

Lane Cove Tunnel: Updated summary of contracts

Incorporating summaries of all contract changes to 25 March 2007

MARCH 2007



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I	Introduction	I
1.1	The project	2
1.2	History of the project's development	6
1.2.1	Concept development and planning approvals	6
1.2.2	The inviting of private sector proposals and selection of a preferred proponent.	8
1.3	The structure of this report	10
2	Overview of the project's contracts	11
2.1	The participants in the project.	11
2.1.1	Public sector parties to the contracts	11
2.1.2	Private sector parties to the contracts	11
2.2	Contractual structure	14
2.3	Conditions precedent	17
2.3.1	Original project contracts	17
2.3.2	Subsequent contracts and contract changes.	18
3	The Project Deed and associated interface, verification, lease and novation arrangements	19
3.1	General obligations on and acceptance of risks by the Trustee and the Company	19
3.2	Design and construction.	20
3.2.1	Scope of works	20
3.2.2	Changes to the scope of works	21
3.2.3	Compliance with and amendments and challenges to the project's planning approval	24
3.2.4	Design obligations and intellectual property.	25
3.2.5	Construction access.	26
3.2.6	Latent conditions and contamination	26
3.2.7	Native title claims	26

3.2.8	Environmental requirements and complaints	27
3.2.9	Third party claims	27
3.2.10	Traffic management during construction	27
3.2.11	Project construction programs, plans, reports, reviews, inspections and rail safety procedures	28
3.2.12	Quality assurance and verification	28
3.2.13	Completion of the works and opening of the motorway	29
3.2.14	Correction of defects	30
3.2.15	Design and construction security bonds.	30
3.3	Operation and maintenance.	30
3.3.1	Scopes of the Company's operation, maintenance and repair obligations and the Trustee's asset renewal obligations	30
3.3.2	Changes to the Company's operation, maintenance and repair obligations and/or the Trustee's asset renewal obligations	33
3.3.3	Compliance with planning and environmental approvals and plans and handling of complaints	33
3.3.4	Operation, maintenance and repair security bonds	33
3.3.5	Preparations for and granting of the Motorway Stratum Lease	34
3.3.6	Tolls and administrative charges	35
3.3.7	Rent payments to the RTA	36
3.3.8	RTA and Government road network, public transport and utility service development rights and restrictions	36
3.3.9	Expiration of the operating term and final handover to the RTA	37
3.4	Miscellaneous general provisions of the Project Deed, the Rail Agreement and the RTA Consent Deed	38
3.4.1	Rates, levies and taxes	38
3.4.2	Loss or damage and insurance	38
3.4.3	Accounting and financial reporting	40
3.4.4	Restrictions on assignments, encumbrances, refinancing and amendment of the contracts	40
3.4.5	Confidentiality and publicity	42
3.4.6	Changes in law	42
3.4.7	Dispute resolution under the Project Deed, the Agreement to Lease and the Motorway Stratum Lease	42
3.4.8	<i>Force majeure</i> under the Project Deed	44
3.5	Renegotiation provisions.	44
3.6	Defaults under and termination of the Project Deed	45
3.6.1	General RTA power to 'step in' following any unremedied Project Deed default by the Trustee or the Company	45
3.6.2	RTA notification and Trustee/Company remediation of Trustee/Company 'events of default'.	46
3.6.3	Security Trustee remediation of Trustee/Company 'events of default' and other potential triggers for termination	47
3.6.4	Termination of the Project Deed by the RTA following a Trustee/Company 'event of default'	48
3.6.5	Termination of the Project Deed by the RTA following a native title claim	49
3.6.6	Claims against the RTA by the Trustee or the Company	50
3.6.7	Termination of the Project Deed by the Trustee or the Company	50
3.7	Defaults under and termination of the Rail Agreement	52
3.8	Finance defaults	52
4	The RTA Security and interactions between RTA and private sector securities	54
4.1	The RTA Security	54
4.2	Consents to and priorities between the RTA and debt financiers' securities.	54
5	NSW Government guarantee of the RTA's performance	56

I Introduction

This report summarises the main contracts, from a public sector perspective, for the Lane Cove Tunnel motorway and associated tolled roadways in North Sydney.

The original (July 2004) version of this document was prepared by the Roads and Traffic Authority of New South Wales (RTA) in accordance with the public disclosure requirements of sections 3.7 and 7.1 of the NSW Government's November 2001 *Working with Government Guidelines for Privately Financed Projects*, and its compliance with these requirements was assessed by the NSW Auditor-General prior to its tabling in Parliament.

This updated report has been prepared by the RTA in accordance with the public disclosure requirements of section 5.2 of the Government's December 2006 *Working with Government Guidelines for Privately Financed Projects*, and its compliance with these revised requirements has again been assessed by the Auditor-General prior to the tabling of this report in Parliament.

The immediate triggers for the preparation of this updated summary of the Lane Cove Tunnel project's contracts were a series of 'transition' changes, made on 1 March 2007, concerning the timing of the project's surface roadworks following the opening of the Lane Cove Tunnel itself. However, in accordance with the December 2006 *Working with Government Guidelines*—and also in an effort to assist readers in understanding the project's contractual structure as a whole—this summary is not confined to these latest changes to the project, but rather is a comprehensive update of the July 2004 summary as a whole, including changes implemented under the previous (November 2001) *Guidelines*.

In line with both versions of the *Working with Government Guidelines for Privately Financed Projects*, this updated report:

- Focuses on those contracts to which the Minister for Roads, the RTA, other NSW Government authorities and/or State-owned corporations are parties, or which otherwise have a



The western portals of the Lane Cove Tunnel, at the junction of Epping Road and Mowbray Road West in Lane Cove, on the day the tunnels opened, 25 March 2007.

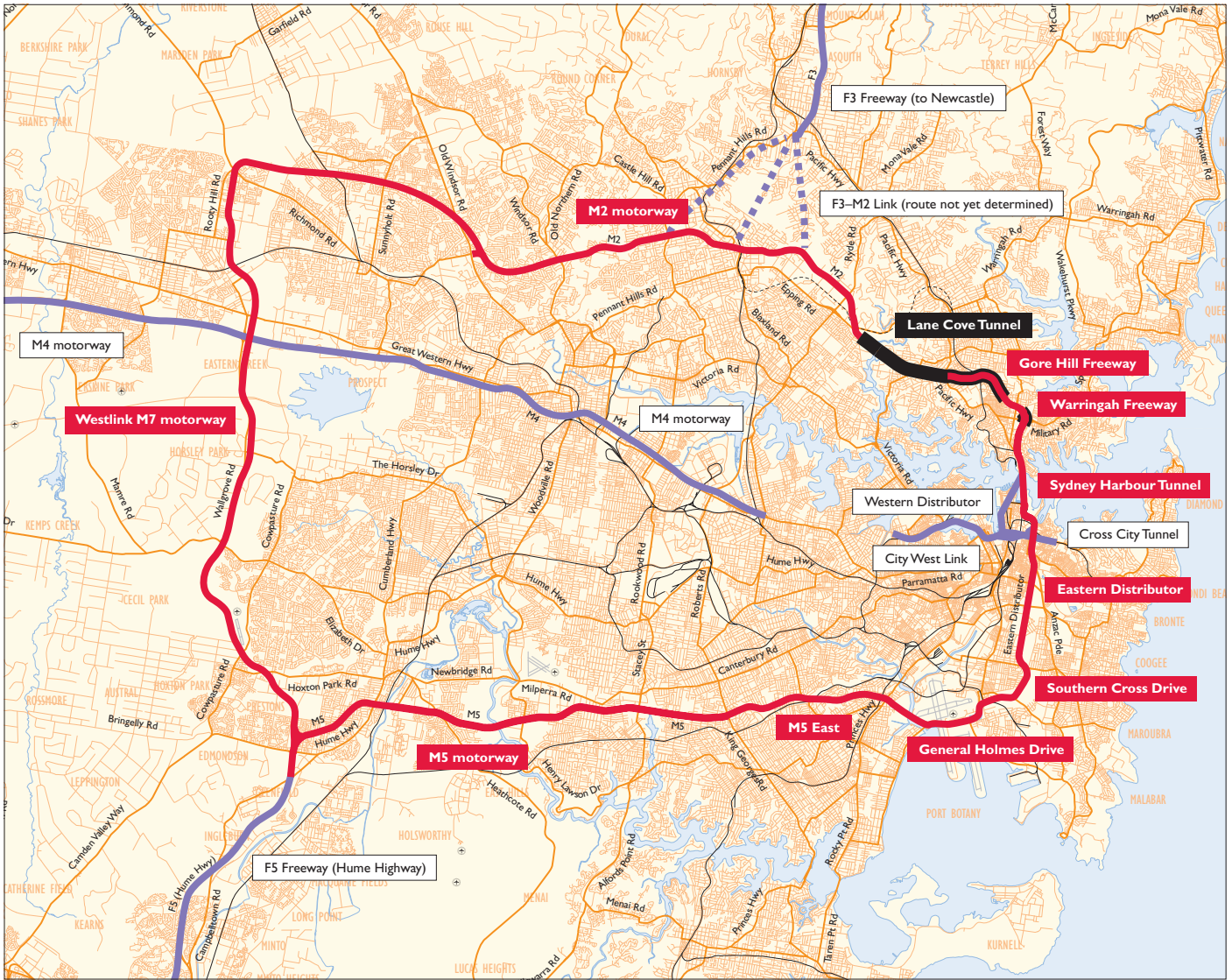


Figure 1. The Lane Cove Tunnel completes the Sydney Orbital freeway and motorway system.

potentially substantive impact on public sector risks or benefits. Other contracts solely between private sector organisations are referred to only to the extent necessary to explain the public sector's exposure.

- Does not disclose the private sector parties' cost structures, profit margins, intellectual property or any other matters which might place them at a disadvantage with their competitors.

This report should not be relied upon for legal advice and is not intended for use as a substitute for the contracts.

It is based on the project's contracts as at the date of opening of the motorway to traffic, 25 March 2007. Subsequent amendments of or additions to these contracts, if any, are not reflected in this report.

1.1 The project

The Lane Cove Tunnel project involves:

- The financing, design, construction, operation and maintenance of a 3.6 km long motorway in twin tunnels between

the Epping Road bridge crossing of the Lane Cove River in Lane Cove West and the Gore Hill Freeway in Artarmon, as the final part of the Sydney Orbital freeway and motorway circuit (Figures 1 and 2)

- The financing, design, construction, operation and maintenance of two tolled north-facing ramps connecting the Warringah Freeway in North Sydney with Falcon Street and Military Road (Figure 2), and
- The financing, design and construction of associated improvements to existing surface roads and intersections, including:
 - Widening of the Gore Hill Freeway to six lanes, including a transit lane in each direction, and
 - Major modifications to Epping Road and Longueville Road between Wicks Road in North Ryde and the Gore Hill Freeway in Artarmon, to improve facilities for cyclists, pedestrians and public transport.

The project is being funded, designed and built and will be operated and maintained by a private sector group that was



Looking west from the rebuilt Reserve Road bridge over the Gore Hill Freeway in Artarmon towards the eastern portals of the Lane Cove Tunnel, 25 March 2007.

originally known as the Lane Cove Tunnel Company consortium and is now known as 'Connector Motorways'.

In addition to the project works described above, the RTA decided in March 2004 to reconstruct the existing south-facing, toll-free off-ramp from the northbound Warringah Freeway to Falcon Street and construct an additional south-facing, toll-free off-ramp to provide better access for northbound traffic from the Warringah Freeway to Military Road. These works necessitated an alternative layout for the Lane Cove Tunnel project's north-facing tolled Falcon Street ramps and intersections, and the additional costs of the new and revised north-facing and south-facing Falcon Street ramps, of \$11,476,437 excluding GST, were met by the RTA (see section 3.2.2).

The RTA has also provided a net amount of \$29,705,788, excluding GST, for a series of other changes to the project, as described later in this report (see section 3.2.2).

Under the contracts summarised in this report the private sector parties had to use their best endeavours to complete all the motorway tunnel and ramp works, all the associated works on the Gore Hill and Warringah Freeways and most of the other associated works on local roads, properties and services by 9 May 2007. In practice, as already indicated, these facilities were opened to traffic on 25 March 2007.

The remaining ('Stage 2') works were originally to be completed within 26 weeks of the completion of these works, but the commencement of most of the 'Stage 2' works was deferred by the RTA on 1 March 2007 and they now have to be completed by 11 months after the opening of the tunnel and ramp works (i.e. by 25 February 2008).

The motorway tunnels and ramps will be operated, maintained and repaired by the consortium until 9 January 2037 or any earlier termination of the project contracts. Specified surface



An artist's impression of the new Parklands Avenue/Longueville Road bus interchange, connected to the Lane Cove shopping centre by a new pedestrian bridge. These works are to be completed by 25 August 2007, after which the construction of other 'Stage 2' works will commence.



Looking east along the widened Gore Hill Freeway under the North Shore railway line bridge in Artarmon, 25 March 2007.

roads, signage, property works and services works will also be maintained and repaired by Connector Motorways during this period.

The principal benefits of the project identified by the RTA are:

- Quicker journey times between the city and Sydney's developing north west sector; with connections to Sydney's orbital motorway and freeway network
- Reduced traffic east of the Lane Cove River on Epping Road, Longueville Road and Mowbray Road West
- Improved access for local traffic, through the reinstatement of right turns on Epping Road and Longueville Road at Centennial Avenue and Parklands Avenue
- Improved bus services, with dedicated bus lanes and a bus interchange on Epping and Longueville Roads and transit lanes on the Gore Hill Freeway
- The construction of a continuous cycleway from Wicks Road in North Ryde to Naremburn, forming part of a continuous bicycle route northwest of Sydney Harbour
- Improved pedestrian facilities
- Improved local access
- Less traffic noise, and
- Improved local air quality.

The results of RTA evaluations of the likely economic performance of the project are summarised in *Table 1*.

Table 1. RTA estimates (in January 2004) of the likely economic performance of the Lane Cove Tunnel project.

taking account of initial and recurring capital costs, operation and maintenance costs, road user benefits (savings in vehicle operating costs, travel time savings and savings in accident costs), pedestrian benefits and environmental 'externalities'

Discount rate	Present value of costs (land acquisitions, initial and recurring capital costs and operating and maintenance costs)	Present value of benefits (road user, pedestrian and environmental benefits)	Net present value	Benefit:cost ratio		Net present value/initial capital cost
				$\frac{\text{Benefits} - O\&M}{D\&C}$	$\frac{\text{Benefits}}{D\&C + O\&M}$	
4%	\$831.5 m	\$5,466 m	\$4,634 m	7.4	6.6	12.6
7%	\$735.0 m	\$3,447 m	\$2,711 m	5.1	4.7	4.1
10%	\$660.9 m	\$2,307 m	\$1,646 m	3.7	3.5	2.7



The project includes major modifications to Epping Road and Longueville Road between Wicks Road in North Ryde and the Gore Hill Freeway in Artarmon, to improve facilities for

The Lane Cove Tunnel bypasses five sets of traffic lights, while the new route between Falcon Street and the M2, via the new north-facing Falcon Street ramps, the Warringah and Gore Hill Freeways and the Lane Cove Tunnel, bypasses 23 sets of traffic lights for westbound traffic and 25 for eastbound traffic.

The motorway tunnels and the north-facing Falcon Street ramps are electronically tolled. The maximum permissible toll charges for the tunnels are \$2.00 for cars and \$4.00 for heavy vehicles, while those for the ramps are \$1.00 and \$2.00, respectively (all at 30 June 1999 prices, including GST). The maximum permissible tolls increase in line with inflation, so that (for example) by the time the tunnels and ramps opened on 25 March 2007 the maximum permissible tolls for the tunnels were \$2.55 for cars and \$5.09 for heavy vehicles and the maximum permissible tolls for the north-facing Falcon Street ramps were \$1.27 for cars and \$2.55 for heavy vehicles. There are no tolls for buses providing public transport services, but additional charges apply for vehicles without electronic tolling transponders.

1.2 History of the project's development

1.2.1 Concept development and planning approvals

The idea of building a Lane Cove Tunnel was first raised in the early 1990s when the Gore Hill Freeway opened.

Several feasibility studies and rounds of public consultations followed, including a February 1997 invitation to the community to comment on options for improving Epping Road identified in studies commissioned by the RTA, which had suggested a tunnel under Epping Road between the Pacific Highway and a point

just west of Centennial Avenue. Community feedback was strongly in favour of a longer tunnel.

Later in 1997 an M2–Epping Road Task Force, comprising the mayors of Lane Cove, Willoughby, North Sydney and Ryde and the Parliamentary Secretary for Roads, was formed to lead community discussions on the options.

Six tunnel route options, involving both 'long' and 'short' tunnels under Mowbray Road West or Epping Road, were placed on public display between 30 March and 15 May 1998, and community feedback on these options was obtained through discussions with the task force, public meetings and a questionnaire.

On 17 December 1999 the NSW Government invited public comments on a *Lane Cove Tunnel Overview Report* which summarised the findings of these initial investigations and identified a preferred tunnel option with twin two-lane tunnels, generally under Epping Road and broadly based on one of the six options identified in 1998. This *Overview Report* also proposed the widening of the Gore Hill Freeway to six lanes, the construction of north-facing ramps to and from the Warringah Freeway at Falcon Street in North Sydney and the funding of the project by tolls.

More detailed investigations and community consultations continued throughout 2000 and 2001, culminating in the exhibition of an *Environmental Impact Statement* for the project—which was now proposed to have wider tunnels, as described in *Figure 2*—between 8 November 2001 and 1 February 2002.

The RTA received 340 submissions in response to this *EIS*.

After considering these submissions, the RTA made nine modifications to the proposal, including:

- A relocation of the western ventilation stack



cyclists, pedestrians and public transport. The section shown here, between Centennial Avenue and the Pacific Highway, will have a narrower roadway with bus lanes and a cycleway.

- A new bus interchange at the Epping Road/Longueville Road/Parklands Avenue intersection, with a new pedestrian bridge over this intersection
- Conversion of the existing transit lanes on the Pacific Highway, between Longueville Road and North Sydney, to dedicated bus lanes
- An additional lane for the southbound off-ramp from the Warringah Freeway to Falcon Street/Military Road, and
- Changes to the shared cycleway and pedestrian path along the Gore Hill Freeway.

These proposed modifications were presented in a *Preferred Activity Report* within a *Lane Cove Tunnel and Associated Road Improvements Representations Report* submitted by the RTA to the NSW Department of Planning in June 2002.

The *Preferred Activity Report* was publicly exhibited between 15 July and 16 August 2002.

The RTA subsequently submitted two further modifications to its proposals:

- A revised tunnel ventilation system with a separate ventilation tunnel below the road tunnels, improving tunnel air quality and avoiding emissions from the tunnel portals, and
- Revisions to the Gore Hill Freeway underpass at Willoughby Road, removing the need for a separate new road tunnel at this location but requiring a relocation of the off-road cycleway in the Naremburn area.

In accordance with section 115C of the Environmental Planning and Assessment Act, a report by the Director-General of the Department of Planning on the modified project proposal, *Proposed Lane Cove Tunnel and Associated Road Improvements: Director*

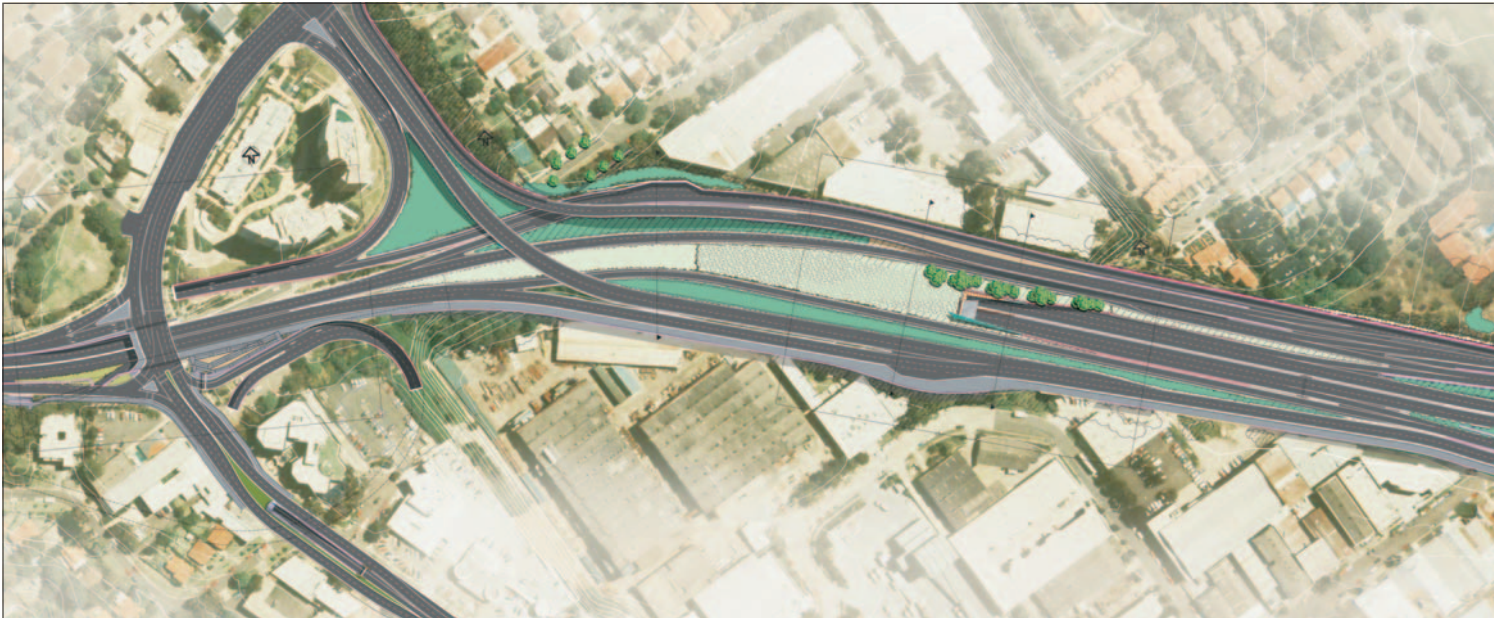
General's Report, was completed in November 2002. Among other things, this report concluded that the modifications proposed by the RTA would not necessitate the preparation of another *Environmental Impact Statement*.

On 3 December 2002 the Minister for Planning, Dr Andrew Refshauge, granted planning approval for the project, as described in the *EIS* and as modified by the *Representations Report* and the *Director-General's Report*, under section 115B(2) of the Environmental Planning and Assessment Act. This approval was subject to 259 conditions.

On 3 December 2003 the Director-General of the Department of Infrastructure, Planning and Natural Resources, acting in accordance with one of these conditions of approval, approved the use of an RTA-nominated mid-tunnel construction access site at 130–132 Epping Road, instead of a previously proposed site in Moore Street south of Epping Road. As a result, conditions 245 to 259 of the original planning approval no longer apply.

Since then there have been four sets of amendments to the project's planning approval:

- On 10 March 2004 the Minister for Infrastructure and Planning, Mr Craig Knowles, made minor amendments to 24 of the conditions of approval under section 115BAA of the Environmental Planning and Assessment Act, mostly to correct typographical and similar errors and clarify the timing of planning requirements that had to be completed before the commencement of substantial construction.
- On 3 June 2006 the Minister for Planning, Mr Frank Sartor, made further minor technical amendments to 14 of the



The project has included widening of the Gore Hill Freeway to six lanes, two of which must become transit lanes by 25 February 2008, and extensive reconfiguration of its layout,

conditions of approval, under section 115BAA of the Environmental Planning and Assessment Act.

- On 21 November 2006 the Minister for Planning, Mr Frank Sartor, amended two of the conditions of approval, concerning the storage and handling of dangerous goods and two community-based air quality monitoring stations, under section 75W of the Environmental Planning and Assessment Act.
- On 21 February 2007 the Minister for Planning, Mr Frank Sartor, amended 20 of the conditions of approval and added three new conditions of approval under section 75W of the Environmental Planning and Assessment Act. Most of these changes concerned the timing of the project's surface works along Epping and Longueville Roads following the opening of the project's tunnel and ramp works.

1.2.2 The inviting of private sector proposals and selection of a preferred proponent

On 20 March 2002 the RTA invited *Registrations of Interest* from private sector parties for the financing, design, construction, operation and maintenance of the Lane Cove Tunnel project.

Registrations of Interest were received from four consortia by the closing date of 24 April 2002:

- The **Lane Cove Tunnel Consortium**, sponsored by Thiess, Transfield Holdings and ABN AMRO
- **Lane Cove Motorway**, sponsored by Leighton Contractors and Deutsche Bank
- **Lane Cove Expressway**, sponsored by Baulderstone Hornibrook, Bilfinger Berger and Transurban Infrastructure Development, and

- **TunnelLink**, sponsored by Abigroup, Ferrovial Infraestructuras and Macquarie Bank.

After evaluating these *Registrations of Interest*, the RTA issued a formal *Request for Proposals* to all four consortia on 26 July 2002, asking them to submit detailed proposals. Before receiving this *Request for Proposals* these proponents warranted, in Deeds of Disclaimer, that they would rely on their own investigations in preparing their proposals. They also executed Process (Probity) Deeds setting out procedures to address any conflicts of interests arising from the common ownership of some of the participants in the different consortia or the engagement of common advisers by two or more proponents.

The RTA's *Request for Proposals* included drafts of a Project Deed, *Scope of Works and Technical Criteria* documentation (including a draft *Site Access Schedule*), a Deed of Appointment of Independent Verifier, a Rail Agreement, a Contractor's Side Deed, an RTA Consent Deed and an Agreement to Lease (including a draft Motorway Stratum Lease).

All four consortia submitted detailed proposals on the closing date, 21 January 2003.

The proposals were evaluated by an evaluation panel comprising Mr Les Wielinga, the RTA's General Manager; Private Infrastructure, Mr Garry Humphrey, the RTA's General Manager; Motorway Services, Mr John Anderson, the RTA's Senior Project Manager; Motorway Services, Mr Kevin Pugh, Senior Manager; Corporate Finance, NSW Treasury Corporation, and Mr Peter Gemell, a principal of Evans and Peck Pty Limited.

The evaluation panel was assisted by the RTA's Lane Cove Tunnel project team (technical and financial advice), NSW Treasury and NSW Treasury Corporation (financial advice), Clayton Utz (legal advice), Evans and Peck (commercial and technical advice) and PricewaterhouseCoopers (financial advice).



ramps and shared cycleway and pedestrian path between Nareburn and the eastern portals of the Lane Cove Tunnel and the Pacific Highway and Longueville Road (left).

Its activities were overseen by a review panel, comprising Mr Mike Hannon, the RTA's Director, Road Network Infrastructure, Mr Brett Skinner, the RTA's Director, Finance, Mr Graham Read, the RTA's Corporate Counsel, Mr Danny Graham, Acting Director, Private Projects, NSW Treasury, and Mr Alan Griffin, chairperson of the State Contracts Control Board, Department of Public Works and Services, and by a probity auditor, Mr Peter Gifford of PAJI Pty Limited.

The RTA's assessment of the proposals involved:

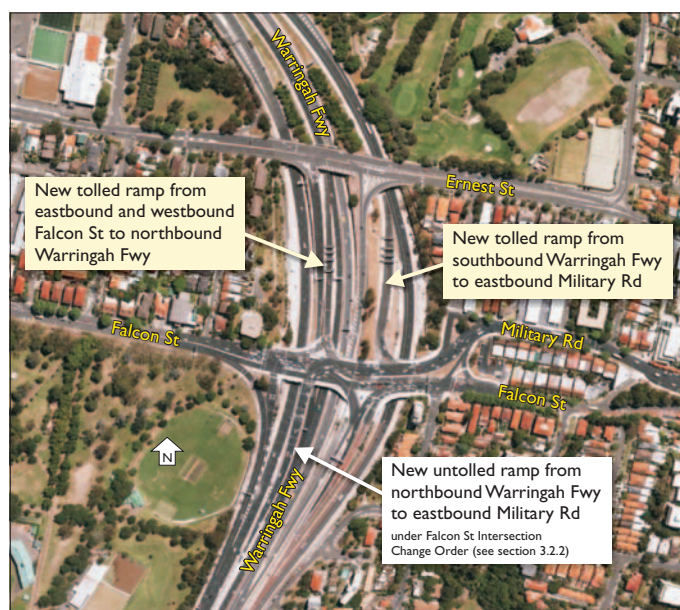
- A 'comparative value' assessment against a 'public sector comparator'—a hypothetical, risk-adjusted estimate of the net present cost of delivering the project, to the same level and standard of service, using the most efficient likely form of delivery able to be financed by the public sector—in accordance with the requirements of the NSW Government guidelines *Working with Government: Guidelines for Privately Financed Projects*.

This 'public sector comparator' was initially prepared by the RTA, before it received the proposals, with the assistance of NSW Treasury, NSW Treasury Corporation, Evans and Peck and PricewaterhouseCoopers. It was subsequently adjusted to reflect market movements in interest rates, with the benchmark rates, initially set on 23 July 2002, being reset on 1 April 2003 for the interim evaluation of all proposals and again on 10 September 2003 for the final evaluation of shortlisted proposals (discussed below).

The 'comparative value' of each proposal was expressed in terms of the net present value to the RTA of the proposed

financial transaction between the proponent and the RTA, adjusted for (among other things) differences in each proposal's risk allocations and whole-of-life costs.*

- A 'non-price assessment', against other pre-determined criteria, weighted as follows:
 - Project structure, participants and organisation: 25%.
 - Design and construction (architectural and landscape design, geometric, drainage, structural, pavement, geotechnical, tunnel, environmental, services, toll collection system and operational management and control



The project's Falcon Street ramps.

* For a 'public sector comparator' based on the most efficient likely form of delivery of the Lane Cove Tunnel project able to be financed by the public sector; the estimated net present value of the normalised risk-adjusted financial cost of the project to the RTA, using 10 September 2003 interest rates, was \$193.2 million. In contrast, the delivery of the project by the private sector; in accordance with the rights, obligations and risk allocations described in this report, is expected to result in a significant net financial benefit to the RTA, with the financial costs of the project to the RTA being outweighed by a substantive transfer of risks to the private sector (see section 3.1) and by an up-front payment to the RTA that had to be (and was) made by the private sector participants on 9 December 2003 (see section 2.3).



Looking west along the widened and reconfigured Gore Hill Freeway at the rebuilt Reserve Road overpass in Artarmon, 25 March 2007.

system concept designs, design specifications, construction phase traffic arrangements, design and construction program, quality plan requirements, project strategies, quality management, independent verifier and sign-age): 35%.

- Initial traffic management and safety plan: 8.5%.
- Initial project plans for quality assurance, project management, environmental management, design, construction, operation and maintenance, community involvement, incident responses, occupational health, safety and rehabilitation management and project training: 21.5%.
- Operation and maintenance (indicative replacement and refurbishment schedule, routine maintenance schedule, specified design lives of asset items and sub-items, maintenance standards and quality manager): 10%.

These assessments, and the combining of each proposal's 'comparative value' and its weighted score under the 'non-price assessment' into an overall 'adjusted comparative value', were carried out in accordance with guidelines and methodologies established and documented by the RTA, with the probity auditor's concurrence, before the proposals were received.

In combining the two types of assessments, the 'non-price assessment' results of all of the proponents were expressed as fractions of the best of the non-price assessment results, the difference between 1.0 and this fraction was then multiplied by a 'nominal value of the non-price assessment in \$ terms' of \$23.0 million—a figure set by the RTA before the proposals had been received—and the result for each proponent was subtracted from its proposal's 'comparative value' to produce an 'adjusted comparative value'. This meant that for the proponent with the best 'non-price assessment' result, the 'adjusted comparative

value' was the same as its 'comparative value', while for the other three proponents it was reduced.

On 24 June 2003, following an interim report by the RTA Evaluation Committee and a report by the Probity Auditor on the selection processes carried out to that stage, the RTA advised the Lane Cove Expressway and Tunnellink consortia that their proposals had been unsuccessful. This narrowing of the shortlist to two proponents was publicly announced on 26 June 2003.

Following further, more detailed evaluations, involving a series of additional requests to the remaining proponents and evaluations of their responses, the RTA's assessments concluded that:

- The proposal submitted by the Lane Cove Tunnel Consortium would represent better value for money than the 'public sector comparator' and the proposal submitted by Lane Cove Motorway
- The Lane Cove Tunnel Consortium should therefore be selected as the preferred proponent
- The RTA should enter into detailed negotiations with this consortium, and
- Lane Cove Motorway should be appointed as a 'reserve proponent', and that the preferred proponent should be advised that the RTA reserved the right to negotiate with this reserve proponent if there were a 'material change to the expected financial transaction, risk profile, technical requirements and/or ranking of proposals'.

On 1 October 2003 the Minister for Roads, Mr Carl Scully, announced the selection of the Lane Cove Tunnel Consortium as the preferred proponent and the commencement of contract negotiations with this consortium.

These negotiations were satisfactorily concluded with the execution of the principal contracts for the project on 4 December 2003, the satisfaction of all their remaining conditions precedent on 9 December 2003 and the announcement of this on 9 December 2003.

As already indicated, following a name change in April 2006 the Lane Cove Tunnel Consortium is now known as the 'Connector Motorways' group.

1.3 The structure of this report

Section 2 of this report summarises the structuring of the Lane Cove Tunnel project and explains the inter-relationships of the various agreements between the public and private sector parties.

Sections 3, 4 and 5 then summarise the main features of the key agreements affecting public sector rights and liabilities and the sharing of the project's benefits and risks.

2 Overview of the project's contracts

2.1 The participants in the project

2.1.1 Public sector parties to the contracts

The principal public sector parties to the Lane Cove Tunnel project contracts are:

- The **Minister for Roads**, on behalf of the State of New South Wales
- The **Roads and Traffic Authority of NSW** (ABN 64 480 155 255) ('**RTA**'), and
- **Rail Corporation New South Wales** (ABN 59 325 778 353) ('**RailCorp**'), which has taken over the contractual rights and obligations originally assumed, prior to its formation on 1 January 2004, by the **NSW Rail Infrastructure Corporation** (ABN 21 298 300 693) ('**RIC**'), the **State Rail Authority of NSW** (ABN 73 997 983 198) ('**SRA**') and the **Office of the Co-ordinator General of Rail** (ABN 54 770 756 513) ('**OCGR**').

The RTA is constituted under Part 6 of the Transport Administration Act 1988. Its powers in relation to the Lane Cove Tunnel project arise from the Transport Administration Act, which empowers the RTA to enter into contracts or arrangements for the carrying out of works and the performance of services, and the Roads Act 1993.

Under the Roads Act the Minister for Roads may declare tollways, the RTA and its agents and contractors may carry out road works and the RTA may lease land it owns. Under the Transport Administration Act, the RTA may do any of these things, and exercise any of its other functions, either in its own

right or in a partnership, joint venture or other association with others.

2.1.2 Private sector parties to the contracts

The private sector parties to the contracts to which the Minister for Roads, the RTA and/or RailCorp are also parties (**Figure 3**) are:

- **Lane Cove Tunnel Nominee Company Pty Limited** (ABN 23 103 411 294) ('**the Trustee**'), in its capacity as trustee of the Lane Cove Tunnel Trust (ABN 16 670 065 604), a unit trust established on 22 August 2003.

All the units in the Lane Cove Tunnel Trust are held by **Lane Cove Tunnel Holding Nominee Company Pty Limited** (ACN 103 411 169) ('**the Holding Trustee**'), in its capacity as trustee of the Lane Cove Tunnel Holding Trust (ABN 42 946 080 667), another unit trust established on 22 August 2003.

In turn, all the shares in the Trustee and the Holding Trustee are owned and controlled by **Lane Cove Tunnel Holding Company Pty Limited** (ABN 39 103 410 993) ('**the Holding Company**'). All the shares in the Holding Company and all the units in the Lane Cove Tunnel Holding Trust are owned by the following equity investors (as at 25 March 2007*):

- CKI Lane Cove Tunnel Holdings (Malaysian) Limited (30.5% of the project's equity interests)
- Macquarie Bank Limited (ABN 46 008 583 542) (19.0%)

* The project's initial equity investors were Motor Trades Association of Australia Superannuation Fund Pty Limited (ABN 14 008 650 628), as the trustee of the MTAA Industry Superannuation Fund (approximately 11.98% of the total equity to be invested), AMP Investment Services Pty Limited (ABN 71 063 986 989), as the trustee of the AMP Investments' Infrastructure Equity Fund (10.13%), Westscheme Pty Limited (ABN 33 009 194 218), as the trustee of the Westscheme superannuation fund (6.45%), and AMP Capital Investments Limited (ABN 59 001 777 591), as agent for the Retail Employees Superannuation Trust (4.61%), and the project's original deferred equity investors, with obligations to complete their subscriptions on 9 March 2006, were ABN AMRO Australia Limited (ABN 78 000 862 797) (28.61%), AMP Life Limited (ABN 84 079 300 379) (12.90%), Thiess Pty Limited (ABN 87 010 221 486) (10.13%), John Holland Pty Limited (ABN 11 004 282 268) (10.13%), and Transfield Infrastructure Pty Limited (ABN 83 105 942 452) (5.07%).

On 2 July 2004, with the RTA's consent, 54.9% of the project's equity interests were sold to CKI Lane Cove Tunnel Holdings (Malaysian) Limited (40.00%) and Seamax Limited, a subsidiary of the Li Ka Shing (Overseas) Foundation (14.90%). Under this equity sell-down, ABN Amro and Transfield Infrastructure sold all of their interests in the project, AMP Life reduced its stake from 12.90% to 0.88% and Thiess and John Holland reduced their stakes from 10.13% each to 5.53% each. AMP Life subsequently sold its remaining 0.88% interest in the project to Equisuper Pty Limited (ABN 64 006 964 049) on 6 August 2004.

On 5 March 2007—this time without the RTA's consent, which was not required because a change in 'control', as defined in the Corporations Act (Cth), was not involved (see section 3.4.4)—19.00% of the project's equity interests were sold to Macquarie Bank Limited (ABN 46 008 583 542), with CKI reducing its stake in the project from 40.00% to 30.50% and Seamax reducing its stake from 14.90% to 5.40%.

There have been further changes in the project's equity interests after the date of this report (i.e. after 25 March 2007).

- Motor Trades Association of Australia Superannuation Fund Pty Limited (ABN 14 008 650 628), as trustee of the MTAA Industry Superannuation Fund (11.98%)
 - AMP Investment Services Pty Limited (ABN 71 063 986 989), as trustee of the AMP Investments' Infrastructure Equity Fund (10.13%)
 - Westscheme Pty Limited (ABN 33 009 194 218), as trustee of the Westscheme superannuation fund (6.45%)
 - Thiess Pty Limited (ABN 87 010 221 486) (5.53%)
 - John Holland Pty Limited (ABN 11 004 282 268) (5.53%)
 - Seamax Limited, a subsidiary of a charitable foundation established by the founder of CKI, the Li Ka Shing (Overseas) Foundation (5.4%)
 - AMP Capital Investments Limited (ABN 59 001 777 591), as agent for the Retail Employees Superannuation Trust (4.61%), and
 - Equisuper Pty Limited (ABN 64 006 964 049) (0.88%).
- **Connector Motorways Pty Limited** (ABN 70 103 411 052) ('**the Company**'), which is wholly owned by the Holding Company. Until 3 April 2006 Connector Motorways Pty Limited was known as Lane Cove Tunnel Company Pty Limited.
- **Thiess Pty Limited** (ABN 87 010 221 486) and **John Holland Pty Limited** (ABN 11 004 282 268) ('**the Contractors**'), which on 5 September 2003 formed a joint venture trading as 'Thiess John Holland' (ABN 17 438 477 568), with each party having joint and several obligations to plan, design, construct and commission the project for the Trustee and the Company, thereby enabling the Trustee to meet its planning, design, construction and commissioning obligations to the RTA and RailCorp and subsequently enabling the Company to meet its operation, maintenance and repair obligations to the RTA and RailCorp.

Thiess Pty Limited is wholly owned by Leighton Holdings Limited (ABN 57 004 482 982), and John Holland Pty Limited is owned by Leighton Holdings Limited (99%) and Heytesbury Pty Limited (ABN 008 666 966) (1%).
- **Leighton Holdings Pty Limited** (ABN 57 004 482 982) ('**the Contractor Guarantor**'), which has given the Trustee and the Company a parent company guarantee of the performance of the Contractors' planning, design, construction and commissioning obligations to the Trustee and the Company.
- **Transfield Services (Australia) Pty Limited** (ABN 11 093 114 553) ('**the Operator**'), which will operate, maintain and repair the motorway tunnel and ramps and specified surface roads, signage, property works and services works for the Trustee and the Company, thereby enabling the Trustee to meet its asset renewal obligations to the RTA and the Company to meet its operation, maintenance and repair obligations to the RTA and RailCorp.
- **Transfield Services Limited** (ABN 69 000 484 417) ('**the Operator Guarantor**'), which wholly owns the Operator and has provided a parent company guarantee of the performance of the Operator's operational, maintenance and repair obligations to the Trustee and the Company.
- **URS Australia Pty Limited** (ABN 46 000 691 690) ('**the Independent Verifier**'), which has been and is independently verifying and certifying the performance by the Trustee of specified design, construction, commissioning and defect rectification obligations to the RTA and RailCorp and will review and monitor the project's initial operation, maintenance and repair.
- **The Hills Motorway Limited** (ABN 28 062 329 828), the operator of the M2 motorway, and **Hills Motorway Management Limited** (ABN 89 064 687 645) and **Perpetual Trustees Australia Limited** (ACN 000 431 827), the responsible entity and custodian (respectively) of the Hills Motorway Trust (ABN 51 058 183 515), concerning arrangements for the connection of the Lane Cove Tunnel to Epping Road in Lane Cove West and changes to Epping Road in North Ryde, which in combination provide the new link between the Lane Cove Tunnel and the M2 motorway.
- The Company, The Hills Motorway Limited and other toll-road operators—**SWR Operations Pty Limited** (ABN 33 002 359 864), **Interlink Roads Pty Limited** (ABN 53 003 845 430), **Airport Motorway Limited** (ABN 26 057 283 093), **Queensland Motorways Limited** (ABN 50 067 242 513), **CrossCity Motorway Pty Limited** (ABN 45 098 445 839), **WSO Co Pty Limited** (ABN 73 102 757 924), **City-Link Melbourne Limited** (ABN 65 070 810 678) and (since 18 December 2005) **ConnectEast Pty Limited** (ABN 101 213 263)—concerning the interoperability of tolling systems on the Lane Cove Tunnel and other Sydney, Brisbane and Melbourne tollroads.
- **Lane Cove Tunnel Finance Company Pty Limited** (ABN 18 103 411 650) ('**the Borrower**'), which is wholly owned by the Trustee and which has received debt finance for the project from the capital markets, underwritten by ABN AMRO Bank NV (Australian Branch) (ABN 84 079 478 612) and guaranteed by MBIA Insurance Corporation.
- **BTA Institutional Services Australia Limited** (ABN 48 002 916 396) ('**the Security Trustee**', formerly known as J. P.

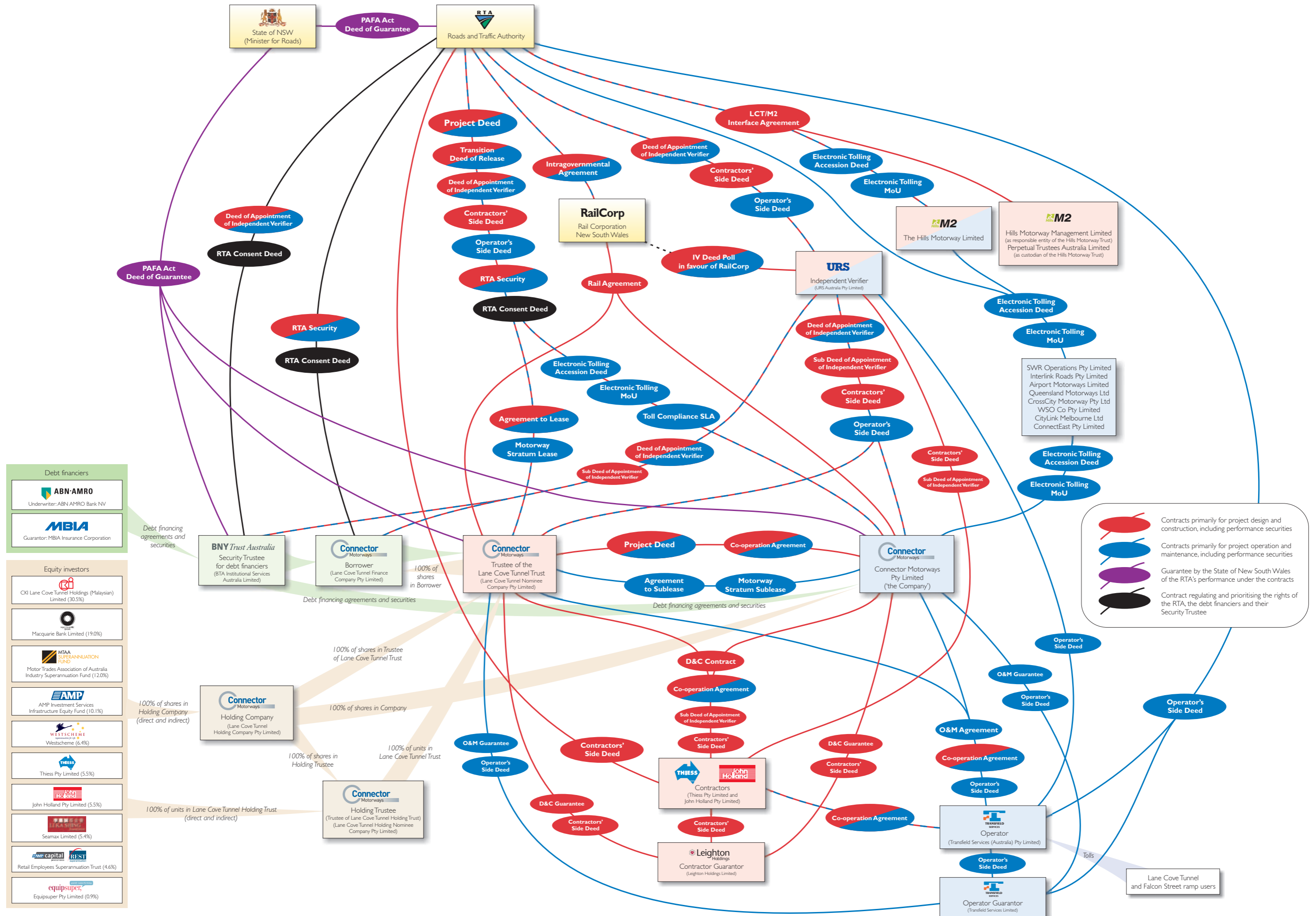


Figure 3. Overview of the structure of the Lane Cove Tunnel project contracts, from a public sector perspective, as at the opening of the tunnels and the Falcon Street ramps to traffic on 25 March 2007.

Morgan Institutional Services Australia Limited), in its role as the security trustee for securities granted by the Trustee, the Company, the Borrower, the Holding Trustee and the Holding Company to secure their obligations under the project's debt financing documents.

2.2 Contractual structure

The contractual structure of the project—inasmuch as the contracts affect or potentially affect public sector rights and obligations—is summarised in *Figure 3*.

The core contract is the **Lane Cove Tunnel Project Deed** ('the **Project Deed**') of 4 December 2003 between the RTA, the Trustee and the Company. This agreement sets out the terms under which:

- (a) **The Trustee had to and must finance, plan, design, construct and commission the motorway (i.e. the tunnels, the Falcon Street ramps and associated works, facilities and systems), plus other surface road, property and services works**, using its best endeavours to complete 'Stage 1'—the motorway and other specified works—by 9 May 2007.

All the other works ('Stage 2') were originally to be completed within 26 weeks of the completion of 'Stage 1', but the Trustee is now obliged to complete these works by 11 months after the opening of the tunnel and ramp works (i.e. by 25 February 2008).

Under the Project Deed construction site access had to be granted by the RTA, and must continue to be granted, as set out in the **Lane Cove Tunnel Deed of Agreement to Lease** ('the **Agreement to Lease**') of 4 December 2003 between the RTA and the Trustee.

The design, construction and commissioning tasks imposed on the Trustee under the Project Deed included railway-related obligations specified in (and also required under) the **Lane Cove Tunnel Rail Agreement** ('the **Rail Agreement**') of 9 December 2003 between RailCorp, the Trustee and the Company. The Rail Agreement was originally executed by RIC, the SRA and the OCGR, but in 2004 RailCorp took over all their rights and obligations under this agreement.

The terms of the Rail Agreement were supplemented by the **Lane Cove Tunnel Intragovernmental Agreement** ('the **Intragovernmental Agreement**') of 6 January 2004 between the RTA and RailCorp (originally executed by RIC, the SRA and the OCGR).

For its part, the RTA had and has an obligation to the Trustee to comply with commitments it made to the Hills Motorway Limited, Hills Motorway Management Limited and Perpetual Trustees Australia Limited, in the

LCT/M2 Interface Agreement of 14 November 2003, concerning Lane Cove Tunnel–Epping Road–M2 interface works and the operation of this interface.

As already indicated, the timing of the project's 'Stage 2' works, including changes to be made to Epping Road and Longueville Road through Lane Cove, and the details of several other Trustee and Company obligations during a 'transition' period following the completion of 'Stage 1' and opening of the motorway, were amended by the RTA on 1 March 2007, under arrangements described later in this report (sections 3.2.2, 3.2.3, 3.2.13, 3.2.10, 3.2.14, 3.3.1, 3.3.3, 3.3.7, 3.3.8, 3.5 and 3.6.2). An associated **Deed of Release: Lane Cove Tunnel Transition Arrangements** between the RTA, the Trustee and the Company ('the **Transition Deed of Release**'), which was also dated 1 March 2007 but took effect only on 16 March 2007 (see section 2.3), sets out arrangements for the RTA to compensate the Trustee and the Company and releases the RTA from claims by the Trustee and the Company concerning the effects of the 'transition changes' on the project.

The Trustee's performance of its planning, design, construction and commissioning obligations to the RTA under the Project Deed have been and will continue to be independently verified by the Independent Verifier. The terms on which the Independent Verifier's duties must be carried out are set out in the Project Deed, the **Lane Cove Tunnel Deed of Appointment of Independent Verifier** of 4 December 2003, between the RTA, the Trustee, the Company, the Security Trustee and the Independent Verifier, and a deed poll made by the Independent Verifier on 4 December 2003, originally in favour of RIC, the SRA and the OCGR and now in favour of RailCorp ('the **IV Deed Poll**').

The Trustee has satisfied and will continue to satisfy its planning, design, construction and commissioning obligations under the Project Deed through the performance by the Contractors of their obligations to the Trustee and the Company under the **Lane Cove Tunnel Project Design and Construction Deed** ('the **D&C Contract**') of 4 December 2003.

The Contractors' performance of these obligations has been guaranteed to the Trustee and the Company by the Contractor Guarantor under a **Lane Cove Tunnel Parent Company Guarantee and Indemnity** ('the **D&C Guarantee**') of 4 December 2003 between the Construction Guarantor, the Trustee and the Company.

The Independent Verifier has verified and will continue to independently verify the Contractors' performance under the D&C Contract in accordance with terms set

out in the **Sub Deed of Appointment of Independent Verifier** of 4 December 2003 between the Trustee, the Company, the Contractors, the Operator, the Security Trustee and the Independent Verifier:

The Trustee, the Company, the Contractors and the Operator have entered into a **Co-operation Deed for the Lane Cove Tunnel** ('the **Co-operation Agreement**'), dated 4 December 2003, which sets out measures aimed at ensuring the Contractors' performance of their obligations under the D&C Contract does not hinder the Operator's performance of its obligations to the Trustee and the Company under the **Lane Cove Tunnel Project Operation and Maintenance Agreement** ('the **O&M Agreement**') of 4 December 2003, between the Trustee, the Company and the Operator (see (b) below), and *vice versa*.

Should the Project Deed be terminated by the RTA during the project's remaining design and construction period, under the **Contractors' Side Deed** of 4 December 2003, between the RTA, the Trustee, the Company, the Contractors, the Contractor Guarantor and the Independent Verifier; and the **Operator's Side Deed** of 4 December 2003, between the RTA, the Trustee, the Company, the Operator, the Operator Guarantor and the Independent Verifier; the RTA will be able effectively to step into the shoes of:

- The Trustee and the Company under the D&C Contract, the D&C Guarantee, the O&M Agreement, a **Lane Cove Tunnel Parent Company Guarantee and Indemnity** ('the **O&M Guarantee**') of 4 December 2003, under which the Operator Guarantor has guaranteed the Operator's performance of its obligations to the Trustee and the Company under the O&M Agreement (see (b) below), and the Co-operation Agreement, and
- The Trustee, the Company and the Security Trustee under the Sub Deed of Appointment of Independent Verifier;

so that:

- Independently verified design and construction work by the Contractors may continue directly for the RTA, and
- Subsequently, independently verified operational, maintenance, repair and asset renewal work by the Operator may be undertaken directly for the RTA,

in each case with the backing of the relevant parent company guarantee.

(b) The Company must operate, maintain and repair the motorway components of the project and maintain

and repair the associated surface road and property works and specified services, and the Trustee must undertake specified asset renewals, from the date of completion of the 'Stage 1' works (20 March 2007) until 9 January 2037 or any earlier termination of the Project Deed.

The operational, maintenance and repair tasks to be carried out by the Company and the asset renewals to be carried out by the Trustee under the Project Deed include tasks specified in the Rail Agreement.

The performance by the Company and the Trustee of their operational, maintenance, repair and asset renewal obligations to the RTA will be independently verified by the Independent Verifier during the first two years of operations, under terms set out in the Project Deed, the Deed of Appointment of Independent Verifier and the IV Deed Poll.

The Company and the Trustee will satisfy their operational, maintenance, repair and asset renewal obligations to the RTA and RailCorp through the performance by the Operator of its obligations to the Company and the Trustee under the **Lane Cove Tunnel Project Operation and Maintenance Agreement** ('the **O&M Agreement**') of 4 December 2003.

As already indicated, the Operator's performance of these obligations has been guaranteed to the Company and the Trustee by the Operator Guarantor under a **Lane Cove Tunnel Parent Company Guarantee and Indemnity** ('the **O&M Guarantee**') of 4 December 2003, between the Operator Guarantor, the Company and the Trustee.

During the first six months of operations the Independent Verifier will independently verify the Operator's performance under the O&M Agreement in accordance with terms set out in the Sub Deed of Appointment of Independent Verifier:

The Co-operation Agreement sets out measures designed to ensure the Operator's performance of its obligations under the O&M Agreement will not hinder the Contractors' performance of their obligations to the Trustee and the Company under the D&C Contract (such as their defect rectification obligations), and *vice versa*.

Should the Project Deed be terminated by the RTA during the project's operational phase, under the **Operator's Side Deed** of 4 December 2003, between the RTA, the Company, the Trustee, the Operator, the Operator Guarantor and the Independent Verifier; the RTA will be able effectively to step into the shoes of the

Company and the Trustee under the O&M Agreement and the O&M Guarantee, and the Company, the Trustee and the Security Trustee under the Sub Deed of Appointment of Independent Verifier, so that the operational phase work of the Operator may continue directly for the RTA, with independent verification (if still relevant) and with the backing of the O&M Guarantee.

If the Contractors' obligations under the D&C Contract have not been completed, under the Contractors' Side Deed and the Operator's Side Deed the RTA may also step into the shoes of the Trustee and the Company under the D&C Contract, the D&C Guarantee and the Co-operation Agreement, so that independently verified design and construction work by the Contractors may continue directly for the RTA, again with the backing of the D&C Guarantee.

- (c) **The Company may collect tolls** from users of the Lane Cove Tunnel and the north-facing Falcon Street ramps, keep these tolls and impose administrative charges on users whose vehicles are not fitted with electronic tolling transponders.

Under a **Deed of Accession to the Memorandum of Understanding Electronic Toll Collection** ('the **Electronic Tolling Accession Deed**') of 24 March 2004, between the RTA, the Company, SWR Operations Pty Limited, Interlink Roads Pty Limited, The Hills Motorway Limited, Queensland Motorways Limited, Cross-City Motorway Pty Limited, WSO Co Pty Limited and CityLink Melbourne Limited, the Company became a party to an existing **Memorandum of Understanding: Management of Electronic Tolling on Tollroads** ('the **Electronic Tolling MoU**'), between all the other parties to the Accession Deed, concerning the interoperability of tolling systems on Sydney, Brisbane and Melbourne tollroads. ConnectEast Pty Limited subsequently became another party to this Electronic Tolling MoU on 18 December 2005.

A **Service Level Agreement for the Provision of Toll Compliance Services** between the RTA and the Company, executed on 1 December 2006 ('the **Toll Compliance SLA**'), sets out arrangements for the RTA to provide paid services to the Company to assist its enforcement of its tolls while ensuring full compliance with the requirements of NSW privacy legislation.

- (d) **The Trustee and the Company must hand over the motorway components of the project to the RTA on 9 January 2037 or upon any earlier termination of the Project Deed.**

Some of the rights and obligations of the RTA, the Trustee and the Company under the Project Deed are subject to restric-

tions or additional process requirements under the **Lane Cove Tunnel RTA Consent Deed** of 4 December 2003 between the RTA, the Trustee, the Company, the Borrower and the Security Trustee ('the **RTA Consent Deed**').

Following the completion of the 'Stage 1' works on 20 March 2007 the RTA must:

- Lease the motorway land—the tunnel strata, associated surface areas of land and the north-facing Falcon Street ramps—to the Trustee, under a **Motorway Stratum Lease**, until 9 January 2037 or any earlier termination of the Project Deed. This lease must take the form of a draft lease annexed to the Agreement to Lease.
- Grant the Trustee a license to access defined maintenance areas, again in accordance with the Agreement to Lease.

In turn, the Trustee must:

- Sublease the leased land to the Company under a **Motorway Stratum Sublease**, which must take the form of a draft sublease annexed to a **Deed of Agreement to Sublease (Lane Cove Tunnel)** ('the **Agreement to Sublease**') of 9 December 2003 between the Trustee and the Company, and
- Grant the Company a sub-licence to access the defined maintenance areas, again in accordance with the Agreement to Sublease.

Under the **Lane Cove Tunnel RTA Security** of 4 December 2003 between the RTA, the Trustee, the Company and the Borrower ('the **RTA Security**'), the obligations of the Trustee, the Company and the Borrower to the RTA under the Project Deed, the Agreement to Lease, the Motorway Stratum Lease, the Deed of Appointment of Independent Verifier, the Contractors' Side Deed, the Operator's Side Deed, the RTA Security, the RTA Consent Deed and all other project contracts to which the RTA is a party are secured by fixed and floating charges over their assets, undertakings and rights.

Priorities between these RTA securities and securities held by the project's debt financiers are governed by the **RTA Consent Deed**, which also records the consents of the RTA and the Security Trustee to each others' securities and 'step in' rights under the project contracts and regulates the RTA's enforcement of its securities under the RTA Security.

A **Lane Cove Tunnel Deed of Guarantee** of 4 December 2003 ('the **PAFA Act Deed of Guarantee**'), between the Minister for Roads (on behalf of the State of NSW), the RTA, the Trustee, the Company and the Security Trustee, provides a guarantee by the State of NSW, in accordance with the Public Authorities (Financial Arrangements) Act 1987, of the RTA's performance of its obligations under the Project Deed, the Agreement to Lease, the Motorway Stratum Lease, the Deed of Appointment of Independent Verifier, the Contractors' Side Deed, the Opera-

tor's Side Deed, the RTA Security, the RTA Consent Deed and any other documents approved by the NSW Treasurer in the future.

2.3 Conditions precedent

2.3.1 Original project contracts

Under their terms, the Project Deed, the RTA Consent Deed, the Rail Agreement, the Agreement to Lease, the Deed of Appointment of Independent Verifier and the IV Deed Poll, along with several other project contracts to which the RTA is not a party, did not become binding until:

- The PAFA Act Deed of Guarantee had been executed. This condition precedent was satisfied on 4 December 2003.
- All the other major original project contracts, other than the Motorway Stratum Lease, the Motorway Stratum Sublease and mortgages of these leases, had been executed in a form satisfactory to the RTA and all of their conditions precedent—other than those relating to the satisfaction of the Project Deed's own conditions precedent—had been satisfied or waived. This condition precedent was satisfied on 9 December 2003.
- The Minister for Roads had declared specified parts of the Lane Cove Tunnel project—the tunnel strata, sections of the associated approach roadways, the sites for tunnel ventilation structures and the motorway's control centre and the sites for the north-facing Falcon Street ramps—as a tollway, in accordance with section 52 of the Roads Act, and had directed the RTA to act as the roads authority for this tollway, in accordance with section 63 of the Roads Act. This condition precedent was satisfied on 21 November 2003, with the gazettal of a tollway declaration by the Minister for Roads.
- All other necessary Ministerial consents and approvals, including the Treasurer's consent under section 20 of the Public Authorities (Financial Arrangements) Act, had been obtained. This condition precedent was satisfied on 27 November 2003.
- The RTA had received two of several security bonds to be provided to it by the Trustee and the Company under the Project Deed. This condition precedent was satisfied on 9 December 2003.
- The Trustee and the Company had effected insurance policies covering the Trustee's design, construction and commissioning works, as specified in the Project Deed, and had provided certified copies of these policies to the RTA. This condition precedent was satisfied on 3 December 2003.
- The RTA had received certified copies of ruling(s) on the project from the Australian Taxation Office, in a form accept-

able to the RTA, concerning the applicability of sections 51AD and Division 16D of Part III of the Income Tax Assessment Act (Cth). These rulings were issued on 27 November 2003, and the condition precedent was satisfied when the RTA received copies on 3 December 2003.

- The RTA had received the private sector parties' 'base case financial model' for the project, an associated statement by the Trustee and an audit of this 'base case financial model', to the satisfaction of the RTA, by an auditor acceptable to the RTA. This condition precedent was satisfied on 9 December 2003.
- The RTA had received certified copies of Foreign Investment Review Board approvals of any foreign ownership of the Trustee, the Company, the Holding Trustee, the Holding Company or the Borrower. The necessary approvals were granted on 24 November 2003 and the condition precedent was satisfied when the RTA received copies on 28 November 2003.
- The Director General of the NSW Department of Infrastructure, Planning and Natural Resources had approved the use of a mid-tunnel access site at 130–132 Epping Road, instead of a previously proposed site in Moore Street south of Epping Road, in accordance with one of the conditions of the Minister for Planning's 3 December 2002 approval of the Lane Cove Tunnel project. This condition precedent was satisfied on 3 December 2003.

In addition, under the terms of the RTA Consent Deed some of its provisions did not become binding until 'financial close', as defined in the project's debt financing documents. This condition precedent was satisfied on 9 December 2003.

Accordingly, the Project Deed, the RTA Consent Deed, the Rail Agreement, the Agreement to Lease, the Deed of Appointment of Independent Verifier and the IV Deed Poll became binding on 9 December 2003. (The other original (2003) contracts involving public sector parties have been binding since their dates of execution.)

On the same date, in accordance with the Project Deed, the Trustee paid the RTA a 'development fee' of \$79,301,000 plus GST.

Part of this money has been and will be used by the RTA to help fund its costs on the project, including the costs of several activities specified in the RTA's *Request for Proposals* of 26 July 2002 (see section 1.2.2), such as the RTA's environmental assessments, feasibility and traffic studies, the obtaining of information for the project and land acquisitions. Other RTA activities which have been or will be funded from the payment include the RTA's concept design development and community consultation programs (see section 1.2.1), the project's planning approval processes, the RTA's future community consultation and plan-

ning approval compliance activities, other RTA project procurement and project management processes and miscellaneous minor RTA works.

2.3.2 Subsequent contracts and contract changes

The Toll Compliance SLA of 1 December 2006 and miscellaneous changes made by the RTA to the scope and timing of the project's works, as detailed in section 3.2.2 below, took effect on the dates they were executed.

However, the Transition Deed of Release, executed on 1 March 2007, did not become binding until:

- The NSW Treasurer had confirmed his approval of the project's joint financing arrangements, as amended by the changes directed by the RTA on 1 March 2007 (see section 3.2.2) and the Transition Deed of Release, under section 20(1) of the Public Authorities (Financial Arrange-

ments) Act 1987. This condition precedent was satisfied on 1 March 2007.

- MBIA Insurance Corporation, the guarantor of the Borrower's loans, had consented to the changes directed by the RTA on 1 March 2007 and the execution of the Transition Deed of Release. This condition precedent was also satisfied on 1 March 2007.
- The Security Trustee had consented to the changes directed by the RTA on 1 March 2007 and the execution of the Transition Deed of Release, in accordance with the requirements of the RTA Consent Deed (see section 3.4.4). This condition precedent was satisfied on 16 March 2007.

Accordingly, the Transition Deed of Release took effect on 16 March 2007.

3 The Project Deed and associated interface, verification, lease and novation arrangements

3.1 General obligations on and acceptance of risks by the Trustee and the Company

The main obligations of **the Trustee** to the RTA under the Project Deed have been and are to:

- **Finance, plan, design, construct and commission** all the project's motorway, local road, property, services and temporary works.

The Trustee had to use its best endeavours to complete its **'Stage 1' works**, as defined in detailed *Scope of Works and Technical Criteria* documentation exhibited to the Project Deed and including all the motorway works, by 9 May 2007. In practice, these 'Stage 1' works were completed on 20 March 2007.

All the other works (the **'Stage 2' works**) were originally to be completed within 26 weeks of the completion of 'Stage 1', but as a result of RTA-requested changes described in section 3.2.2 below the Trustee must now complete these works by 11 months after the opening of the tunnel and ramp works (i.e. by 25 February 2008).

- Undertake specified **asset renewals**, involving refurbishments, replacements and upgradings as set out in the *Scope of Works and Technical Criteria* documentation, at specified intervals between the completion of the 'Stage 1' works and 9 January 2037 or any earlier termination of the Project Deed.
- **Yield possession** of the motorway to the RTA on 9 January 2037 or upon any earlier termination of the Project Deed.

The main obligations of **the Company** to the RTA under the Project Deed are to:

- **Operate, maintain and repair** the motorway from the completion of the 'Stage 1' works until 9 January 2037 or any earlier termination of the Project Deed.
- **Maintain and repair** specified local road and property works, plus any of the project's services works not handed over to or maintained by organisations other than the RTA, throughout this period.
- **Yield possession** of the motorway to the RTA on 9 January 2037 or upon any earlier termination of the Project Deed.

The Trustee and the Company have unconditionally and irrevocably guaranteed each other's performance of their obligations to the RTA and RailCorp under the project's contracts, and each has agreed to indemnify the RTA and RailCorp for any loss or damage they suffer because of a failure by the other to perform these obligations.*

Subject to specific terms in the Project Deed and the Rail Agreement discussed in sections 3.2 to 3.5 below, the Trustee and the Company have accepted all the risks associated with the project, including:

- The risks associated with the costs of the project
- The risks that traffic volumes or project revenues may be less than expected
- Tax risks, and
- The risks that their works or operational and maintenance activities might be disrupted by the lawful actions of other government and local government authorities.

The Project Deed expressly acknowledges that the RTA has made no representations or promises concerning the motor-

* Under the Project Deed, these and other Project Deed, Agreement to Lease or Motorway Stratum Lease indemnities provided by the Trustee and the Company to the RTA are reduced—other than in the case of any legal liability of the RTA for the acts or omissions of the Trustee or the Company—to the extent that the RTA contributes to the indemnified claim or loss through an act or omission that is not in accordance with its rights or powers under the Project Deed, the Agreement to Lease or the Motorway Stratum Lease. Similarly, any indemnities provided by the RTA to the Trustee and/or the Company are reduced to the extent that any act or omission by them contributes to the indemnified claim or loss.

way's traffic levels. Similarly, the Rail Agreement acknowledges that RailCorp has made no representations or promises concerning its rail infrastructure facilities, including their condition or any contamination on these facilities, and is not responsible for the accuracy of any data or other information provided to the Trustee or the Company about the rail-related works or rail infrastructure facilities.

More generally, the Trustee and the Company have expressly acknowledged that:

- In entering the Project Deed they did not rely on any information, representations or documents provided or made by the RTA, and did not rely on the accuracy, adequacy, suitability or completeness of any RTA information, representations or documents
- In entering the Project Deed they did not rely on any representations or inducements by or on behalf of the RTA or the NSW Government, other than those in the original project contracts to which the RTA is a party
- No representations or inducements to enter any of the original project contracts to which the RTA is a party, or the Transition Deed of Release, had in fact been made by or on behalf of the RTA (or, in the case of the original contracts, the NSW Government), again with the exception of any express inducements in the contracts themselves, and
- They have not relied and will not rely on any data or other information provided or not provided to them by RailCorp about the rail-related works or RailCorp's rail infrastructure facilities, and in entering the Rail Agreement they relied entirely on their own investigations.

The Trustee and the Company have also indemnified the RTA against any claim or loss arising from their use or disclosure of 395 specified RTA information documents, even if these documents contained misleading information.

The Project Deed makes it clear, however, that the Trustee and the Company are not required to assume all the risks associated with the project. Some specific risks are allocated to or shared with the RTA, as discussed in sections 3.2 to 3.4 below, and if certain specified 'material adverse effect' circumstances arise the parties must negotiate in good faith with the aim of achieving a series of specified objectives, as described in section 3.5.

3.2 Design and construction

3.2.1 Scope of works

The works to be designed, constructed and commissioned by the Trustee comprised and comprise:

- The motorway itself, as specified in a *Scope of Works and Technical Criteria* exhibited to the Project Deed (in essence,

the tunnels, their immediate approach roads and the motorway control centre, including their associated ventilation, drainage, services, control systems, plant and equipment, and the north-facing Falcon Street ramps, including their associated services, control systems, plant and equipment)

- 'Property works' as specified in the *Scope of Works and Technical Criteria*
- 'Local road works', including adjustments to existing major and minor surface roads, footpaths, cycleways, open space and street landscaping and the construction of new pedestrian, cyclist, vehicle access, signage, lighting, street furniture, safety barrier and noise mitigation facilities, as specified in the *Scope of Works and Technical Criteria*
- 'Service works', to protect, adjust or enhance services infrastructure affected by the project, as specified in the *Scope of Works and Technical Criteria*
- Temporary works required only during the construction of the project
- M2 motorway interface works, as specified—in accordance with RTA commitments to The Hills Motorway Limited, Hills Motorway Management Limited and Perpetual Trustees Australia Limited in the LCT/M2 Interface Agreement—in a schedule to the Project Deed and in the Project Deed's *Scope of Works and Technical Criteria*, and
- Railway-related works as specified—in accordance with RTA commitments to RailCorp in the Intragovernmental Agreement—in the Rail Agreement and the Project Deed's *Scope of Works and Technical Criteria*.

The Project Deed's *Scope of Works and Technical Criteria* documents set out detailed site investigation and surveying requirements, quality assurance and project verification requirements, performance and fitness for purpose requirements, design standards, construction method requirements, safety requirements and community involvement requirements for the Trustee and the Company.

The Project Deed also imposed and imposes more general obligations on the Trustee to design and construct its works so that they were, are and will remain fit for their intended purposes and constructed with good workmanship and materials.

In addition, under the Rail Agreement the Trustee had general obligation to ensure its works:

- Did not reduce rail safety or damage rail infrastructure or other RailCorp property
- Met specified design and construction standards, and
- Complied with several more specific obligations aimed primarily at protecting rail safety.

3.2.2 Changes to the scope of works

General change provisions and procedures

The RTA could and may change the works to be designed and constructed by the Trustee under the Project Deed and/or require the Company to carry out a change in the works, including any addition to, omission from or demolition of the works, provided the change would not or will not adversely affect the use, patronage or capacity of the motorway or the Company's ability to levy or collect tolls.

Under these change arrangements, within 15 business days of receiving a 'change order' from the RTA, the Trustee and/or the Company must give the RTA detailed estimates of the likely costs or savings, details on the implications of the proposed change for the functional integrity of the works, performance standards, quality standards, the date of completion of the works and any other obligations affected by the change, and any other information requested in the 'change order'.

The RTA then has 15 business days to advise the Trustee and/or the Company whether it wishes to proceed with the proposed change.

If it decides to proceed, and the RTA agrees with the costings and advice provided by the Trustee and/or the Company, the RTA may notify them of this within this period and the change will take effect in accordance with the costings and advice they have provided (i.e. with the notified amended standards etc).

If the RTA disagrees with the costings and/or advice provided by the Trustee and/or the Company, the RTA may refer the matter for determination under dispute resolution procedures set out in the Project Deed, discussed in section 3.4.7 below. In the meantime, it may require the Trustee and/or the Company to implement the change, with the RTA paying them on the basis of their cost estimates during this period.

Changes to the scope of works may also be proposed by the Trustee and/or the Company, which may be required by the RTA to certify that their proposed changes will not adversely affect the functional integrity of the works, performance standards, quality standards, the date of completion of the works or any of their other obligations to the RTA.

The RTA has an absolute discretion whether to approve or reject any proposal by the Trustee and/or the Company for a change in the scope of works. If the RTA approves the proposed change, the Trustee or the Company (as relevant) must pay all the costs associated with the change, including those incurred by the RTA, unless the RTA agrees otherwise in writing.

If a change in the scope of works directed by the RTA increases the cost of the works to be designed and constructed by the Trustee, or if it subsequently increases the costs of the asset renewals to be carried out by the Trustee and/or the opera-

tional, maintenance and repair tasks to be carried out by the Company, the RTA must pay the Trustee and/or the Company:

- The costs reasonably incurred by the Trustee, the Company, the Holding Trustee, the Holding Company and the Borrower, as a group, as a result of the change, including any increased financing, construction, operating and maintenance costs
- Reasonable amounts associated with the overheads and profit margins of the Contractors and/or the Operator, as applicable, and
- If the change had prevented the Trustee from completing the 'Stage 1' works by 9 May 2007, the delay costs incurred by the Trustee, the Company, the Holding Trustee, the Holding Company and the Borrower, as a group, except to the extent that these costs could reasonably have been mitigated by the Trustee and its contractors.

These payments to the Trustee and the Company must be distributed between them in accordance with their joint directions to the RTA.

If a change in the scope of works directed by the RTA reduces the costs of the works to be designed and constructed by the Trustee, or if it subsequently reduces the costs of the asset renewals to be carried out by the Trustee and/or the operational, maintenance and repair tasks to be carried out by the Company, the RTA is entitled to receive all of the cost savings, including any acceleration savings and reductions in financing costs.

On the other hand, if cost savings arise from a change in the scope of works suggested by the Trustee and/or the Company and agreed to by the RTA, the RTA is entitled to receive 50% of the actual cost savings or 50% of the cost savings as originally estimated by the Trustee and/or the Company when they proposed the change (whichever is the higher amount).

Under these arrangements,

- Unless otherwise agreed, any payments by the RTA to the Trustee and/or the Company must be made progressively, within ten business days of the end of each month during which the relevant work has been undertaken.
- Any payments by the Trustee to the RTA of some or all of any design and construction cost savings or asset renewal cost savings must either be made progressively, within ten business days of the end of each month during which the omitted work would otherwise have been undertaken, or set off against any change costs payable by the RTA.
- Any payments by the Company to the RTA of some or all of any operational, maintenance and repair cost savings must be made in a manner and at a time to be agreed between the RTA and the Company. If they cannot agree,

the manner and timing of these payments must be determined by an expert, under the Project Deed's dispute resolution procedures described in section 3.4.7, who must ensure that the timing of the payments will not adversely affect:

- The ability the Borrower had, prior to the change, to make payments under the project's debt financing agreements, or
- The ability the Trustee, the Company, the Holding Trustee, the Holding Company and the Borrower had, collectively and prior to the change, to give the project's equity investors—all notionally treated as if they were among the project's initial equity investors—after-tax returns equal to the lower of the returns they would have received but for the change and the returns predicted in the private sector participants' 'base case financial model' for the project, submitted to the RTA on 9 December 2003.

Two initial, 'pre-agreed' changes

On 4 December 2003 the RTA formally proposed two changes in the scope of the Trustee's design and construction works by issuing two 'pre-agreed' 'change orders':

- Modifications to the design of the Falcon Street ramps and intersections, including relocations of the tolled north-facing ramps and a new untolled south-facing off-ramp to make it easier for northbound traffic on the Warringah Freeway to access Military Road (**Lane Cove Tunnel Change Order (Falcon Street Intersection)**), and
- Deletion of a requirement to transplant a large, mature fig tree on the southern side of Epping Road about 60 metres east of the Lane Cove River and the inclusion of a requirement simply to remove this tree (**Lane Cove Tunnel Change Order (Mature Fig Tree)**).

Both of these 'change orders' were made after the RTA had received costings and other advice from the Trustee and before the arrangements described above had become binding, so they adopted slightly different timing, response and payment requirements.

Under the Falcon Street Intersection change order,

- The Trustee was not required to provide further advice to the RTA
- The normal requirement for the RTA to decide within 15 business days whether to proceed with the proposed change was replaced by a deadline of 9 June 2004
- If the RTA decided to proceed with the change,
 - The RTA would have to procure the revocation of the initial tollway declaration of 21 November 2003

and the issuing of a new tollway declaration, covering the revised north-facing ramps, within eight weeks of the RTA's notification of the Trustee that it wished to proceed with the change, and

- The RTA would have to pay the Trustee \$11,476,437 plus GST (\$548,224 by the end of the month in which the RTA notified the Trustee that it wished to proceed, and the balance over 22 months, between August 2004 and June 2006, in accordance with a schedule to the change order), and
- If the RTA did not notify the Trustee by 9 June 2004 that it wished to proceed with the proposed change, the Trustee would have had to pay the RTA a 'fee' of \$1,882,000, plus GST, on 9 March 2006.

On 17 March 2004 the RTA advised the Trustee and the Company that it had decided to proceed with the change proposed in the Falcon Street Intersection 'change order', in accordance with these special arrangements, and on 8 April 2004 the portion of the original tollway declaration concerning the Falcon Street ramps was revoked and a new tollway declaration by the Minister for Roads was gazetted.

Similarly, under the Mature Fig Tree 'change order':

- The Trustee was not required to provide further advice to the RTA
- The normal requirement for the RTA to decide within 15 business days whether to proceed with the proposed change was replaced by a deadline of 9 February 2004, and
- If the RTA decided to proceed with the change, the Trustee was required to pay the RTA \$442,000 plus GST, half of it on 9 November 2004 and half on 9 December 2004.

On 13 January 2004 the RTA advised the Trustee and the Company that it had decided to proceed with the change proposed in the Mature Fig Tree change order, in accordance with these special arrangements.

Changes during the design and construction of 'Stage 1'

During the design and construction of the motorway and the other 'Stage 1' works the Project Deed's general change provisions were utilised by the RTA to direct four additional sets of changes to the scope of the trustee's design and construction works:

- On 15 June 2005 the RTA issued and the Trustee and the Company accepted a 'change order' for 22 detailed design and construction changes which had been agreed between the parties on 18 May 2005. The RTA subsequently paid the Trustee and the Company \$2,750,000, plus GST, to cover the associated additional costs.

- On 12 May 2006 the RTA issued a 'change order' requiring cover plates for route numbers on directional signage. This change was confirmed by the RTA on 19 May 2006, when it agreed to a response issued by the Trustee and the Company on 12 May 2006, and the RTA subsequently paid \$50,500, plus GST, to cover the associated additional costs.
 - On 31 August 2006 the RTA issued a 'change order' for a further eleven detailed design and construction changes which had been agreed between the parties on 18 May 2005 and 14 and 24 July 2006. This 'change order' was accepted by the Trustee and the Company on 1 September 2006, and the RTA subsequently paid the Trustee and the Company \$1,713,372, plus GST, to cover the associated additional costs.
 - On 21 February 2007 the RTA issued a 'change order' for a further six detailed design and construction changes which had been agreed between the parties on 12 February 2007. This 'change order' was accepted by the Trustee and the Company on 22 February 2007, and the RTA subsequently paid the Trustee and the Company \$633,916, plus GST, to cover the associated additional costs.
- The motorway's off-ramp from the eastbound tunnel to the eastbound Gore Hill Freeway transit lane and a ramp from the Pacific Highway to the eastbound extension of Longueville Road (and thence the eastbound Gore Hill Freeway) would both remain closed, and
 - The lanes that will ultimately become transit lanes on the Gore Hill Freeway would operate as general traffic lanes
- During the period between the date five months after the opening of the motorway tunnels for traffic and a date no later than eleven months after the tunnels' opening, all of the Trustee's other 'Stage 2' works would be constructed in the forms originally envisaged, with the bus lanes along Epping and Longueville Roads between Mowbray Road and the Pacific Highway having to be operational from the date ten months after the opening of the tunnels
 - All of the Trustee's 'Stage 2' works would have to be completed within eleven months of the tunnels' opening, and
 - The closed motorway and Pacific Highway ramps and the Gore Hill Freeway's transit lanes would be opened and operational within eleven months of the tunnels' opening.

Changes to the timing of the 'Stage 2' works and the execution of the Transition Deed of Release

On 15 December 2006 the RTA issued another 'change order' (the **Lane Cove Tunnel Transition to Stage 2 Works Change Order**), proposing changes to the timing of the Trustee's 'Stage 2' works, and deferrals of the opening of selected motorway ramps and the Gore Hill Freeway transit lanes, in line with 'transition option 6' of a December 2006 *Lane Cove Tunnel Surface Traffic Modifications Environmental Assessment Report* prepared by the RTA.

As already indicated, the Trustee was originally required to use its best endeavours to complete all of its 'Stage 2' works within 26 weeks of the completion of 'Stage 1'. Under the 'transition option 6' changes proposed by the RTA, which are described in later documents as '**the transition changes**',

- During the period between the completion of 'Stage 1' and the date five months after the opening of the motorway tunnels for traffic,
 - The only 'Stage 2' works carried out would be the construction of the new Longueville Road/Parklands Avenue bus interchange and a new pedestrian bridge across Longueville Road at this location, replacing the existing Kimberley Avenue pedestrian bridge
 - Existing traffic arrangements on Epping and Longueville Roads through Lane Cove would continue
- The RTA compensated them for the estimated costs of preparing for and implementing the proposed 'transition changes' and paid them an additional amount reflecting the likely effects on the motorway's patronage, as detailed in their notice
- Suitable amendments were made to their contractual obligations affected or rendered impossible by the 'transition changes', again as detailed in their notice, and
- A satisfactory Deed of Release was executed.

On 26 February 2007—following the modification of the project's planning approval by the Minister for Planning, Mr Frank Sartor, on 21 February 2007, so as to permit the proposed 'transition option 6' changes and amend several other conditions of the planning approval—the Trustee and the Company notified the RTA of their formal response to the RTA's 'change order' of 15 December 2006.

The Trustee and the Company advised that although they were not contractually obliged to accept the proposed changes, because they would adversely affect the use, patronage and/or capacity of the motorway, they would be willing to do so, provided:

On 1 March 2007 the RTA responded to this notice by:

- Formally advising the Trustee and the Company, under the Project Deed's general change procedures described above, that it agreed with the matters stated in their notice, and

- Executing the Transition Deed of Release with the Trustee and the Company.

As already discussed in section 2.3, the Transition Deed of Release became effective on 16 March 2007.

The combined effects of these responses were to:

- Oblige the Trustee and the Company to implement the 'transition changes', notwithstanding any potential adverse effects on the use, patronage and/or capacity of the motorway
- Amend or qualify a series of related obligations of the Trustee and the Company under the Project Deed, including the date for completion of the Trustee's 'Stage 2' works (now 25 February 2008), the project's 'defects correction periods' (see section 3.2.14), the Company's obligations to keep all of the motorway's traffic lanes and ramps open except in specified circumstances (see sections 3.2.13 and 3.3.1), and the Trustee's obligations for traffic management, incident responses and road maintenance on Epping and Longueville Roads prior to the deferred commencement of most of its 'Stage 2' works (see section 3.2.10)
- Require the RTA to pay the Trustee and the Company \$6,108,906, excluding GST, within ten business days of the opening of the motorway (i.e. by 5 April 2007), to compensate them for the costs they incurred in investigating the 'transition changes' and the costs they expect to incur in implementing these changes
- Require the RTA, again within ten business days of the opening of the motorway (i.e. by 5 April 2007), to pay the Trustee and the Company \$18,891,094, excluding GST, in return for their releasing the RTA from any liability the RTA would otherwise have to them as a result of the 'transition changes', including the RTA's liabilities under the Project Deed (such as the renegotiation provisions described in section 3.5 below) but *excluding*:
 - Any RTA liabilities under section 52 of the Trade Practices Act 1974 (Cth) or section 42 of the Fair Trading Act 1987 (NSW) for misleading or deceptive conduct
 - The RTA's obligations under the Transition Deed of Release to make the compensation payments themselves
 - Any RTA liabilities (other than under the renegotiation provisions) for the additional costs of any extension of specified air quality monitoring, as required under condition 166 of the project's amended planning consent, beyond the originally required period of 12 months from the opening of the tunnel (under the 21 February 2007 modifications to the planning

approval, this monitoring might be extended by five months)

- Any RTA liabilities arising from a legal challenge to the project's planning approval or an associated environmental assessment, expressly including any challenges associated with the 1 March 2007 'transition changes' and/or the 21 February 2007 modifications to the planning approval (see sections 3.2.3 and 3.3.3), and
 - Any RTA liabilities arising from a native title claim (see section 3.2.7)
- Amend the forecasts of gross toll revenues used to calculate the Trustee's rent payments to the RTA under the Motorway Stratum Lease (see section 3.3.7), but only until 30 June 2010, and
 - Expressly confirm the right of the Company to operate the motorway without tolls, should it choose to do so, during the first month after the opening of the motorway.

3.2.3 Compliance with and amendments and challenges to the project's planning approval

The respective responsibilities of the RTA, the Trustee and the Company for ensuring the project complies with the conditions of the project's planning approval are detailed in a schedule to the Project Deed.

The Trustee has warranted to the RTA that those aspects of the *Scope of Works and Technical Criteria* exhibited to the Project Deed which are relevant to its design and construction obligations comply with the original planning approval.

If the project's planning approval is modified in any way or a new planning approval is issued—other than as a result of a breach of the planning approval by the Trustee, the Company or their contractors or a change to the project proposed by the Trustee and/or the Company and agreed to by the RTA—and this necessitates a change to the works (other than temporary, construction-phase-only works and processes) or a change to the motorway or its operation,

- The change must be addressed as if the RTA had directed the change by issuing a 'change order' under the arrangements described in section 3.2.2 (in the case of the planning approval modifications of 21 February 2007, a 'change order' had already been issued on 15 December 2006, as just described in section 3.2.2)
- The Trustee and the Company must take all reasonable steps to mitigate the costs of the change, comply with all reasonable RTA directions concerning the change and its consequences and ensure their contractors do likewise, and

- In some circumstances the renegotiation provisions described in section 3.5 may apply.

If there is a legal challenge to the project's environmental assessment(s) or planning approval or *State Environmental Planning Policy No 63—Major Transport Projects* (29 January 2001), the Trustee must continue to perform its obligations to the RTA under the project contracts unless it is ordered not to, or is ordered to change the way it does so, by a court. If a court does issue such an order;

- The Trustee must take all reasonable steps to mitigate the resultant costs, comply with all reasonable RTA directions concerning the legal challenge and its consequences, and ensure the Company and the Contractors do likewise.
- The RTA must pay the Trustee for any reasonable costs directly incurred as a result of the court order—including any reasonable interest, fees or other amounts payable under the project's debt financing arrangements during the delay—by:
 - The Contractors (other than any amounts payable, except on an arms-length, commercial basis, to the Trustee, the Company, the Holding Trustee, the Holding Company, the Borrower, their related corporate entities or a related entity of a Contractor), and, without double-counting,
 - The Trustee, the Company, the Holding Trustee, the Holding Company and the Borrower (other than any amounts payable to each other, their related corporate entities, a Contractor or a related entity of a Contractor),

but *not* for:

- Any delay costs if the court order did not prevent the completion of the 'Stage 1' works by 9 May 2007,
- Any costs incurred by a Contractor, the Trustee, the Company, the Holding Trustee, the Holding Company or the Borrower as a result of a failure by the Trustee to mitigate the costs or comply with RTA directions, or
- Any costs resulting from the initiation or upholding of the legal challenge or issuing of the court order because of a breach of the Project Deed by the Trustee or the Company.
- In some circumstances the renegotiation provisions described in section 3.5 may apply.

As indicated in section 3.2.2, the releases provided by the Trustee and the Company in the Transition Deed of Release do not apply to any liabilities the RTA may have to them (other than under the renegotiation provisions described in section

3.5) arising from a legal challenge to the planning approval or an associated environmental assessment, expressly including any challenges associated with the 1 March 2007 'transition changes' to the project and/or the 21 February 2007 modifications to the planning approval.

3.2.4 Design obligations and intellectual property

The Trustee's principal design obligations have been and are to satisfy the requirements of the *Scope of Works and Technical Criteria* and ensure the works will be, and will remain, fit for their intended purposes. Additional requirements, intended to protect railway infrastructure, operations and safety and including a requirement to obtain RailCorp's approval of any changes in the design of the project's railway-related works, were set out in the Rail Agreement.

The Trustee had to and must give the RTA, RailCorp and the Independent Verifier the opportunity to comment on and monitor its design development and documentation, which had to and must comply with timeframes set out in a documentation schedule appended to the *Scope of Works and Technical Criteria*.

The design documentation for each discrete design element had to and must be certified by the Trustee and verified by the Independent Verifier as being suitable for construction and in compliance with the *Scope of Works and Technical Criteria*, including, in particular, its durability and design life requirements.

The Trustee and the Company have warranted to the RTA that at the time the Project Deed took effect on 9 December 2003 they owned or were otherwise entitled to use all the project's existing design documentation and everything else they will use for the project which is subject to any intellectual property rights. On that date ownership of and copyright in the existing design documentation owned by the Trustee and the Company passed to the RTA, and the RTA also automatically owns and has copyright in all the design documentation subsequently created by them for the project.

In the case of design documentation owned by others, the Trustee had to and must reasonably attempt to obtain ownership and grant the RTA an irrevocable, perpetual, royalty-free licence to use the documentation for all purposes associated with the project. In the case of other proprietary project documentation owned by others, the Trustee and the Company had to and must reasonably attempt to obtain a right to use this documentation and had to and must again grant the RTA an irrevocable, perpetual, royalty-free licence to use the documentation for all purposes associated with the project.

The Trustee and the Company had to and must obtain the irrevocable written consent of all authors of the project's 'artistic works', as defined in the Copyright Act 1968 (Cth), to any non-attribution or false attribution of these works by the RTA,

the Trustee or the Company and any RTA, Trustee or Company repairs, maintenance, additions refurbishments, alterations, relocations, destructions or replacements affecting these works.

3.2.5 Construction access

The RTA had to and must give the Trustee, the Contractors and their contractors, agents and employees access to construction sites and temporary works areas defined in three *Access Schedules* exhibited to the Project Deed, under arrangements set out in the Project Deed and the Agreement to Lease. The RTA was and is liable for the costs of any land acquisitions needed for these defined construction sites and temporary works areas.

If the RTA failed or fails to provide access in accordance with the Agreement to Lease, the Trustee had to or must take all reasonable steps to mitigate any resultant delay or other impacts, including changes to its construction sequences and methodologies.

The Rail Agreement set out more specific (and heavily safety-related) requirements concerning access by the Trustee and the Company to rail infrastructure facilities on and adjacent to the North Shore railway line. On each occasion RailCorp was to determine the type of access required and decide whether access should be granted, and the Trustee or the Company had to pay RailCorp an 'access fee' and meet the costs of setting up the access, any bussing operations if trains were not able to operate and any site protection requirements.

The Trustee had to give the RTA and The Hills Motorway Limited at least 20 business days' notice of the expected commencement of any works on the M2 motorway or other areas leased under the contracts for the M2 motorway, and at least three business days' notice of the actual commencement of this work. The RTA then had to procure the granting of access to these areas by The Hills Motorway Limited and the responsible entity and custodian of the Hills Motorway Trust, in line with their obligations to the RTA under the LCT/M2 Interface Agreement.

If the Trustee required or requires additional land in order to construct the project's works, it had to or must procure this 'extra land' (or the use of this land) itself, at its own cost and at its sole risk, and ensure the use and rehabilitation of this 'extra land' was or is satisfactory to the relevant land owners and lessees, the RTA and all relevant government and local government authorities.

Until the completion of all construction the RTA may access the construction sites and all other areas relevant to the works during business hours or on reasonable notice (or immediately during emergencies), subject to normal safety and security constraints, in order to observe the progress of the works, monitor the Trustee's compliance with the Project Deed and exercise its other rights and obligations under the contracts.

3.2.6 Latent conditions and contamination

The Trustee and the Company accepted and continue to accept all the risks of losses or delay associated with the physical conditions and characteristics of the land used for the project, its surroundings and structures on the land, including water and sub-surface conditions and any hazardous contamination.

They have also confirmed that the RTA has made no representations or promises about the condition of this land.

The Trustee and the Company had to and must remove and/or treat any contamination, remediate the land at their own expense and indemnify the RTA against any claims or losses arising from the contamination.

3.2.7 Native title claims

If there is a native title claim over any part of any construction site or temporary works area, the Trustee must continue to perform its design and construction obligations unless it is ordered not to by the RTA, a court or tribunal or any other legal requirement, in which case:

- The Trustee and the Company must take all reasonable steps to mitigate the resultant costs, comply with all reasonable RTA directions concerning the native title claim and its consequences, and ensure the Contractors do likewise.
- The RTA must pay the Trustee and the Company for any reasonable costs directly incurred as a result of the order or requirement—including any reasonable interest, fees or other amounts payable under the project's debt financing arrangements during the delay—by:
 - The Contractors (other than any amounts payable, except on an arms-length, commercial basis, to the Trustee, the Company, the Holding Trustee, the Holding Company, the Borrower, their related corporate entities or a related entity of a Contractor), and, without double-counting,
 - The Trustee, the Company, the Holding Trustee, the Holding Company and the Borrower (other than any amounts payable to each other, their related corporate entities, a Contractor or a related entity of a Contractor),

but *not* for:

- Any delay costs if the order or requirement did not prevent the completion of the 'Stage 1' works by 9 May 2007, or
- Any costs incurred by a Contractor, the Trustee, the Company, the Holding Trustee, the Holding Company or the Borrower as a result of a failure by the Trustee or the Company to mitigate the costs or comply with RTA directions.

These payments to the Trustee and the Company must be distributed between them in accordance with their joint directions to the RTA.

- In some circumstances the renegotiation provisions described in section 3.5 may apply.
- If the Trustee is prevented from carrying out its works for more than six months, the RTA may terminate the Project Deed, in its absolute discretion, by giving the Trustee and the Company a notice to this effect (see section 3.6.5).

3.2.8 Environmental requirements and complaints

As already indicated, the Trustee had to and must comply with the conditions of the project's planning approval—many of which were and are intended to reduce construction-phase environmental impacts—in accordance with an allocation of responsibilities detailed in a schedule to the Project Deed.

It also had to and must:

- Comply with other environmental requirements detailed in an appendix to the Project Deed's *Scope of Works and Technical Criteria*
- Prepare and comply with *Environmental Management Plans*, again as detailed in the Project Deed's *Scope of Works and Technical Criteria*
- Indemnify the RTA from and against any claim or loss if they fail to meet these obligations
- Obtain all other government and local government approvals required for the project
- Take precautions to prevent the removal of or damage to any archaeological or other artefacts from the sites, permit the RTA or any person authorised by the RTA to observe or examine any excavations, notify the RTA immediately if it discovers any artefacts and comply, at its own expense, with any resultant directions by any government authority
- Notify the RTA immediately of any complaints or threatened or actual legal proceedings concerning land contamination, any non-compliance by the Trustee with the planning approval or other environmental requirements, the Trustee's use or occupation of the land required for the project or any damage by the Trustee to third parties' property, and
- Resolve any such matters as soon as possible and keep detailed records of all complaints etc and its responses.

3.2.9 Third party claims

Under the Project Deed the Trustee had to and must indemnify the RTA against any claim or loss arising from damage or injury to others, including any liability for pure economic losses by third

parties as well as any liability for physical damage and/or injury and consequential economic losses.

Under the Rail Agreement the Trustee provided a similar indemnity to RailCorp, but this did not extend to losses caused by negligence by RailCorp or its contractors, agents or employees.

The Trustee had to and must, at its own cost, promptly repair any third party property damage caused by a breach of its obligations under the Project Deed or for which it was or is otherwise legally liable. If it failed or fails to do so, the RTA could or may carry out these repairs and recover its costs from the Trustee as a debt.

More specifically, the Trustee had to and must indemnify the RTA against any claim or loss arising from:

- Physical damage to the M2 motorway, any other damage to the property of The Hills Motorway Limited, Hills Motorway Management Limited or their contractors and subcontractors, or any injury to any person, arising out of the connection of the M2 to the Lane Cove Tunnel (via Epping Road) or any failure by the Trustee to comply with its M2 interface obligations under the Project Deed, and
- Its works under the Rail Agreement or any failure by the Trustee to comply with the Rail Agreement.

The Trustee also had to and must make payments to the RTA of:

- The amounts required for the RTA to reimburse The Hills Motorway Limited and Hills Motorway Management Limited, in accordance with the LCT/M2 Interface Agreement, for the reasonable costs they incurred or incur in obtaining third party engineering, legal and other advice on the Lane Cove Tunnel/ Epping Road/M2 interface, and
- Agreed amounts to enable the RTA to compensate The Hills Motorway Limited for M2 motorway and Epping Road lane closures associated with these interface works, as described in section 3.2.10 below.

3.2.10 Traffic management during construction

The Trustee was and is responsible for controlling, directing and protecting all traffic affected by the construction of the project, in accordance with detailed requirements set out in the Project Deed's *Scope of Works and Technical Criteria*, including a periodically updated *Traffic Management and Safety Plan*, and any directions by the RTA or other relevant authorities.

However, under the 'transition changes' described in section 3.2.2 the Trustee is not responsible for traffic management, incident responses or road maintenance on Epping and Longueville Roads prior to the generally deferred commencement of the relevant 'Stage 2' works.

Specific arrangements for the closure of M2 motorway lanes and/or lanes on Epping Road between Mowbray Road west and the M2 or for the imposition of reduced speed limits on these roadways during construction are detailed in a schedule to the Project Deed. This schedule also sets out payments to be made by the Trustee to the RTA when specified types of M2/Epping Road lane closures occur, so that the RTA may, in turn, make compensation payments, of the same amounts, to The Hills Motorway Limited, in accordance with the LCT/M2 Interface Agreement.

3.2.11 Project construction programs, plans, reports, reviews, inspections and rail safety procedures

An initial design and construction works program was exhibited to the Project Deed. This works program had to be (and must continue to be) progressively updated and detailed by the Trustee as set out in a documentation schedule appended to the Project Deed's *Scope of Works and Technical Criteria*.

In addition, under the Rail Agreement the Trustee had to submit a draft construction program to RailCorp by 3 March 2004 and then submit a finalised construction program to RailCorp at least four months before commencing any works affecting rail infrastructure.

Under the Project Deed an initial *Project Training Plan, Quality Plan, Project Management Plan, Environmental Management Plan, Design Plan, Construction Plan, Community Involvement Plan, Incident Response Plan, Occupational Health, Safety and Rehabilitation Management Plan* and *Traffic Management and Safety Plan* appended to the *Scope of Works and Technical Criteria* had to be (and must continue to be) developed, amended and updated by the Trustee throughout the design and construction works, again in accordance with detailed requirements specified in the Project Deed and the *Scope of Works and Technical Criteria*, and submitted to the RTA and the Independent Verifier.

The RTA may, but need not, review any of these project plans. The Trustee must promptly submit an amended project plan if the RTA notifies it within 15 business days that any of these plans does not comply with the Project Deed. The RTA may also order amendments or updating of a project plan if it has not been adequately updated as required or if it otherwise does not comply with the Project Deed.

The Trustee's compliance with its *Quality Plan, Environmental Management Plan* and *Occupational Health, Safety and Rehabilitation Plan* had to be (and must continue to be) independently audited, by an auditor acceptable to the RTA, at least every six months during the design and construction of the project, and independent audits of the Trustee's compliance with any of the project plans must also be carried out whenever this is reasonably requested by the RTA.

Similarly, under the Rail Agreement the Trustee had to:

- Prepare a *Safe Work Method Statement, a Risk Management Plan, an Environmental Management Plan, an Emergency Event Plan* and details on their designs and construction methodologies, have them verified as 'appropriate' by the Independent Verifier and submit these documents to RailCorp at least four months before commencing any works affecting rail infrastructure
- Comply with RailCorp rail safety requirements—including requirements for the preparation of a RailCorp-approved *Rail Safety Plan*—as set out in a *Safety Protocol* reproduced as a schedule to the Rail Agreement and in the *Emergency Event Plan* and otherwise as notified by RailCorp
- Pay RailCorp's costs in administering this *Rail Safety Protocol*
- Notify RailCorp of its proposed subcontractors and comply with any RailCorp direction not to use a subcontractor; and
- Regularly update RailCorp on the progress of works affecting rail infrastructure, and notify it immediately of anything which threatened or was likely to threaten rail safety or rail operational capacity and efficiency.

The Trustee and/or the Company had to give the RTA a *Project Industrial Relations Plan*, as detailed in the Project Deed and the *Scope of Works and Technical Criteria*, before the Trustee commenced any construction works, and had to and must resubmit this plan on a monthly basis for RTA implementation reviews, making all relevant industrial relations management records held by the Trustee and the Company, including those of the Contractors and their subcontractors, available to the RTA on request.

The RTA may, but need not, inspect, review and monitor the works being carried out by the Trustee, and monitoring and testing of any aspect of the Trustee's work may be carried out by the RTA or the Independent Verifier at any time. If the RTA notifies the Trustee of a defect, the Trustee must correct this defect unless it notifies the RTA within five business days that it disagrees with the RTA's notice, in which case the RTA and the Trustee must attempt to resolve the matter. If they cannot do so within five business days, either of them may refer the matter for determination by the Independent Verifier within the following five business days.

Similarly, under the Rail Agreement RailCorp could at any time inspect any of the works affecting rail infrastructure, provided it did not cause unnecessary inconvenience to the Trustee or the Company.

3.2.12 Quality assurance and verification

The Trustee has assumed all responsibility for the quality and durability of its designs and works.

The Trustee had to and must continue to implement a quality system for all its design and construction activities and works as specified in the Project Deed's *Scope of Works and Technical Criteria*, including the development and implementation of a *Quality Plan*. As already indicated, the Trustee's compliance with this *Quality Plan* had to be (and must continue to be) independently audited, by an auditor acceptable to the RTA, at least every six months during the design and construction of the project, and also whenever reasonably requested by the RTA. Procedures for the correction of non-conformances are set out in the *Scope of Works and Technical Criteria* and must be included in the *Quality Plan*.

The Independent Verifier, which has been and is obliged to act independently of the RTA, RailCorp, the Trustee, the Company, the Contractors, the Operator, their subcontractors and the Security Trustee, has had to and must:

- Verify that the works comply with the requirements of the Project Deed
- Make a series of binding determinations, as set out in the Project Deed and listed in a schedule to the Deed of Appointment of Independent Verifier; and
- Undertake other design and construction review, certification and reporting responsibilities as set out in the Project Deed and Rail Agreement and listed in the schedule to the Deed of Appointment of Independent Verifier:

The Independent Verifier acknowledged in the Deed of Appointment of Independent Verifier and the IV Deed Poll that the RTA, RailCorp, the Trustee, the Company and the Security Trustee would and will be relying on its skills and expertise, and warranted that it would and will perform its services honestly, diligently, reasonably and with the professional care and skills expected of an expert providing these types of services within the construction industry generally and the construction of major engineering works in particular:

3.2.13 Completion of the works and opening of the motorway

As already indicated, the Trustee had to use its best endeavours to complete its 'Stage 1' works, as defined in the Project Deed's *Scope of Works and Technical Criteria* and including the motorway, by 9 May 2007, and 'Stage 2'—all the other works to be constructed—must now be completed within eleven months of the opening of the motorway (i.e. by 25 February 2008).

If the Trustee becomes aware of any matter which will or might delay it in achieving the completion of 'Stage 2' by the due date, it must immediately notify the RTA of this in writing, providing details and a proposed corrective action plan involving, for example, changes to construction sequencing or methodologies. The Trustee must also give the RTA a proposed corrective

action plan if the RTA notifies it that the RTA believes the Trustee will not achieve completion by the due date.

The RTA then has five business days to notify the Trustee if it is not satisfied this plan will mitigate the effects of the delay. If it does so, an amended plan must be submitted. If it does not, the Trustee must implement the plan.

The Project Deed sets out procedures for the advance notification of estimated completion dates for each stage of the project and the certification of completion by the Independent Verifier. Completion has been and is subject to a series of pre-conditions, detailed in the Project Deed, including:

- The provision of road safety audits, quality reports, non-conformance documents, drainage design approvals, a series of certificates on specific works, copies of operation and maintenance manuals and plans, copies of all approvals for the operation of the motorway, evidence of operational phase insurance policies, notification of traffic opening dates, notices from relevant authorities that the services and local road works have been completed, bridge inventory details, copies of specified site investigation reports and property condition surveys, and details of the locations of services
- NSW Fire Brigade approval of the motorway's fire fighting systems, including its automatic fire protection system, the capacity of its deluge system, fire hydrant system booster points and all other fire-fighting equipment
- RTA approval of the Company's asset management system
- In the case of 'Stage 1' completion, the Trustee's giving the RTA an unconditional bank guarantee for \$1 million to secure potential operational-phase Trustee and Company liabilities to the RTA if there are excessive carbon monoxide concentrations in the tunnels (see sections 3.3.3 and 3.3.4), and
- In the case of 'Stage 2' completion, the correction of all known 'Stage 1' defects (see section 3.2.14 below), the provision of 'as built' drawings, copies of all the Trustee's property and land surveys, copies of releases concerning any 'extra land' used for construction of the project (see section 3.2.5), RTA receipt and approval of durability assessment reports, and the removal of all construction phase signage.

The Independent Verifier certified the completion of 'Stage 1' on 20 March 2007.

The Company was originally obliged to open all lanes of the motorway for traffic as soon as practicable after the completion of 'Stage 1'. However, as described in section 3.2.2, a temporary exemption from this requirement was granted on 1 March 2007 in the case of the eastbound motorway ramp to the eastbound Gore Hill Freeway transit lane. With this exception, the motorway was opened for traffic on 25 March 2007.

The RTA was obliged to ensure, before the motorway was opened for traffic, that the Minister for Roads:

- Supplemented the tollway declaration of 21 November 2003—as amended on 8 April 2004 in the case of the Falcon Street ramps (see section 3.2.2)—by declaring any undeclared parts of the motorway as a tollway, in accordance with section 52 of the Roads Act, and
- Directed the RTA to act as the roads authority for these additional sections of the tollway (if any) in accordance with section 63 of the Roads Act.

In practice, however, no further tollway declarations were required.

The RTA must ensure all the motorway's tollway declarations and directions remain effective until 9 January 2037 or any earlier termination of the Project Deed. It may, however, procure further tollway declaration(s) by the Minister for Roads to modify the boundaries of the tollway, so that these boundaries conform with the surveyed boundaries of the land to be leased to the Trustee under the Motorway Stratum Lease (see section 3.3.5).

3.2.14 Correction of defects

The Trustee must correct all defects existing at the time of certification of completion as soon as practicable.

In particular, all 'Stage 1' defects existing at the time of completion of 'Stage 1' (20 March 2007) must be corrected as a pre-condition for the completion of 'Stage 2'.

In addition, during 'defects correction periods' which are specified in the Project Deed but have been amended under the 'transition changes' described in section 3.2.2, the Trustee must then correct all defects in its local road works, service works and property works notified by the RTA, within times specified by the RTA.

These 'defects correction periods', as amended, are:

- For the 'Stage 1' works, 42 months after the completion of 'Stage 1' in the case of local road works and 18 months after the completion of 'Stage 1' in the case of service works and property works, and
- For the 'Stage 2' works, 36 months after the completion of 'Stage 2' in the case of local road works and 12 months after the completion of 'Stage 2' in the case of service works and property works.

Whenever a defect is corrected, a new 12-month defects correction period commences for each of the affected works upon the completion of the correction.

If the Trustee disagrees with an RTA direction to carry out corrective works, it must notify the RTA of this, in writing, within five business days, and the RTA and the Trustee must attempt to

resolve their differences. If they cannot do so within ten business days of the notification, either may refer the matter for final, binding determination by the Independent Verifier, which must make its determination within ten business days of this referral.

If the Trustee fails to comply with an RTA direction to carry out corrective works, the RTA may employ others to carry out these works and recover its costs and other losses from the Trustee as a debt.

In addition to these Project Deed obligations, under the Rail Agreement the Trustee must pay any costs incurred by RailCorp in correcting any defects in rail infrastructure or railway land caused by any of the Trustee's works, either during its works affecting rail infrastructure or during the following 12 months. The Trustee must also give RailCorp 'as constructed' drawings of all the works affecting rail infrastructure within six months of their completion.

As described in section 3.3.1 below, the Company has ongoing obligations throughout the operating term of the motorway to correct all defects as soon as possible.

3.2.15 Design and construction security bonds

In addition to the security granted to the RTA under the RTA Security (see section 4.1), the Trustee has given the RTA two unconditional bank guarantees in favour of the RTA, one for \$30 million and the other for \$10 million.

If they are not drawn upon,

- The \$30 million bank guarantee is to be released within 20 business days of the completion of the 'Stage 2' works, and
- The \$10 million bank guarantee is to be released within 20 business days of the end of the defects correction periods for local road works, services works and property works (section 3.2.14).

3.3 Operation and maintenance

3.3.1 Scopes of the Company's operation, maintenance and repair obligations and the Trustee's asset renewal obligations

The Company must:

- Operate maintain and repair the motorway, including its control centre and all associated plant and equipment, and
- Maintain and repair the project's local road and property works within a specified geographic area, plus any of the project's services works not handed over to or maintained by organisations other than the RTA,

and the Trustee must:

- At specified intervals, undertake specified asset renewals, involving refurbishments, replacements and upgrades as

set out in the *Scope of Works and Technical Criteria* documentation,

from the completion of 'Stage 1' (20 March 2007) until 9 January 2037 or until any earlier termination of the Project Deed, so that:

- All the motorway's lanes—apart from any lanes subject to the temporary 'transition change' exemption granted on 1 March 2007 in the case of the eastbound motorway ramp to the eastbound Gore Hill Freeway transit lane, as described in section 3.2.2—are opened for traffic as soon as practicable after the completion of Stage 1.
- All the motorway's lanes—including its ramps, exits and entries, but again excluding the eastbound motorway ramp to the eastbound Gore Hill Freeway transit lane during the period of the temporary exemption granted on 1 March 2007, described in section 3.2.2—are then kept open at all times, regardless of whether tolling systems are operational, unless:
 - The RTA grants a 'road occupancy licence' authorising it to close the motorway or a traffic lane, in accordance with arrangements set out in an appendix to the Project Deed's *Scope of Works and Technical Criteria*
 - The RTA otherwise consents, in writing, or
 - It is necessary to close the motorway or a lane because of:
 - The legal requirements of a relevant government or local government authority
 - The occurrence of a *force majeure* event (see section 3.4.9)
 - A material threat to public health or safety
 - Emergency maintenance or repairs
 - Access by the RTA, or a person authorised by the RTA, to instal, maintain, repair or remove RTA cabling, as set out in the *Scope of Works and Technical Criteria*, or to carry out other expressly permitted RTA activities, as summarised in section 3.3.8 below, or
 - Traffic management measures in response to congestion or incidents on the road network surrounding the motorway, in accordance with protocols to be agreed to by the RTA and the Company in writing.

The Company must promptly notify the RTA and the Trustee, in writing, if it closes or proposes to close any part of the motorway for any reason, specifying the reasons for the closure.

- The motorway and the local road, property and services works meet and maintain performance standards, design life standards and handover conditions specified in the Project Deed's *Scope of Works and Technical Criteria*, and otherwise remain fit for their intended purposes at all times.
- All defects are corrected as soon as possible.
- The conditions of the project's planning approval of 3 December 2002, as amended, and other environmental requirements set out in an appendix to the *Scope of Works and Technical Criteria* are met at all times. (As already indicated in section 3.2.3, the responsibilities of the RTA, the Company and the Trustee for meeting the planning approval's conditions have been allocated in a schedule to the Project Deed.)

Minimum standards, tasks and obligations for the Company and the Trustee to fulfil these general obligations are detailed in the *Scope of Works and Technical Criteria*. If further measures are needed, the Company and the Trustee must implement them at their own cost.

The Company must develop an *Operation and Maintenance Plan*, operational-phase *Environmental Management Plans*, an operational-phase *Community Involvement Plan*, an operational-phase *Occupational Health, Safety and Rehabilitation Management Plan*, an operational-phase *Traffic Management and Safety Plan*, an operational-phase *Project Training Plan*, an operational-phase *Incident Response Plan* and overall *Operation and Maintenance Manuals* incorporating all these plans, as detailed in the *Scope of Works and Technical Criteria*, prior to the completion of Stage 1, and maintain and implement them throughout the project's operating term. The Trustee must prepare, maintain and implement analogous plans as relevant to its asset renewal obligations, and any aspects of these plans relevant to the Company's operational, maintenance and repair obligations must be incorporated in the Company's *Operation and Maintenance Manuals*.

The Company and the Trustee have warranted that their operation, maintenance and repair works and asset renewals, respectively, will use workmanship and materials of the highest standard and fit for their intended purposes, that all replacement parts will be of equal quality and fit for their intended purposes and that the *Operation and Maintenance Manuals* will also be fit for their intended purposes.

Quality assurance and verification requirements, including monitoring, auditing, testing and reviews by the Independent Verifier, will be analogous to those described in section 3.2.12 above for the design and construction phase. Independent quality audits, by auditors acceptable to the RTA, must be conducted at least once every 12 months and also whenever reasonably requested by the RTA.

The Company's operation, maintenance and repair obligations and the Trustee's asset renewal obligations extend to upgrading of the motorway by incorporating advances in technology or operation and maintenance practices.

The Company will be responsible for controlling, directing and protecting all traffic affected by its operation, maintenance and repair activities or the Trustee's asset renewals, in accordance with detailed requirements set out in the *Scope of Works and Technical Criteria*, including the periodically updated *Traffic Management and Safety Plans*, and any directions by the RTA or other relevant authorities.

The Company and the Trustee must obtain RailCorp's consent before they may enter any area within 50 metres of any rail facility for any purpose, including maintenance of the motorway. RailCorp may grant or withhold this consent in its discretion and may impose any conditions it wishes. All Company maintenance work within 50 metres of any rail infrastructure must comply with the *Safety Protocol* reproduced as a schedule to the Rail Agreement.

The Company must also comply with specific requirements concerning the operational interfaces of the Lane Cove Tunnel and M2 motorways, as set out in a schedule to the Project Deed and the *Scope of Works and Technical Criteria*, which reflect the RTA's commitments to The Hills Motorway Limited, Hills Motorway Management Limited and Perpetual Trustees Australia Limited under the LCT/M2 Interface Agreement.

Under these arrangements,

- The Company must operate any parts of the Lane Cove Tunnel works which are located within the areas leased or to be leased under the M2 motorway's contracts
- The Company must also maintain and repair any Lane Cove Tunnel works in these M2 lease areas, but may fulfil this obligation by arranging for the M2 motorway's operator, The Hills Motorway Limited, to undertake these tasks
- The RTA must procure irrevocable licences from the M2 operator, and if necessary Perpetual Trustees Australia Limited, so the Company may access the M2 lease areas for inspections, maintenance and repairs or during emergencies
- The Trustee, the Company and the M2 operator must discuss and develop procedures for joint Lane Cove Tunnel motorway/M2 motorway management of emergencies, incidents and maintenance, and
- The Company and the M2 operator have promised the RTA they will make live video feeds from their surveillance cameras available to each other.

Advertising and other promotional signage will not be permitted on or near the Lane Cove Tunnel motorway or the Company's local road, property and services works.

All the motorway's fixtures and fittings must be owned by the Trustee and all of its dedicated equipment must be owned by the Company, unless these fittings and fixtures and items of equipment are leased or on hire purchase, in which case they must be able to be transferred to the RTA if necessary (see sections 3.6.4 and 3.6.5).

The Company and the Trustee must ensure that any entity carrying out substantial operational, maintenance and/or repair obligations for the Company on the motorway is reputable and has sufficient experience, expertise, skills and resources, including financial resources and commercial standing, and must give the RTA prior written details of any such appointments and any changes in the terms of these appointments.

The Company and the Trustee must obtain the RTA's prior written consent before appointing any replacement for the Operator or any other motorway operator. The RTA may not withhold its consent if the replacement operator meets the criteria described above, the terms and conditions of the appointment or novation are reasonably acceptable to the RTA, the proposed operator has agreed to be bound by the terms of the relevant project contracts and all the RTA's costs associated with the proposed appointment or novation have been met by others.

The RTA and its agents may inspect and observe the Company's operation, maintenance and repair activities and/or the Trustee's asset renewals at any time during business hours or after giving reasonable notice (or immediately in emergencies). Monitoring and testing of any aspect of the Company's operational, maintenance and repair tasks may also be carried out by the RTA or the Independent Verifier at any time.

The Company must promptly give the RTA and the Trustee detailed written reports on:

- Any material damage or disrepair to the motorway or the local road, services and property works it is maintaining and repairing
- The corrective action it proposes to take, and
- Any incidents or other accidents causing injuries or material damage to the motorway or the local road, services and property works it is maintaining and repairing.

The Company and the Trustee may not make or permit any structural changes to the motorway, or any other changes outside the *Scope of Works and Technical Criteria*, without the RTA's prior written approval, which must be granted if the changes are required to comply with the law. They must also notify the RTA of any other changes to the motorway or the project's local road, property or services works.

More specific obligations leading up to the handover of the motorway to the RTA are discussed in section 3.3.9 below.

3.3.2 Changes to the Company's operation, maintenance and repair obligations and/or the Trustee's asset renewal obligations

If any changes to the Trustee's design and construction obligations (section 3.2.1) affect the scope or costs of the Company's subsequent operation, maintenance and repair obligations and/or the scope or costs of the Trustee's subsequent asset renewal obligations, the cost-sharing/savings-sharing arrangements described in section 3.2.2 will apply.

There are no equivalent procedural or cost/benefit-sharing provisions in the Project Deed concerning changes to the scope of operation, maintenance and repair and/or asset renewal obligations which do not arise out of changes to the project's design and construction works.

3.3.3 Compliance with planning and environmental approvals and plans and handling of complaints

In fulfilling their operation, maintenance and repair obligations and asset renewal obligations the Company and the Trustee must comply with the conditions of the project's planning approval, as amended, in accordance with an allocation of responsibilities detailed in a schedule to the Project Deed.

Among other things, the Company and the Trustee have accepted the responsibilities of:

- Ensuring air quality within the Lane Cove Tunnel complies with carbon monoxide standards set out in conditions 160 and 161 of the planning approval, and
- If these tunnel air quality limits are exceeded and the Director-General of the Department of Infrastructure, Planning and Natural Resources orders corrective action, implementing any corrective strategies prepared by the RTA—at the Company's cost and as approved by the Director-General—in accordance with condition 163 of the planning approval.

These corrective strategies may involve expenditures of up to \$50,000 (December 2002 \$, indexed to the consumer price index) for each day any of the air quality limits is exceeded.

The Company and the Trustee must also:

- Comply with other environmental requirements detailed in an appendix to the Project Deed's *Scope of Works and Technical Criteria*
- Prepare and comply with their operational-phase *Environmental Management Plans*, again as detailed in the Project Deed's *Scope of Works and Technical Criteria*
- Indemnify the RTA from and against any claim or loss if they fail to meet these obligations

- Obtain all other government and local government approvals required for their operation, maintenance, repair and asset renewal activities
- Notify the RTA immediately of any complaints or threatened or actual legal proceedings concerning land contamination, any non-compliance by them with the planning approval or other environmental requirements, their use or occupation of the motorway or maintenance sites or any damage by them to third parties' property, and
- Resolve any such matters as soon as possible and keep detailed records of all complaints etc and its responses.

If the project's planning approval is modified or a new planning approval is issued—other than as a result of a breach of the planning approval by the Company, the Trustee or their contractors or a change to the project proposed by the Company and/or the Trustee and agreed to by the RTA—and this necessitates a change to the motorway or its operation,

- The change must be addressed as if the RTA had directed the change by issuing a 'change order' under the arrangements described in section 3.2.2 and referred to in section 3.3.2
- The Company and the Trustee must take all reasonable steps to mitigate the costs of the change, comply with all reasonable RTA directions aimed at reducing these costs and ensure the Operator does likewise, and
- In some circumstances the renegotiation provisions described in section 3.5 may also apply.

As discussed in section 3.2.2, in the case of the 'Stage 2 transition' modifications to the planning approval made on 21 February 2007, the releases provided by the Trustee and the Company in the Transition Deed of Release do *not* apply to any liabilities the RTA may have to them (other than under the renegotiation provisions described in section 3.5) for the additional costs of any extension of specified air quality monitoring, as required under condition 166 of the project's amended planning consent, beyond the originally required period of 12 months from the opening of the tunnel.

3.3.4 Operation, maintenance and repair security bonds

In addition to the security granted to the RTA under the RTA Security (see section 4.1),

- Prior to the completion of the project's 'Stage 1' works, the Trustee was obliged—as already indicated in section 3.2.13—to give the RTA an unconditional bank guarantee for \$1 million to secure the potential operational-phase liabilities of the Trustee and the Company to make payments to the RTA to reimburse it for any expenditures by the RTA for corrective strategies, under condition 163 of the project's planning approval, if there are excessive carbon monoxide

concentrations within the tunnels. (As indicated in section 3.3.3 above, the Company must fund any corrective strategies itself, but if it fails to do so and the RTA has to cover any of the costs the Company must reimburse the RTA.)

If it is not drawn upon, this bank guarantee is to be released within 20 business days of the fifth anniversary of the opening of the motorway to traffic (i.e. by 24 April 2012).

- The Trustee must give the RTA a further unconditional bank guarantee for \$1 million if, after 25 March 2012,
 - The Company fails to pay for any corrective action ordered under condition 163 of the planning approval following an exceedance of air quality limits within the tunnels, or
 - More generally, the RTA incurs any expense, loss, damage or liability as a result of any breach of any of the air quality conditions of the planning approval, including 'ambient' air quality limits (outside the tunnels).

If it is not drawn upon, this additional bank guarantee is to be released within 20 business days of the earlier of:

- Any 12-month period in which there have been no breaches of any of the planning approval's air quality conditions, and
 - The fifth anniversary of the date on which the guarantee was given to the RTA.
- If the Company:
 - Fails to comply with its operation, maintenance and repair obligations under the Project Deed, including, in particular, its obligations to maintain and comply with its *Operation and Maintenance Manuals* and its obligation to ensure these manuals are an adequate mechanism for ensuring the motorway will be in a good handover condition at the end of its operating term in 2037, and
 - Fails to comply with an RTA notice requiring it to rectify these non-conformances, as specified by the RTA, within 12 months,

the RTA may require the Company to provide a further unconditional bank guarantee of up to \$20 million, indexed to the CPI from 4 December 2003, to secure its operation, maintenance and repair obligations to the RTA.

If this guarantee is not drawn upon, it is to be released within 20 business days of the final handing over of the motorway to the RTA (see section 3.3.9).

- Within the last three years of the operating term of the motorway, and again within the last 18 months of this operating term, the Company may:
 - Provide the RTA with an additional unconditional bank guarantee for an amount equal to 40% of the estimated cost of maintenance and repair works required to bring the motorway to its final handover condition, as specified in the *Scope of Works and Technical Criteria*, or
 - Deposit 40% of its toll revenues in a special RTA escrow account, until its balance reaches 40% of the estimated cost of these maintenance and repair works

as a security for the performance by the Company and the Trustee of these works and their other obligations leading up to the final handover of the motorway (see section 3.3.9).

If the Company chooses to provide a bank guarantee and it is not drawn upon, the bank guarantee is to be released within 20 business days of the final handing over of the motorway to the RTA.

Similarly, if the Company chooses to deposit toll revenues into an RTA escrow account, the RTA must pay the Company the balance remaining in this account within 20 business days of the final handing over of the motorway to the RTA.

3.3.5 Preparations for and granting of the Motorway Stratum Lease

The Agreement to Lease sets out procedures for:

- The Trustee to conduct 'as built' engineering surveys within 12 months of the completion of 'Stage 1' (i.e. by 20 March 2008) and deliver specified drawings and a three-dimensional computer model to the RTA, including adequate information for the RTA to determine the boundaries of the land to be leased to the Trustee
- The RTA to use its best endeavours to create specified easements and register plans of consolidation or subdivision within the following 18 months
- The RTA to procure further tollway declaration(s) by the Minister for Roads, under section 52 of the Roads Act, to modify the boundaries of the Lane Cove Tunnel tollway so that they conform with the surveyed boundaries of the land to be leased to the Trustee under the Motorway Stratum Lease
- The RTA to grant and the Trustee to accept the Motorway Stratum Lease, which must be on the terms set out in a draft of this lease annexed to the Agreement to Lease, and a licence to access maintenance areas on local roads

- The RTA to give the Trustee a registrable form of the lease following the registration of the necessary plans of consolidation or subdivision
- The Trustee and the RTA to execute and register the lease, and
- The RTA to create other specified easements, including, where possible, easements requested by the Trustee.

The land to be leased to the Trustee under the Motorway Stratum Lease, and subleased by it to the Company under the Motorway Stratum Sublease, is shown generally in an annexure to the Agreement to Lease and will generally comprise strata extending 1 metre beyond the motorway's structures, the sites of the ventilation stacks and motorway control centre, areas around the parapets, retaining walls and footings of ramps leading into and out of the tunnels, other specified areas on the approaches to the tunnel portals and variable message signs on the motorway. The 'maintenance site' areas on local roads which the Trustee will be able to access and use under a non-exclusive licence to be granted under the Motorway Stratum Lease, in return for a one-off payment of \$10 to the RTA, are similarly shown in a schedule to the draft lease and an annexure to the agreement to Lease. The RTA will bear the costs of any land acquisitions which might be required.

The Motorway Stratum Lease must commence on 20 March 2007 and continue until 9 January 2037, unless it is terminated earlier—and automatically—upon any early termination of the Project Deed. (The Trustee's Motorway Stratum Sublease to the Company will also automatically terminate in these circumstances.) Pending its execution and registration, the RTA and the Trustee will be bound by the draft form of the lease annexed to the Agreement to Lease.

3.3.6 Tolls and administrative charges

The Company may levy and retain tolls on motor vehicles using the motorway, or any part of it, in accordance with a toll calculation schedule to the Project Deed.

The details of the tolling system which must be used to collect these tolls electronically and systems to identify vehicles not fitted with electronic tolling transponders are specified in the Project Deed's *Scope of Works and Technical Criteria*. In addition, under the Electronic Tolling MoU—to which the Company has become a party as a result of the execution of the Electronic Tolling Accession Deed—the Lane Cove Tunnel motorway's electronic tolling system and associated operational, data transfer, security and privacy policies must be interoperable and compatible with those of other tollroads in NSW, Melbourne and Brisbane.

For vehicles without electronic tolling transponders or with temporary transponders, the Company may levy not only the tolls applying for all vehicles but an additional administration

charge, under arrangements which are also set out in the Project Deed's toll calculation schedule.

No tolls may be levied on buses providing regular public transport services or any other vehicles exempted under the Roads Act or its Regulations.

For other vehicles the tolls which may be charged for trips on any of four defined sections of the motorway—the eastbound tunnel, the westbound tunnel, the north-facing off-ramp from the Warringah Freeway to Falcon Street/Military Road and the north-facing on-ramp from Falcon Street to the Warringah Freeway—may not exceed 'theoretical tolls', as specified in the toll calculation schedule for 'passenger' vehicles (defined as all vehicles up to 2.8 metres high and up to 12.5 metres long) and 'heavy' vehicles (all other vehicles except buses etc), rounded to the nearest whole cent.

During any three-month quarter these 'theoretical tolls' are and will be \$2 for passenger vehicles and \$4 for heavy vehicles using either of the tunnels and \$1 for passenger vehicles and \$2 for heavy vehicles using either of the north-facing Falcon Street ramps, multiplied in each case by the ratio of the Consumer Price Index (CPI) during the quarter before the quarter which has just finished to the CPI during the March–June quarter of 1999. If there is any decrease in the CPI from one quarter to the next, the 'theoretical tolls' based on the CPI during the latter quarter will remain unchanged.

If the rate of GST changes in the future, the theoretical tolls will automatically increase or decrease to match this change.

The Company must give the RTA at least 20 business days' notice of any increase in the tolls it actually imposes, and these increases may not commence until at least the start of the next quarter.

As indicated in section 3.2.2, the Transition Deed of Release expressly confirmed the right of the Company to operate the motorway without tolls, should it choose to do so, during the first month after the opening of the motorway.

The administration charges levied on 'casual users' (vehicles without transponders) and the issuing of temporary transponders, in addition to the tolls described above, must be determined by the Company for each quarter, in consultation with the RTA, so as to recover the actual direct and indirect costs of processing, administering and collecting revenue from these users.

In determining these charges, the Company must take account of the 'casual user' products it wishes to implement, actual and anticipated numbers of casual users, toll and administrative charge recovery rates and the objective of encouraging the fitting of transponders.

The Company may review its administration charge for casual users once each quarter. If it wishes to change it, it must give the

RTA at least 20 business days' notice, providing reasonable details of its calculations, and the new charge may not commence until at least the start of the next quarter.

As indicated in section 2.2, the Toll Compliance SLA sets out arrangements for the RTA to provide paid services to the Company to assist its enforcement of its tolls while ensuring full compliance with the requirements of NSW privacy legislation. The RTA may subcontract its services or transfer its responsibilities under the Toll Compliance SLA to the Infringement Processing Bureau of the NSW Office of State Revenue.

3.3.7 Rent payments to the RTA

Under the Motorway Stratum Lease, the Trustee must make the following rent payments to the RTA for the period between the completion of 'Stage 1' and the following 30 June, for each successive financial year during the lease and then for the final period of the lease, in each case within 20 business days of the end of the relevant period:

- \$1, plus
- A share of the gross revenue from any non-toll business uses of the motorway or the land leased to the Trustee, as agreed to by the RTA as part of the RTA approval which is required before any such non-toll businesses may be conducted, plus
- If the Company's actual toll revenue (see section 3.3.6) has been more than 10% higher than:
 - A forecast of toll revenue for the financial year in question, as set out in an annexure to the Transition Deed of Release, for the period between the completion of 'Stage 1' and 30 June 2010, or
 - After 30 June 2010, the toll revenue forecast for the financial year in question by the private sector partici-

pants' 'base case financial model' for the project as at 9 December 2003,

a progressively increasing share of this extra toll revenue, as set out in Table 2.

3.3.8 RTA and Government road network, public transport and utility service development rights and restrictions

The Project Deed and the Transition Deed of Release do not limit or restrict the powers of the RTA or the NSW Government to develop, operate, maintain and extend the NSW road network, manage and change traffic or transport systems, extend, change, upgrade and close other roads (including existing tollways and freeways), extend, change and upgrade public transport services, construct new public transport routes, establish new transport services or, more generally, develop the transport network and implement Government policies.

The RTA, the Trustee and the Company have expressly acknowledged, however, that:

- The private sector participants' 'base case financial model' assumes that 12 traffic connections to the motorway, as specified in a schedule to the Project Deed, will not be closed or materially reduced during the motorway's operating term from the completion of 'Stage 1' to 9 January 2037, unless this is necessary during special events, emergencies or road maintenance or repair works, in response to incidents or because there is a material threat to public health or safety, and
- The local road works to be carried out by the Trustee include 'Stage 2' works which will significantly reduce the 'mid-block' capacities of Epping Road and Longueville Road between Mowbray Road West and the Pacific Highway, to levels specified in the Project Deed.

Accordingly, the renegotiation provisions described in section 3.5 below may apply if:

- Any of the specified connections to the motorway are not maintained, except under the circumstances listed above,
- Any of the Epping Road/Longueville Road traffic restrictions are removed or altered so as to increase the 'mid-block' capacities of this route above the levels specified in the Project Deed, or
- Any new road tunnel directly connecting the M2 motorway with the Gore Hill or Warringah Freeways is opened to traffic.

The RTA is expressly entitled to:

- Make road and pedestrian access connections to the motorway

Table 2. The RTA's share of any unexpectedly high toll revenues, generally over 12-month periods.

Portion of the actual toll revenue, expressed in terms of percentages of forecast gross toll revenue	RTA's share of this portion of the actual toll revenue (to be paid by the Trustee as part of its rent under the Motorway Stratum Lease)
up to 110%	0%
110% to 120%	10%
120% to 130%	20%
130% to 140%	30%
140% to 150%	40%
more than 150%	50%

- Construct, operate and maintain any road above or below the motorway
- Construct, operate and maintain utility services or other infrastructure or improvements in the leased motorway stratum, and
- Connect any utility services or other infrastructure or improvements to the motorway itself or to the leased motorway stratum,

provided this is not done prior to the completion of 'Stage 2' construction without the consent of the Trustee and the Company and does not prevent them from undertaking the project.

If the RTA proposes to carry out any of these permitted activities, it must give the Trustee and the Company reasonable notice and they must cooperate with the RTA to enable the activity to occur:

If the RTA then decides to proceed with the permitted activity,

- The Trustee and the Company must give the RTA and its nominees adequate access, facilitate the permitted activity through reasonable traffic adjustments (lane closures, lane realignments and changes to posted speed limits, etc) within or adjacent to the motorway and mitigate any losses they might suffer by (for example) opening the motorway's shoulders to traffic and installing any equipment needed to prevent untolled use of the motorway
- The RTA must coordinate all activities associated with the permitted activity and minimise any interference with the operation and use of the motorway, but will not be under any obligation to install or pay for equipment to prevent untolled use of the motorway
- The RTA must compensate the Company for any measured reductions in its toll revenues in any section of the motorway subject to traffic adjustments which reduce its capacity, in accordance with a schedule to the Project Deed, if these traffic adjustments:
 - Occur between 5 am and 9 pm, or
 - Otherwise involve the complete closure of all traffic lanes on a carriageway for more than 10 minutes in any hour or reduce the speed limit on all lanes on a carriageway by more than 20 km/h
- The RTA will not otherwise be liable for any Trustee or Company losses connected with the permitted activity, and
- Upon the completion of the works, the Company must maintain and repair the new works—other than any new road above or below the motorway—at its own cost, as if they formed part of the motorway.

3.3.9 Expiration of the operating term and final handover to the RTA

Three years before the end of the motorway's operating term on 9 January 2037, and again 18 months before the end of its operating term, the RTA may require the Trustee and the Company to carry out joint inspections, with the RTA, of the motorway and the local road, property and service works being maintained by the Company.

If the RTA imposes this requirement, the RTA, the Trustee and the Company must then seek to agree on the maintenance and repair works that will be required to satisfy the 'final handover' requirements of the Project Deed, discussed below, a program to carry out these works and an estimate of the cost of these works. If they cannot agree within 20 business days of the relevant inspection, the RTA may refer the matter for determination under the Project Deed's dispute resolution procedures, summarised in section 3.4.7.

The Company and the Trustee (as relevant) must then carry out the agreed or determined works, with the Company providing the RTA with a security for this, as already described in section 3.3.4, in the form of:

- An unconditional bank guarantee for an amount equal to 40% of the estimated cost of the works, or
- Deposits of 40% of its toll revenues into a special RTA escrow account, until its balance reaches 40% of the estimated cost of the works.

During the final three months of the motorway's operating term—that is, during the three months leading up to 9 January 2037—the Company must train RTA personnel, or others nominated by the RTA, in all aspects of the operation, maintenance and repair of the motorway and the local road, property and service works being maintained by the Company.

At the end of the operating term, or upon any earlier termination of the Project Deed, the Trustee and the Company must:

- Surrender the motorway, the land leased under the Motorway Stratum Lease and all rights and interests in them to the RTA in a fully functional condition, complying with the Project Deed's *Scope of Works and Technical Criteria* and the *Operation and Maintenance Manuals*
- Deliver the *Operation and Maintenance Manuals* and all furniture, fittings, plant and equipment required to operate, maintain and repair the motorway and maintain and repair the local road, property and services works
- Pay the RTA any unexpended insurance proceeds and assign their insurance rights to the RTA, unless this is contrary to the arrangements for insurance proceeds described in section 3.4.2 below, and

- Do everything reasonably necessary for the RTA to operate the motorway at least to the same level as that achieved just before the end of the operating term.

At the end of the operating term the remaining life of each motorway asset and each local road, property and services asset maintained and repaired by the Company must be no less than the relevant residual design life specified and determined in accordance with the Project Deed's *Scope of Works and Technical Criteria*. The RTA is to assess compliance with this requirement within 60 business days of the end of the operating term. If it believes any asset does not comply, the RTA may notify the Company and the Trustee of this, specifying the shortfall in the expected life of the asset and the cost of rectifying this shortfall. The Company and the Trustee may then either:

- Carry out the necessary rectification work within a reasonable time and by no later than 60 business days of the RTA's notice, or
- Pay the RTA the cost determined and notified by the RTA, as a debt due to the RTA.

Before a final handover to the RTA may occur;

- The training of RTA personnel (or other nominated personnel) must be completed to the RTA's reasonable satisfaction
- The Company and the Trustee must have complied with their obligations to rectify or pay for any shortfalls in the life of the tunnel, local road, property or services assets
- There must be no immediate repair works required and no defects
- The Company and the Trustee must transfer ownership of all the operational, maintenance and repair plant and equipment they own, or for which they have an option to obtain ownership, to the RTA or its nominee, and
- The Company must give the RTA all the spare parts and special tools needed for the first 12 months of operations, maintenance and repair after the end of the motorway's operating term.

Once the Company and the Trustee believe they have satisfied these conditions, they must notify the RTA. The RTA will then have five business days to advise them of its agreement or otherwise, providing reasons if it considers the conditions have not yet been met.

The RTA must release the bank guarantee securing the works required to satisfy the final handover conditions, or pay the Company the balance of the escrow account held by the RTA for the same purpose, within 20 business days of the final handover of the motorway to the RTA.

During the first 12 months after the end of the operating term the Company must make competent, experienced personnel available to consult with the RTA on any aspect of motorway, local road, property or services operations, maintenance or repair:

3.4 Miscellaneous general provisions of the Project Deed, the Rail Agreement and the RTA Consent Deed

3.4.1 Rates, levies and taxes

The Trustee must pay all land-based rates, taxes and charges associated with the land it will lease under the Motorway Stratum Lease from the completion of Stage 1, but if the Trustee's land tax liabilities and water, sewerage and drainage rates (excluding water use charges) exceed \$240,000 per year, indexed to the CPI from 4 December 2003, the RTA must reimburse the excess to the Trustee on demand.

The Trustee and the Company must also pay all other taxes levied on the project, subject to GST input tax credits and other GST-specific arrangements.

3.4.2 Loss or damage and insurance

The Trustee and the Company bear the risk of loss or damage to the construction works and then, until the termination of the Project Deed, the completed Lane Cove Tunnel motorway.

Before the Trustee commenced design and construction of the project the Trustee and the Company had to effect the following insurance policies:

- Contract works or construction risks insurance, for risks described in an exhibit to the Project Deed, with at least \$500 million of cover for each occurrence plus additional cover for specified purposes, continuing until the completion of Stage 2
- Transit insurance, until the completion of Stage 2
- Third party liability insurance, for at least \$250 million for each occurrence and with no aggregate limit, until the end of the last defects liability period
- Professional indemnity insurance for at least \$50 million per claim and \$150 million per year in total, until six years after the end of the last defects liability period
- Workers' compensation insurance, until the completion of Stage 2
- Motor vehicle third party property damage insurance, for at least \$100 million per claim and with no aggregate limit, until the completion of Stage 2

- Advance business interruption insurance covering all debt servicing obligations, other standing charges and losses of anticipated net revenue for 24 months, until the completion of Stage 2, and
- Directors' and officers' liability insurance for at least \$10 million per occurrence and \$10 million per year in total, until the end of the motorway's operating term.

From the completion of 'Stage 1' and throughout the motorway's operating term the Trustee and the Company must effect and maintain the following insurance policies for the motorway:

- Industrial special risks insurance, for at least \$500 million for each occurrence, for physical loss or damage and other risks as reasonably required by the RTA from time to time
- Third party liability insurance, for at least \$250 million for each occurrence and with no aggregate limit
- Employer's liability and workers' compensation insurance
- Motor vehicle third party property damage insurance, for at least \$100 million per claim and with no aggregate limit
- Business interruption insurance covering all debt servicing obligations, other standing charges and losses of anticipated net revenue for 24 months
- Directors' and officers' liability insurance for at least \$10 million per occurrence and \$10 million per year in total, and
- Any other insurance policies which are reasonably required by the RTA, which are commonly effected by land owners, lessees or contractors in the position of the Trustee or the Company and which can be obtained by the Trustee or the Company for a reasonable premium.

All these insurance policies had to and must be with insurers approved by the RTA. They had to and must comply with terms set out in the Project Deed or otherwise approved by the RTA, and in several cases they must also had to comply with terms set out in the Rail Agreement or otherwise approved by RailCorp. Procedural requirements were and are set out in both the Project Deed and the Rail Agreement.

If the Trustee or the Company fails to effect or maintain any of the required policies or pay any premium, the RTA may do so instead and recover its costs from the Company—or from the Trustee, if the Trustee and the Company so advise the RTA—as a debt.

The contract works/construction risks, transit, industrial special risks, third party liability, motor vehicle and business interruption policies must be in the joint names of the RTA, the Trustee, the Company and others with insurable interests under the project's contracts, including RailCorp, the Security Trustee, The Hills Motorway Limited, Hills Motorway Management Limited, Toll-

aust Pty Limited (which is operating and maintaining the M2 motorway for The Hills Motorway Limited) and their financiers.

The Project Deed sets out procedures for the RTA, the Trustee and the Company to review the project's operational phase insurance requirements prior to the completion of 'Stage 1' and then every five years.

The Trustee and the Company must deposit any insurance proceeds they receive for any loss or damage to the construction works or the completed motorway—other than the first \$25 million of the proceeds of any claim relating to the period before the completion of the 'Stage 2' works—in a special purpose account for which the only signatory, prior to the repayment of all the project debt, will be the private sector debt financiers' Security Trustee.

If there is any loss or damage to the construction works or the completed motorway, the Trustee or the Company, as applicable, must promptly make good the loss or damage *unless*:

- It has resulted from an 'uninsurable event', as defined in the Project Deed,* *and*
- This means the contract renegotiation provisions described in section 3.5 apply,

in which case the obligation to make good the loss or damage is suspended until:

- The renegotiation processes described in section 3.5 have resulted in an agreement between the RTA, the Trustee and the Company, or
- If they cannot agree, a final, binding determination, award or judgment has been made by an expert or arbitration under the dispute resolution procedures described in section 3.4.7 or by a court.

In making good any loss or damage the Trustee and/or the Company as applicable, must:

- After a reasonable time for inspections by the insurers, immediately start clearing any debris and carrying out initial repairs
- Promptly consult with the RTA and take all steps necessary to promptly repair or replace the loss or damage in order to minimise disruption to the project and, as much as possible, continue to comply with their obligations under the project's contracts
- Minimise the impacts of these activities on the works or the motorway's operations, and
- Keep the RTA fully informed of progress,

If insurance proceeds received by the Trustee, the Company, the Holding Trustee, the Holding Company, the Borrower and/or the Security Trustee are less than or equal to \$125 million,

indexed to the CPI from 4 December 2003, they must be applied to the repair and reinstatement of the works or motorway. If the insurance proceeds exceed this amount, they must again be applied to the repair and reinstatement of the works or motorway, *provided*:

- The insurance proceeds and other sources of funds are sufficient to repair or reinstate the works or motorway within a reasonable time
- The Borrower is able to meet its obligations to repay the debt financiers substantially in accordance with its debt financing arrangements or on revised terms acceptable to these financiers, and
- It is economically viable to repair or reinstate the works or motorway.

If these three requirements have not been satisfied within six months of the receipt of the insurance proceeds, or any longer period agreed to by the Security Trustee, the Security Trustee may, if it wishes, apply part or all of the insurance proceeds to

* (*previous page*) 'Uninsurable events', as defined in the Project Deed, include, at any time, any war; invasion, act of a foreign enemy, hostility between nations, civil insurrection, military coup, radioactive contamination (from nuclear waste or the combustion of nuclear fuel) or confiscation, nationalisation, requisition or property damage under the order of any government which is beyond the reasonable control of the Trustee or the Company and their contractors, causes the Trustee or the Company to be unable to perform its obligations under the Project Deed, and could not have been prevented or avoided by the Trustee, the Company or their contractors by their taking the steps a prudent, experienced and competent concessionaire, designer, constructor or tollroad operator would have taken.

Since the completion of Stage 1 on 20 March 2007, 'uninsurable events' also include any other unanticipated physical event which:

- Is beyond the reasonable control of the Trustee or the Company and their contractors and which could not have been prevented or avoided by their taking the steps a prudent, experienced and competent concessionaire, designer, constructor or tollroad operator would have taken, including the exercise of reasonable care
- Is not an exercise by the RTA of any of its statutory functions or powers, and
- Directly damages the motorway or nearby property or land or otherwise prevents the motorway from being open to the public for the safe, continuous and efficient passage of traffic

and for which:

- Insurance is not available from insurers with at least an 'A' rating in the Australian or London insurance markets
- Insurance is available from such insurers, but only on terms which, in the opinion of an independent insurance broker acceptable to the RTA, the Trustee and the Company, mean prudent, experienced and competent concessionaires, designers, constructors and tollroad operators are generally not insuring against the event, or
- The loss suffered by the Trustee or the Company exceeds the amount recoverable (after deductibles) under any of its insurance policies

provided the event is not caused by a breach of contract or negligence by the Trustee or the Company or its contractors or employees, *provided* the loss is not caused by an insurance requirement to absorb commonly applied deductibles and *provided* the insurance proceeds (if any) are not reduced or not paid because of an act or omission by the Trustee, the Company or its contractors, by any negligence on their part, by any insolvency of the insurer or by any under-insurance.

repay the debt financiers, with the balance, if any, being paid by the Trustee or the Company to an account established by it with the RTA. This balance, if any, must then be applied to the repair and reinstatement of the works or motorway.

3.4.3 Accounting and financial reporting

The Project Deed sets out requirements for the Trustee and the Company to:

- Maintain accounts and other records, have them audited annually, make them available for RTA inspections and audits at any reasonable time
- Provide financial statements to the RTA on each six months' and year's performance of the Trustee, the Company, the Holding Trustee, the Holding Company and the Borrower
- Give the RTA copies of all ASIC and ASX documents they receive and any other information reasonably required by the RTA
- Immediately notify the RTA when the project's debt financiers have been fully repaid, and
- Give the RTA specified daily, monthly and annual reports on traffic volumes and toll revenues.

3.4.4 Restrictions on assignments, encumbrances, refinancing and amendment of the contracts

Except as provided in the private sector debt financing agreements and in the RTA Consent Deed provisions described below,

- The Trustee and the Company may not sell, transfer, assign, novate, otherwise deal with or encumber their interests in the motorway or any of the main project contracts, and
- Control of the Trustee, the Company, the Holding Trustee and the Holding Company may not be changed, other than under a stock exchange listing or transfer of shares or units,

without the RTA's prior written consent, which may not be unreasonably withheld. The RTA has already consented, in the RTA Consent Deed, to a series of financiers' securities (see sections 3.6.3, 3.8 and 4.2) and, in the Project Deed, to any assignments the Trustee or the Company may be required to make for these securities under the project's debt financing arrangements. It has also consented to an 'equity sell down' of 54.9% of the project's equity interests on 2 July 2004, as described in the footnote in section 2.1 of this report.

Similarly, the Trustee and the Company may not transfer or otherwise deal with their interests in the Rail Agreement without RailCorp's prior written consent.

Except as provided in the Project Deed and RTA Consent Deed provisions on project refinancings described below, and except for a transfer of an equity investor's interest in specified

equity investment documents which falls short of a change of control requiring the RTA's consent under the provisions just described, the Trustee and the Company may not at any time materially amend, terminate or surrender any of the project contracts to which they are parties without first obtaining the RTA's consent, in accordance with procedures set out in the Project Deed.

Under the RTA Consent Deed,

- The Trustee, the Company, the Borrower and the Security Trustee may:
 - Refinance the project only in accordance with Project Deed requirements described below, and
 - Otherwise amend, replace or agree to any amendment or replacement of any of the project's debt financing agreements—except for minor technical changes which they reasonably believe will not worsen the RTA's position—only with the RTA's prior written consent, which may not be unreasonably withheld.

If these requirements are breached, the RTA's liabilities under the project contracts will be the same as before the unauthorised refinancing or amendments.

- The Trustee, the Company and the Borrower must obtain the RTA's written consent before permitting the debt bond underwriter (currently ABN AMRO Bank NV (Australian Branch)) or the debt bond guarantor (currently MBIA Insurance Corporation) to transfer any of their rights or obligations under the debt financing agreements.

The RTA may not unreasonably withhold its consent, and must grant it if the proposed transferee is a bank or financial institution satisfying specified minimum S&P or Moody's ratings or another entity whose obligations are guaranteed, on terms acceptable to the RTA, by a financial institution satisfying the same minimum S&P or Moody's ratings.

- The Security Trustee must obtain the RTA's written consent, which may not be unreasonably withheld, before transferring any of its rights and obligations under the debt financing agreements, except for the appointment of a replacement Security Trustee to carry out its security functions under these agreements.
- Any dealings with the motorway or the land leased by the Trustee under the Motorway Stratum Lease under the debt financiers' securities will be subject to the Trustee's obligations, under the Project Deed, to surrender the motorway and this leased land to the RTA at the end of the motorway's operating term (see section 3.3.9).

For its part, the RTA:

- May not amend, replace or novate the LCT/M2 Interface Agreement or waive any of its terms without the prior

consent of the Trustee and/or the Company, as applicable, if this would have a material adverse effect on either's ability to exercise its rights and perform its obligations under the Project Deed or increase its costs in doing so

- May otherwise transfer, sell or otherwise dispose of its own rights and obligations under any of its contracts with private sector parties without the consent of the Trustee and the Company, provided the transferee is backed by a NSW Government guarantee on terms at least as favourable as the PAFA Act Deed of Guarantee, but may do so only with the prior written consent of the Security Trustee, which may not unreasonably withhold its consent and must grant its consent if written details have been provided, the proposed transferee has agreed to be bound by the RTA contracts and the transferee will be backed by a NSW Government guarantee on terms at least as favourable as the PAFA Act Deed of Guarantee
- Has acknowledged that the Trustee, the Company and the Borrower may amend, replace, rescind, terminate or waive their rights and obligations under the project contracts only in accordance with the debt financing agreements, and has agreed that any amendments etc not complying with these requirements will be ineffective, and
- May not amend any of the project contracts to which it is a party—other than by changing the scope of works under the arrangements described in sections 3.2.2 and 3.3.2 or by making minor technical amendments which could not reasonably affect the interests of the project's debt financiers—without the Security Trustee's prior written consent, which may not be unreasonably withheld or delayed.

Under the Project Deed's provisions on project refinancings, covering any amendment to or replacement of any of the private sector debt financing agreements and the exercising or waiving of rights under any of these debt financing agreements, the Borrower may execute a proposed refinancing without the RTA's prior consent if:

- It is a 'scheduled' refinancing specifically taken into account in the private sector's 'base case financial model' of 9 December 2003 (or any updated version reflecting a later refinancing), or it is a 'par value' refinancing replacing but not exceeding an existing debt under the terms of the debt financing documents, or it is an 'unscheduled' refinancing which (a) will not produce net refinancing gains for the Trustee, the Company, the Holding Trustee, the Holding Company, the Security Trustee, the project's equity investors and their related bodies corporate, as specified in the Project Deed, and (b) will not adversely affect the RTA's position under the project contracts
- The refinancing involves a bond issue or financing by a bank or financial institution satisfying specified minimum S&P or

Moody's ratings or financing by another entity whose obligations are guaranteed, on terms acceptable to the RTA, by a bank or financial institution satisfying the same minimum S&P or Moody's ratings

- The Trustee and the Company give the RTA detailed information on the proposed refinancing, as specified in the Project Deed and as reasonably requested by the RTA, and
- The Trustee and the Company reimburse the RTA for all its reasonable costs concerning the proposed refinancing.

The RTA's prior written consent is required, however, if:

- The Borrower proposes a 'scheduled', 'par value' or 'unscheduled' refinancing involving financing by any source other than those described above, or
- The Borrower proposes an 'unscheduled' refinancing which (a) will produce net refinancing gains for the Trustee, the Company, the Holding Trustee, the Holding Company, the Security Trustee, the project's equity investors and their related bodies corporate, of types specified in the Project Deed, or (b) might adversely affect the RTA's position under the project contracts.

In both cases,

- The Trustee and the Company must again give the RTA detailed information on the proposed refinancing and reimburse the RTA for all its reasonable costs, and
- The RTA may not unreasonably withhold its consent.

The RTA will be entitled to receive 50% of any net refinancing gains from any 'unscheduled' refinancing, regardless of whether it requires the RTA's consent, provided the refinancing increases the project debt beyond that forecast in the private sector parties' 'base case financial model'.

The 'base case financial model' must be promptly updated, to the RTA's satisfaction, following any 'unscheduled' refinancing.

If a proposed 'unscheduled' refinancing requiring the RTA's consent is primarily aimed at curing an actual or potential default under the project's debt financing documents, or if it has another purpose but the RTA is prepared to consider it further, the RTA, the Trustee and the Company must seek to agree on how to calculate the net refinancing gain, how and when the RTA should be paid its share of this gain, if any, and how the 'base case financial model' should be adjusted.

If they cannot agree within 20 business days of the original request for the RTA's consent, or any longer period agreed between them,

- The Trustee or the Company may refer any of these matters concerning a proposal aimed at curing a financing default for determination under the Project Deed's dispute resolution procedures, described in section 3.4.7, and

- In all other cases, the proposed refinancing may not proceed.

3.4.5 Confidentiality and publicity

The project contracts and specified associated documents are subject to confidentiality restrictions. Specified exemptions to these restrictions include the release of information as required by the law or for legitimate government purposes, the release of information to aid investors, financiers and insurers and the publication of this updated *Summary of Contracts* (as tabled in Parliament after auditing by the Auditor-General).

The Trustee and the Company may make statements about the project to the media only with the RTA's prior written consent.

3.4.6 Changes in law

The renegotiation provisions described in section 3.5 below may apply if:

- There is a change in NSW legislation—including NSW regulations and other subordinate legislation, but excluding approvals by government or local government authorities—or a change in the application or interpretation of any such State law as a result of other NSW legislation, and this change specifically and only affects the Lane Cove Tunnel project, either on its own or together with other privately owned and operated NSW tollroads, or
- There is a change in any Commonwealth law requiring air quality and pollution control measures for the project—including legal principles established by court decisions, Commonwealth legislation and subordinate legislation and other binding requirements, such as approvals by government authorities under Commonwealth legislation—or the way any such Commonwealth law is applied or interpreted.

Except for the possibility of renegotiation if such a 'discriminatory change in State law' or 'change in Federal environmental law' occurs, the Trustee and the Company have accepted all the risks associated with any changes in law.

3.4.7 Dispute resolution under the Project Deed, the Agreement to Lease and the Motorway Stratum Lease

The Project Deed sets out detailed procedures which must be followed whenever there is a dispute between the RTA and the Trustee and/or the Company concerning:

- The Project Deed,
- The project's design and construction works or its operation, maintenance, repair and asset renewal works (other than disputes concerning the Trustee's construction and construction rehabilitation and repair works in and near areas leased or to be leased under the M2 motorway's contracts and disputes concerning the Operator's maint-

enance and repair of any Lane Cove Tunnel works in these M2 lease areas, which must be referred for expert determination under different procedures set out in a Schedule to the Project Deed),

- Whether an event has had a 'material adverse effect' on the project (one of the triggers for the renegotiation provisions described in section 3.5 below) or the outcomes of any renegotiations, or
- The Agreement to Lease or the Motorway Stratum Lease.

The Project Deed's dispute resolution procedures follow the following sequence:

- (i) First, at the request of any of the parties, negotiation of the dispute between the chief executive officers of the RTA, the Trustee and/or the Company or their nominees.

The RTA must give the Security Trustee reasonable notice of these negotiations, and the Security Trustee or up to two representatives of the project's debt financiers may attend and participate in these negotiations, subject to the RTA's prior written consent.

If the negotiations resolve the dispute, the decision of the CEOs or other representatives of the parties will be binding.

- (ii) If these negotiations fail to resolve the dispute within five business days, *and* the dispute concerns:
- A determination by the Independent Verifier, *or*
 - A failure to agree on the costs associated with a proposed change in the scope of the Trustee's design and construction works (see sections 3.2.2 and 3.3.2), *or*
 - A failure to agree on the maintenance and repair works required to satisfy the 'final handover' requirements of the Project Deed (see section 3.3.9), *or*
 - A failure to agree within 90 business days on whether an event potentially triggering the renegotiation provisions described in section 3.5 has had or is starting to have a 'material adverse effect' on the project, *or*
 - A failure to agree within 90 business days on the outcomes of any such renegotiations, *or*
 - A failure to agree on insurance liability limits or deductibles during a five-yearly review of operational phase insurance requirements (see section 3.4.2), *or*
 - A disagreement about whether an RTA notice extending the time available for the Trustee and/or the

Company to remedy a 'default event' provides a reasonable extension period (see section 3.6.2), *or*

- A failure to agree on how to calculate and share any net refinancing gain or adjust the 'base case financial model' under a proposed refinancing of the project aimed at curing an actual or potential default under the project's debt financing agreements (see section 3.4.4),

the dispute may be referred by the RTA, the Trustee or the Company, within ten business days, for determination by an independent expert, selected as specified in the Project Deed, in accordance with rules set out in the Project Deed.

The RTA must give the Security Trustee reasonable notice of any hearings held by the expert, and the Security Trustee or up to two representatives of the project's debt financiers may attend, participate in and make submissions at these hearings, subject to the RTA's prior written consent.

The RTA, the Trustee and the Company must equally share the costs of the expert, and each party must bear its own costs.

The decision of the expert will be final and binding, unless one of the parties involved notifies the other(s), within ten business days, that it is not satisfied and intends to refer the matter to arbitration.

- (iii) If a dispute is not of the types able to be referred to expert determination, as listed in (ii) above, and has not been resolved by the negotiations described in (i) within five business days, *or* if the dispute has been referred to expert determination but this has not resulted in its resolution to the satisfaction of all the parties, any party may refer the matter for final and binding arbitration, again in accordance with procedures and rules set out in the Project Deed (for disputes already considered by an expert, expedited arbitration rules will apply).

The RTA must give the Security Trustee reasonable notice of the arbitration hearings, and the Security Trustee or up to two representatives of the project's debt financiers may attend, participate in and make submissions at these hearings, subject to the RTA's prior written consent.

Notwithstanding the existence of any dispute, the RTA, the Trustee and the Company must continue to perform their obligations under the Project Deed.

The procedures outlined above do not prevent any party from seeking urgent relief from a court.

3.4.8 Force majeure under the Project Deed

Force majeure events are defined in the Project Deed as any:

- (a) Earthquake, cyclone, fire, explosion, flood, malicious damage, sabotage, act of a public or foreign enemy, terrorism, civil unrest, war, invasion, hostility between nations, civil insurrection, military coup or radioactive contamination from nuclear waste or the combustion of nuclear fuel
- (b) Confiscation, nationalisation, requisition or property damage under the order of any government, or
- (c) Other event after the opening of the motorway which is not itself, or does not arise from, a breach of the Project Deed by the Trustee or the Company and which is not otherwise subject to a specific risk allocation under the Project Deed

which:

- Is beyond the reasonable control of the Trustee or the Company and their contractors
- Causes the Trustee or the Company to be unable to perform its obligations under the Project Deed, and
- Could not have been prevented or avoided by the Trustee or the Company and their contractors by taking the steps a prudent, experienced and competent concessionaire, designer, constructor or tollroad operator would have taken.

If the Trustee or the Company alleges *force majeure* has occurred, it must promptly notify the RTA in writing, providing details of the event, its effects on its obligations, the actions it has taken or proposes to remedy the situation, the time it is unlikely to be able to carry out its affected obligations, the estimated costs of remediation and the insurance proceeds upon which it expects to be able to rely.

The RTA, the Trustee and the Company must then meet within five business days to determine how long the *force majeure* is likely to continue.

The Trustee and/or the Company, as relevant, must remedy the effects of the *force majeure* promptly, in accordance with the reinstatement provisions described in section 3.4.2 above.

Their Project Deed obligations affected by a *force majeure* event will be suspended, but only to the extent and for so long as the *force majeure* continues to affect these obligations.

More specifically, their obligations to keep all the motorway's traffic lanes open, subject to the exceptions listed in section 3.3.1 above, will be suspended only if the *force majeure* event prevents the safe passage of vehicles.

3.5 Renegotiation provisions

In addition to the Project Deed's provisions for amendment of its *Scope of Works and Technical Criteria* discussed in section 3.2.2 and the general restrictions on amendments to the project's contracts summarised in section 3.4.4, the Project Deed expressly envisages a range of circumstances under which the project's contracts might need to be renegotiated and/or other changes might need to be negotiated.

If:

- The project's planning approval is modified or a new planning approval is issued—other than as a result of a breach of the planning approval by the Trustee, the Company or their contractors or a change to the project proposed by the Trustee or the Company and agreed to by the RTA—and this necessitates a change to change to the Trustee's design and construction works (other than temporary, construction-phase-only works and processes) or a change to the motorway or its operation (see sections 3.2.3 and 3.3.3), or
- Any of 12 specified traffic connections to the motorway is closed or materially reduced, unless this is necessary during special events, emergencies or road maintenance or repair works, in response to incidents or because there is a material threat to public health or safety (see section 3.3.8), or
- Any of the Epping Road/Longueville Road traffic restrictions to be constructed as part of the 'Stage 2' works between Mowbray Road West and the Pacific Highway is removed or altered so as to increase the 'mid-block' capacities of this route above levels specified in the Project Deed (see section 3.3.8), or
- Any new road tunnel directly connecting the M2 motorway with the Gore Hill or Warringah Freeways is opened to traffic (see section 3.3.8), or
- A 'discriminatory change in State law' occurs (see section 3.4.6), or
- A 'change in Federal environmental law' occurs (see section 3.4.6), or
- An 'uninsurable event' occurs (see sections 3.4.2 and 3.4.8), or
- A court makes a final determination, not subject to appeal or no longer able to be appealed, which:
 - Is not issued because of a breach of the project contracts or any other wrongful act or omission by the Trustee or the Company or their contractors, and

- Prevents the Trustee or the Company from undertaking the project substantially in accordance with the Project Deed,

and the RTA overcomes the effect of this court order within 12 months of being notified of it by the Trustee or the Company

and this event or circumstance has had, or is starting to have, a material adverse effect on:

- The ability of the Borrower to repay its debt financiers substantially in accordance with the project's debt financing arrangements, or
- The nominal after-tax returns of notional initial corporate equity investors,

the Trustee and the Company must use all reasonable endeavours to mitigate the adverse consequences and may seek negotiations with the RTA under the arrangements described below.

If they notify the RTA of the event or circumstance, providing full details of its effects on the project, the RTA, the Trustee and the Company must enter into good faith negotiations, as soon as practicable but in any event within 20 business days of this notice, aimed at:

- Enabling the Borrower to repay the project's debt financiers and obtain scheduled refinancing in accordance with the project's debt financing arrangements, and
- Enabling the Trustee, the Company, the Holding Trustee, the Holding Company and the Borrower, collectively, to give the project's equity investors—nominally treated as if they were all among the project's initial equity investors—the lower of:
 - The after-tax equity return they would have received had the event or circumstance not occurred, and
 - The after-tax equity return they were originally predicted to receive, in the 'base case financial model' of 9 December 2003.

If the Borrower was not able to repay the debt financiers in accordance with the project's debt financing arrangements before the event or circumstance, or if the Trustee, the Company, the Holding Trustee, the Holding Company and the Borrower, collectively, were not able to provide the 'base case financial model' equity returns before the event or circumstance, these negotiations must instead aim simply to restore their abilities to those applying before the event or circumstance.

The RTA, the Trustee and the Company have agreed to take a flexible approach in any negotiations following an event or circumstance having a material adverse effect on the project. Among other things, they would have to consider amendments to the project contracts, a change in the motorway's operating

term, changes to the contributions to the project by the RTA, the Trustee and the Company (including their financial contributions) and adjustments to the project's tolls.

In the case of renegotiations following an 'uninsurable event', however, a change in the RTA's financial contribution to the project may not be considered unless other approaches negotiated in good faith between the RTA, the Trustee and the Company will not achieve the prescribed objectives.

The Trustee and the Company must use all reasonable endeavours to ensure the negotiation processes and results are efficiently applied and structured (for example, by not increasing taxation liabilities).

The Trustee or the Company must give the Security Trustee copies of all relevant communications and the RTA must notify it of all the negotiations. The Security Trustee or up to two representatives of the project's debt financiers may attend and participate in the negotiations.

As already discussed in section 3.2.2, the Trustee and the Company have agreed in the Transition Deed of Release that they will not be entitled to seek relief under these Project Deed renegotiation provisions for anything arising from or connected with the 'Stage 2' 'transition changes', subject to the exclusions described in section 3.2.2.

3.6 Defaults under and termination of the Project Deed

3.6.1 General RTA power to 'step in' following any unremedied Project Deed default by the Trustee or the Company

If the Trustee or the Company fails to perform any obligation to the RTA under the Project Deed, and does not remedy this failure within a reasonable period of time after receiving a written notice from the RTA requiring it to do so, the RTA may take any action necessary to remedy the default.

This expressly includes the imposition of a requirement by the RTA for part or all of the motorway to be closed and the entry by the RTA onto construction and maintenance sites and any land being used for construction, operational, maintenance, repair or asset renewal activities.

Any losses reasonably incurred by the RTA in taking this action will be recoverable from the Trustee or the Company, as applicable, as a debt.

The debt financiers' Security Trustee has expressly acknowledged the RTA's right to 'step in' in these circumstances.

This general right of the RTA to 'step in' is in addition to more specific rights for the RTA to 'step in', as described in section 3.6.2 below, following more narrowly defined 'default events'.

3.6.2 RTA notification and Trustee/Company remediation of Trustee/Company 'events of default'

'Events of default' are defined in the Project Deed as:

- Any failure by the Trustee to commence or expeditiously and diligently progress construction of the project
- Any display by the Trustee or the Company of an intention to permanently abandon the project
- After the opening of the motorway, any failure by the Company to keep all the motorway's traffic lanes, ramps, exits and entries open, except in expressly permitted circumstances (see section 3.3.1) and except for the eastbound ramp to the eastbound Gore Hill Freeway transit lane during the period of the temporary 'transition changes' exemption granted on 1 March 2007, as described in section 3.2.2
- Any material failure by the Company to operate, maintain, repair or insure the motorway in accordance with the Project Deed
- Any material failure by the Trustee to renew the motorway's assets in accordance with the Project Deed
- Any other material default by the Trustee, the Company or the Borrower under the Project Deed or any of their other contracts with the RTA
- Any of a defined series of 'events of insolvency' concerning the Trustee, the Company, the Borrower, the Holding Trustee or the Holding Company, even if the Trustee and the Company are not in breach of the Project Deed
- Again regardless of whether the Trustee and the Company are in breach of the Project Deed, any 'event of insolvency' concerning a Contractor or the Operator if the relevant Contractor or the Operator (as applicable) is not replaced within 30 days by a reputable, solvent entity which is acceptable to the RTA and which has the resources and experience to perform its obligations under the D&C Contract or the O&M Agreement (as applicable)
- Once again regardless of whether the Trustee and the Company are in breach of the Project Deed, any 'event of insolvency' concerning the Contractor Guarantor or the Operator Guarantor, if the relevant guarantor is not replaced within 30 days by a reputable, solvent entity which is acceptable to the RTA and which has the resources and experience to perform the Contractors' obligations under the D&C Contract or the Operator's obligations under the O&M Agreement (as applicable)
- Any material breach of a warranty or representation given by the Trustee or the Company under the Project Deed

- Any material breach of an undertaking, warranty or representation given by the Trustee under the Agreement to Lease or the Motorway Stratum Lease
- Any material breach of a warranty or representation given by the Trustee, the Company or the Borrower under the RTA Security, and
- A cancellation of the debt financiers' obligation to provide funding under the project's debt financing agreements.

If any of these 'events of default' occurs, the RTA may give the Trustee or the Company a written notice, copied to the other party, requiring the remediation of the default or the overcoming of its effects within:

- Five days if any of the motorway's lanes are closed, or
- For all other defaults, a reasonable period of time, as judged by the RTA and specified in the notice, but not more than 40 business days (if the default is a failure to pay money, the parties have already agreed a reasonable time will be ten business days).

The RTA must also give a copy of this notice to the Security Trustee.

The Trustee or the Company must then comply with this notice and ensure the other party and the Borrower, the Holding Trustee and the Holding Company do likewise.

Unless urgent action is required, or the default is a failure to pay money, the Trustee or the Company, as relevant, must give the RTA a program to remedy the default or overcome its effects, the RTA must consult with it on this program in good faith, and the Trustee and the Company must then comply with the settled remedial program and ensure the Borrower, the Holding Trustee and the Holding Company do likewise.

The Trustee and the Company must keep the Security Trustee informed on all the measures they are taking or intend to take to remedy the default. If it is requested to do so, the RTA must give the Security Trustee copies of all notices and other documents it issues to the Trustee or the Company concerning the default.

If there is a failure to remedy the default or overcome its effects, or if urgent action is necessary, the RTA may take any action it considers appropriate to remedy the default, and the Trustee and the Company must indemnify the RTA against any claims or losses it reasonably incurs in doing so.

If the Trustee or the Company believes, in good faith, that the time for remedying the default specified by the RTA's notice is not reasonable, it must immediately notify the RTA of this in writing, providing reasons, and the RTA must then review the specified time as soon as practicable.

If the Trustee, the Company, the Borrower, the Holding Trustee and the Holding Company are diligently carrying out a program

to remedy the default, and the motorway is open to the public, to the extent that it is safe for this to occur; in compliance with the Project Deed, the time specified in the RTA's notice must be extended by the time reasonably required to remedy the default, but not by more than six months, and this revised time to remedy the default must be notified in writing.

This process of requesting and obtaining extensions of time to remedy the default may be repeated, but the total extension of time granted may not exceed six months.

If the Trustee or the Company believes, in good faith, that the time for remedying the default specified by the RTA in an extension-of-time notice is still not reasonable, it may refer the matter for expert determination, and if necessary then for arbitration, under the Project Deed's dispute resolution procedures described in section 3.4.7 above. The maximum aggregate extension of time an expert or arbitrator may grant for remedying a default is six months.

While the 'event of default' remains unremedied the Trustee and the Company must obtain the RTA's consent before replacing a Contractor or the Operator (by novating the D&C Contract or the O&M Agreement), in accordance with procedures and criteria set out in the RTA Consent Deed. In the case of any replacement of the Operator, these procedures and criteria are the same as those applying at all times under the Project Deed, as already described in section 3.3.1.

If the 'event of default' is not remedied within the notified or determined period, as extended, or if at any time during this period:

- The Trustee, the Company, the Borrower, the Holding Trustee and the Holding Company are not diligently carrying out a program to remedy the default or overcome its effects, or
- The motorway is not open to the public, to the extent that it would be safe for this to occur, except in the circumstances described in section 3.3.1,

the RTA may initiate procedures to terminate the Project Deed, as described in section 3.6.4 below, subject to a potential further extension of the time to remedy the default if the Security Trustee intervenes under the arrangements summarised in section 3.6.3.

3.6.3 Security Trustee remediation of Trustee/Company 'events of default' and other potential triggers for termination

In addition to the rights and obligations of the Trustee, the Company and the RTA under the Project Deed to remedy

'events of default' as discussed above, under the RTA Consent Deed the Security Trustee has the right to remedy or procure the remedy of:

- The 'events of default' listed in section 3.6.2, and
- Any other event or circumstance entitling the RTA to terminate any or all of the contracts to which the RTA is a party*

by 'stepping in' and:

- Exercising the rights of the Trustee and/or the Company under the project contracts
- Appointing a receiver, manager, administrator, controller, agent or attorney to perform some or all of the obligations of the Trustee and/or the Company under these agreements
- Engaging (or permitting such a receiver etc to engage) other persons or organisations, reasonably acceptable to the RTA, to perform some or all of the Trustee's and/or the Company's obligations under the agreements, or
- Assigning, novating or otherwise disposing of any or all of the rights and obligations of the Trustee and/or the Company under the agreements, or permitting a receiver etc to do so.

The RTA has expressly acknowledged and consented to these rights of the Security Trustee (and receivers etc) in these circumstances, along with all the other rights of the Security Trustee and the debt financiers under the project's private sector debt financing securities.

If any event entitling the Security Trustee etc to 'step in' occurs, the RTA must:

- Give the Security Trustee etc and its agents, consultants and contractors all necessary access to the relevant sites or land if the Security Trustee notifies the RTA of their intention to access these areas, subject to the provisions of the Project Deed, the Agreement to Lease and the Motorway Stratum Lease, and
- In response to reasonable requests, give the Security Trustee etc all relevant information in the RTA's possession.

If the Security Trustee has 'stepped in' to attempt to remedy an 'event of default' or any other event or circumstance entitling the RTA to terminate contracts, it must advise the RTA of its remediation plans at least once every month, and also whenever reasonably requested by the RTA, providing details of the alternatives it is considering, estimated timeframes, any material changes to its plans and the progress being made in implementing the plans.

* The Security Trustee 'step in' provisions described in this section 3.6.3 do not apply, however, if a direction by the RTA, a court or tribunal or any other legal requirement following a native title claim is preventing the Trustee from carrying out construction work, even though, as already indicated in section 3.2.7 and as discussed further in section 3.6.5 below, the RTA may terminate the Project Deed, in its absolute discretion, if this situation continues for more than six months.

While the 'event of default' or other event remains unremedied the Security Trustee must obtain the RTA's consent before:

- Replacing a Contractor or the Operator (by novating the D&C Contract or the O&M Agreement)
- Transferring or otherwise disposing of the rights and obligations of the Trustee, the Company, the Borrower, the Holding Trustee and/or the Holding Company under the project contracts, or
- Disposing of all the units in the Trust and shares in the Company

in accordance with procedures and criteria set out in the RTA Consent Deed. The RTA Consent Deed also sets out requirements for the RTA and the other relevant parties to execute agreements giving effect to any such replacement or disposal.

Under the RTA Consent Deed the RTA's rights under the Project Deed to terminate that deed for an unremedied 'event of default', following the procedures described in section 3.6.4 below, may not be exercised:

- During the remedy period notified by the RTA to the Trustee or the Company, as extended under the Project Deed provisions described in section 3.6.2, *provided*:
 - The Trustee, the Company, the Borrower, the Holding Trustee and the Holding Company are diligently carrying out a program to remedy the default or overcome its effects, and
 - The motorway is open to the public, to the extent that it would be safe for this to occur, except in the circumstances described in section 3.3.1.
- During any additional period of up to 12 months, *provided*:
 - The Security Trustee or a receiver, manager, administrator, controller, agent or attorney appointed by the Security Trustee is diligently trying to remedy the 'event of default', and
 - If the motorway has been opened, the Security Trustee or receiver etc is continuing to operate the motorway and keep it open to the public, to the extent that it is safe for this to occur, in compliance with the Project Deed (see section 3.3.1).
- At any time, if the 'event of default' was caused by a material breach by the RTA of the Project Deed or the Motorway Stratum Lease.

These RTA Consent Deed provisions do not affect the RTA's rights under the Project Deed to terminate the Project Deed if a direction by the RTA, a court or tribunal or any other legal requirement following a native title claim has prevented the Trustee from carrying out construction work for more than six months (see sections 3.2.7 and 3.6.5).

3.6.4 Termination of the Project Deed by the RTA following a Trustee/Company 'event of default'

If an 'event of default' is not remedied within the notified or determined period, as extended, or if at any time during this period:

- The Trustee, the Company, the Borrower, the Holding Trustee and the Holding Company are not diligently carrying out a program to remedy the default, or
- The motorway is not open to the public, to the extent that it would be safe for this to occur, except in the circumstances described in section 3.3.1,

the RTA may—subject to a possible extension of the remedy time if the Security Trustee 'steps in' as just described—give the Trustee and the Company, and the Security Trustee, 20 business days' notice, in writing, that the RTA intends to terminate the Project Deed.

If the 'event of default' is not remedied or the Security Trustee has not 'stepped in' within this 20 business day period, the RTA may then immediately terminate the Project Deed.

If the RTA does terminate the Project Deed for an unremedied 'event of default',

- The Agreement to Lease, the Motorway Stratum Lease and the Motorway Stratum Sublease will automatically be terminated
- The RTA will be entitled to recover any losses it may suffer as a result of the termination, plus any other damages arising from breaches of contract by the Trustee or the Company
- The RTA will not be liable to pay any compensation or other money to the Trustee or the Company, except for any damages payable because of any breach of contract by the RTA
- The RTA must maintain and repair any parts of the Lane Cove Tunnel works which are located within areas leased or to be leased under the M2 motorway's contracts
- The RTA may require the novation of the D&C Contract, D&C Guarantee and the Sub Deed of Appointment of Independent Verifier in accordance with the Contractors' Side Deed, with the RTA effectively stepping into the shoes of:
 - The Trustee and the Company under the D&C Contract and the D&C Guarantee, and

- The Trustee, the Company and the Security Trustee under the Sub Deed of Appointment of Independent Verifier;

so that independently verified design and construction work by the Contractors may continue directly for the RTA, with the backing of the Contractor Guarantor under the D&C Guarantee

- Similarly, the RTA may require the novation of the O&M Agreement, the O&M Guarantee and the Sub Deed of Appointment of Independent Verifier in accordance with the Operator's Side Deed, with the RTA effectively stepping into the shoes of:

- The Trustee and the Company under the O&M Agreement and the O&M Guarantee, and
- The Trustee, the Company and the Security Trustee under the Sub Deed of Appointment of Independent Verifier;

so that the operational phase work of the Operator may continue directly for the RTA, with independent verification (if still relevant) and with the backing of the Operator Guarantor under the O&M Guarantee

- If the D&C Contract and the O&M Agreement are both novated to the RTA, the Co-operation Agreement will automatically be novated to the RTA, with the RTA stepping into the shoes of the Trustee and the Company under this agreement
- The Trustee and the Company must execute documents transferring all their interests in the project and its assets to the RTA, and ensure the Borrower, the Holding Trustee and the Holding Company do likewise
- The Trustee and the Company must surrender the motorway and the land leased under the Motorway Stratum Lease to the RTA
- The Company must deliver the *Operation and Maintenance Manuals* and all furniture, fittings, plant, equipment, machinery and spare parts required to operate, maintain and repair the motorway and maintain and repair the local road, property and services works
- The Trustee and the Company must pay the RTA any unexpended insurance proceeds and assign their insurance rights to the RTA, unless this is contrary to the arrangements for insurance proceeds described in section 3.4.2
- The Trustee and the Company must give the RTA their accounts and all other records relating to the project, and must ensure the Borrower, the Holding Trustee and the Holding Company do likewise (the RTA must allow the Trustee and the Company to access the accounts and records they hand over for the next seven years), and

- The Trustee and the Company must do everything else they can to enable the RTA to complete construction, to maintain and repair the motorway and the local road, property and services works and to operate the motorway at at least the same level as immediately before the termination of the Project Deed, with minimal disruption to its use as a tollroad.

3.6.5 Termination of the Project Deed by the RTA following a native title claim

As already indicated in sections 3.2.7 and 3.6.3, if a direction by the RTA, a court or tribunal or any other legal requirement following a native title claim has prevented the Trustee from carrying out construction work for more than six months, the RTA may terminate the Project Deed, in its absolute discretion, simply by giving the Trustee and the Company a notice to this effect.

If the RTA does terminate the Project Deed in these circumstances,

- The Agreement to Lease, the Motorway Stratum Lease and the Motorway Stratum Sublease will automatically be terminated
- The RTA must pay the Trustee and the Company, within 30 days,
 - An amount equal to the project's total debt on the date of payment, and
 - An amount that will permit the Trustee, the Company, the Borrower, the Holding Trustee and the Holding Company to give the project's equity investors—treated as if they were all among the project's initial equity investors—the after-tax equity return they would otherwise have been expected to receive to the date of payment, taking account of previous payments and any obligations of the Trustee, the Company, the Borrower, the Holding Trustee and the Holding Company to make termination payments to their contractors (other than any amount related to an amount payable by a Contractor to a related corporate entity not engaged by it on an arm's-length commercial basis)
- The RTA must release any security bonds provided to it by the Trustee or the Company
- The RTA, the Trustee and the Company will continue to be liable for any damages payable because of a breach of contract
- The RTA must maintain and repair any parts of the Lane Cove Tunnel works which are located within areas leased or to be leased under the M2 motorway's contracts

- The RTA may require the novation of the D&C Contract, D&C Guarantee and the Sub Deed of Appointment of Independent Verifier in accordance with the Contractors' Side Deed, with the RTA effectively stepping into the shoes of:
 - The Trustee and the Company under the D&C Contract and the D&C Guarantee, and
 - The Trustee, the Company and the Security Trustee under the Sub Deed of Appointment of Independent Verifier;

so that independently verified design and construction work by the Contractors may continue directly for the RTA, with the backing of the Contractor Guarantor under the D&C Guarantee

- Similarly, the RTA may require the novation of the O&M Agreement, the O&M Guarantee and the Sub Deed of Appointment of Independent Verifier in accordance with the Operator's Side Deed, with the RTA effectively stepping into the shoes of:
 - The Trustee and the Company under the O&M Agreement and the O&M Guarantee, and
 - The Trustee, the Company and the Security Trustee under the Sub Deed of Appointment of Independent Verifier;

so that the operational phase work of the Operator may continue directly for the RTA, with independent verification (if still relevant) and with the backing of the Operator Guarantor under the O&M Guarantee

- If the D&C Contract and the O&M Agreement are both novated to the RTA, the Co-operation Agreement will automatically be novated to the RTA, with the RTA stepping into the shoes of the Trustee and the Company under this agreement
- The Trustee and the Company must execute documents transferring all their interests in the project and its assets to the RTA, and ensure the Borrower, the Holding Trustee and the Holding Company do likewise
- The Trustee and the Company must surrender the motorway and the land leased under the Motorway Stratum Lease to the RTA
- The Company must deliver the *Operation and Maintenance Manuals* and all furniture, fittings, plant, equipment, machinery and spare parts required to operate, maintain and repair the motorway and maintain and repair the local road, property and services works

- The Trustee and the Company must pay the RTA any unexpended insurance proceeds and assign their insurance rights to the RTA, unless this is contrary to the arrangements for insurance proceeds described in section 3.4.2
- The Trustee and the Company must give the RTA their accounts and all other records relating to the project, and must ensure the Borrower, the Holding Trustee and the Holding Company do likewise (the RTA must allow the Trustee and the Company to access the accounts and records they hand over for the next seven years), and
- The Trustee and the Company must do everything else they can to enable the RTA to complete construction, to maintain and repair the motorway and the local road, property and services works and to operate the motorway at at least the same level as immediately before the termination of the Project Deed, with minimal disruption to its use as a tollroad.

3.6.6 Claims against the RTA by the Trustee or the Company

The RTA is not liable for any claims made by the Trustee or the Company in connection with any act or omission by the RTA or any of their design and construction, asset renewal and operation and maintenance works, other than claims arising from *force majeure* events (section 3.4.8) or the renegotiation arrangements described in section 3.5, if the Trustee or the Company, as relevant, does not comply with notification requirements which are detailed in the Project Deed.

3.6.7 Termination of the Project Deed by the Trustee or the Company

The Trustee and the Company may terminate the Project Deed, by giving the RTA 30 business days' notice in writing, if:

- A court makes a final determination, not subject to appeal or no longer able to be appealed, which:
 - Prevents the Trustee, the Company, the Borrower, the Holding Trustee or the Holding Company from undertaking the project substantially in accordance with the project contracts, and
 - Does *not* arise from any contractual breach or other wrongful act or omission by the Trustee, the Company, the Borrower, the Holding Trustee, the Holding Company or their contractors,

and the RTA fails to overcome the effect of the determination within 12 months of being notified about it by the Trustee or the Company,* or

* During this 12-month period the RTA must pay the Trustee and the Company, monthly in arrears, amounts sufficient to place the Trustee, the Company, the Borrower, the Holding Trustee and the Holding Company, collectively, in the net (after tax) position they would have been in had the court not made its determination.

- The NSW Government enacts legislation, including any rules, regulations or by-laws, which has the effect of prohibiting the Trustee, the Company, the Borrower, the Holding Trustee or the Holding Company from undertaking the project substantially in accordance with the project contracts, or
- Any government or local government authority resumes any part of the motorway stratum, and this prevents the Trustee, the Company, the Borrower, the Holding Trustee or the Holding Company from undertaking the project substantially in accordance with the project contracts, or
- The RTA breaches its Project Deed obligations to provide construction access (see section 3.2.5), and this prevents the Trustee, the Company, the Borrower, the Holding Trustee or the Holding Company from undertaking the project substantially in accordance with the project contracts and is not remedied by the RTA within 12 months of the RTA's being notified of the breach.*

The RTA may, however, suspend the rights of the Trustee and the Company to terminate the Project Deed for up to 12 months from the date of their original notice of termination, by giving them a written notice to this effect within 30 business days.

During this period of suspension,

- The Trustee and the Company must continue to perform their obligations under the Project Deed if it is lawful and practicable for them to do so, and
- The RTA must pay the Trustee and the Company, monthly in arrears, amounts sufficient to place the Trustee, the Company, the Borrower, the Holding Trustee and the Holding Company, collectively, in the net (after tax) position they would have been in had the event giving the Trustee and the Company the right to terminate never occurred.

If the relevant event has not been remedied by the RTA at the end of the suspension period, the Project Deed will automatically terminate on that date, and

- The Agreement to Lease, the Motorway Stratum Lease and the Motorway Stratum Sublease will automatically be terminated
- The RTA must pay the Trustee and the Company, within 30 days,
 - An amount equal to the project's total debt on the date of payment, and
 - An amount that will permit the Trustee, the Company, the Borrower, the Holding Trustee and the Holding Company to give the project's equity investors—

treated as if they were all among the project's initial equity investors—the after-tax equity return they would otherwise have been expected to receive to the date of payment, taking account of previous payments and any obligations of the Trustee, the Company, the Borrower, the Holding Trustee and the Holding Company to make termination payments to their contractors (other than any amount related to an amount payable by a Contractor to a related corporate entity not engaged by it on an arm's-length commercial basis)

- The RTA must release any security bonds provided to it by the Trustee or the Company
- The RTA, the Trustee and the Company will continue to be liable for any damages payable because of a breach of contract
- The RTA must maintain and repair any parts of the Lane Cove Tunnel works which are located within areas leased or to be leased under the M2 motorway's contracts
- The RTA may require the novation of the D&C Contract, D&C Guarantee and the Sub Deed of Appointment of Independent Verifier in accordance with the Contractors' Side Deed, with the RTA effectively stepping into the shoes of:
 - The Trustee and the Company under the D&C Contract and the D&C Guarantee, and
 - The Trustee, the Company and the Security Trustee under the Sub Deed of Appointment of Independent Verifier;

so that independently verified design and construction work by the Contractors may continue directly for the RTA, with the backing of the Contractor Guarantor under the D&C Guarantee

- Similarly, the RTA may require the novation of the O&M Agreement, the O&M Guarantee and the Sub Deed of Appointment of Independent Verifier in accordance with the Operator's Side Deed, with the RTA effectively stepping into the shoes of:
 - The Trustee and the Company under the O&M Agreement and the O&M Guarantee, and
 - The Trustee, the Company and the Security Trustee under the Sub Deed of Appointment of Independent Verifier;

so that the operational phase work of the Operator may continue directly for the RTA, with independent verification

* During this 12-month period the RTA must pay the Trustee and the Company, monthly in arrears, amounts sufficient to place the Trustee, the Company, the Borrower, the Holding Trustee and the Holding Company, collectively, in the net (after tax) position they would have been in had the RTA's breach not occurred.

(if still relevant) and with the backing of the Operator Guarantor under the O&M Guarantee

- If the D&C Contract and the O&M Agreement are both novated to the RTA, the Co-operation Agreement will automatically be novated to the RTA, with the RTA stepping into the shoes of the Trustee and the Company under this agreement
- The Trustee and the Company must execute documents transferring all their interests in the project and its assets to the RTA, and ensure the Borrower, the Holding Trustee and the Holding Company do likewise
- The Trustee and the Company must surrender the motorway and the land leased under the Motorway Stratum Lease to the RTA
- The Company must deliver the *Operation and Maintenance Manuals* and all furniture, fittings, plant, equipment, machinery and spare parts required to operate, maintain and repair the motorway and maintain and repair the local road, property and services works
- The Trustee and the Company must pay the RTA any unexpended insurance proceeds and assign their insurance rights to the RTA, unless this is contrary to the arrangements for insurance proceeds described in section 3.4.2
- The Trustee and the Company must give the RTA their accounts and all other records relating to the project, and must ensure the Borrower, the Holding Trustee and the Holding Company do likewise (the RTA must allow the Trustee and the Company to access the accounts and records they hand over for the next seven years), and
- The Trustee and the Company must do everything else they can to enable the RTA to complete construction, to maintain and repair the motorway and the local road, property and services works and to operate the motorway at at least the same level as immediately before the termination of the Project Deed, with minimal disruption to its use as a tollroad.

3.7 Defaults under and termination of the Rail Agreement

Under the Rail Agreement, RailCorp may, at any time and at the cost of the Trustee or the Company, 'step in' to rectify any damage to rail infrastructure caused by the Trustee, the Company or the Lane Cove Tunnel project, and/or to do anything necessary or desirable to protect rail infrastructure facilities.

If the Trustee or the Company defaults on any of its obligations under the Rail Agreement, RailCorp may issue a notice requiring it to rectify the default within a specified reasonable time. Within 48 hours the Trustee or the Company, as applicable, must

submit a 'cure plan' for rectifying the default and may request an extension of the rectification period. RailCorp must review this plan within a reasonable time, and if it approves the plan—or a cure plan with modifications required by RailCorp—the Trustee or the Company, as applicable, must rectify the default in accordance with the plan and within the timeframe stipulated or agreed to by RailCorp. If the Trustee or the Company fails to do so, or if urgent action is necessary, RailCorp may take any action it considers appropriate to rectify the default or take the urgent action, with the Trustee or the Company, as applicable, being liable to pay RailCorp for its costs.

The parties to the Rail Agreement may terminate the Rail Agreement at common law. In addition, and without limiting this, the Rail Agreement expressly gives RailCorp the right to terminate the Rail Agreement if:

- The Trustee or the Company fails to submit a 'cure plan' within 48 hours or any longer period nominated by RailCorp
- The Trustee or the Company does not comply with an approved 'cure plan' for rectifying a default, or
- A Trustee or Company default cannot be rectified.

3.8 Finance defaults

Under the RTA Consent Deed the Security Trustee must:

- Promptly notify the RTA of any default under the project's debt financing agreements
- Give the RTA copies of any correspondence or documents it issues to the Trustee, the Company, the Borrower, the Holding Trustee or the Holding Company concerning such a finance default, and
- Give the RTA at least ten days' written notice before it declares any debts due and payable or takes any action to enforce the debt financiers' securities or recover any of the money secured (see section 4.2), unless the Security Trustee reasonably believes any delay in appointing a receiver etc would materially harm the debt financiers, in which case only 24 hours' written notice need be given.

The RTA has expressly acknowledged the rights of the Security Trustee, the financiers and any receiver etc appointed by the Security Trustee under the debt financiers' securities, including their rights to assume the rights and obligations of the Trustee and the Company under the project contracts to which the RTA is a party.

In exercising its rights under the debt financiers' securities following a finance default the Security Trustee must, however, obtain the RTA's consent before:

- Transferring or otherwise disposing of the rights and obligations of the Trustee, the Company, the Borrower, the Holding

Trustee and/or the Holding Company under the project contracts, or

- Disposing of all the units in the Trust and shares in the Company

in accordance with procedures and criteria set out in the RTA Consent Deed.

The RTA Consent Deed also sets out requirements for the RTA and the other relevant parties to execute agreements giving effect to any such disposal.

4 The RTA Security and interactions between RTA and private sector securities

4.1 The RTA Security

Under the RTA Security each of the Trustee, the Company and the Borrower has granted the RTA a fixed and floating charge* over all its present and future assets, undertakings and rights as security for the satisfaction of all its obligations to the RTA under the Project Deed, the Agreement to Lease, the Motorway Stratum Lease, the Deed of Appointment of Independent Verifier, the Contractors' Side Deed, the Operator's Side Deed, the RTA Security, the RTA Consent Deed and all other project contracts.

Under the RTA Consent Deed, however, until the project's debt financiers have been fully repaid each of these charges will operate only as a floating charge—even for property over which the charge is fixed from the outset under the terms of the RTA Security—unless the asset in question is also subject to a fixed charge, at the same time, under any of the debt financiers' securities under the project's private sector debt financing arrangements, or otherwise unless the Security Trustee has consented to the asset's being subject to a fixed charge to the RTA. The Security Trustee may not unreasonably withhold its consent.

The Trustee, the Company and the Borrower have warranted in the RTA Security that there are and will be no encumbrances over their charged property other than encumbrances specified in and permitted under the private sector debt financing arrangements and encumbrances in favour of the RTA.

They have also undertaken not to create any other encumbrances or sell, transfer or otherwise deal with any of their property subject to the fixed charges in favour of the RTA, other than encumbrances specified in and permitted under the private sector debt financing arrangements.

The relative priorities of the charges created by the RTA Security and the project debt financiers' securities are governed by the RTA Consent Deed, as discussed in section 4.2 below. With one exception, discussed in section 4.2, the charges created by the RTA Security rank behind the debt financiers' securities but

ahead of all other securities affecting the property of the Trustee, the Company and the Borrower.

Subject to the priorities between securities under the RTA Consent Deed, the restrictions on enforcement also imposed under that deed (section 4.2) and any law requiring a period of notice or a lapse of time, the charges created by the RTA Security may be immediately enforced by the RTA if:

- An 'event of default' occurs (see section 3.6.2), or
- The Trustee or the Company fails to comply with its Project Deed obligations to the RTA, at the end of the operating term or upon any earlier termination of the Project Deed, to surrender the motorway and the leased land to the RTA and fulfil other obligations listed in section 3.3.9.

In these circumstances, and again subject to the RTA Consent Deed, the RTA may:

- Appoint a receiver or a receiver and manager of the charged property, exercising powers set out in the RTA Security
- Exercise any of these powers itself, along with any other powers conferred on the RTA by the project contracts, by statutes or by law or equity, and/or delegate its powers to agent(s) of the RTA, and
- Do anything it considers necessary or expedient to remedy a failure by the Trustee, the Company or the Borrower to comply with its obligations under the project contracts.

The Trustee, the Company and the Borrower have irrevocably appointed the RTA as their attorney, able to do all the acts required of them under the RTA Security and take whatever additional action the RTA thinks necessary or desirable to better secure the payment of any money owing under the contracts.

4.2 Consents to and priorities between the RTA and debt financiers' securities

The RTA Consent Deed formally records the RTA's consent to the debt financiers' securities under the project's private sector

* The Trustee, the Company and the Borrower may deal with the parts of their property subject only to a floating charge in the ordinary course of their businesses, but may not deal with the parts of their property subject to a fixed charge, except as described below.

debt financing agreements and the Security Trustee's consent to the RTA's securities under the RTA Security.

With the exception of what are termed 'RTA priority moneys'—any amounts the Trustee or the Company owes to the RTA because it has taken action to remedy a Project Deed default by the Trustee or the Company after a failure by them to remedy the default themselves, as described in sections 3.6.1 and 3.6.2—each of the debt financiers' securities has priority over any RTA security over the same property.

Accordingly, any money received by the Security Trustee, the RTA or any receiver, receiver/manager, agent or attorney on enforcement of a debt financiers' security or an RTA charge, as the case may be, must be applied:

- First, to pay any 'RTA priority moneys'
- Second, to pay all sums secured from time to time by the debt financiers' securities, and
- Third, to pay all other sums of money secured from time to time by the RTA charges.

Similarly, any action by the Security Trustee or a receiver etc under the debt financiers' securities will take precedence over any enforcement action by the RTA.

The RTA must obtain the consent of the Security Trustee before it may:

- Enforce the RTA charges or exercise any of its other rights under the RTA Security, including any action to crystallise a floating charge or appoint a receiver or receiver/ manager, or
- Sell, take possession of or appoint a controller to any property subject to the RTA charges.

In addition, the RTA may not take any action that initiates, supports or is otherwise connected with any insolvency, winding up, liquidation, reorganisation, administration or dissolution proceedings or voluntary arrangements concerning the Trustee, the Company or the Borrower.

5 NSW Government guarantee of the RTA's performance

Under the Public Authorities (Financial Arrangements) Act Deed of Guarantee, between the Minister for Roads (on behalf of the State of NSW), the RTA, the Trustee, the Company and the Security Trustee, the State of NSW has unconditionally and irrevocably guaranteed the RTA's performance of all its obligations under the Project Deed, the Agreement to Lease, the Motorway Stratum Lease, the Deed of Appointment of Independent Verifier, the Contractors' Side Deed, the Operator's Side Deed, the RTA Security, the RTA Consent Deed and any other documents approved by the NSW Treasurer in the future.

This guarantee is a continuing obligation. It will remain in force until seven months after the term of these contracts or seven

months after any earlier termination of the contracts, even if the RTA is discharged from any or all of its guaranteed obligations under the contracts for any reason whatsoever.

The State must satisfy its obligations under the guarantee within 21 days of a demand being made by the Trustee, the Company or the Security Trustee. Such a demand may be made if a demand has previously been made on the RTA and the RTA has failed to perform within the time allowed under the guaranteed project contracts.

In turn, the RTA has indemnified the State, the NSW Treasurer and the NSW Government against any and all liabilities they may incur because of the PAFA Act Deed of Guarantee.



This *Updated Summary of Contracts* was written, edited, designed and produced for the New South Wales Roads and Traffic Authority (RTA) by Catalyst Communications, Suite 101A, 75 Archer Street, Chatswood, NSW 2067 (phone (02) 9413 1497, fax (02) 9415 1027, www.catalyst.com.au). The assistance of the RTA and Clayton Utz is gratefully acknowledged.

Catalyst Communications makes no representations or warranties, express or implied, as to the accuracy or completeness of sections 1.1 and 1.2 of this report, for which original source documentation has generally not been sighted.

In addition, and in accordance with the NSW Government's *Working with Government Guidelines for Privately Financed Projects*, sections 2 to 5 of this report:

- Present only summaries of, and *not* complete reports on, the Lane Cove Tunnel project contracts of greatest relevance to the public sector; and
- Do not cover matters which might disclose the private sector parties' cost structures, profit margins or intellectual property or otherwise place them at a disadvantage with their competitors.

This report should not be relied upon for legal advice and is not intended for use as a substitute for the contracts.

It is based on the project's contracts as at the date of opening of the motorway to traffic, 25 March 2007. Subsequent amendments of or additions to these contracts, if any, are not reflected in this report.