

# Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by Tawreed Investments Limited (Cayman Islands company registration number 243195)

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## **1 Person giving the Undertaking**

- 1.1 This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by the following entity:

Tawreed Investments Limited (Cayman Islands company registration number 243195),

(the “**Undertaking Signatory**”).

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## **2 Background**

### **Parties to the Proposed Acquisition**

- 2.1 Sydney Transport Partners consortium (STP Consortium) is a consortium comprising Transurban Group, AustralianSuper Pty Ltd (AustralianSuper), Canada Pension Plan Investment Board (CPPIB) and Tawreed Investments Limited (Tawreed).
- 2.2 Transurban Group is listed on the Australian Securities Exchange (ASX), and is Australia's largest toll road operator. Transurban Group's operations include the development, ownership, management and operation of toll roads in Australia and North America. Transurban holds at least a 50 per cent interest in 15 of 19 toll road concessions in Australia and seven of nine concessions in NSW.
- 2.3 AustralianSuper acts solely as the corporate trustee for AustralianSuper industry superannuation fund. The trustee company is owned equally by ACTU Super Shareholding Pty Ltd and Australian Industry Group.
- 2.4 CPPIB is a Canadian federal crown corporation established pursuant to the Canada Pension Plan Investment Board Act.
- 2.5 Tawreed is a wholly owned subsidiary of the Abu Dhabi Investment Authority.
- 2.6 Sydney Motorway Corporation Pty Ltd (SMC), through its Related Bodies Corporate, operates and is developing a network of toll roads in Sydney comprising the WestConnex Stages. SMC's shares are held by the NSW Government.

### **The Proposed Acquisition**

- 2.7 WestConnex is a partially completed motorway development in Sydney, NSW. WestConnex comprises approximately 33 kilometres of interconnected motorways and road upgrades, which will improve and extend the M4 motorway from Parramatta to Sydney Airport and duplicate the M5 East corridor.
- 2.8 SMC currently holds, through a trust structure, the three concessions to build, operate and toll the WestConnex motorways.

- 2.9 The NSW Government is conducting a competitive tender process for WestConnex. The winning bidder will acquire a 51 per cent interest in the three WestConnex concessions.
- 2.10 The STP Consortium is participating in the tender process for WestConnex and is therefore proposing to acquire a 51 per cent interest in the three WestConnex concessions (the Proposed Acquisition).

#### **The ACCC's review**

- 2.11 On 26 February 2018, the ACCC commenced its public review of the Proposed Acquisition.
- 2.12 On 17 May 2018, the ACCC published a Statement of Issues that raised preliminary concerns that the Proposed Acquisition may substantially lessen competition for future toll road concessions in NSW.
- 2.13 The ACCC undertook further market inquiries and considered information provided by the STP Consortium, the NSW Government and a range of industry participants and others. The purpose of the ACCC's inquiries was to assess whether the Proposed Acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market in Australia in contravention of section 50 of the Act.

#### **The ACCC's competition concerns**

- 2.14 The ACCC concluded that, in the absence of the Principal Undertaking given by Transurban, the Proposed Acquisition raises competition concerns that may have the effect, or be likely to have the effect, of substantially lessening competition in the market for acquiring future new toll road concessions in NSW.
- 2.15 The ACCC's concerns are that:
- (a) Transurban Group, through its interests across an extensive network of toll road concessions in NSW, has competitive advantages compared with firms without an established network who face barriers to competing successfully for future NSW toll road concessions. These competitive advantages would be enhanced through the Proposed Acquisition;
  - (b) those competitive advantages include:
    - (i) access to traffic data not generally available;
    - (ii) significant traffic modelling and forecasting capability; and
    - (iii) an enhanced ability to satisfy the NSW Government's uniqueness criterion for assessing unsolicited proposals that, provides Transurban with an enhanced ability to be successful with unsolicited proposals for new toll road concessions; and
  - (c) in the absence of the Proposed Acquisition, an alternative acquirer of WestConnex would establish a significant presence in NSW for the operation of toll roads, with comparable competitive advantages to Transurban Group, and would have the ability to compete aggressively against Transurban for Future NSW Toll Road Concessions.

## **The Principal Undertaking and this Undertaking**

- 2.16 The objective of the Principal Undertaking is to address the ACCC's competition concerns as set out above that would otherwise arise as a consequence of the Proposed Acquisition. In particular, the objective of the Principal Undertaking is to provide other bidders who compete for future toll road concessions in NSW with access to traffic count data that Transurban Group has as a result of its extensive interests in toll road concessions by ensuring that any entity which is a potential bidder or bidder for a Future NSW Toll Road Concession (including its advisors and consultants) has free and timely access to, and a right to use, Specified Traffic Data collected by Transurban Group from the Transurban NSW Toll Roads sufficient to support the development and operation of a model for forecasting future traffic and revenue in respect of that Future NSW Toll Road Concession.
- 2.17 The Principal Undertaking aims to achieve this objective by placing obligations on Transurban to:
- (a) publish Specified Traffic Data on a quarterly basis;
  - (b) update the Specified Traffic Data, in the event the NSW Government announces a toll road concession sale process six or more weeks before Specified Traffic Data is due to be published under the quarterly process;
  - (c) correct any identified errors in the published Specified Traffic Data;
  - (d) provide for the effective oversight of Transurban's compliance with the Principal Undertaking; and
  - (e) provide for regular reviews of the Principal Undertaking to ensure that the Principal Undertaking continues to meet its objectives as described above.
- 2.18 The Undertaking Signatory's consent is needed in order for Transurban to access, use and publish the Specified Traffic Data for WestConnex.
- 2.19 The objective of this Undertaking is to support the operation of the Principal Undertaking, by ensuring the Undertaking Signatory enables and facilitates, and does not hinder or prevent Transurban's compliance with the Principal Undertaking.
- 2.20 This Undertaking achieves this objective by placing obligations on the Undertaking Signatory to:
- (a) consent to Transurban accessing and using Specified Traffic Data for WestConnex in accordance with the Principal Undertaking;
  - (b) consent to Transurban publishing Specified Traffic Data for WestConnex in accordance with the Principal Undertaking;
  - (c) not prevent or hinder Transurban accessing and using Specified Traffic Data for WestConnex in accordance with the Principal Undertaking;
  - (d) not prevent or hinder Transurban publishing Specified Traffic Data for WestConnex in accordance with the Principal Undertaking; and

- (e) provide for the effective oversight of the Undertaking Signatory's compliance with this Undertaking.

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### 3 Commencement of this Undertaking

3.1 This Undertaking comes into effect when:

- (a) the Principal Undertaking:
  - (i) is executed by each Transurban Signatory; and
  - (ii) so executed is accepted by the ACCC; and
- (b) this Undertaking:
  - (i) is executed by the Undertaking Signatory; and
  - (ii) so executed is accepted by the ACCC,

(the "Commencement Date").

**Note:** The timing of operative provisions are linked to the **Control Date**. **Control Date** is defined in the Dictionary in Part 1 of Schedule 1.

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### 4 Cessation of Ongoing Obligations

#### Withdrawal

- 4.1 This Undertaking is taken to be withdrawn on the date the ACCC consents in writing to the withdrawal of this Undertaking in accordance with section 87B of the Act.

#### Revocation

- 4.2 The ACCC may, at any time, revoke its acceptance of this Undertaking if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

#### Waiver

- 4.3 The ACCC may, at any time, expressly waive in writing any of the obligations contained in this Undertaking or extend the date by which any such obligation is to be satisfied.

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### 5 Jurisdiction

- 5.1 The Undertaking Signatory irrevocably submits to the jurisdiction of the Federal Court of Australia in relation to this Undertaking.
- 5.2 Unless and until notified in writing by the Undertaking Signatory to the ACCC of the appointment of another person as agent within Australia, the Undertaking Signatory appoints the person, the particulars of whom are set out at clause 5.3,

as their agent for the purposes of service of any process in relation to this Undertaking.

- 5.3 The Undertaking Signatory appoints the following person for the purpose of clause 5.2:

Mr Nick Barwell  
McBurney & Partners Pty Ltd  
Level 10, 68 Pitt Street  
Sydney NSW 2000

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## 6 Consents

- 6.1 With effect as from the Control Date, and for so long as the Undertaking Signatory holds an ownership interest (whether directly or indirectly) in WestConnex, the Undertaking Signatory:
- (a) Consents to access by Transurban to, and use by Transurban of, the Specified Traffic Data for WestConnex in accordance with the Principal Undertaking.
  - (b) Consents to the publication by Transurban of the Specified Traffic Data for WestConnex in accordance with the Principal Undertaking.
  - (c) Shall not prevent or hinder access by Transurban to, and use by Transurban of, the Specified Traffic Data for WestConnex for the purpose of the publication by Transurban of that Specified Traffic Data in accordance with the Principal Undertaking.
  - (d) Shall not prevent or hinder the publication by Transurban of the Specified Traffic Data for WestConnex in accordance with the Principal Undertaking.
- 6.2 With effect as from the Control Date, the Undertaking Signatory shall not revoke, withdraw, suspend, qualify or impose a condition upon the Consents given by the Undertaking Signatory in accordance with clause 6.1 of this undertaking for so long as:
- (a) the Undertaking Signatory holds an ownership interest (whether directly or indirectly) in WestConnex; and
  - (b) the Principal Undertaking remains in force and has not been withdrawn with the consent in writing of the ACCC in accordance with section 87B of the Act.

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## 7 Independent Audit of the Principal Undertaking

**The Undertaking Signatory's obligations in relation to the Approved Independent Auditor**

- 7.1 The Undertaking Signatory must:
- (a) not interfere with, or otherwise hinder, the Approved Independent Auditor's ability to carry out his or her functions as the Approved Independent Auditor under the Principal Undertaking, including:

- (i) to the extent within the control, power and authority of the Undertaking Signatory, providing access to the facilities, sites or operations of WestConnex as required by the Approved Independent Auditor; and
- (ii) giving its Consent to Transurban providing to the Approved Independent Auditor under and in accordance with the Principal Undertaking, any information or documents,

insofar as they relate to WestConnex, he or she requests from Transurban under the Principal Undertaking and considers necessary for carrying out his or her functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC under the Principal Undertaking.

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## **8 ACCC requests for information**

- 8.1 The ACCC may direct the Undertaking Signatory in respect of its compliance with this Undertaking to, and the Undertaking Signatory must:
- (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
  - (b) produce documents and materials to the ACCC within the Undertaking Signatory's custody, power or control in the time and in the form requested by the ACCC; and/or
  - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 8.2 Any direction made by the ACCC under clause 8.1 will be notified to the Undertaking Signatory, in accordance with clause 13.2.
- 8.3 The information furnished, documents and material produced or information given in response to any request or direction from the ACCC under this clause 8 that the Undertaking Signatory marks or otherwise identifies as confidential, will remain confidential. Nothing in this clause prevents the ACCC from disclosing such information as is:
- (a) required by law;
  - (b) permitted by section 155AAA of the Act; or
  - (c) necessary for the purpose of enforcement action under section 87B of the Act.
- 8.4 Information furnished, documents and material produced or information given in response to any request or direction from the ACCC under this clause 8 may be used by the ACCC for any purpose consistent with the exercise of its statutory duties.
- 8.5 Nothing in this clause 8 requires the provision of information or documents in respect of which the Undertaking Signatory has a claim of legal professional or other privilege.



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## **9 Disclosure of this Undertaking**

The Undertaking Signatory acknowledges that the ACCC may:

- (a) make this Undertaking publicly available;
- (b) publish this Undertaking on its Public Section 87B Undertakings Register and Public Mergers Register; and
- (c) from time to time publicly refer to this Undertaking.

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## **10 No Derogation**

- 10.1 This Undertaking does not prevent the ACCC from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by the Undertaking Signatory of any term of this Undertaking.
- 10.2 Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the Act for penalties or other remedies in the event that the Undertaking Signatory does not fully implement and/or perform its obligations under this Undertaking or in any other event where the ACCC decides to take action under the Act for penalties or other remedies.

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## **11 Change of Control**

- 11.1 In the event that a Change of Control is reasonably expected to occur, the Undertaking Signatory must:
  - (a) notify the ACCC of this expectation as soon as practicable; and
  - (b) only implement a Change of Control to another person or entity if that person or entity has given a section 87B undertaking to the ACCC that requires it to comply with the same obligations as are imposed on the Undertaking Signatory pursuant to this Undertaking, or on terms that are otherwise acceptable to the ACCC, unless the ACCC has notified the Undertaking Signatory in writing that a section 87B Undertaking under this clause is not required.

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## **12 Costs**

- 12.1 The Undertaking Signatory must pay all of its own costs incurred in relation to this Undertaking.

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## 13 Notices

### Giving Notices

- 13.1 Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Email address: [mergers@accc.gov.au](mailto:mergers@accc.gov.au)  
Attention: Executive General Manager  
Merger and Authorisation Review Division

**With a copy sent to:** [mergersru@accc.gov.au](mailto:mergersru@accc.gov.au)  
Attention: Director, Remedies Unit  
Coordination and Strategy Branch  
Merger and Authorisation Review Division

- 13.2 Any notice or communication to the Undertaking Signatory pursuant to this Undertaking must be sent to:

Name: Tawreed Investments Limited.

Address: Willow House, Cricket Square, PO Box 709, Grand Cayman KY1-1107, Cayman Islands.

Email Address: [REID\\_Infra\\_Ops@adia.ae](mailto:REID_Infra_Ops@adia.ae) and [Project.Byrne@adia.ae](mailto:Project.Byrne@adia.ae)

Fax number: Not Applicable

Attention: The directors

**With a copy sent to:**

Name: Mr Nick Barwell, McBurney & Partners

Address: Level 10, 68 Pitt Street, Sydney NSW 2000

Email Address: Not Applicable

Fax number: Not Applicable

Attention: Not Applicable

- 13.3 If sent by post, notices are taken to be received three Business Days after posting (or seven Business Days after posting if sent to or from a place outside Australia).
- 13.4 If sent by email, notices are taken to be received at the time shown in the email as the time the email was sent.

### Change of contact details

- 13.5 The Undertaking Signatory must notify the ACCC of a change to its contact details within three Business Days.
- 13.6 Any notice or communication will be sent to the most recently advised contact details and subject to clauses 13.3 and 13.4, will be taken to be received.

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## **14 Defined terms and interpretation**

### **Definitions in the Dictionary**



- 14.1 A term or expression starting with a capital letter:
- (a) which is defined in the Dictionary in Part 1 of Schedule 1 (Dictionary), has the meaning given to it in the Dictionary; or
  - (b) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

### **Interpretation**

- 14.2 Part 2 of Schedule 1 sets out rules of interpretation for this Undertaking.

## Executed as an Undertaking

Signed by *Tawreed Investments Limited* (Cayman Islands company registration number 243195):

	
Signature of authorised signatory	Signature of authorised signatory
KARIM MOURAD	SULTAN ALMHEIRI
Name of authorised signatory (print)	Name of authorised signatory (print)
28 August 2018	28 August 2018
Date	Date

Accepted by the Australian Competition and Consumer Commission pursuant  
to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

29/8/18

Date

and signed on behalf of the Commission:

D. Sims

Chairman

29/8/18

Date

# Undertaking to the Australian Competition and Consumer Commission

## Schedule 1 Dictionary and interpretation

### 1. Dictionary

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**ACCC** means the Australian Competition and Consumer Commission.

**Act** means the *Competition and Consumer Act 2010* (Cth).

**Approved Independent Auditor** means the person approved by the ACCC and appointed as the Approved Independent Auditor under the Principal Undertaking.

**AustralianSuper** means AustralianSuper Pty Ltd (ACN 006 457 987) acting solely as the corporate trustee for AustralianSuper (ABN 65 714 394 898) industry superannuation fund.

**Business Day** means a day other than a Saturday or Sunday on which banks are open for business generally in the Australian Capital Territory.

**Change of control** means the assignment or other transfer of the legal or beneficial ownership of some or all of any direct ownership interest held by the Undertaking Signatory in WestConnex to any other person or entity that may impact compliance with this Undertaking in its entirety.

**Commencement Date** has the meaning given in clause 3.1 of this Undertaking.

**Consents** means an unconditional consent, approval, release, discharge, waiver or authorisation.

**Control Date** means the date of Completion of the sale and purchase agreement pursuant to which the WestConnex Sale Interest is transferred to the STP Consortium, should STP be the successful bidder. For the purposes of this definition, "Completion" has the meaning given to it in that sale and purchase agreement.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**CPPIB** means Canada Pension Plan Investment Board a Canadian federal crown corporation established pursuant to the Canada Pension Plan Investment Board Act.

**Entity** has the meaning given by section 64A of the Corporations Act.

**Future NSW Toll Road Concession** has the meaning given to the term in the Principal Undertaking.

**Principal Undertaking** means the section 87B undertaking proffered by Transurban and accepted by the ACCC on 29 August 2018 in respect of the Proposed Acquisition pursuant to section 87B of the Act. A non-confidential copy of that Principal Undertaking can be found on the Public Mergers Register and Public Section 87B Undertakings Register.

**Proposed Acquisition** means the proposed acquisition by the STP Consortium of the WestConnex Sale Interest.

**Public Mergers Register** means the ACCC's public register of merger clearances, available at [www.accc.gov.au](http://www.accc.gov.au).

**Public Section 87B Undertakings Register** means the ACCC's public register of section 87B undertakings, available at [www.accc.gov.au](http://www.accc.gov.au).

**Related Bodies Corporate** has the meaning given to it by section 50 of the *Corporations Act 2001* (Cth).

**SMC** means Sydney Motorway Corporation Pty Limited (ACN 47 601 507 591).

**Specified Traffic Data** has the meaning given to the term in the Principal Undertaking.

**STP Consortium** means the Sydney Transport Partners Consortium comprising of Transurban Group, AustralianSuper, CPPIB and Tawreed.

**Tawreed** means Tawreed Investments Limited (Cayman Islands company registration number 243195) a wholly owned subsidiary of the Abu Dhabi Investment Authority.

**Transurban** means Transurban Limited (ABN 96 098 143 410).

**Transurban Group** means Transurban, Transurban Holdings, Transurban International and Transurban Infrastructure, and any Related Body Corporate.

**Transurban Holdings** means Transurban Holdings Limited (ABN 86 098 143 429).

**Transurban Infrastructure** means Transurban Infrastructure Management Limited (ABN 27 098 147 678) as responsible entity of the Transurban Holding Trust, and its controlled entities.

**Transurban International** means Transurban International Limited (ABN 90 121 746 825).

**Transurban NSW Toll Road** has the meaning given to the term in the Principal Undertaking.

**Transurban Signatory** means an undertaking signatory as defined in the Principal Undertaking.

**Undertaking** is a reference to all provisions of this document, including its schedules and as varied from time to time under section 87B of the Act.

**Undertaking Signatory** has the meaning given to it in clause 1.1 of this Undertaking.

**WestConnex** means the WestConnex concessions and toll roads for all the WestConnex Stages.

**WestConnex Sale Interest** means 51 per cent of the ultimate holding entities of the WestConnex group, being WCX Asset Hold Trust and WCX Project Hold Trust (and shares in their trustees), as well as all associated entities.

**WestConnex Stage** means any of:

- (a) the concession rights in respect of WestConnex M4, comprising the M4 West/Widening and M4 East;

- (b) the concession rights in respect of WestConnex M5, including the New M5 motorway, the M5 East and the M5 West from 11 December 2026 along with any other motorways specified in the WestConnex M5 Project Deed from time to time; and
- (a) the concession rights in respect of WestConnex M4 – M5 Link, involving the construction of tunnels connecting the M4 East and the M5, and the Iron Cove Link and Rozelle Interchange including provision for a future connection to the Western Harbour Tunnel,

and **WestConnex Stages** means all of them.

## **2. Interpretation**

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2.1 In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:

- (a) a reference to this Undertaking includes all of the provisions of this document including its schedules;
- (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;
- (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
- (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- (e) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
- (f) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
- (g) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- (h) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (i) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
- (j) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
- (k) a construction that would promote the purpose - or object - underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
- (l) material not forming part of this Undertaking may be considered to:



- (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
  - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (m) in determining whether consideration should be given to any material in accordance with paragraph (m), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to the:
  - (i) effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
  - (ii) need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns;
- (n) the ACCC may authorise the ACCC Mergers Review Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (o) in performing its obligations under this Undertaking, each Undertaking Signatory will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking;
- (p) a reference to:
  - (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
  - (ii) a party includes its successors and permitted assigns; and
  - (iii) a monetary amount is in Australian dollars.

