

Deed of Guarantee and Indemnity

Date:

**THE HONOURABLE WILLIAM R BAXTER, MINISTER FOR ROADS AND PORTS
OF THE STATE OF VICTORIA FOR AND ON BEHALF OF THE CROWN IN RIGHT
OF THE STATE OF VICTORIA**

TRANSFIELD HOLDINGS PTY LTD

OBAYASHI CORPORATION

Commercial-in-Confidence

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DEED OF GUARANTEE AND INDEMNITY made at on 19

BETWEEN THE HONOURABLE WILLIAM R BAXTER, MINISTER FOR ROADS AND PORTS OF THE STATE OF VICTORIA FOR AND ON BEHALF OF THE CROWN IN RIGHT OF THE STATE OF VICTORIA ("State")

AND TRANSFIELD HOLDINGS PTY LTD ACN 001 241 265 of 12th Floor, 100 Arthur Street, North Sydney, New South Wales

AND OBAYASHI CORPORATION ARBN 002 932 756 of Level 16, State Bank Centre, 52 Martin Place, Sydney, New South Wales

(each a "**Guarantor**")

RECITALS

- A. At the request of each of the Guarantors, the State has agreed to execute the Concession Deed which provides, inter alia, for the implementation of the Project.
- B. It is a condition precedent to the obligations of the State under the Concession Deed that each of the guarantors enter into this Deed.

THIS DEED WITNESSES

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Deed:

"Concession Deed" means the deed made with effect from 20 October 1995 entitled "Concession Deed" made between the State, the Company, the Trustee and the Manager.

"Guaranteed Obligations" means each of the obligations (including any obligations to indemnify the State or any other party), whether express or implied, actual or contingent, or present or future which the Company, the Trustee, or both of them has or have, expressly or impliedly agreed to fulfil, pursuant to or otherwise as a consequence of:

- (a) Clauses 2.15, 4.3 and 17.2, Article 7 and Article 8, and sub-paragraphs 14.3 (d)(i), (e)(i), (e)(ii) and (e)(iii), of the Concession Deed;
- (b) clause 12.4 of the Concession Deed (only in respect of any claim, demand, damage, expense, loss or liability brought against or suffered by the State arising out of, and to the extent of, the failure of the Company or the Trustee to perform any of the other Guaranteed Obligations referred to in the other paragraphs of this definition);
- (c) paragraph 9.2(a) of the Concession Deed (insofar as obligations referable to that paragraph are, or may become required, to be satisfied prior to the first

anniversary of Completion of the last Section to be Completed);

- (d) clauses 5.1, 5.2 and 6.2(a) of the Concession Deed (insofar as obligations referable to any such clause are (or may become required) to be satisfied prior to Completion of the last Section to be Completed);
- (e) clause 10.1 of the Concession Deed (insofar as it relates to damage or a defect occurring or subsisting in a Section (or part of a Section) prior to Completion of the Section);
- (f) clause 3.3(a) of the Concession Deed (insofar as it relates to approvals and permits with respect to execution of the Works, Commissioning or Completion of a Section or any matter pertaining to design or construction of the Project; or
- (g) clauses 4.5, 4.10, 4.11 and 14.3(e)(vi) of the Concession Deed (insofar as they relate to, or relate to things done or authorities or rights exercised in relation to, execution of a part of the Works prior to Completion of the Section to which that part relates).

"Obligor" means in relation to a Guaranteed Obligation the person or persons who has or have agreed under the Concession Deed to fulfil the Guaranteed Obligation.

"Project Warranty" means each of the warranties given by the Company and the Trustee under clauses 7.1, 12.2(b) and 14.2 of the Concession Deed at the date of that Deed (other than the warranties given under paragraphs 14.2(a)(i) and 14.2(c)).

1.2 **Concession Deed**

Any word, expression, reference or term used in this Deed (or in any clause of the Concession Deed incorporated in this Deed) which is defined in the Concession Deed and is not specifically defined in this clause 1, shall, unless the context otherwise requires, have in this Deed (including in any clause of the Concession Deed incorporated into this Deed) the same meaning as in the Concession Deed.

1.3 **Interpretation**

In this Deed unless the context indicates a contrary intention:

- (a) the expression **"Guarantors"** means each of the Guarantors severally and the Guarantors jointly;
- (b) the expression **"person"** includes an individual, a body politic, corporation and a statutory or other authority or association whether incorporated or unincorporated;
- (c) a reference to any person includes that person's executors, administrators, successors, substitutes and assigns, including any person taking by way of novation;
- (d) a reference to this Deed or to any other deed, agreement, document or

instrument includes, respectively, this Deed or such other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time;

- (e) words importing the singular shall include the plural (and vice versa) and words denoting a given gender shall include all other genders;
- (f) headings are for convenience only and do not affect interpretation; and
- (g) unless otherwise stated, a reference to any amount is a reference to all or part of that amount.

2. GUARANTEE

2.1 Guarantee

Each Guarantor irrevocably and unconditionally guarantees to the State the full and complete performance when due of each of the Guaranteed Obligations and warrants the accuracy and correctness of each Project Warranty.

2.2 Guarantors to Procure Performance

If an Obligor does not fully and completely perform a Guaranteed Obligation when due, then (subject to any period allowed to the Obligor under the Concession Deed to remedy its failure to perform the Guaranteed Obligation or overcome the consequences of the failure to perform it) each Guarantor must within 5 Business Days of a demand made by the State from time to time promptly procure the performance of the Guaranteed Obligation.

3. INDEMNITY

As a covenant separate and distinct from that contained in clause 2.1, each Guarantor irrevocably and unconditionally agrees to indemnify the State and at all times to keep the State indemnified against any damage, expense, loss or liability suffered by the State arising out of:

- (a) any failure by an Obligor to fully and completely perform any Guaranteed Obligation when due;
- (b) any breach of a Project Warranty; or
- (c) the Concession Deed being wholly or partly void, voidable or unenforceable against an Obligor for any reason and whether or not the State knew or ought to have known of that reason, with the result, in any such case, that obligations or warranties which would (but for the voidness, voidability, or unenforceability) have been Guaranteed Obligations or Project Warranties (as the case requires) are not enforceable by the State under clause 2.

4. NATURE AND PRESERVATION OF LIABILITY

4.1 Absolute liability

The liability of each Guarantor under this Deed arises immediately on execution and delivery of this Deed by that Guarantor, and:

- (a) arises notwithstanding that any person expressed to be a party to this Deed does not execute and deliver this Deed, that there is any invalidity, forgery or irregularity in the execution or purported execution of this Deed by any other person, or that this Deed is or becomes unenforceable against any such person for any reason; and
- (b) is not conditional on the entering into by any person of any other agreement, document or instrument which might benefit (directly or indirectly) a Guarantor, or on the satisfaction of any other condition.

4.2 **Unconditional liability**

The liability of each Guarantor under this Deed will not be affected by any thing which, but for this clause 4.2, would release the Guarantor from or reduce that liability, including but not limited to:

- (a) **(Time or indulgence)**: the State granting or agreeing with a Guarantor or an Obligor to grant time, waiver, covenant not to sue or other indulgence or concession to, or making any composition or compromise with any person;
- (b) **(Forbearance)**: the State not exercising or delaying in the exercise of any remedy or right it has at any time to terminate or enforce its rights guarantor this Deed or any other agreement, document or instrument;
- (c) **(Variation)**: any variation, novation or alteration to or substitution of this Deed, or other agreement, document or instrument, whether or not that variation, novation or alteration permits or results in a change in any of the Guaranteed Obligations or a change in the date by which any of the Guaranteed Obligations must be performed.
- (d) **(Disclosure)**: any failure by the State to disclose to a Guarantor any material or unusual fact, circumstance, event or thing known by, or which ought to have been known by, the State relating to or affecting an Obligor or a Guarantor before or at any time after the date of this Deed;
- (e) **(Assignment)**: the transfer, assignment or novation by the State or any other person of all or any of its rights or obligations under any agreement, document or other instrument to which it is a party; or
- (f) **(Administration)**: the provisions of section 440J of the Corporations Law so operating as to prevent or delay:
 - (i) the enforcement of this Guarantee against any Guarantor other than a Guarantor in respect of whose liability the section applies; and/or
 - (ii) any claim for contribution against any Guarantor.

4.3 **No marshalling**

The State is under no obligation to marshal or appropriate in favour of a Guarantor or to exercise, apply, transfer or recover in favour of any Guarantor, any funds or assets that the State holds, has a claim on, or is entitled to receive.

4.4 **Claim on the Guarantor**

The State is not required to take any steps to enforce its rights under any agreement, document or other instrument before enforcing its rights against any Guarantor under this Deed.

4.5 **No representation by State**

Each Guarantor acknowledges that in entering into this Deed it has not relied on any representation, warranty, statement or conduct of, or material provided by, the State, a Victorian Government Agency or a Utility. Clause 7.2 of the Concession Deed is, however, incorporated into this Deed and applies in this Deed as if each Guarantor were the Company.

5. **CORPORATE REPRESENTATIONS AND WARRANTIES**

Each Guarantor represents and warrants to the State that:

- (a) **(Memorandum and Articles)**: the execution, delivery and performance of this Deed does not contravene its Memorandum and Articles of Association or any other document, agreement, law or rule of equity, regulation or official directive by which it is bound;
- (b) **(Corporate power)**: it has taken all corporate and other action required to enter into this Deed and to authorise the execution and delivery of this Deed and the performance of its obligations under this Deed;
- (c) **(Filings)**: it has filed all notices and effected all registrations with the Australian Securities Commission or similar office in its jurisdiction of incorporation and in any other jurisdiction as required by law, and those filings and registrations are current, complete and accurate;
- (d) **(Corporate Benefit)**: the execution of this Deed is in the beneficial commercial interests of the Guarantor;
- (e) **(Consideration)**: this Deed is executed for valuable consideration, the receipt and adequacy of which the Guarantor acknowledges; and
- (f) **(Validity)**: its obligations under this Deed are valid and binding and are enforceable against it in accordance with their terms.

6. **PAYMENTS**

6.1 **On demand**

Any money payable by a Guarantor under this Deed must be paid on demand (in writing) to the State in immediately available funds to the account and in the manner notified from time to time by the State to the Guarantor.

6.2 **Interest**

Each Guarantor must on demand by the State from time to time pay interest on all amounts due and payable by it and unpaid under or in respect of this Deed. Interest will accrue on those amounts from day to day from the due date up to the date of actual payment, before and (as a separate and independent obligation) after judgment, at the Default Rate. Interest so payable shall be capitalised periodically, with the State selecting that period from time to time (but not being more frequent than monthly). A capitalised amount shall be due for payment on the date it is capitalised and shall bear interest under this clause until paid in full.

6.3 **No set-off or deduction**

All payments by a Guarantor under this Deed must be made without any set-off, condition or counterclaim and without deduction or withholding for any present or future Taxes unless the Guarantor is compelled by law to make any deduction or withholding and if this is the case, the Guarantor must pay to the State any additional amounts as are necessary to enable the State to receive, after all those deductions and withholdings, a net amount equal to the full amount which would otherwise have been payable had no deduction or withholding been required to be made.

7. **EXPENSES AND STAMP DUTY**

7.1 **Expenses**

Each Guarantor must on demand indemnify and keep the State indemnified against all expenses, including legal fees, costs and disbursements on a solicitor/own client basis, incurred by the State in connection with the enforcement or attempted enforcement of any rights under this Deed.

7.2 **Taxes**

Each Guarantor must:

- (a) **(Payment of all Taxes):** pay all Taxes in connection with the execution, delivery, performance, enforcement, or attempted enforcement of this Deed or any other payment or other transaction under or contemplated in this Deed; and
- (b) **(Indemnity):** indemnify and keep indemnified the State against any loss or liability incurred or suffered by it as a result of the delay or failure by the Guarantor to pay Taxes under clause 7.2(a).

8. ASSIGNMENT

Subject to clauses 18.1(d) and (e) of the Concession Deed, the State may at any time assign or otherwise transfer all or any part of its rights under this Deed and may (for that purpose) disclose to a proposed assignee or transferee any information in the possession of the State relating to a Guarantor.

9. GOVERNING LAW AND JURISDICTION

9.1 Governing Law

This Deed is governed by and will be construed in accordance with the laws of Victoria.

9.2 Jurisdiction

- (a) **(Acceptance of jurisdiction):** Each Guarantor irrevocably submits to and accepts, generally and unconditionally, the non-exclusive jurisdiction of the courts and appellate courts of Victoria with respect to any legal action or proceedings which may be brought at any time relating in any way to this Deed.
- (b) **(No objection to inconvenient forum):** Each Guarantor irrevocably waives any objection it may now or in the future have to the venue of any action or proceeding, and any claim it may now or in the future have that any action or proceeding has been brought in an inconvenient forum.

10. MISCELLANEOUS

10.1 Certificate of State

A certificate in writing of the State certifying the amount payable by an Obligor or a Guarantor to the State or stating any other act, matter or thing relating to this Deed or any other agreement, document or instrument (including the resolution that has been reached to any dispute under or in connection with the Concession Deed) will be (as between each Guarantor and the State) prima facie evidence of that amount, act, matter or thing in the absence of manifest error on the face of the certificate.

10.2 Notices

- (a) A notice, request, approval, consent or certificate given under this Deed (a "communication") shall be in writing and is deemed to be duly given to a party if it is:
 - (i) left at the party's address;
 - (ii) sent by prepaid post to the party's address with a request for confirmation of receipt to be provided by post; or
 - (iii) transmitted by facsimile to the party using the party's facsimile number, but only if the sender receives an "error free" transmission report for the correct facsimile number.

- (b) A communication given to a party is deemed to have been received by the party:
- (i) if left at the party's address, when delivered;
 - (ii) if sent by prepaid post to that address with a request for confirmation of receipt to be provided by post, on the day evidenced by the receipt given by the postal service; and
 - (iii) if transmitted by facsimile using the facsimile number of the party, on the day of transmission, but only if the sender receives an "error free" transmission report for the correct facsimile number,

provided however that:

- (iv) if a party would, but for this provision, be deemed to have received a communication after 4.00pm on a Business Day or on a day not being a Business Day, the party shall be deemed to have received the communication on the next Business Day; and
- (v) in determining whether a requirement that there be a period of Business Days' notice in relation to a communication has been satisfied, the relevant number of Business Days shall be calculated from, but excluding, the Business Day of deemed receipt.

10.3 **Address for Notices**

The addresses and facsimile numbers of the parties for the purposes of this Deed are:

Transfield Holdings Pty. Ltd.

Address: 12th Floor, 100 Arthur Street, North Sydney, New South Wales
Fax No.: (02) 9954 0547
Attention: Managing Director

Obayashi Corporation

Address: Level 16, State Bank Centre, 52 Martin Place, Sydney, New South
Wales
Fax No.: (02) 2235354
Attention: General Manager

The State

Address: Care of Melbourne City Link Authority, Level 1, 150 Jolimont Road,
East Melbourne
Fax No.: 9650 7410
Attention: Chief Executive

10.4 Continuing obligation

This Deed will be a continuing obligation of the Guarantors notwithstanding any settlement of account, intervening payment, express or implied revocation or any other matter or thing, and continues to entitle the State to rely on the accuracy of the Project Warranties and on the full and complete performance of any of the Guaranteed Obligations which become due after settlement of account, payment, revocation or other matter or thing until a final discharge has been given to the Guarantor in accordance with this Deed. More than one claim can be made under the guarantee contained in this Deed.

10.5 Non-avoidance

(a) If any payment, performance, conveyance, transfer or other transaction has been made or entered into by the Guarantors in favour of the State relating to or affecting the Guaranteed Obligations and is subsequently held or conceded to be void, voidable or unenforceable in whole or in part or compromised in whole or in part, the liability of the Guarantors under this Deed is the same as if:

- (i) that payment, performance, conveyance, transfer or transaction (or the void, voidable, unenforceable or compromised part of it); and
- (ii) any release, settlement or discharge made by the State in reliance on anything referred to in sub-paragraph (a)(i),

had not been made and the Guarantors must immediately take all action and sign all documents necessary or required by the State to restore to the State the benefits under this Deed available immediately prior to the payment, performance, conveyance, transfer or transaction which was subsequently held or conceded to be void, voidable, unenforceable or compromised.

(b) Paragraph (a) applies whether or not the State knew, or ought to have known, of anything referred to in that paragraph.

10.6 Form of Demand

A demand on a Guarantor for payment or otherwise under this Deed may be in the form and contain any information as the State determines. In the case of a demand for payment, it need not specify the amount of the payment required, nor the method or basis of calculation of all or any part of the payment required, including without limitation amounts of, or in the nature of interest.

10.7 Severability of provisions

Any provision of this Deed which is illegal, void or unenforceable will be ineffective to the extent only of that illegality, voidness or unenforceability without invalidating the remaining provisions of this Deed.

10.8 **Remedies cumulative**

The rights and remedies conferred by this Deed on the State are cumulative and in addition to all other rights or remedies available to the State by law or by virtue of any other agreement, document or instrument.

10.9 **Waiver**

A failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of any right, remedy, power or privilege under this Deed by the State will not in any way preclude or operate as a waiver of any further exercise or enforcement of it, or the exercise or enforcement of any other right, remedy, power or privilege under this Deed or provided by law.

10.10 **Consent and approvals**

Where under this Deed the consent or approval of the State is required to any act or thing, then unless expressly provided otherwise in this Deed, that consent or approval may be given or withheld in the absolute and unfettered discretion of the State.

10.11 **Written waiver, consent and approval**

Any waiver, consent or approval given by the State under this Deed will only be effective and will only bind the State if it is given in writing, or given verbally and subsequently confirmed by the State in writing.

10.12 **Counterparts**

This Deed may be executed in any number of counterparts and by the different parties on different counterparts, each of which constitutes an original of this Deed, and all of which together constitute one and the same instrument.

10.13 **Resolution of disputes binding**

The settlement with the consent of the Company or the Trustee or the resolution of any dispute arising under or in connection with the Concession Deed whether by express or implied agreement between the parties to the Concession Deed, in accordance with the procedures provided for in Article 16 of the Concession Deed or otherwise will be binding on each of the Guarantors and a Guarantor will not reopen, revisit or otherwise dispute that settlement or resolution and the subject matter of that settlement or resolution.

10.14 **No right to be heard**

Each Guarantor waives and expressly disclaims any right to be heard at or appear in any procedure (whether judicial, arbitral, administrative or of any other nature) which is conducted, inter alia, for purposes connected with settling or resolving or attempting to

settle or resolve any dispute referred to in clause 10.13 or otherwise to be involved in the settlement or resolution of any such dispute.

10.15 Action by State

The State may not commence any action under this Deed relating to a failure to perform a Guaranteed Obligation after the seventh anniversary of the Date of Completion of the last Section to be Completed.

EXECUTED as a deed.

SIGNED, SEALED and DELIVERED by)
THE HONOURABLE WILLIAM R)
BAXTER MP, Minister for Roads and Ports)
of the State of Victoria for an on behalf of the)
Crown in Right of the State of Victoria in the)
presence of:)

.....

.....
Witness

.....
Name

SIGNED, SEALED and DELIVERED for)
and on behalf of **TRANSFIELD**)
HOLDINGS PTY LTD by its Attorney in)
the presence of:)
)
)

.....
Witness

.....
Name

SIGNED, SEALED and DELIVERED for)
and on behalf of **OBAYASHI**)
CORPORATION by its Attorney in the)
presence of:)

.....

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Witness

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Name