Areas only for the Permitted Use.

5. Licence Fee

Project Company must pay the Licence Fee to LMA, if demanded by LMA.

6. Term of Maintenance Licence

This Maintenance Licence takes effect on the Licence Commencement Date and continues until the earlier of:

- (a) the termination of the Project Agreement; and
 - (b) any other date agreed by the parties,
- (Term).

7. Harm minimisation

Project Co must:

- (a) **(use of Licensed Maintenance Areas):** in using or occupying the Licensed Maintenance Areas; and
- (b) **(necessary for O&M Activities):** except to the extent necessary to undertake the O&M Activities and otherwise to comply with its obligations under the Project Agreement,

cause as little harm and inconvenience and do as little damage as reasonably possible to the Licensed Maintenance Areas (and any adjacent area) and any improvement or foliage on the Licensed Maintenance Areas or any adjacent area (including any Utility Infrastructure or non-road infrastructure (as defined in the Road Management Act)).

8. Removal of materials and make good

Without limiting its obligations under clause 6.5 of the Project Agreement, Project Co must, on cessation of occupation from time to time or completion of the O&M Activities in respect to the Licensed Maintenance Areas (or a the relevant part of the Licensed Maintenance Areas) and in any event, prior to the end of the Term:

- (a) **(removal):** remove all plant, equipment, machinery, facilities and vehicles (except to the extent they form part of the Maintained Off-Freeway Facilities);
- (b) **(clean and safe condition):** ensure that the relevant part of the Licensed Maintenance Areas is left in a clean and safe condition;
- (c) **(removal of waste):** ensure that all waste, rubbish, debris and redundant materials are removed promptly from the relevant part of the Licensed Maintenance Areas in accordance with Best O&M Practices;
- (d) **(public use):** without limiting clause 8(b), ensure that any relevant part of the Licensed Maintenance Areas open to the public is safe for public use and occupation; and
- (e) **(damage):** except to the extent necessary to undertake the O&M Activities and otherwise to comply with its obligations under the Project Agreement, make good all damage caused by Project Co's use and occupation of the Licensed Maintenance Areas.

9. GST General

- (a) **(Amount payable):** Notwithstanding any other provision of this Maintenance Licence, any amount payable for a supply made under or in connection with this Maintenance Licence 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 Maintenance Licence:
- (i) any amount payable or consideration to be provided in accordance with any other provision of this Maintenance Licence for that Taxable supply (**Agreed Amount**) is exclusive of GST;
 - (ii) an additional amount will be payable by the party which is the recipient of the Taxable Supply (**Recipient**), equal to the amount of GST payable on that Taxable Supply as calculated by the Supplier in accordance with the GST Law, which will be payable at the same time and in the same manner as for the Agreed Amount; and
 - (iii) the Supplier will provide a Tax Invoice to the Recipient in connection with that supply, either at the time expressly set out in any other provision of this Maintenance Licence or no later than the time at which the Agreed Amount for that Taxable Supply is to be provided in accordance with this Maintenance Licence. The Recipient is not obliged to pay any amount in accordance with this clause 9(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 9(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 9(b) or 9(c) to the extent that the GST to which the amount relates has ceased to be payable by or refundable to the Supplier by the Commissioner of Taxation under the GST Law.
- (e) **(Expert Determination):** If the Recipient is dissatisfied with any calculation to be made by the Supplier in accordance with this clause 9 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 Maintenance Licence, the matters required to be taken into account by the Supplier in accordance with this clause 9 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 Maintenance Licence 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 Maintenance Licence 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 Maintenance Licence, 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 Maintenance Licence.
- (i) **(GST Groups):** For the purposes of this Maintenance Licence, a reference to GST payable by a party includes any corresponding GST payable on a Taxable Supply made 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 9 also applies then clause 53 of the Project Agreement will apply in respect of that supply and the provisions of this clause 9 (but for this paragraph) will not apply.
- (k) **(Definitions):** In this clause 9, unless otherwise defined in this Maintenance Licence, terms used have the meanings given to them in the GST Law.

10. Dispute Resolution

10.1 Procedure for resolving disputes

- (a) **(Disputes to be resolved):** Any dispute between the parties arising under this Maintenance Licence (**Dispute**) must be resolved in accordance with this clause 10.
- (b) **(Procedure):** The procedure that is to be followed to resolve a Dispute is as follows:
 - (i) firstly, the Dispute must be the subject of negotiation as required by clause 10.2;
 - (ii) secondly, if the Dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 10.2(c)(i) the parties may agree that the Dispute be referred to an expert for determination in accordance with clauses 10.4 to 10.8 (inclusive) or to arbitration under clause 11; 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 10.2(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 10.2(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 10.6(a),

then the Dispute must be referred to arbitration in accordance with under clause 11.

10.2 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 10.2(a) must:
 - (i) state that it is a notice under this clause 10; 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 10.2(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 10.2(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.

10.3 Expert determination

If:

- (a) **(dispute unresolved by Representatives):** a Dispute which has been referred to the Representatives for negotiation in accordance with clause 10.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 10.2(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 10.2(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 10.4 to 10.8. For the avoidance of doubt, a Dispute may only be referred to an expert for determination by agreement of the parties.

10.4 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 10.3, the State and Project Co must exchange lists of 3 persons (in order of preference) who, if appointed, would satisfy the requirements of clause 10.4(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 10.4(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 10.2(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 10.2(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 10.4(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 10.4(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 10.4 on the basis that the expert does not satisfy the requirements of clause 10.4(d).
- (f) (**Not an arbitration agreement**): Any agreement for expert determination under this Maintenance Licence 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.

10.5 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.

10.6 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 under clause 11.
- (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.

10.7 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.

10.8 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.

11. Arbitration

11.1 Reference to Arbitration

- (a) **(Dispute):** If:
 - (i) a Dispute:

- A. which has been referred to the Representatives for negotiation pursuant to clause 10.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 10.2(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 10.3(b); or
- (ii) in the case of a Dispute which the parties agree to refer to expert determination under clause 10.3:
- C. a determination is not made within 30 days of the expert's acceptance of the appointment; or
 - D. a notice of dissatisfaction is given in accordance with clause 10.6,
- 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 11.1(a), the Dispute will be referred to arbitration.

11.2 Arbitration

- (a) **(ACICA Rules):** Arbitration pursuant to this clause 11 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 11.
- (b) **(Seat):** The seat of the arbitration will be Melbourne, Victoria.
- (c) **(Language):** The language of the arbitration will be English.

11.3 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 11.1(b), the arbitrator will be appointed by the Australian Centre for International Commercial Arbitration.

11.4 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 11 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 11.4(a)(i) and 11.4(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 11.4(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 11.4(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.

11.5 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 11.5, have applied to any Dispute referred to arbitration pursuant to this clause 11.

11.6 Extension of ambit of arbitration proceedings

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

- (i) a Dispute between the parties to this Maintenance Licence is referred to arbitration in accordance with this clause 11; and
- (ii) there is some other Dispute also between the parties to and in accordance with this Maintenance Licence (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 11.6(a) on such terms and conditions (if any) as the arbitrator thinks fit.

11.7 Award final and binding

- (a) **(Final and binding):** Subject to clause 11.7(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 pursuant to this clause 11.

11.8 Continue to perform

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

11.9 Governing law of arbitration agreement

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

11.10 Interlocutory relief

This clause 11 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.

12. Notices

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

- (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);

LMA:

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 12(b); and
- (e) **(taken to be received)**: are taken to be received by the addressee at the address set out in clause 12(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.

13. Miscellaneous

13.1 Governing Law and jurisdiction

- (a) **(Governing Law)**: This Maintenance Licence is governed by, and must be construed according to, the Laws of Victoria, Australia.
- (b) **(Jurisdiction)**: Without limiting clauses 10 to 11, 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 Maintenance Licence.

13.2 Entire agreement

To the extent permitted by Law, in relation to its subject matter, this Maintenance Licence 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.

13.3 Further acts and documents

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

13.4 Surviving provisions

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

13.5 Waiver

- (a) (**Writing**): A waiver given by a party in accordance with this Maintenance Licence 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 Maintenance Licence 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 Maintenance Licence.
- (c) (**No waiver of another breach**): No waiver of a breach of a term of this Maintenance Licence operates as a waiver of another breach of that term or of a breach of any other term of this Maintenance Licence.

13.6 Consents, approvals and directions

- (a) (**LMA**): A consent or approval required in accordance with this Maintenance Licence from LMA may be given or withheld, or may be given subject to any conditions, as LMA (in its absolute discretion) think fit, unless this Maintenance Licence expressly provides otherwise.

- (b) **(Project Co):** A consent or approval required under this Maintenance Licence from Project Co may not be unreasonably withheld, unless this Maintenance Licence expressly provides otherwise.

13.7 Amendments

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

13.8 Expenses

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

13.9 Severance

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

13.10 Counterparts

This Maintenance Licence 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.

13.11 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 LMA.

13.12 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 Maintenance Licence whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.
- (b) **(Rights, obligations and liabilities):** Without limiting clause 13.12(a), the rights, obligations and liabilities of the parties (including those relating to proportionate liability) are as specified in this Maintenance Licence and not otherwise, whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.

13.13 No partnership or joint venture

Except as expressly provided in this Maintenance Licence, nothing contained or implied in this Maintenance Licence 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.

13.14 No agency

Except as expressly permitted or contemplated by this Maintenance Licence, 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 is being carried on or managed or supervised by LMA nor may Project Co act as or represent itself to be the servant or agent of LMA.

13.15 No merger

The rights and obligations of the parties will not merge on the completion of any transaction contemplated by this Maintenance Licence. They will survive the execution and delivery of any assignment or other document entered into for the purpose of implementing a transaction.

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

Annexure A - Licensed Maintenance Area Plan

Executed as an agreement.

[State Note: Execution blocks to be inserted.]