

CLAYTON UTZ

Schedule 23 - Deed of Novation

Document for Release

Execution Version

Novation Deed

Stage One - East West Link

[]
LMA

[]
Project Co

[]
[#insert party name]

Contents

Schedule 23 - Deed of Novation 1

1. Definitions and interpretation 1

 1.1 Definitions 1

 1.2 Interpretation 2

 1.3 Relationship of the parties 3

 1.4 Approvals, directions and notices in writing 3

 1.5 EWC Trustee’s Limitation of Liability..... 3

2. Novation 5

 2.1 Rights and obligations of Project Co..... 5

 2.2 Release of LMA..... 5

 2.3 Release of [*insert name of party*]..... 5

3. Further Assurances 5

4. Notices..... 6

5. Goods and Services Tax (GST)..... 6

6. Miscellaneous 8

 6.1 Governing Law and jurisdiction..... 8

 6.2 Entire agreement..... 8

 6.3 Waiver 8

 6.4 Amendments 8

 6.5 Expenses 8

 6.6 Severance 8

 6.7 Counterparts..... 9

 6.8 Proportionate liability 9

 6.9 Assignment..... 9

Novation Deed dated

Parties [] (LMA)
[] (Project Co)
[] ([Insert name of party])

Background

- A. LMA and [insert name of party] are parties to the [insert name of agreement].
- B. LMA and Project Co are parties to the Project Agreement.
- C. LMA and Project Co intend that, with effect from the Effective Date, Project Co should acquire the benefit of the [insert name of agreement] and should perform and discharge LMA's obligations and liabilities under the [insert name of agreement].
- D. The parties wish to release and discharge LMA from the [insert name of agreement] and to substitute the [insert name of agreement] with a new agreement between Project Co and [insert name of party] on the terms set out in this Deed.

Operative provisions

1. Definitions and interpretation

1.1 Definitions

In this Deed, unless the context *otherwise* requires:

[insert name of agreement] means [insert description of agreement] dated [].

Agreed Amount has the meaning given in clause 5(b)(i).

Authority means any government or any governmental, semi-governmental or local government authority, local council, administrative or judicial body or tribunal, department, commission, public authority, agency, minister, statutory corporation or instrumentality.

Cost has the meaning given in clause 5(g).

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

Effective Date means the date of this Deed.

GST has the meaning given in the GST Act and where appropriate includes Notional GST.

GST Act means the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

GST Law has the meaning given in the GST Act.

Law means:

- (a) those principles of common law and equity established by decisions of courts; and
- (b) all other statutes, regulations, by laws, ordinances and subordinate legislation of the Commonwealth, the State or Authority.

Notional GST means, where, in relation to the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations and the *National Taxation Reform (Consequential Provisions) Act 2000* (Vic) (**NTR Act**) or a direction given under section 5 of the NTR Act, the supplier is obliged to make voluntary or notional GST payments, in which case Notional GST means those voluntary or notional payments. For the avoidance of doubt, Notional GST amounts will be calculated as if the GST Act applies to the relevant supplies.

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

Recipient has the meaning given in clause 5(b)(ii).

Revenue has the meaning given in clause 5(f).

Services means [insert description of services, or define by reference to the relevant agreement].

Supplier has the meaning given in clause 5(b).

1.2 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) **(Deed references)**: a reference to a party or clause is a reference to a party or clause of or to this Deed;
- (d) **(deed as amended)**: a reference to this Deed or to any other deed, agreement, document or instrument includes a reference to this Deed or such other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (e) **(party)**: a reference to a party includes that party's legal representatives, trustees, executors, administrators, successors and permitted substitutes and assigns, including any persons taking part by way of novation;
- (f) **(person)**: a reference to a person includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (g) **(legislation)**: a reference to legislation includes its delegated legislation and a reference to such legislation or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (h) **(definitions)**: if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (i) **("includes")**: "includes" will be read as if followed by the phrase "(without limitation)";

- (j) ("**or**"): the meaning of "or" will be that of the inclusive, being one, some or all of a number of possibilities;
- (k) ("**\$**"): a reference to "\$", AUD or dollar is to Australian currency;
- (l) ("**time**"): a reference to time is a reference to time in Melbourne, Australia;
- (m) ("**rights**"): a reference to a right includes any benefit, remedy, function, discretion, authority or power;
- (n) ("**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;
- (o) ("**may**"): the term "may", when used in the context of a power, right or remedy exercisable by LMA, means that LMA can exercise that power, right or remedy in its absolute and unfettered discretion and LMA has no obligation to do so; and
- (p) ("**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.

1.3 Relationship of the parties

Unless otherwise expressly provided, this Deed does not:

- (a) ("**no additional relationship**"): create a partnership, joint venture, fiduciary, employment or agency relationship between the parties; or
- (b) ("**no good faith**"): impose any duty of good faith on LMA.

1.4 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.

1.5 EWC Trustee's Limitation of Liability

- (a) ("**Capacity**"): The parties acknowledge that the obligations of each EWC Trustee under this Deed 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 1.5(c)(i) below.
- (b) ("**Limited liability**"): Subject to clause 1.5(c), each EWC Trustee will:
 - (i) not be liable to pay or satisfy any of its obligations or liabilities under this Deed 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 Deed 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 Deed 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 Deed for any loss or damage which LMA or [insert name of party] (as applicable) may suffer as a result of a breach of this Deed 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 Deed 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 Deed.
 - (ii) LMA or [insert name of party] (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 Deed;
 - B. take proceedings to obtain an injunction or other order to restrain any breach of this Deed by any EWC Trustee or declaratory relief or other similar judgment or order as to the obligations of any EWC Trustee under this Deed; 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 1.5 prevents State or [insert name of party] (as applicable) obtaining any injunctive relief, order for specific performance, declaration or similar relief against any EWC Trustee.
- (d) **(Limited recourse):** LMA and [insert name of party] must not, except to the extent an EWC Trustee is personally liable under clause 1.5(c)(i) and subject to clause 1.5(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 1.5(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. Novation

2.1 Rights and obligations of Project Co

In accordance with clause [*insert clause reference which permits this novation*] of the [*insert name of agreement*]:

- (a) LMA and [*insert name of party*] mutually agree to terminate the [*insert name of agreement*] and to release each other from all obligations and liabilities under the [*insert name of agreement*]; and
- (b) Project Co and [*insert name of party*] will be deemed to have entered into a new contract on the same terms and conditions as the [*insert name of agreement*], subject to the following:
 - (i) Project Co will be named in the new contract in lieu of LMA; and
 - (ii) all rights, obligations and liabilities of Project Co and [*insert name of party*] will be as if Project Co had executed the [*insert name of agreement*] in lieu of LMA.

2.2 Release of LMA

With effect from the Effective Date, [*insert name of party*] releases LMA from all obligations and liabilities under [*insert name of agreement*] to be performed or discharged at or after the Effective Date.

2.3 Release of [*insert name of party*]

With effect from the Effective Date, LMA releases [*insert name of party*] from all obligations and liabilities under the [*insert name of agreement*] to be performed or discharged at or after the Effective Date.

3. Further Assurances

Project Co and [*insert name of party*] undertake upon request by LMA to execute all documents and do all things necessary to vest in Project Co the [*insert name of agreement*] or otherwise to give effect to the terms of this Deed.

4. Notices

The address of Project Co for the purposes of clause [*insert clause reference regarding notices*] of the [*insert name of agreement*] is as follows (or as otherwise notified by Project Co to [*insert name of party*] from time to time):

Attention: [#]
Address: [#]
Email: [#],

as if Project Co had been a party to the [*insert name of agreement*] instead of LMA.

5. Goods and Services Tax (GST)

- (a) **(GST exclusive amounts):** Unless otherwise expressly stated, all amounts referred to in this Deed 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 Deed:
- (i) any amount payable or consideration to be provided in accordance with any other provision of this Deed 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 Deed or no later than the time at which the Agreed Amount for that Taxable Supply is to be provided in accordance with this Deed. The Recipient is not obliged to pay any amount in accordance with this clause 5(b) unless and until a Tax Invoice is received by the Recipient in connection with the Taxable Supply except where the Recipient is required to issue the Tax Invoice.
- (c) **(Variation in GST payable):** If for any reason, the GST payable by the Supplier in connection with a supply it makes under or in connection with this Deed (incorporating any increasing adjustments or decreasing adjustments relating to that supply) varies from the additional amount it received from the Recipient under clause 5(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 5(b) or 5(b) 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 5 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 Deed, the matters required to be taken into account by the Supplier in accordance with this clause 5 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 Deed to price, value, sales, revenue, profit or a similar amount (**Revenue**), is a reference to the GST exclusive component of that Revenue, unless the contrary intention is expressed.
- (g) **(Cost net of GST):** Any reference in this Deed to cost, expense, liability or other similar amount (**Cost**) of a party, is a reference to that Cost reduced by the Input Tax Credits to which the party is entitled in respect of such Cost, unless the contrary intention is expressed.
- (h) **(General obligation):** Each party agrees to do all things, including providing Tax Invoices and other documentation, that may be necessary or desirable to enable or assist the other party in determining its GST payable on any supply made by that other party in connection with this Deed, 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 Deed.
- (i) **(GST Groups):** For the purposes of this Deed, 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 Deed makes a Taxable Supply by virtue of entering into or performing this Deed and the 'recipient' of that Taxable Supply (within the meaning of the GST Act) is an Associate (as defined in the Project Agreement) of another party to this Deed (which for this purpose, in relation to LMA, shall include the State and any Associate of the State), that other party to this Deed will be obliged either to pay the amount referred to in clause 5(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 5 in relation to the relevant Taxable Supply.
- (j) **(Definitions):** In this clause 5 unless otherwise defined in this Deed, terms used have the meanings given to them in the GST Law.

6. Miscellaneous

6.1 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):** 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.

6.2 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.

6.3 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.

6.4 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.

6.5 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.

6.6 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.

6.7 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.

6.8 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 6.8(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.

6.9 Assignment

Except as expressly contemplated by this Deed, Project Co and [insert name of party] may not assign or transfer any of its rights or obligations under this Deed.

Stage One - East West Link
Novation Deed

Commercial in Confidence

Executed as a deed.

[State Note: Execution blocks to be inserted.]