

## Financiers' Certifier Direct Deed

Stage One - East West Link

[ ]  
State

[ ]  
Financiers' Certifier

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## Financiers' Certifier Direct Deed dated

**Parties** [ ] (State)  
[ ] (Financiers' Certifier)

### Background

- A. The background to the Project is set out in the Project Agreement.
- B. The D&C Subcontractor has entered into the D&C Subcontract with Project Co to undertake the D&C Activities.
- C. The Financiers' Certifier has entered into the Appointment Deed with Project Co and the [Security Trustee] to perform the [Financiers' Certifier Services].
- D. The Financiers' Certifier acknowledges that payments by the State to Project Co (and in turn the D&C Subcontractor) will be made based on the determinations made by the Financiers' Certifier under the Appointment Deed and that the State has a legitimate interest in ensuring that the [Financiers' Certifier Services] are performed properly.
- E. The Financiers' Certifier acknowledges and agrees that it will perform the [Financiers' Certifier Services] in accordance with this Deed.

### Operative provisions

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## 1. Defined terms & interpretation

### 1.1 Project Agreement definitions

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

### 1.2 Defined terms

In this document, unless the context otherwise requires:

**Appointment Deed** means the document entitled [*#insert*] dated on or about the date of this Deed between Project Co, the Financiers' Certifier and [the Security Trustee]. [*State Note: Subject to Proposal structure.*]

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

**Dispute** has the meaning given in clause 4.1(a)

**[Financiers' Certifier Contractual Material]** has the meaning given in the Appointment Deed. [*State Note: Subject to terminology in finalised Appointment Deed.*]

**[Financiers' Certifier Services]** has the meaning given in the Appointment Deed. [*State Note: Subject to terminology in finalised Appointment Deed.*]

**[Payment Certificate]** has the meaning given in the D&C Subcontract. [*State Note: Subject to terminology in finalised D&C Subcontract.*]

**Payment Certification Material** means:

- (a) the [Payment Certificate];

- (b) the [Withdrawal Notice]; and
- (c) any supporting, supplementary or clarifying written communications, reports, certificates, opinions, notices, materials or other documents provided by the Financiers' Certifier in connection with either the Payment Certificate or the Withdrawal Notice. *[State Note: Subject to terminology in finalised Appointment Deed.]*

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

**[Project Party]** has the meaning given in the Appointment Deed (*i.e. Project Co and the Security Trustee*). *[State Note: Subject to terminology in finalised Appointment Deed.]*

**Relevant Documents** means:

- (a) this Deed;
- (b) the Appointment Deed;
- (c) the Facility Agreement; and
- (d) the D&C Subcontract.

**Representative** has the meaning given in clause 4.2(a).

**[Withdrawal Notice]** has the meaning given in the Facility Agreement. *[State Note: Subject to terminology in finalised Facility Agreement.]*

### 1.3 Interpretation

In this Deed:

- (a) **(headings)**: headings (including any heading at the beginning of any subclause) are for convenience only and do not affect interpretation;

and unless the context otherwise requires:

- (b) **(count and gender)**: a word importing the singular includes the plural and vice versa, a word indicating a gender includes every other gender;
- (c) **(agreement and schedule references)**: a reference to:
  - (i) a party, clause, Schedule, Exhibit, or Annexure is a reference to a party, clause, schedule, exhibit or annexure of or to this Deed; and
  - (ii) a section is a reference to a section of a Schedule;
- (d) **(agreement as amended)**: a reference to this Deed or to any other deed, agreement, document or instrument includes a reference to this Deed or such other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (e) **(party)**: a reference to a party includes that party's legal representatives, trustees, executors, administrators, successors and permitted substitutes and assigns, including any persons taking part by way of novation;

- (f) (**person**): a reference to a person includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (g) (**legislation**): a reference to legislation includes its delegated legislation and a reference to such legislation or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (h) (**definitions**): if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (i) ("**includes**"): "includes" will be read as if followed by the phrase "(without limitation)";
- (j) ("**or**"): the meaning of "or" will be that of the inclusive, being one, some or all of a number of possibilities;
- (k) (**information**): a reference to information includes information, representations, statements, data, samples, calculations, assumptions, deductions, determinations, drawings, design specifications, models, plans and other documents in all forms including the electronic form in which it was generated;
- (l) ("**\$**"): a reference to "\$", AUD or dollar is to Australian currency;
- (m) (**time**): a reference to time is a reference to time in Melbourne, Australia;
- (n) (**rights**): a reference to a right includes any benefit, remedy, function, discretion, authority or power;
- (o) (**obligations and liabilities**): a reference to an obligation or a liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;
- (p) ("**may**"): the term "may", when used in the context of a power, right or remedy exercisable by the State, means that the State can exercise that power, right or remedy in its absolute and unfettered discretion and the State has no obligation to do so;
- (q) (**construction**): where there is a reference to an Authority, institute or association or other body referred to in this Deed which:
  - (i) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity, this Deed is deemed to refer to that other entity; or
  - (ii) ceases to exist, this Deed is deemed to refer to that new entity which serves substantially the same purpose or object as the former entity;
- (r) (**remedy**): the use of the word "remedy" or any form of it in this Deed means that the event to be remedied must be cured or its effects overcome; and
- (s) (**contra proferentem rule not to apply**): each provision will be interpreted without disadvantage to the party who (or whose representative) drafted or proffered that provision.

## 1.4 Priority of documents

To the extent of any inconsistency, ambiguity or discrepancy between this Deed and the Appointment Deed, this Deed will prevail.

## 1.5 Business Day

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

## 1.6 Relationship of the parties

Unless otherwise expressly provided, this Deed does not:

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

## 1.7 Approvals, directions and notices in writing

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

## 1.8 State's rights and obligations

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

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## 2. [Financiers' Certifier Services]

- (a) **(Duties of the Financiers' Certifier)**: In the performance by the Financiers' Certifier of the [Financiers' Certifier Services] under the Appointment Deed, including its certification functions identified or described in *[State Note: Insert clause references describing the certifying functions of the Financiers' Certifier.]* of the Appointment Deed, the Financiers' Certifier must:
  - (i) act fairly, reasonably and independently;
  - (ii) exercise the powers, duties and authority that are conferred upon the Financiers' Certifier by the Relevant Documents;
  - (iii) act professionally;

- (iv) subject to the terms of the applicable Relevant Documents, arrive at a reasonable measure or value of work, quantities, time or progress;
  - (v) exercise its powers, duties, functions and authority honestly, reasonably and impartially and fairly;
  - (vi) where the Financiers' Certifier may, rather than must, exercise a right, function or power, exercise such right, function or power in a professional, timely and independent manner;
  - (vii) exercise the powers, duties, discretions or authorities as an independent reviewer, assessor and valuer engaged by the Project Parties and not as agent for the State, the D&C Subcontractor or any Project Party;
  - (viii) for the purposes only of keeping the State informed, and without any obligation to provide any professional services to the State:
    - A. use reasonable endeavours to keep the State regularly informed as to all matters affecting or relating to the Payment Certification Material; and
    - B. consult with the State when reasonably requested;
  - (ix) forward to the State a copy of all Payment Certification Material provided by or on behalf of a Project Party or the D&C Subcontractor to the Financiers' Certifier, or by or on behalf of the Financiers' Certifier to a Project Party or the D&C Subcontractor;
  - (x) perform the [Financiers' Certifier Services] in a timely manner in accordance with the times prescribed under the Relevant Documents, or if no time is prescribed, within a time period which the Financiers' Certifier determines is reasonably necessary to properly perform that Financiers' Certifier Service in accordance with its obligations under the Relevant Documents; and
  - (xi) otherwise perform such [Financiers' Certifier Services] in accordance with the requirements applicable to the Financiers' Certifier under the Relevant Documents, including the obligations of the Financiers' Certifier under clauses [ ] (*Standard of care*), [ ] (*Coordination by Financiers' Certifier*), [ ] (*Right to enter, inspect and test*), [ ] (*Key People*), [ ] (*Restriction on delegation and sub-contracting*), [ ] (*Obligations under the Relevant Documents*), [ ] (*Non-complying Financiers' Certifier Services*), [ ] (*Audit*), [ ] (*Timely provision of Financiers' Certifier Services*), [ ] (*Professional indemnity insurance*) to [ ] (*Notices from or to insurer*) inclusive and [ ] (*Financiers' Certifier's indemnity*) of the Appointment Deed. [***State Note: Insert applicable clause references.***]
- (b) **(Acknowledgements and warranties):** The State:
- (i) acknowledges that:
    - A. it receives any [Financiers' Certifier Contractual Material] subject to the terms of the Appointment Deed and this clause 2(b);

- B. it understands that it has been agreed that, as a condition precedent to it receiving any [Financiers' Certifier Contractual Material], each recipient of the [Financiers' Certifier Contractual Material] must first deliver to the Financiers' Certifier an acknowledgement in the form of this clause 2(b)(i) on behalf of itself and any third parties on whose behalf it is acting;
  - C. subject to 2(b)(iii), it must not disclose the [Financiers' Certifier Contractual Material] to any third party without the prior consent of the Financiers' Certifier and without obtaining and providing to the Financiers' Certifier a signed acknowledgement in the form of a deed from the third party on identical terms to these acknowledgements;
  - D. pursuant to clause 3(a), neither it nor any of its affiliates or parties on whose behalf it is acting will in any circumstances make any demands or claims, initiate any suits, actions or other proceedings or seek any form of compensation from or against the Financiers' Certifier to the extent that would result in the Financiers' Certifier having greater aggregate liability than specified in clause [ ] (*Limitation of liability*) of the Appointment Deed; and [***State Note: Insert applicable clause references.***]
- (ii) covenants and agrees that it is bound by clause [ ] (*Disclosure and reliance*) of the Appointment Deed in relation to any dealings with the [Financiers' Certifier Contractual Material], and is a [Disclosee] as defined under that clause; [***State Note: Insert applicable clause references.***]
- (iii) may:
- A. disclose the [Financiers' Certifier Contractual Material] to the State's employees, officers, agents, nominees, advisers and auditors, and any other persons who in the ordinary course of the State's business have access to the papers and records of the State, but only to allow such persons to perform their duties for the State and on the basis that they will not disclose in breach of this clause 2(b)(iii)A;
  - B. disclose the [Financiers' Certifier Contractual Material] if required by law or regulation or in accordance with an official directive or request (whether or not having the force of law);
  - C. disclose the [Financiers' Certifier Contractual Material] in connection with any litigation or proposed litigation in relation to the Relevant Documents or the Project; or
  - D. file the [Financiers' Certifier Contractual Material] with a government or other agency or quote or refer to the [Financiers' Certifier Contractual Material] in a public document, disclosed to regulatory authorities to whose jurisdiction the State may become subject to the extent required by those authorities,



but not for the purpose of reliance by any person receiving the [Financiers' Certifier Contractual Material] under this clause 2(b)(iii); and

- (iv) acknowledges that the Financiers' Certifier is relying on the acknowledgements, covenants and agreements set out in this Deed.

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### 3. Limitation of liability

- (a) **(Acknowledgement):** The State acknowledges and is aware of the Financiers' Certifier's limitation and exclusions of liability provided for under clause [ ] (*Limitation of liability*) of the Appointment Deed, and agrees: [*State Note: Insert applicable clause references.*]
  - (i) that the liability referred to in that clause [ ] (*Limitation of liability*) includes any and all liability of the Financiers' Certifier to the State arising out of or in connection with this Deed;
  - (ii) to be bound by those limitations and exclusions of liability as if it were an additional party to the Appointment Deed; and
  - (iii) that it will not in any circumstances make any demand or claim, initiate any suit, action or other proceeding or seek any form of compensation from or against the Financiers' Certifier to the extent that such demand, claim, suit, action, proceeding or seeking of compensation would result in the Financiers' Certifier having greater aggregate liability than specified in clause [ ] (*Limitation of liability*) of the Appointment Deed.
- (b) **(No liability):** The State has no liability whatsoever to the Financiers' Certifier for the cost of performance of its obligations under this Deed or the Appointment Deed.

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### 4. Dispute Resolution

#### 4.1 Procedure for resolving disputes

- (a) **(Disputes to be resolved):** Any dispute between the parties arising under this Deed (**Dispute**) must be resolved in accordance with this clause 4.
- (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 4.2;
  - (ii) secondly, if the Dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 4.2(c)(i) the parties may agree that the Dispute will be referred to an expert for determination under clauses 4.4 to 4.8 (inclusive) or to arbitration under clause 5; 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 4.2(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 4.2(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 under clause 4.6(a),

then the Dispute must be referred to arbitration under clause 5.

## 4.2 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 the Financiers' Certifier **(Representatives)**.
- (b) **(Contents of Notice):** A notice under clause 4.2(a) must:
  - (i) state that it is a notice under this clause 4; 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 4.2(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 4.2(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.

## 4.3 Expert determination

If:

- (a) **(dispute unresolved by Representatives):** a Dispute which has been referred to the Representatives for negotiation in accordance with clause 4.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 4.2(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 4.2(c)(i), that the Dispute be referred to an expert for determination,

then those parts of the Dispute which remain unresolved will be referred to an expert for determination under clauses 4.4 to 4.8. For the avoidance of doubt, a Dispute may only be referred to an expert for determination by agreement of the parties.

#### 4.4 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 4.3, the State and Financiers' Certifier must exchange lists of 3 persons (in order of preference) who, if appointed, would satisfy the requirements of clause 4.4(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 4.4(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 4.2(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 4.2(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 4.4(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 4.4(a).
- (d) **(Appropriate skills):** It is the intention of the parties that the expert appointed to determine a Dispute will be an independent person with appropriate skills having regard to the nature of the matters in dispute.
- (e) **(No entitlement to challenge appointment):** Neither party will be entitled to challenge the appointment of an expert under this clause 4.4 on the basis that the expert does not satisfy the requirements of clause 4.4(d).
- (f) **(Not an arbitration agreement):** Any agreement for expert determination under this Deed will not constitute an arbitration agreement for the purposes of the *Commercial Arbitration Act 2011* (Vic).
- (g) **(Agreement):** The State and Financiers' Certifier 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.

#### 4.5 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.

#### 4.6 Expert finding

- (a) **(Notification):** The determination of the expert must be in writing and will be final and binding on the State and Financiers' Certifier 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 5.

- (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.

#### 4.7 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 Financiers' Certifier 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.

#### 4.8 Costs

The State and Financiers' Certifier 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.

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## 5. Arbitration

### 5.1 Reference to Arbitration

- (a) **(Dispute):** If:
  - (i) a Dispute:
    - A. which has been referred to the Representatives for negotiation in accordance with clause 4.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 4.2(c)(i); and
    - B. the parties do not agree to refer the Dispute to an expert for determination; or
  - (ii) in the case of a Dispute which the parties agree to refer to expert determination under clause 4.3:

- 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 4.6,

then the State or Financiers' Certifier 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 5.2(a), the Dispute will be referred to arbitration.

## **5.2 Arbitration**

- (a) **(ACICA Rules)**: Arbitration in accordance with this clause 5 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 5.
- (b) **(Seat)**: The seat of the arbitration will be Melbourne, Victoria.
- (c) **(Language)**: The language of the arbitration will be English.

## **5.3 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 14 Business Days of the Dispute being referred to arbitration in accordance with clause 5.1(b), the arbitrator will be appointed by the Australian Centre for International Commercial Arbitration.

## **5.4 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 5 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 5.4(a)(i) and 5.4(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 5.4(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 5.4(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.

## **5.5 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 5.5, have applied to any dispute referred to arbitration in accordance with this clause 5.

## **5.6 Extension of ambit of arbitration proceedings**

- (a) **(Extending Disputes):** Where:
- (i) a Dispute between the parties to this Deed is referred to arbitration in accordance with this clause 5; and
  - (ii) there is some other Dispute also between the parties to and in accordance with this Deed (whenever occurring),

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

- (b) **(Arbitrator's order):** An arbitrator may make an order in accordance with clause 5.6(a) on such terms and conditions (if any) as the arbitrator thinks fit.

## 5.7 Award final and binding

- (a) **(Final and binding):** Subject to clause 5.7(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 5.

## 5.8 Continue to perform

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

## 5.9 Governing law of arbitration agreement

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

## 5.10 Interlocutory relief

This clause 5 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.

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## 6. Notices

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

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

**State:**

Attention: [#]

Address: [#]

Email: [#]

**Financiers' Certifier:**

Attention: [#]

Address: [#]

Email: [#]

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

- (d) **(form of delivery)**: must be delivered by hand or posted by prepaid post to the address or emailed (in the form agreed by both parties) to the email address of the addressee set out in clause 6(b); and
- (e) **(taken to be received)**: are taken to be received by the addressee at the address set out in clause 6(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.

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## 7. Miscellaneous

### 7.1 Governing Law and jurisdiction

- (a) **(Governing Law)**: This Deed is governed by, and must be construed according to, the Laws of Victoria, Australia.
- (b) **(Jurisdiction)**: Without limiting clauses 4 to 5, each party irrevocably submits to the non-exclusive jurisdiction of the courts of Victoria, and the courts competent to determine appeals from those aforementioned courts, with respect to any proceedings which may be brought in connection with this Deed.

### 7.2 Entire agreement

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

- (a) **(entire understanding)**: embodies the entire understanding of the parties and constitutes the entire terms agreed by the parties; and
- (b) **(prior agreements)**: supersedes any prior agreement of the parties.



### **7.3 Further acts and documents**

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

### **7.4 Survival of certain provisions**

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

### **7.5 Waiver**

- (a) **(Writing):** A waiver given by a party in accordance with this Deed is only effective and binding on that party if it is given or confirmed in writing by that party.
- (b) **(No waiver):** A failure to, a delay in or the partial exercise or enforcement of a right provided by Law or in accordance with this Deed by a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right provided by Law or in accordance with this Deed.
- (c) **(No waiver of another breach):** No waiver of a breach of a term of this Deed operates as a waiver of another breach of that term or of a breach of any other term of this Deed.

### **7.6 Consents, approvals and directions**

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

## 7.7 Amendments

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

## 7.8 Expenses

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

## 7.9 Severance

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

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

## 7.10 Counterparts

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

## 7.11 Moratorium legislation

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

## 7.12 Proportionate liability

- (a) **(Excluded operation of Wrongs Act):** The operation of Part IVAA of the *Wrongs Act 1958* (Vic) is excluded in relation to all and any rights, obligations or liabilities of either party under this Deed whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.
- (b) **(Rights, obligations and liabilities):** Without limiting clause 7.12(a), the rights obligations and liabilities of the parties (including those relating to proportionate liability) are as specified in this Deed and not otherwise, whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.

## 7.13 Assignment

Except as expressly contemplated by this Deed, the Financiers' Certifier may not assign or transfer any of its rights or obligations under this Deed.

**Executed** as an agreement.

*[State Note: Execution blocks to be inserted.]*