

## Agreement Synopsis, Context and Review

<b>Sector:</b>	Water
<b>Name of Agreement:</b>	Project Deed
<b>Type of Agreement:</b>	Deed
<b>Year of Agreement/ Draft:</b>	N/A (unsigned)
<b>Principal Author(s)</b>	Law firm of Corrs Chambers Westgarth
<b>Reviewed by:</b>	Victoria Rigby Delmon, LEGPS, World Bank; Luiz Alcoforado, LEGPS, World Bank
<b>Purpose and Context:</b>	<p>This Deed between the State and the Project Company (<i>Project Co</i>) sets out the terms on which the Project will be developed and implemented, and has been prepared and negotiated (together with the other Project Documents) on the premise that:</p> <ul style="list-style-type: none"><li>(i) the Project is being undertaken by the private sector to deliver significant benefits to the community in terms of positive economic, social and environmental outcomes;</li><li>(ii) the Project is being implemented in accordance with the <i>Partnerships Victoria</i> guidelines;</li><li>(iii) significant private funding is to be used for the Project;</li><li>(iv) the Electricity Transmission and Connection Assets are to be handed over to the State or its nominee by the O&amp;M Transition Date; and</li><li>(v) the Desalinated Water Supply System (<i>DWSS</i>) is to be handed over to the State or its nominee at the end of the Project Term.</li></ul>
<b>Drafted for common law/ civil law jurisdiction:</b>	Common Law
<b>Main Features:</b>	<p>This Deed was drafted by the law firm of Corrs Chambers Westgarth to be entered by and between the State (represented by the Minister for Water of the State of Victoria) and the Project Co. (AquaSure Pty Ltd). The Governing Law is that of the State of Victoria.</p>

### PART A: GENERAL

- This Deed prevails if there is any inconsistency between a provision thereof and a provision of another Project Document, unless Parties have agreed otherwise
  - If there is an ambiguity or inconsistency between the documents comprising this Deed, the higher standard, quality, level of service or quantum will prevail (clause 1.4)
- State's objectives for the Project are, among others (clause 2.1):
  - To provide Victoria with a non-rainfall dependent supply; to ensure Desalinated Water delivered meets the State's water

quality requirements; to deliver the Project in a manner consistent with the State's policy of retaining ownership and management of water resources in public hands (Scope);

- To deliver innovative solutions and overall value for money to the State, water users and the general public, through a whole of life approach to service delivery, risk management and the design, construction, operation and maintenance of the Project (Value for Money)
- Project Term expires on the earlier of the Expiry Date<sup>1</sup> or the date on which this Deed is terminated in accordance with its terms (clause 4)
- Project Co may procure that a bond is issued to the State so as to fulfill its obligations under clause 69.1(d)(ii) (i.e., to either deposit each monthly Service Payment it receives into a Handover Escrow Account; or provide to the State a bond equal to the Estimated Handover Costs Amount), following the conditions set out in this clause (clause 5)

### **PART B: ROLE OF THE PARTIES**

- Provisions on the roles, communications, authority, delegation, appointment, costs and expenses, certificates, among others, of the following Parties (clauses 6-11):
  - Project Co's representative
  - State's right to delegate its functions, powers and rights
  - Independent Reviewer & Environmental Auditor (*IR&EA*) (whose role is to, among others, verify that the design documentation for each design package and the Works comply with the requirements of the Project Documents)
  - Proof Engineer, Design Reviewer and Independent Water Testing Laboratory
  - Senior Project Group
  - State as a Government Agency

### **PART C: LAND, ENVIRONMENT AND APPROVALS**

- State grants rights, and access to and from Project Area to Project Co (clause 12)
- State makes no representation about the conditions of land, which Project Co accepts; Project Co to avoid and/or minimize adverse impacts on the environment; Project Co to manage the handling and proper disposal of Waste produced by the project activities; further rules on contamination, native vegetation framework, native title, artefacts, etc. (clause 13)
- State and Project Co to obtain the "Key Approvals" (as defined in clause 1.1) (clause 14)
- Project Co to notify the State immediately if any complaint is made or proceedings instituted or threatened (clause 15)

### **PART D: D&C PHASE**

- General Design and Construction (D&C) Phase obligations (clause 16) are, among others:
  - Project Co to carry out the D&C activities
  - Project Co responsible for construction

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<sup>1</sup> The Expiry Date is the after the date for RT Finalisation that is 27 years and 3 months plus the aggregate period of any Extensions of Time to the Late RT Finalisation Date.

- State to procure that Melbourne Water (*MW*) constructs the “MW Enabling Works”
- Project Co to submit a detailed D&C Program to the State and the IR&EA, which should be reviewed regularly (clause 17)
- Design of the Works will be and remain at all relevant times throughout the Project Term fit for their intended purposes; Project Co gives some design warranties; Parties agree on the design-related preconditions to commencement of construction (clauses 18.1 and 18.4)
- Project Co assumes some construction warranties; State has right to enter, inspect and test (clause 19)
- Project Co to promptly commence performance of the D&C Activities from Financial Close and complete them expeditiously and diligently; State not obliged to take any action to assist or enable Project Co to achieve any particular sequencing or rate of progress of the D&C Activities; Project Co to bear all risk and cost of delay and disruption to the progress of the D&C Activities; Project to immediately commence and diligently pursue all activities to achieve completion if completion is not achieved by the relevant date; provision for a “Late Completion Date”; provision for “Progressive Completion and Handover of Returned Facilities” (clause 20)
- Project Co to carry out Tests for Commercial Acceptance and RT Finalisation (clause 21)
- Achievement of *Preliminary Commercial Acceptance* does not relieve or limit Project Co’s obligation under the Project Documents to achieve Commercial Acceptance; Project Co to notify the State and the IR&EA of its achievement of Commercial Acceptance and request a “Certificate of Commercial Acceptance”; State may waive any of the Project Co’s obligations required to be completed prior to Preliminary Commercial Acceptance, Commercial Acceptance or RT Finalisation (clause 22)
- Project Co to correct all Defects in respect of the Returned Facilities during the Defects Liability Period (one for each returned facility); State to pay Project Co each Construction Payment on each Construction Payment date in consideration of the execution of the works; State only to pay if it receives the corresponding Receivables Purchase Payment from Finance Co under the Receivables Purchase Deed (clause 24)

#### **PART E: O&M PHASE**

- Project Co to operate, maintain and repair the DWSS and do all other things necessary so as to, among others, comply with the Project Documents and so that the DWSS remain fit for its intended purpose and is operated, maintained and repaired in accordance with O&M Best Practices (clause 25)
- State has right to inspect during operating hours and observe the use, operation, maintenance or repair of the DWSS; or to exercise any right or perform any obligation under the Project Documents (clause 26)
- Project Co to maintain, and promptly repair and make good any damage to or defect, error, omission, deficiency etc. in the DWSS, or any failure of the DWSS to comply with the Project Documents, be and remain fit for its intended purpose; Project Co to give the State a budget in relation to the Maintenance and Repair Account; Project Co to establish a “Maintenance and Repairs Account”, the balance of which must at all times be sufficient to fund anticipated asset replacement for the DWSS (clause 28)

- Provisions on the production of Desalinated Water and Reverse Flows (clause 31):
  - Project Co may determine quantity of desalinated water to be supplied during “Preliminary Supply Period”
  - State is deemed to have issued a Supply Notice for the amount of 150 GL (per month) during “Interim Supply Period”
  - State to provide Supply Notice of its required annual water volume as well as forecasts of the quantity of Desalinated Water to be supplied by Project Co during a “Supply Period”
  - Supply Notice to specify the required annual water volume (not to exceed the “Guaranteed Supply Capacity”) and, where applicable, an “optional excess water volume”
  - Project Co acknowledges it does not own the Pipeline Water, but it bears the risk in it until it delivers the Water (risk passes from Project Co to the Water Authority to which it is delivered, and from MW to Project Co upon delivery of Reverse Flow Water at DP1<sup>2</sup>; Project Co not to dispose of any Pipeline Water other than delivery of it of disposal to the sea or other waste management
- Provisions for the Renewable Energy mechanisms (Renewable Energy Certificates, or “RECs”) (clause 33):
  - RECs must be generated from an eligible Renewable Energy Source by an accredited Power Station connected to the National Electricity Market and be validly registered in a REC Registry
  - Electricity Usage to be calculated by determining the number of megawatt hours used by the DWSS for a specific supply period
  - Project Co to procure that the required RECs for a supply period are transferred to the State, and to provide required evidence to show that RECs comply with the requirements of this Deed
  - In case of a “REC Shortfall” for a supply period, State may deduct amounts from the payments payable by the State to Project Co equal to the product of the REC Price for that supply period multiplied by the REC Shortfall; or it may purchase RECs up to the REC Shortfall, among other options
  - In case of a change in Renewable Energy Law that: (i) mandates a direct regulatory replacement for RECs, then if this “REC Replacement” is calculated in the same way as RECs, this deed will be deemed amended accordingly; or (ii) affects the creation of RECs, creates an emission trading regime which replaces the existing regime, then Parties will determine the appropriate mechanism for replacing the RECs considering that:
    - Project Co must continue to offset 100% of the Electricity Usage with the megawatt hour equivalent of renewable energy
    - Project Co may seek to satisfy its obligations to offset Electricity Usage using non-REC instruments, and
    - Project Co to be kept in substantially the same net financial position as before

## **PART F: MODIFICATIONS**

- Modifications<sup>3</sup> may be proposed by the State, upon using its “best endeavors” to engage in prior consultation with Project Co.; Project Co to

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<sup>2</sup> The point of connection between the Transfer Pipeline and the MW System.

<sup>3</sup> Defined as any variation, change, omission, addition or deletion to the Project Activities, the Works, the Temporary Works or the DWSS.

provide the State with a “Change Notice” specifying the impact of the modification; Project Co not to undertake any modification without the prior consent of the State, except by proposing a modification through a “Change Notice” (clauses 34-36)

- Project Co to maintain a level of technology in its system -- as part of operating, maintaining and repairing the DWSS during the O&M phase - - that is consistent with O&M Best Practices and ensures the DWSS is able to operate effectively and efficiently with the remainder of Victoria’s water and electricity networks (clause 37)

#### **PART G: PAYMENTS, ABATEMENTS AND TAX**

- State will pay Project Co in consideration of Project Co performing its obligations under the Project Documents all payments that become due and payable under those Documents, except if the relevant payment obligation arose as a result of any default or breach by Project Co; Project Co to pay the State all payments which become due and payable pursuant to the Project Documents in accordance with this Deed or the relevant Project Document. This clause sets out further rules for: payment documentation, set-off or deductions, interest, payment following resolution of payment disputes, payments following Electricity Supplier or REC Contractor Insolvency, reimbursements, among others (clause 39)
- Provisions for general parameters and water quality parameters, assessment of performance under the KPI<sup>4</sup> Regime (i.e., the regime for delivery and measurement of services by Project Co), and abatements for Project Co’s failure to meet the services standards or target specifications (clause 40)
- Project Co to pay all taxes levied on, and properly charged by reference to its rights to or occupation of, the Project Area, its operation, maintenance or repair of the DWSS, or any one or more of these. State to, if requested by Project Co, reimburse Project Co for any land rates or land taxes (clause 41)

#### **PART H: RISKS AND LIABILITIES**

- Project Co accepts and bears all risks relating to the Project and is not entitled to make any claim against the State arising out of such risks, including the risk of obtaining (and the quality and characteristics of) the seawater needed to perform the Project Activities (clause 43)
- Project Co may issue, and the State may require it to issue, a “Change Notice” in respect of a discriminatory change in State Law or relevant change in law provided that it does so as soon as practicable after a notice is given or received by the Project Co; State may: (i) accept the Change Notice, (ii) vary any requirements of this deed to avoid the consequences of the discriminatory change in law, or (iii) issue a notice that disputes Project Co’s Change Notice; Project Co may claim compensation for financial consequences that it has suffered from a discriminatory change in law (clause 44)
- Provision on Force Majeure (*FM*):
  - If Project Co is prevented from or delayed in complying with its non-financial obligations as a direct result of a FM Event, then the obligation to comply with the relevant obligations will be suspended to that extent from the date the Project Co gives a

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<sup>4</sup> Key Performance Indicators.

suspension notice and until it ceases to be so prevented or delayed (clause 45)

- Provisions for property damage and personal injury provisions (clause 46):
  - Project Co to bear the risk of, and must promptly make good any loss or damage to or destruction of, the Works, the DWSS or the Project Area, except in the case of the transfer pipeline and the Cranbourne extension easement land, where it bears limited risks
  - Project Co to pursue correction of any defect in, or the repair and reinstatement of any material damage to or destruction of, the Works, the DWSS or the Project Area
  - Project Co to reinstate in the case of damage due to an uninsurable FM Event
- State not liable for any claim arising out the Project, unless expressly provided for in a Project Document, or arising as a direct result of a breach of a Project Document by the State (clause 47)
- Project Co to obtain and maintain such insurances as a prudent owner and operator would obtain and maintain for works substantially similar to the Project Activities and for facilities of a type substantially similar to the DWSS; it need not effect or maintain any particular D&C Phase or O&M Phase insurance to the extent that it covers a risk agreed to be “uninsurable” (clause 50)

#### **PART I: GENERAL UNDERTAKINGS**

- Project Co acknowledges that State has made no representation, given any advice, warranty or undertaking of any kind in respect of any of the Project Documents, any transaction or arrangement, water usage or any matter that does or might affect demand for, or usage of, water in Victoria (clause 52)
- Project Co undertakes with respect to the following (clause 55):
  - Provision of information, format of manuals, plans and reports
  - Personnel, Nuisance and Privacy
  - Project IP
  - Naming rights (i.e., State has the sole right to determine the name of the DWSS and Project, vary its name from time to time, and grant naming rights for the DWSS to any person)
- Project Co must not, without prior consent of the State, conduct any business other than the Project; acquire or hold any property or incur any liability other than for the purposes of the Project; enter into contracts with, assume any liability in favor of, or buy, sell or dispose of assets to or from a group member or a related body corporate or related trust entity of Project Co (clause 56)
- Project Co must not redeem, repurchase, defuse, retire or repay, or issue any share capital or units in Project Co, Finance Co or Finance Co. No. 2; Project Co may effect a “permitted share capital dealing” (e.g., change to share capital or units in a holding entity publicly listed, the creation of a permitted security interest, etc.) (clause 57)
- Project Co may not enter into, make or permit any modification to, terminate, permit the novation, assignment of, or enter into any agreement which affects the operation of a “material contract”<sup>5</sup> without obtaining the prior consent of the State (clause 58)

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<sup>5</sup> A “material contracts” is any other D&C Contract the value of the works under which exceeds \$25 million (or when aggregated with the value of the works under any other D&C contract previously entered into, the total value exceeds \$100 million); and any other O&M

- Project Co to prepare and submit to the State and the IR&EA all of the Project Plans required under this Deed, the objective of which is to explain how Project Co plans to perform the Project Activities (clause 60)
- After Financial Close (i.e., the date on which the last of the conditions precedent was satisfied or waived), the Base Case Financial Model (i.e., Project Co's financial model for the Project and relevant assumptions, information, data files and output analysis routines used by the financial model) may only be varied upon the occurrence of a "Model Variation Event" and following the principles and procedures set out in this clause (clause 61)
- Project Co not to enter into or implement any Refinancing without the prior consent of the State (clause 62)
- Project Co to keep proper records; have its accounts audited annually; submit monthly reports in form and substance requested by the State; give notice of complaints or proceedings instituted or threatened; and provide further information as required under the Deed (clause 63)

## **PART J: DEFAULT AND TERMINATION**

- An "Event of Default" can be any of the following: failure to commence or to expeditiously and diligently pursue D&C Activities by Project Co; abandonment by Project Co; failure to comply with approvals and laws; failure to deliver water, among other breaches by Project Co of provisions of the Deed or other Project Document (clause 64)
- State has right to terminate this Deed if (among others) an Event of Default is not remedied or its effects overcome within a given period; Project Co is not diligently pursuing the remedy of an Event of Default; or Project Co has not achieved Commercial Acceptance by the "Late Commercial Acceptance Date"
  - Such right is restricted if Event of Default arose as a direct and sole result of a breach by the State of a Project Document
  - State has right to terminate this Deed at any time on giving not less than 60 business days notice to Project Co.
  - Either the State or the Project Co may terminate this Deed for a subsisting FM Event (clause 65)
- State may recover all loss from Project Co that it may incur in connection with termination of this deed for failure to remedy by Project Co (65.2) as a result of a failure to remedy or overcome the effects of an Event of Default (or other circumstances). Other payments on termination include: the default termination amount, the early termination amount and the FM termination amount payable by the State to Project Co. In certain circumstances, the State may assume some or all of Project Co's actual debt outstanding ("novation of liabilities to the State") (clause 66)
- State may, in certain circumstances, temporarily take or assume management and control of the D&C Activities or possession, management and control of the DWSS; and do anything which Project Co is entitled to do under a Project Document or with respect to the Project (State's Step-In Right), during which time Project Co is to assist the State and Project Co's rights are suspended (clause 68)
- Project Co to handover the DWSS to the State at the end of the Project Term, including all rights, title and interest in the DWSS, free from any

encumbrances and in a state and condition which complies with the Project Documents, including that there are:

- no repair works required to any part of the DWSS, and
- subject to the fair wear and tear, no defects in the DWSS
- Damages not an adequate remedy for any failure of Project Co to comply with handover; Project Co to provide access to its employees and books and records for the purpose of preparation for retendering) (clause 69)

#### **PART K: DISPUTE RESOLUTION**

- Any dispute arising out of a Project Document must be resolved in accordance with the procedure set out in this Part K of the Deed (clause 70)
- Parties must observe following procedure: party issues a notice of dispute to the other party; notice to be referred to the senior project group for good faith consultation; if dispute remains unresolved (and it relates to any of the 27 matters listed in this clause), dispute to be referred for expert determination; either party may immediately commence litigation in respect of the unresolved dispute, unless the parties agree to refer the dispute to arbitration in accordance with clause 74 (clause 71)
- Provisions on Negotiation and Expert Determination (clauses 72-73)
- Provisions on Arbitration or Litigation (clause 74):
  - Single arbitrator; Rules of arbitration: the “Expedited Arbitration Rules” set out in schedule 10 or the Arbitration Rules of the Australian Center for International Commercial Arbitration; place of arbitration, litigation or expert determination will be Victoria
- Parties to continue to perform and to pay undisputed amounts notwithstanding the existence of a dispute (clause 75)

#### **PART L: MISCELLANEOUS**

- Project Co may not – and State will not without the prior consent of Project Co – assign, novate, mortgage, charge or declare any trust over or otherwise deal with its interest in, or obligations under, any of the Project Documents (clause 77.1)
- Project Co may mortgage or charge its interest under the Project Documents so as to secure its obligations to any Financier under the Financing Documents if the Financier (or Security Trustee or agent for the Financier) is party to the Finance Direct Deed (77.2)
- Project Co must not create any security interest over, or lease, sub-lease, license, transfer, or otherwise deal with, the Project Area, the Works, or the DWSS without the prior consent of the State (77.3)

#### **SCHEDULES**

1. Payment Schedule
2. Certification Schedule
3. Form of Bond
4. Documentation Schedule
- 4A. Site Reinstatement of Leased Areas
5. Commercial Acceptance and Close-Out
6. Performance standards and abatements



7. Termination Payments
8. Property Schedule
9. Change Compensation Principles
10. Expedited Arbitration Rules
11. Key Personnel
- 11A. Project Co's List of Experts
12. Expert Determination Agreement
13. Insurances
14. Capacity Test Response Protocol
15. Principles for HVAC Operation Agreement
- 15A. Principles for Interim HVAC Operation Agreement
16. ETCW Payment Schedule

**ANNEXURES**

1. Victorian Industry Participation Policy (VIPP) Statement
2. Pro Forma Documents (Pro Forma Direct Deed<sup>6</sup>; Pro Forma Transfer Pipeline O&M License; Pro Forma Booster Pump Station Land Lease<sup>7</sup>; Pro Forma Surge Vessel Land Lease<sup>8</sup>; and Pro Forma Crown Licenses)
3. Project Scope and Project Requirements (PS&PR)
4. Property Schedule Annexures
5. GFC Provisions

**Possible additional provisions that it might be appropriate to include:** N/A

**Experience Since Coming Into Force (including any amendments)/ if draft form, whether it has been applied:** N/A

**Tracking Number:** *Ref #: Project Deed (date unknown)*

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<sup>6</sup> Already annotated on the PPPIRC website.

<sup>7</sup> Already annotated on the PPPIRC website.

<sup>8</sup> Already annotated on the PPPIRC website.