

Escrow Agreement

Stage One - East West Link

The Minister for Roads on behalf of the Crown in right of the State of Victoria
State

East West Connect Partnership
Project Co

Perpetual Corporate Trust Limited
Escrow Agent

Contents

- 1. Defined terms & interpretation..... 1**
 - 1.1 Project Agreement definitions 1
 - 1.2 Definitions 1
 - 1.3 Interpretation 2
 - 1.4 Business Day 3
 - 1.5 Approvals, directions and notices in writing 3
 - 1.6 Action without delay..... 3
 - 1.7 State's rights and obligations 4
 - 1.8 EWC Trustees' Limitation of Liability..... 4
- 2. Purpose of agreement 6**
- 3. Term of agreement..... 6**
- 4. Conduct of Escrow Agent 6**
- 5. Deposit of Financial Model..... 6**
 - 5.1 Deposit of Financial Model 6
 - 5.2 Other Material..... 6
 - 5.3 Confirmation of receipt 7
 - 5.4 Storage of Escrow Material..... 7
 - 5.5 Escrow Material register 7
 - 5.6 Information and inspection requests 7
- 6. Access to Escrow Material 7**
- 7. Loss of Escrow Material 7**
 - 7.1 Loss of Escrow Material..... 7
 - 7.2 Specific performance..... 8
- 8. Release of Escrow Material 8**
- 9. Release of Escrow Material to State on termination..... 8**
- 10. Release of Escrow Material to new Escrow Agent 8**
- 11. Escrow fees and charges 9**
 - 11.1 Payment 9
 - 11.2 Increases..... 9
 - 11.3 Late payments..... 9
 - 11.4 Other charges..... 9
- 12. Goods and Services Tax (GST)..... 9**
- 13. Confidentiality..... 11**
 - 13.1 Confidentiality of Escrow Material 11
 - 13.2 Prohibited acts..... 11
 - 13.3 After termination 11
- 14. Escrow Agent's further obligations 11**
- 15. Termination of Agreement 12**
- 16. Assignment 12**
 - 16.1 Assignment by Escrow Agent 12
 - 16.2 Assignment by State and Project Co 12
- 17. Subcontracting..... 12**

- 18. Dispute Resolution 12**
 - 18.1 Procedure for resolving disputes 12
 - 18.2 Negotiation 13
 - 18.3 Expert determination 13
 - 18.4 Selection of expert..... 14
 - 18.5 Rules of expert determination 15
 - 18.6 Expert finding 15
 - 18.7 Liability of expert 15
 - 18.8 Costs 15
- 19. Arbitration 15**
 - 19.1 Reference to Arbitration..... 15
 - 19.2 Arbitration 16
 - 19.3 Appointment of arbitrator 16
 - 19.4 General Principles for conduct of arbitration 16
 - 19.5 Proportional liability 18
 - 19.6 Extension of ambit of arbitration proceedings 18
 - 19.7 Award final and binding 18
 - 19.8 Continue to perform..... 18
 - 19.9 Governing law of arbitration agreement 18
 - 19.10 Interlocutory relief 18
 - 19.11 Consolidation..... 18
- 20. Notices..... 19**
- 21. Miscellaneous 20**
 - 21.1 Governing Law and jurisdiction..... 20
 - 21.2 Entire agreement..... 20
 - 21.3 Further acts and documents 20
 - 21.4 Survival of certain provisions 20
 - 21.5 Waiver 21
 - 21.6 Consents, approvals and directions 21
 - 21.7 Amendments 21
 - 21.8 Expenses 21
 - 21.9 Severance 22
 - 21.10 Counterparts..... 22
 - 21.11 Moratorium legislation 22
 - 21.12 Proportionate liability 22
- Schedule 1 – Fees and Charges 23**

Escrow Agreement dated

Parties **The Minister for Roads on behalf of the Crown in right of the State of Victoria (State)**

East West Connect Partnership (Project Co)

Perpetual Corporate Trust Limited ABN 99 000 341 533 (Escrow Agent)

Background

- A. The background to this Project is set out in the Project Agreement.
- B. The Escrow Agent has been appointed by the State and Project Co to hold the Escrow Material in escrow.

Operative provisions

1. **Defined terms & interpretation**

1.1 **Project Agreement definitions**

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

1.2 **Definitions**

In this Agreement, unless the context otherwise requires:

Agreed Amount has the meaning given in clause 12(b)(i).

Agreement means this agreement and includes all schedules, exhibits, attachments and annexures to it.

Commencement Date means the date of this Agreement.

Cost has the meaning given in clause 12(g).

Disputing Parties has the meaning given in clause 18.1(a).

Escrow Fee means the fees described in Schedule 1.

Escrow Material means:

- (a) the Financial Model; and
- (b) any Other Material.

Other Material means any data or material provided by Project Co or the State to the Escrow Agent in accordance with the terms of this Agreement (other than the Financial Model provided in accordance with clause 5.1(a)) as varied, added to or replaced from time to time.

Recipient has the meaning given in clause 12(b)(ii).

Representative has the meaning given in clause 18.2(a).

Revenue has the meaning given in clause 12(f).

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

Supplier has the meaning given in clause 12(b).

1.3 Interpretation

In this Agreement:

- (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 and 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 Agreement; and
 - (ii) a section is a reference to a section of a Schedule;
- (d) **(agreement as amended)**: a reference to this Agreement or to any other deed, agreement, document or instrument includes a reference to this Agreement 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 Agreement which:
 - (i) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity, this Agreement is deemed to refer to that other entity; or
 - (ii) ceases to exist, this Agreement 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 words "remedy" or "cure" or any form of such words in this Agreement means that the event to be remedied cured must be remedied or 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 Business Day

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

1.5 Approvals, directions and notices in writing

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

1.6 Action without delay

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

1.7 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 Agreement.
- (b) **(No Claim):** Subject to clause 1.7(c), Project Co and the Escrow Agent 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 1.7(a) and (b) do not limit any Liability which the State would have had to Project Co or the Escrow Agent 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.

1.8 EWC Trustees' Limitation of Liability

- (a) **(Capacity):** The parties acknowledge that the obligations of each EWC Trustee under this Agreement are incurred by it solely in its capacity as trustee of the relevant EWC Trust other than where expressly provided otherwise, including as contemplated by clause 1.8(c)(i) below.
- (b) **(Limited liability):** Subject to clause 1.8(c), each EWC Trustee will:
 - (i) not be liable to pay or satisfy any of its obligations or liabilities under this Agreement in relation to the relevant EWC Trust out of any assets held by it personally;
 - (ii) only be liable to pay or satisfy any of its obligations or liabilities under this Agreement in relation to the relevant EWC Trust out of the assets of that EWC Trust out of which it is actually indemnified; and
 - (iii) not be liable to pay or satisfy any of its obligations or liabilities under this Agreement in its personal capacity out of any asset held by it personally.
- (c) **(Circumstances where an EWC Trustee is personally liable):**
 - (i) Each EWC Trustee will be personally liable under this Agreement for any loss or damage which the Escrow Agent or the State (as applicable) may suffer as a result of a breach of this Agreement by that EWC Trustee where such breach is caused by:
 - A. fraud of that EWC Trustee;
 - B. wilful default of that EWC Trustee;
 - C. that EWC Trustee having committed a breach of trust;
 - D. that EWC Trustee having been negligent in the performance of its duties as trustee of the relevant EWC Trust;
 - E. a representation or warranty given by that EWC Trustee under this Agreement in respect of itself (in any capacity) or the relevant EWC Trust being untrue, incorrect or misleading when made or repeated; or

- F. a breach of any undertaking (other than an undertaking to pay) of that EWC Trustee given under this Agreement.
- (ii) The Escrow Agent or the State (as applicable) may:
 - A. do anything necessary to enforce its rights in connection with any representation or warranty (with respect to the relevant EWC Trustee or the relevant EWC Trust) or undertaking (other than an undertaking to pay) given by any EWC Trustee under this Agreement;
 - B. take proceedings to obtain an injunction or other order to restrain any breach of this Agreement by any EWC Trustee or declaratory relief or other similar judgment or order as to the obligations of any EWC Trustee under this Agreement; and
 - C. prove in any insolvency proceedings in respect of any EWC Trustee only in order to protect and enforce its rights in respect of the property of the relevant EWC Trust and the Trustee's Indemnity.
- (iii) Nothing in this clause 1.8 prevents the Escrow Agent or the State (as applicable) obtaining any injunctive relief, order for specific performance, declaration or similar relief against any EWC Trustee.
- (d) **(Limited recourse):** The Escrow Agent and the State must not, except to the extent an EWC Trustee is personally liable under clause 1.8(c)(i) and subject to clause 1.8(c)(ii):
 - (i) bring any proceeding for the winding up or liquidation of an EWC Trustee;
 - (ii) appoint, or seek the appointment of, a receiver or receiver and manager or other controller (as defined in the Corporations Act) to an EWC Trustee or its assets or the assets of an EWC Trust;
 - (iii) incur, or permit any other person to incur, any obligation binding on an EWC Trustee;
 - (iv) take any action to obtain a judgment against an EWC Trustee or to enforce a judgment against an EWC Trustee other than:
 - A. a counterclaim in any proceedings commenced by an EWC Trustee; or
 - B. as permitted by clause 1.8(c)(iii); or
 - (v) levy or enforce a levy or distress or other execution upon or against any assets of an EWC Trustee.
- (e) **(EWC Trustee as Partner):** A reference to an EWC Trustee includes a reference to the relevant EWC Partner as a partner in the East West Connect Partnership.

2. Purpose of agreement

Subject to the terms and conditions of this Agreement, to secure the interests of the State and Project Co under the Project Agreement:

- (a) **(Deposit of Financial Model):** Project Co must deposit the Financial Model in accordance with the Project Agreement and any Other Material in accordance with this Agreement, with the Escrow Agent in Melbourne; and
- (b) **(Escrow Material):** the Escrow Agent must act as escrowee of the Escrow Material.

3. Term of agreement

- (a) **(Commencement):** Subject to clause 3(b), this Agreement commences on the Commencement Date and will remain in force until this Agreement is terminated.
- (b) **(Conditions Precedent):** The satisfaction or waiver of the Conditions Precedent in accordance with clause 3 of the Project Agreement, is a condition precedent to the coming into operation of this Agreement (other than this clause 3(b)).

4. Conduct of Escrow Agent

Neither the State nor Project Co will be liable for any act or omission of the Escrow Agent.

5. Deposit of Financial Model

5.1 Deposit of Financial Model

- (a) **(At Financial Close):** Project Co must deposit the Financial Model with the Escrow Agent promptly following Financial Close as required by the Project Agreement, and the Escrow Agent must accept custody of the Financial Model.
- (b) **(When updated):** Upon the occurrence of any of the events set out in clause 48.8 of the Project Agreement, or when otherwise agreed by the State and Project Co, the State and Project Co may:
 - (i) seek the release in accordance with clause 8 or 9 (as the case may be) of the then current version of the Financial Model held by the Escrow Agent; and
 - (ii) subsequently deposit that Financial Model, or a further updated version of the Financial Model as Other Material in accordance with clause 5.2, with the Escrow Agent.

5.2 Other Material

Project Co and the State may agree Other Material (which may be updated versions of the Financial Model amended in accordance with the Project Agreement or otherwise by agreement between the State and Project Co) to be deposited with the Escrow Agent and the Escrow Agent must accept custody of such Other Material deposited with it.

5.3 Confirmation of receipt

The Escrow Agent must give Project Co and the State confirmation of receipt of all Escrow Material referred to in clauses 5.1 and 5.2 immediately when it is received.

5.4 Storage of Escrow Material

The Escrow Agent must store the Escrow Material in a safe and secure place at the Escrow Agent's premises in Melbourne.

5.5 Escrow Material register

The Escrow Agent must maintain a register of Escrow Material deposited, stored and released under this Agreement in the form agreed by the State, Project Co and the Escrow Agent.

5.6 Information and inspection requests

- (a) **(Requests for inspection):** The Escrow Agent must promptly comply with a request of the State or Project Co to inspect and be furnished with a copy of the register referred to in clause 5.5 and to be furnished with information about storage, safety and security procedures relating to the Escrow Material.
- (b) **(Cost of Escrow Agent):** The reasonable costs of the Escrow Agent complying with a request in this clause 5.6 will be borne by Project Co.
- (c) **(State to reimburse for State requests):** The State will promptly reimburse Project Co for the costs of the Escrow Agent borne by Project Co arising from a request by the State under this clause 5.6.

6. Access to Escrow Material

Subject to this Agreement and unless required by Law, no other person will have access to the Escrow Material unless the Escrow Agent has been notified in advance by Project Co and the State.

7. Loss of Escrow Material

7.1 Loss of Escrow Material

If the Escrow Material or any medium containing the Escrow Material is lost, destroyed or damaged while in the possession, custody or control of the Escrow Agent:

- (a) **(notification):** the Escrow Agent must promptly notify Project Co and the State; and
- (b) **(obligation to replace):** Project Co must within 7 Business Days replace the lost, damaged or destroyed Escrow Material to the extent it is replaceable at:
 - (i) the Escrow Agent's costs if the loss, damage or destruction was caused by the Escrow Agent's fraud, negligence, recklessness, act or omission or breach of this Agreement; or

- (ii) Project Co's and the State's cost (shared equally in each case) in all other circumstances.

7.2 Specific performance

Without derogating from any other right to obtain specific performance, Project Co acknowledges that the State is entitled to specific performance of Project Co's obligations in clause 7.1.

8. Release of Escrow Material

The Escrow Agent will immediately release the Escrow Material to:

- (a) **(any nominated person)**: any person nominated by a notice signed by both the State and Project Co; and
- (b) **(State's auditor)**: upon the State's request, the State's auditor (appointed in accordance with clause 48.7 of the Project Agreement). The State's auditor will conduct the audit under that clause at the Escrow Agent's premises or, if the Escrow Agent does not have the required equipment or facilities, at Project Co's premises.

9. Release of Escrow Material to State on termination

The Escrow Agent must release the Escrow Material to the State immediately after notice from the State that:

- (a) **(unable or unwilling to perform functions)**: Project Co is unable or unwilling to perform its obligations under this Agreement;
- (b) **(Major Default or Default Termination Event)**: a Major Default or Default Termination Event has occurred under the Project Agreement;
- (c) **(termination)**: the Project Agreement has been terminated; or
- (d) **(expiration)**: the Term of the Project Agreement has expired.

10. Release of Escrow Material to new Escrow Agent

In the event that this Agreement terminates in accordance with clause 15, or the Escrow Agent:

- (a) **(unable to perform functions)**: refuses to or is unable to perform its obligations under this Agreement;
- (b) **(Insolvency Event)**: becomes, threatens to become or is in jeopardy of becoming subject to an Insolvency Event; or
- (c) **(breach)**: is otherwise in breach of this Agreement,

then the Escrow Agent will on instruction from the State and Project Co immediately release the Escrow Material to a new escrow agent agreed by the State and Project Co and notified to the Escrow Agent or, failing agreement, appointed, in accordance with clause 48.9 of the Project Agreement.

11. Escrow fees and charges

11.1 Payment

During the term of this Agreement, Project Co and the State will each pay 50% of the Escrow Fee to the Escrow Agent without demand in accordance with the payment terms of the Escrow Fee in Schedule 1.

11.2 Increases

The Escrow Agent may increase its fees in accordance with Schedule 1.

11.3 Late payments

- (a) **(Escrow Agent to notify):** The Escrow Agent will notify the parties within a reasonable period if either of them fails to make any payment to the Escrow Agent by the due date. On receipt of such notice, the other party may pay to the Escrow Agent all amounts for which the defaulting party is in arrears.
- (b) **(Deduction of late payments):** The State or Project Co may deduct amounts paid or incurred under clause 11.3(a) by the State or Project Co (as the case may be) from any moneys otherwise due from the State or Project Co (as the case may be) under the Project Agreement or otherwise or recover such amounts as a debt.

11.4 Other charges

The Escrow Fee is inclusive of all taxes, duties, fees or other government charges which may be imposed on the storage of the Escrow Material under this Agreement or otherwise.

12. Goods and Services Tax (GST)

- (a) **(GST exclusive amounts):** Unless otherwise expressly stated, all amounts referred to in this Agreement or any Project Document are exclusive of GST.
- (b) **(GST payable by Supplier):** If GST becomes payable on any Taxable Supply made by a party (**Supplier**) under or in connection with this Agreement:
 - (i) any amount payable or consideration to be provided in accordance with any other provision of this Agreement 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 Agreement or no later than the time at which the Agreed Amount for that Taxable Supply is to be provided in accordance with this Agreement. The Recipient is not obliged to pay any amount in accordance this clause 12 unless and until a Tax Invoice is received by

the Recipient in connection with the Taxable Supply except where the Recipient is required to issue the Tax Invoice.

- (c) **(Variation in GST payable):** If for any reason, the GST payable by the Supplier in connection with a supply it makes under or in connection with this Agreement (incorporating any increasing adjustments or decreasing adjustments relating to that supply) varies from the additional amount it received from the Recipient under clause 12(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 12(b) or 12(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 12 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). The expert will act as an expert and not as an arbitrator and must take into account the terms of this Agreement, the matters required to be taken into account by the Supplier in accordance with this clause 12 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 Agreement to price, value, sales, revenue, profit or a similar amount (**Revenue**), will be 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 Agreement to cost, expense, liability or other similar amount (**Cost**), will be a reference to that Cost reduced by the Input Tax Credits in respect of such Cost 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 Agreement, 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 Agreement.
- (i) **(GST Groups):** For the purposes of this Agreement, 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, and if a party to this Agreement makes a Taxable Supply by virtue of entering into or performing this Agreement and the 'recipient' of that Taxable Supply (within the meaning of the GST Act) is an Associate of another party to this Agreement (which for this purpose includes, in relation to the State, LMA), that other party to this Agreement will be obliged either to pay the amount referred to in clause 12(b)(ii) or procure that the actual recipient pays the relevant amount, and the payer of that amount shall be the 'Recipient' for the purposes of this clause 12 in relation to the relevant Taxable Supply.

- (j) **(Project Agreement to prevail):** If clause 53 of the Project Agreement would apply in respect of a Taxable Supply to which this clause 12 also applies, then clause 53 of the Project Agreement will apply in respect of that supply and the provisions of this clause 12 (but for this paragraph) will not apply.
- (k) **(Definitions):** In this clause 12 unless otherwise defined in this Agreement, terms used have the meanings given to them in the GST Law.

13. Confidentiality

13.1 Confidentiality of Escrow Material

The Escrow Agent acknowledges that the Escrow Material is the property of Project Co or the State and accordingly must treat the Escrow Material which comes into its possession, control or custody, under this Agreement as confidential.

13.2 Prohibited acts

Other than as set out in this Agreement, the Escrow Agent must not copy, reproduce, deal with or in any way use the Escrow Material or disclose it to any person without the permission of both Project Co and the State.

13.3 After termination

The obligations under this clause 13 survive the termination of this Agreement or the release of the Escrow Material.

14. Escrow Agent's further obligations

- (a) **(Obligations):** The Escrow Agent must:
 - (i) retain the Escrow Material in a safe and secure manner and in an environment that minimises degradation of the Escrow Material; and
 - (ii) ensure the Escrow Material remains in the same condition it was in at the time of deposit with the Escrow Agent.
- (b) **(Limitations on obligations):** The Escrow Agent has no obligation to verify:
 - (i) the completeness or accuracy of Escrow Materials, or of electronic or other notations on such deposits; or

- (ii) that the Escrow Material is sufficient to enable the State to use the Escrow Material as contemplated by the Project Agreement.

15. Termination of Agreement

This Agreement will immediately terminate if both Project Co and the State give 10 Business Days' notice to the Escrow Agent of such termination or, where the Escrow Material has been released to the State under clause 9 upon termination or expiry of the Project Agreement, if the State gives 10 Business Days' notice to the Escrow Agent of such termination.

16. Assignment

16.1 Assignment by Escrow Agent

The benefit of this Agreement will not be dealt with in any way by the Escrow Agent (whether by assignment or otherwise) without the prior consent of both Project Co and the State.

16.2 Assignment by State and Project Co

The State and Project Co may at any time assign, novate or otherwise transfer all or any part of their rights or liabilities under this Agreement to any person to whom the State or Project Co assign their rights under the Project Agreement.

17. Subcontracting

The Escrow Agent must not subcontract or otherwise arrange for another person to perform any part of this Agreement or to discharge any of its obligations under this Agreement without the prior consent of the State and Project Co.

18. Dispute Resolution

18.1 Procedure for resolving disputes

- (a) **(Disputes to be resolved):** Any dispute arising under this Agreement must be resolved by the parties to that dispute (**Disputing Parties**) in accordance with this clause 18.
- (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 18.2;
 - (ii) secondly, if the dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 18.2(c)(i) the Disputing Parties may agree that the dispute will be referred to an expert for determination in accordance with clauses 18.4 to 18.8 (inclusive) or to arbitration under clause 19; 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 18.2(c)(i) and irrespective of whether the Disputing Parties failed to meet as required by that clause or whether having so met the parties 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 18.2(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 18.6(a),
- then the dispute must be referred to arbitration in accordance with clause 19.

18.2 Negotiation

- (a) **(Notification):** If a dispute arises then a party may give notice to each other party requesting that the dispute be referred for resolution by negotiation between the Chief Executive Officers (or equivalent) of the Disputing Parties **(Representatives)**.
- (b) **(Contents of Notice):** A notice under clause 18.2(a) must:
 - (i) state that it is a notice under this clause 18; and
 - (ii) include or be accompanied by particulars of the matters which are the subject of the dispute.
- (c) **(Attempt to resolve Dispute):** If a dispute is referred for resolution by negotiation under clause 18.2(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 18.2(a) is received (or such later date as the Disputing Parties may agree); and
 - (ii) any agreement reached between the Representatives will be reduced to writing, signed by or on behalf of each Disputing Party and will be contractually binding on the Disputing Parties.

18.3 Expert determination

If:

- (a) **(dispute unresolved by Representatives):** a dispute which has been referred to the Representatives for negotiation in accordance with clause 18.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 18.2(c)(i); and

- (b) **(referral to expert):** the Disputing Parties agree within 20 Business Days after the expiration of the period for negotiation referred to in clause 18.2(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 18.4 to 18.8. For the avoidance of doubt, a dispute may only be referred to an expert for determination by agreement of the Disputing Parties.

18.4 Selection of expert

- (a) **(Exchange of lists of 3 preferred experts):** Within 7 Business Days after the date on which the Disputing Parties agree to refer a dispute to an expert for determination under clause 18.3, the Disputing Parties must exchange lists of 3 persons (in order of preference) who, if appointed, would satisfy the requirements of clause 18.4(d), from whom the expert is to be chosen.
- (b) **(Appointment of person who appears on both lists):** Any person who appears on the list of all of the Disputing Parties exchanged under clause 18.4(a) will be appointed as the expert to determine a dispute and if more than one person appears on the list of all of the Disputing Parties, the person given the highest order of priority by the party who gave the notice under clause 18.2(a) will be appointed.
- (c) **(Appointment if no person appears on both lists):** If no person appears on the list of all of the Disputing Parties and the Disputing Parties cannot otherwise agree an expert, the party which gave the notice under clause 18.2(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 Disputing Parties under clause 18.3(a); or
 - (ii) if there is no governing body for the technical or professional discipline the subject of the relevant dispute or such governing body advises that it will not nominate an expert, the President of the Australian Centre for International Commercial Arbitration to nominate a person to act as the expert, having regard to, but not being bound by, those persons proposed by the Disputing Parties under clause 18.4(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):** No Disputing Party will be entitled to challenge the appointment of an expert under this clause 18.4 on the basis that the expert does not satisfy the requirements of clause 18.4(d).
- (f) **(Not an arbitration agreement):** Any agreement for expert determination under this Agreement will not constitute an arbitration agreement for the purposes of the *Commercial Arbitration Act 2011* (Vic).
- (g) **(Agreement):** Once an expert is appointed, the Disputing Parties must enter into an agreement with the expert on the terms of the Expert Determination Agreement or such other reasonable terms as the expert may require.

18.5 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.

18.6 Expert finding

- (a) **(Notification):** The determination of the expert must be in writing and will be final and binding on the Disputing Parties unless, within 10 Business Days of receipt of the determination, a Disputing Party gives notice to each other Disputing Party of its dissatisfaction and intention to refer the matter to arbitration in accordance with clause 19.
- (b) **(Amendment to determination):** Upon submission by any Disputing Party, the expert may amend the determination to correct:
 - (i) a clerical mistake;
 - (ii) an error from an accidental slip or omission;
 - (iii) a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or
 - (iv) a defect in form.

18.7 Liability of expert

- (a) **(Liability of expert):** The Disputing Parties agree:
 - (i) that the expert will not be liable in connection with the expert determination, except in the case of fraud on the part of the expert; and
 - (ii) to indemnify the expert against any Claim or Liability in connection with the expert determination, except in the case of fraud on the part of the expert, in which case a Claim may be made against him or her by any person who is party to the dispute.
- (b) **(Engagement):** The Disputing Parties will jointly engage the expert services in connection with the expert determination proceedings and each Disputing Party will seek a separate Tax Invoice equal to its share of the costs of the expert.

18.8 Costs

The Disputing Parties must:

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

19. Arbitration

19.1 Reference to Arbitration

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

- A. which has been referred to the parties' Representatives for negotiation in accordance with clause 18.2(a) remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 18.2(c)(i); and
 - B. the Disputing Parties do not agree to refer the dispute to an expert for determination; or
- (ii) in the case of a dispute which the Disputing Parties agree to refer to expert determination under clause 18.3:
- 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 18.6,

then any Disputing Party may notify the other Disputing Parties that it requires the dispute to be referred to arbitration.

- (b) **(Referral):** Upon receipt by a Disputing Party of a notice under clause 19.1(a), the dispute will be referred to arbitration.

19.2 Arbitration

- (a) **(ACICA Rules):** Arbitration in accordance with this clause 19 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 19.
- (b) **(Seat):** The seat of the arbitration will be Melbourne, Victoria.
- (c) **(Language):** The language of the arbitration will be English.

19.3 Appointment of arbitrator

The Disputing Parties will endeavour to agree on the arbitrator or arbitrators (if the Disputing Parties agree to appoint three arbitrators), but if no such agreement is reached within 14 Business Days of the dispute being referred to arbitration in accordance with clause 19.1(b), the arbitrator or arbitrators will be appointed by the Australian Centre for International Commercial Arbitration.

19.4 General Principles for conduct of arbitration

- (a) **(Conduct of arbitration):** The Disputing Parties agree that:
- (i) they have chosen arbitration for the purposes of achieving a just, quick and cost-effective resolution of any dispute;
 - (ii) any arbitration conducted in accordance with this clause 19 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 19.4(a)(i) and 19.4(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 19.4(a) when determining the duration of the oral hearing;
 - (iii) oral evidence in chief at the hearing will be permitted only with the permission of the arbitrator for good cause;
 - (iv) the oral hearing must be conducted on a stop clock basis with the effect that the time available to the parties must be split equally between the parties so that each party has the same time to conduct its case unless, in the opinion of the arbitrator, such a split would breach the rules of natural justice or is otherwise unfair to one of the parties;
 - (v) not less than 28 days prior to the date fixed for oral hearing each of the Disputing Parties must give notice of those witnesses (both factual and expert) of each other Disputing Party that it wishes to attend the hearing for cross examination;
 - (vi) in exceptional circumstances the arbitrator may amend the date of hearing and extend the time for the oral hearing set in accordance with clause 19.4(d)(ii);
 - (vii) a Disputing Party will not be bound to accept the written evidence of a witness submitted on behalf of the opposing party which is not challenged in cross examination; and
 - (viii) each Disputing Party is expected to put its case on significant issues in cross examination of a relevant witness called by the other Disputing Party or, where it seeks to challenge the evidence of a witness not called for cross-examination by reference to other evidence, to identify that evidence in its written opening submissions so that the other Disputing Party may know the nature of and basis for the challenge to the witness' written evidence.
- (e) **(Experts):** Unless otherwise ordered each Disputing Party may only rely upon one expert witness in connection with any recognised area of specialisation.

19.5 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 19.5, have applied to any dispute referred to arbitration in accordance with this clause 19.

19.6 Extension of ambit of arbitration proceedings

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

- (i) a dispute between the Disputing Parties to this Agreement is referred to arbitration in accordance with this clause 19; and
- (ii) there is some other dispute also between the Disputing Parties to and in accordance with this Agreement (whenever occurring),

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

(b) **(Arbitrator's order):** An arbitrator may make an order in accordance with clause 19.6(a) on such terms and conditions (if any) as the arbitrator thinks fit.

19.7 Award final and binding

(a) **(Final and binding):** Subject to clause 19.7(b), any award will be final and binding on the Disputing Parties.

(b) **(Appeal):** Each Disputing Party consents to any appeal to a court where that appeal is made under the *Commercial Arbitration Act 2011* (Vic) on a question of law arising in connection with an arbitral award made in accordance with this clause 19.

19.8 Continue to perform

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

19.9 Governing law of arbitration agreement

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

19.10 Interlocutory relief

This clause 19 does not prevent a Disputing Party from seeking urgent interlocutory relief from a court of competent jurisdiction where, in that Disputing Party's reasonable opinion, that action is necessary to protect that Disputing Party's rights.

19.11 Consolidation

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

20. Notices

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

- (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: Chief Executive Officer, Linking Melbourne Authority

Address: [not disclosed – addresses and names]

Email: [not disclosed – addresses and names]

Project Co

Attention: Chief Executive Officer, East West Connect Partnership

Address: [not disclosed – addresses and names]

Email [not disclosed – addresses and names]

Escrow Agent

Attention: Head of Custody

Address: [not disclosed – addresses and names]

Email: [not disclosed – addresses and names]

- (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 20(b); and
- (e) **(taken to be received)**: are taken to be received by the addressee:
 - (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;
 - (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.

21. Miscellaneous

21.1 Governing Law and jurisdiction

- (a) **(Governing Law):** This Agreement is governed by, and must be construed according to, the Laws of Victoria, Australia.
- (b) **(Jurisdiction):** Without limiting clauses 18 to 19, 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 Agreement.

21.2 Entire agreement

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

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

21.3 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 Agreement.

21.4 Survival of certain provisions

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

21.5 Waiver

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

21.6 Consents, approvals and directions

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

21.7 Amendments

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

21.8 Expenses

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

21.9 Severance

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

21.10 Counterparts

This Agreement 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.

21.11 Moratorium legislation

Without limiting clause 5.3 of the Project Agreement, to the fullest extent permitted by Law, the provisions of all Laws which operate to lessen or affect in favour of a party other than the State any obligation under this Agreement, or to prejudicially affect the exercise by the State of any right, power or remedy under this Agreement or otherwise, are expressly waived.

21.12 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 Agreement whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.
- (b) **(Rights, obligations and liabilities):** Without limiting clause 21.12(a), the rights, obligations and liabilities of the parties (including those relating to proportionate liability) are as specified in this Agreement and not otherwise, whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.

Schedule 1 – Fees and Charges

Escrow Fee: \$[not disclosed – includes sensitive third party agreements] per annum (payable annually in advance from the Commencement Date). The fee is indexed to CPI annually and all applicable GST is payable in addition to the fee.

CPI means the All Groups Consumer Price Index Weighted Average of Eight Capital Cities (IECC) (ABS Cat No. 6401.0 Series ID A2325846C) published quarterly by the Australian Bureau of Statistics or, if there is a change to that index, the index determined in accordance with section 3 of Schedule 20 (Indexes Schedule) of the Project Agreement.

Executed as an agreement.

State

Executed by the **Honourable Terence Mulder MP,**
in his capacity as the Minister for Roads, on behalf
of the Crown in right of the State of Victoria in the
presence of:

Signature of witness

Signature of Minister

Full name of witness

Project Co

Signed for
**East West Connect 1 Pty Limited as trustee for East West Connect Trust 1 for and
on behalf of East West Connect Partnership**
by its attorney

sign here ► _____
Attorney

print name _____

in the presence of

sign here ► _____
Witness

print name _____

Signed by
**East West Connect 2 Pty Limited as trustee for East West Connect Trust 2 for and
on behalf of East West Connect Partnership**
by

sign here ▶ _____
Company Secretary

print name _____

sign here ▶ _____
Director

print name _____

Signed for
**East West Connect 3 Pty Limited as trustee for East West Connect Trust 3 for and
on behalf of East West Connect Partnership**
by its attorney

sign here ▶ _____
Attorney

print name _____

in the presence of

sign here ▶ _____
Witness

print name _____

Signed for
**East West Connect 4 Pty Limited as trustee for East West Connect Trust 4 for and
on behalf of East West Connect Partnership**
by its attorney

sign here ► _____
Attorney

print name _____

in the presence of

sign here ► _____
Witness

print name _____

Signed for
**East West Connect 5 Pty Limited as trustee for East West Connect Trust 5 for and
on behalf of East West Connect Partnership**
by its attorney

sign here ► _____
Attorney

print name _____

in the presence of

sign here ► _____
Witness

print name _____

Escrow Agent

Signed in my presence for and on behalf
PERPETUAL CORPORATE TRUST LIMITED ABN 99 000 341 533 by its attorneys
and under power of attorney
dated 31 March 2009 and the attorneys declare that he/she has no notice of the revocation of his/her
powers thereunder.

sign here ▶ _____
Attorney Attorney

print name _____

in the presence of

sign here ▶ _____
Witness Witness

print name _____

print address _____