



MINISTRY OF TRANSPORT

Associated Operator Direct Agreement

The Director-General of the Ministry of Transport

[Name of Associated Operator]

Explanatory Note

It is a condition precedent to the MBSC that each Associated Operator enters into an Associated Operator Direct Agreement with the Director-General.

This Associated Operator Direct Agreement includes the following provisions:

- (i) an agreement to do or refrain from doing anything the MBSC requires the Operator to procure the Associated Operator do or refrain from doing;
- (ii) an undertaking not to terminate the subcontract agreement between the Operator and the Associated Operator in certain circumstances;
- (iii) acknowledging cure rights in favour of the Director-General in the case of a default by the Operator of the AO Subcontract; and
- (iv) similar end of term rights in favour of the Director-General over the Associated Operator's Contract Buses and Contract Region Depots on termination or expiry of the MBSC (or any Second Contract).

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Date

Parties **Director-General of the Ministry of Transport** under the *Passenger Transport Act* of Level 19, 227 Elizabeth Street, Sydney, New South Wales on behalf of The Crown in Right of the State of New South Wales (**Director-General**)

[insert name and address of Associated Operator] (Associated Operator)

Recitals

- A. The Director-General has agreed to allow the Operator to subcontract the provision of part of the Bus Services to the Associated Operator.
- B. The Associated Operator has agreed to grant the Director-General certain rights over its assets on the termination or expiry of the MBSC or any Second Contract.
- C. This Agreement sets out the parties' agreement as to how the Director-General may exercise his rights, and other relevant matters between the parties.

Operative provisions

1 Definitions and interpretation

1.1 Definitions

In this Agreement, unless the context requires another meaning:

AO Subcontract means any agreement between the Operator and the Associated Operator, pursuant to which the Associated Operator agrees to provide services required for the Operator to fulfil its obligations under the MBSC or any Second Contract.

Bus Lease means any Operating Lease or Finance Lease under which a Contract Bus is leased to the Associated Operator. As at the date of this Agreement, the Bus Leases are listed in Schedule 2.

Bus Lease Direct Agreement means a direct agreement between, among others, the Director-General and the Associated Operator and substantially in the form set out in Annexure B.

Certificate of Service Commencement means a certificate issued by the Director-General to the Operator pursuant to Clause 2.2(a) of the MBSC.

Contract Bus means a Bus owned or leased by the Associated Operator and used or to be used in the provision of any of the Bus Services.

Contract Region Business means the business of:

- (a) performing Bus Services; and
- (b) any business or activity associated with the provision of Bus Services,

to be conducted by the Operator and the Associated Operator on and from the Service Commencement Date.

Contract Region Depot means a bus depot owned or leased by the Associated Operator and used or to be used in the provision of any of the Bus Services, including the land, buildings and other improvements comprising the depot.

Deed of Charge means a fixed and floating charge granted by the Associated Operator in favour of the Director-General and substantially in the form set out in Annexure A.

Default means:

- (a) any breach by the Operator of any of its obligations under the AO Subcontract or any event of default, termination event or similar event (whatever called) under the AO Subcontract; or
- (b) any other event or circumstance which, alone or with the giving of notice or passage of time or both, would entitle the Associated Operator to avoid, terminate, discharge or rescind the AO Subcontract or treat it as repudiated or to suspend the Associated Operator's performance of obligations under it;

Depot Lease means any lease under which a Contract Region Depot is leased to the Associated Operator. As at the date of this Agreement, the Depot Leases are listed in Schedule 3.

Depot Lease Direct Agreement means a direct agreement between, among others, the Director-General and the Associated Operator and substantially in the form set out in Annexure C.

Depot Sale Contract means a contract materially in the form described in Annexure E.

Enforcing Party means the Director-General or any receiver, receiver and manager, agent, attorney or nominee appointed or acting under an Operator Security, the MBSC or any Second Contract.

Existing Asset means any Existing Bus or Existing Depot.

Existing Bus means a Contract Bus owned or used by the Associated Operator at the date of this Agreement.

Existing Depot means a Contract Region Depot owned or used by the Associated Operator at the date of this Agreement.

General Financier Direct Agreement means a direct agreement between, among others, the Director-General and the Associated Operator and substantially in the form set out in Annexure D.

MBSC means the Metropolitan Bus System Contract dated [x] between the Operator and the Director-General;

New Asset means any New Bus or New Depot.

New Bus means any Bus to be owned or leased by the Associated Operator and approved by the Director-General under Clause 11.1 of the MBSC;

New Depot means any depot to be owned or leased by the Associated Operator and approved by the Director-General under Clause 11.3 of the MBSC.

Novation Asset means any Novation Bus or Novation Depot.

Novation Bus means:

- (a) an Existing Bus subject to a Bus Lease with the Associated Operator and set out in Part A of Schedule 5;
- (b) any New Bus subject to a Bus Lease with the Associated Operator;
- (c) an Existing Bus or New Bus subject to a Replacement Bus Lease with the Associated Operator; and
- (d) any other Contract Bus the Director-General and the Associated Operator agree to be a Novation Bus for the purposes of this definition,

together with any associated Spares, but does not include any Replaced Bus.

Novation Depot means:

- (a) an Existing Depot subject to a Depot Lease with the Associated Operator and set out in Part B of Schedule 5;
- (b) any New Depot subject to a Depot Lease with the Associated Operator;
- (c) any other Contract Region Depot the Director-General and the Associated Operator agree to be a Novation Depot for the purposes of this definition,

together with any associated plant and equipment, but does not include any Replaced Depot.

Operator means [insert name of Operator].

Operator Security means any Security Interest granted by the Operator (whether before or after the date of this Agreement) in favour of the Director-General and includes any other Security Interest or assurance from the Operator in favour of an Enforcing Party.

Permitted Security Interest means:

- (a) a Security Interest created or outstanding in respect of any asset other than a Sale Asset or Novation Asset;
- (b) a Security Interest created or outstanding in respect of a Sale Asset or Novation Asset with the prior written consent of the Director-General, which consent will not be unreasonably withheld where the holder of that Security Interest enters into a General Financier Direct Agreement; or
- (c) a lien:
 - (i) which arises by operation of law in the ordinary course of day-to-day trading;
 - (ii) which does not secure Financial Indebtedness; and
 - (iii) under which the indebtedness secured by it is paid when due or is being contested in good faith.

Property Mortgage means a real property mortgage granted by the Associated Operator in favour of the Director-General and substantially in a form satisfactory to the Director-General.

Replaced Bus means any Contract Bus that:

- (a) is irretrievably lost, stolen, destroyed or damaged beyond economic repair during the term of the MBSC or any Second Contract;

- (b) is subject to a Bus Lease that expires or terminates without replacement by a Replacement Bus Lease, or the relevant Bus being acquired by the Associated Operator; or
- (c) the Director-General agrees in writing shall cease to be a Sale Asset or Novation Asset (as the case may be).

Replaced Depot means a Contract Region Depot that:

- (a) is destroyed or damaged beyond economic repair during the term of the MBSC or any Second Contract;
- (d) is subject to a Depot Lease that expires or terminates without replacement by a Replacement Depot Lease, or the relevant Depot being acquired by the Associated Operator; or
- (b) the Director-General agrees in writing shall cease to be a Sale Asset or Novation Asset (as the case may be).

Replacement Bus Lease means a Bus Lease entered into by the Associated Operator pursuant to Clause 9.3 on the expiry or termination of a Bus Lease over an Existing Bus or New Bus.

Replacement Depot Lease means a Depot Lease entered into by the Associated Operator pursuant to Clause 9.4 on the expiry or termination of a Depot Lease over an Existing Depot or New Depot.

Sale Asset means any Sale Bus or Sale Depot.

Sale Bus means:

- (a) an Existing Bus owned by the Associated Operator and set out in Part A of Schedule 4;
- (b) any Existing Bus subject to a Bus Lease as at the date of this Agreement and set out in Part A of Schedule 5, but subsequently acquired by the Associated Operator during the term of the MBSC or any Second Contract;
- (c) any New Bus owned by the Associated Operator;
- (d) any New Bus subject to a Bus Lease approved by the Director-General under Clause 11.1 of the MBSC, but subsequently acquired by the Associated Operator during the term of the MBSC or any Second Contract; and
- (e) any other Contract Bus the Director-General and the Associated Operator agree to be a Sale Bus for the purposes of this definition,

in each case together with any associated Spares, but does not include any Replaced Bus.

Sale Depot means:

- (a) an Existing Depot owned by the Associated Operator and set out in Part B of Schedule 4;
- (b) any Existing Depot subject to a Depot Lease as at the date of this Agreement and set out in Part B of Schedule 5, but subsequently acquired by the Associated Operator during the term of the MBSC or any Second Contract;
- (c) any New Depot owned by the Associated Operator;
- (d) any New Depot subject to a Depot Lease approved by the Director-General under Clause 11.3 of the MBSC, but subsequently acquired by the Associated Operator during the term of the MBSC or any Second Contract; and

- (e) any other Contract Region Depot the Director-General and the Associated Operator agree to be a Sale Depot for the purposes of this definition,

together with any associated plant and equipment, but does not include any Replaced Depot.

Termination Date means:

- (a) in the case of the MBSC, the effective date of termination of the MBSC or the scheduled expiry date of the MBSC, whichever is applicable; or
- (b) if the Operator and the Director-General enter into a Second Contract for the provision of bus services in the Contract Region, and the Associated Operator will remain as a subcontractor of the Operator for the purposes of that Second Contract, the date of termination of the Second Contract or the scheduled expiry date of the Second Contract Term, whichever is applicable.

Transaction Document means:

- (a) this Agreement;
- (b) each Deed of Charge;
- (c) each Property Mortgage;
- (d) each Bus Lease Direct Agreement;
- (e) each Depot Lease Direct Agreement;
- (f) each General Financier Direct Agreement; and
- (g) any other document or agreement that the Director-General and the Associated Operator agree is to be a Transaction Document for the purposes of this Agreement.

Valuation Date means:

- (a) in the case of the MBSC, the earlier of:
 - (i) the date of a Termination Notice under clause 24.8 of the MBSC, where such Termination Notice does not include any conditions;
 - (ii) the final date for satisfying the conditions in a Termination Notice under clause 24.8 of the MBSC, where such Termination Notice includes any conditions and those conditions are not satisfied or waived by that date; and
 - (iii) 3 months prior to the scheduled date of expiry of the MBSC; or
- (b) where a Second Contract has been executed by the Operator and Director-General, and the Associated Operator will remain as a subcontractor of the Operator for the purposes of that Second Contract, the earlier of:
 - (i) the date of a notice terminating the Second Contract, where such notice does not include any conditions;
 - (ii) the final date for satisfying the conditions in a notice terminating the Second Contract, where such notice includes any conditions and those conditions are not satisfied or waived by that date; and
 - (iii) 3 months prior to the scheduled date of expiry of the Second Contract.

1.2 Interpretation

- (a) A term defined in the MBSC, and not defined in this Agreement, has the same meaning when used in this Agreement.
- (b) Clause 1.2 to 1.8 of the MBSC apply to this Agreement as if set out in full and all references to "this Agreement" were references to this Agreement and all references to "Operator" were references to "Associated Operator".

1.3 Determination, Statement and Certificate conclusive

Except where otherwise provided in this Agreement any determination, statement or certificate by the Director-General or an authorised officer of the Director-General provided for in this Agreement is conclusive and binds the parties in the absence of manifest error.

2 MBSC

If the MBSC requires the Operator to procure that the Associated Operator do or refrain from doing any thing, the Associated Operator undertakes to the Director-General to do or refrain from doing that thing.

3 End of MBSC Treatment of Assets

3.1 Treatment of Existing Assets

The Associated Operator and the Director-General have agreed to the following treatment of any Existing Assets, being that:

- (a) Clause 7 shall apply in respect of any Sale Assets; and
- (b) Clause 8 shall apply in respect of any Novation Assets;

3.2 Treatment of New Assets

Any New Assets shall be treated as Sale Assets or Novation Assets for the purposes of Clauses 7 and 8 where owned or leased by the Associated Operator.

3.3 Required Transaction Documents

Unless the Director-General otherwise agrees in writing, the Associated Operator must provide the Director-General, within the period required by clause 2.8(b) of the MSBC, with:

- (a) the Deed of Charge;
- (b) a Property Mortgage over any Sale Depot;
- (c) a Bus Lease Direct Agreement in respect of any Novation Bus;
- (d) a Depot Lease Direct Agreement in respect of any Novation Depot,
- (e) a General Financier Direct Agreement in respect of any secured financier of the Associated Operator,

together with any ancillary documents required by the terms of those documents, in each case executed by the Associated Operator and all relevant counterparties (except the Director-General if the Director-General is party to such document).

3.4 Second Contract

If the Operator and the Director-General enter into a Second Contract for the provision of bus services in the Contract Region, and the Associated Operator will remain as a subcontractor of the Operator for the purposes of that Second Contract, the parties must meet and agree any amendments required to this Agreement to reflect the provisions of the Second Contract on and from the commencement of the Second Contract.

4 Acknowledgements and agreements

The Associated Operator acknowledges and agrees that:

- (a) **no Default:** neither the creation of any Operator Security nor the exercise of any of the Director-General's Powers under any Operator Security, the MBSC or any Second Contract will of itself contravene or constitute a Default under the AO Subcontract or entitle the Associated Operator to exercise any Power (including termination) under it;
- (b) **enforcement:** any Enforcing Party may, at any time after the Director-General has given notice to the Associated Operator stating that:
 - (i) the Operator Security has become enforceable; or
 - (ii) a Step-in Party is entitled to exercise the Step-in Right under the MBSC or any Second Contract,exercise all or any of the Powers, and perform all or any of the obligations, of the Operator under or in relation to the AO Subcontract as if it were the Operator to the exclusion of the Operator;
- (c) **not liable:** without limiting the liability of the Operator (who continues to be responsible for the performance of its obligations under the AO Subcontract), no Enforcing Party will be liable, or taken to have assumed liability, for any obligation of the Operator under the AO Subcontract by reason only of:
 - (i) the creation of the Operator Security;
 - (ii) the exercise of any of the Director-General's Powers under the Operator Security, the MBSC or any Second Contract; or
 - (iii) the exercise of any of the Operator's Powers, or the performance of any of its obligations, under the AO Subcontract; and
- (d) **no adoption:** without limiting paragraph (c), nothing in this Agreement requires an Enforcing Party to adopt or accept the obligations of the Operator, in whole or in part, under the AO Subcontract.

5 General undertakings

5.1 Undertakings of the Associated Operator

Unless the Director-General otherwise agrees in writing, the Associated Operator must:

- (a) **Amendments:** not materially amend or supplement, or consent to any material amendment or supplement of, the AO Subcontract.
- (b) **Termination, release, etc:** not, except as permitted by Clause 6:
 - (i) avoid, release, surrender, terminate, rescind, discharge (other than by performance) or accept the repudiation of; or
 - (ii) suspend the performance of any of its obligations under, the AO Subcontract.
- (c) **Security:** not create or allow to exist any Security Interest over the AO Subcontract other than a Permitted Security Interest;
- (d) **Assignment:** not sell, transfer, lease or otherwise dispose of or deal with all or part of its rights under or interest in the AO Subcontract;
- (e) **Notices:** notify the Director-General of any Default as soon as it becomes aware of it; and
- (f) **Copy:** promptly provide a copy to the Director-General of any notice given or received by it terminating, or suspending the performance of any obligations under, the AO Subcontract.

5.2 Undertakings of the Director-General

Unless the Associated Operator otherwise agrees in writing, the Director-General must:

- (a) **Extension:** give the Associated Operator a copy of any notice given to the Operator extending the term of the MBSC, or any Second Contract, promptly after that notice is given to the Operator; and
- (b) **Early Termination:** give the Associated Operator a copy of any notice given to the Operator terminating the MBSC, or any Second Contract, promptly after that notice is given to the Operator.

6 Termination or suspension of AO Subcontract

6.1 Termination or suspension for default

- (a) Subject to paragraph (b), the Associated Operator may only terminate, or suspend the performance of its obligations under, the AO Subcontract as a result of a Default in accordance with the terms of the AO Subcontract and if:
 - (i) the Associated Operator has given notice (a **Default Notice**) to the Director-General and the Operator setting out the Default; and
 - (ii) either:
 - (A) if the Default is capable of remedy, the Default has not been remedied within 30 days of the date on which the Default Notice is given to the Director-

General and the Operator or such longer period as is allowed for remedy of the Default under the AO Subcontract; or

- (B) if the Default is not capable of remedy, all of the obligations of the Operator under the AO Subcontract do not commence and continue to be performed within 30 days of the date on which the Default Notice is given to the Director-General and the Operator or such longer period as is allowed under the AO Subcontract. For the avoidance of doubt "all of the obligations of the Operator" excludes any existing Defaults and accrued obligations.
- (b) The Associated Operator must not terminate, or suspend the performance of its obligations under, the AO Subcontract as a result of a Default if:
 - (i) the Director-General has notified the Associated Operator that he is entitled to exercise his step-in right under the MBSC or the Security has become enforceable; and
 - (ii) an Enforcing Party is performing all of the obligations of the Operator under the AO Subcontract. For the avoidance of doubt "all of the obligations of the Operator" excludes any existing Defaults and accrued obligations.
- (c) Paragraphs (a) and (b) do not prejudice the Associated Operator's rights against the Operator in respect of remedies other than termination of the AO Subcontract or suspension of the performance by the Associated Operator of its obligations under the AO Subcontract.

6.2 Cure rights

- (a) On becoming aware of any Default, an Enforcing Party may take steps to:
 - (i) remedy, or procure the remedy of, the Default; or
 - (ii) if the Default is not capable of remedy, commence and continue to perform the obligations of the Operator under the AO Subcontract.
- (b) To the extent reasonably requested by an Enforcing Party for the purpose of exercising its Powers under the Operator Security or this Agreement, the Associated Operator must promptly provide the Enforcing Party with any information in its possession (including details of any steps which the Associated Operator considers appropriate to be taken to, remedy the Default or, if the Default is not capable of remedy, to commence and continue to perform all of the obligations of the Operator under the AO Subcontract).

6.3 Application of clauses

Clause 6.1 applies despite anything in the AO Subcontract or any other document and whether or not the Director-General has exercised any Power under the Operator Security, the MBSC or any Second Contract.

7 Sale Assets

7.1 Sale and Purchase

The Director-General shall procure the Successor Operator purchases, and the Associated Operator shall sell to the Successor Operator, the Sale Assets on the terms of this Clause 7.

7.2 Sale Completion Date

- (a) The sale and purchase of the Sale Assets shall occur on the later of:
- (i) the Termination Date; and
 - (ii) 5 Business Days following the Associated Operator and the Director-General agreeing a price (**Sale Price**) for each Sale Asset, or such Sale Price being determined, in accordance with Clause 7.4,

(the **Sale Completion Date**).
- (b) On the Sale Completion Date:
- (i) the Director-General must procure that the Successor Operator pays to the Associated Operator the Sale Price for each Sale Asset;
 - (ii) the Associated Operator must deliver, or procure delivery of, title to and possession of each Sale Bus at the locations in the Sydney metropolitan area agreed between the Associated Operator and the Successor Operator or, if no agreement is reached by the date falling 5 Business Days prior to the Sale Completion Date, at the locations in New South Wales reasonably nominated by the Director-General; and
 - (iii) the Associated Operator must deliver, or procure delivery of, title to and possession of each Sale Depot to the Successor Operator.
- (c) Title to the Sale Assets must pass to the Successor Operator on the Sale Completion Date, free of any Security Interest.
- (d) If the Sale Assets include any Sale Depots, the transfer of a Sale Depot must be pursuant to a Depot Sale Contract. The Associated Operator and the Successor Operator must complete all relevant documents, execute the Depot Sale Contract and satisfy all conditions to such Depot Sale Contract by the Sale Completion Date.

7.3 Delivery of documents in respect of Sale Assets

On the Sale Completion Date, the Associated Operator must deliver to the Successor Operator all documents of design, technical and maintenance records, operational and maintenance manuals, data and all other documents relating to the Sale Assets.

7.4 Sale Price

- (a) The Sale Price payable by the Successor Operator for each Sale Asset will be determined in accordance with the following process:
- (i) within 10 Business Days following the Valuation Date, the Associated Operator and Director-General must meet and use their best endeavours to reach agreement on the Sale Price payable by the Successor Operator for each of the Sale Assets;
 - (ii) if the Associated Operator and the Director-General have not reached agreement on the Sale Price for each of the Sale Assets within 25 Business Days following the Valuation Date, any Sale Price yet to be agreed shall be determined by an expert appointed jointly by the Director-General and the Associated Operator from a panel of experts jointly agreed by the Director-General and the Bus and Coach Association for the purposes of this Clause within 6 months after the Service Commencement Date;

- (iii) if no agreement has been reached and an expert has not been appointed within 35 Business Days following the Valuation Date, the expert will be appointed by the President of the Australian Commercial Disputes Centre at the request of either the Director-General or the Associated Operator; and
 - (iv) the expert shall be instructed to determine the Sale Price payable in respect of each Sale Asset in accordance with Clauses 7.4(b), 7.4(c) and 7.4(d)(as applicable).
- (b) The Sale Price payable by the Successor Operator for each Sale Asset that is an Existing Asset shall be determined on the following basis:
 - (i) as an existing use market valuation based on an arms length commercial arrangement between a willing buyer and a willing seller; and
 - (ii) valuing only the relevant Sale Asset in each case and not the Sale Assets collectively as a business. The expert shall not make any allowance for goodwill in valuing the Sale Assets and determining a Sale Price.
- (c) The Sale Price payable by the Successor Operator for each Sale Asset that is a New Bus shall be determined in accordance with paragraphs 9.2(a) and (b) of Schedule 4 of the MBSC as if that Sale Asset were an asset of the Operator.
- (d) The Sale Price payable by the Successor Operator for each Sale Asset that is a New Depot shall be determined in accordance with a basis agreed by the Operator and the Director-General on approval of the acquisition of that New Depot under clause 11.3 of the MBSC.
- (e) The Associated Operator and the Director-General agree to be bound by the determination of the expert.
- (f) The Associated Operator must allow the expert and any nominee of the Director-General reasonable access to the Sale Assets for the purpose of determining any Sale Price.

7.5 Access to Sale Assets Pending Sale Completion Date

- (a) If the Sale Completion Date will be a date after the Termination Date, the Associated Operator must make the Sale Assets available to the Successor Operator and any Interim Operator from the Termination Date until the Sale Completion Date at a reasonable charge (taking into account fair wear and tear on the Sale Assets and registration charges in relation to the Sale Assets) for the purpose of operating bus services in the Contract Region. If there is any dispute as to the charges payable under this Clause, either party may refer the matter to expert determination using the procedures set out in Clause 7.4.
- (b) The Director-General must procure that the Successor Operator and any Interim Operator agree to:
 - (i) maintain the Sale Assets in accordance with the degree of skill, diligence, prudence and practice that would ordinarily be exercised by a skilled and experienced bus operator operating bus services comparable to the size, scope and complexity of the Bus Services and in accordance with all applicable laws, including section 7 of the Act;
 - (ii) insure the Sale Assets with insurers, and on terms, approved by the Director-General; and
 - (iii) indemnify the Associated Operator in respect of any Losses that may be incurred or sustained by the Associated Operator in respect of or arising from the operation of the Sale Assets during that period. The indemnity will not apply to the extent that the

Losses are attributable to a breach of any of the Associated Operator's warranties in Schedule 1.

8 Novation Assets

8.1 Novation

The Associated Operator must, in accordance with the provisions of any relevant direct agreement and this Clause 8, novate each Bus Lease and Depot Lease over a Novation Asset (**Novation Leases**) to the Successor Operator.

8.2 Novation Completion Date

- (a) The novation of each Novation Lease shall occur on the later of:
- (i) the Termination Date; and
 - (ii) 5 Business Days following the Associated Operator and the Director-General agreeing the consideration payable to the Associated Operator (**Novation Completion Amount**) for the Novation Lease, or such Novation Completion Amount being determined, in accordance with Clause 8.4, and obtaining any lessor consents required by the terms of the Novation Lease or direct agreement,
- (the **Novation Completion Date**).
- (b) On the Novation Completion Date:
- (i) the Director-General must, subject to Clause 8.2(c) and Clause 8.5, procure that the Successor Operator pays to the Associated Operator the Novation Completion Amount for the Novation Lease;
 - (ii) the Associated Operator must deliver, or procure delivery of, possession of each Novation Bus at the locations in the Sydney metropolitan area agreed between the Associated Operator and the Successor Operator or, if no agreement is reached by the date falling 5 Business Days prior to the Novation Completion Date, at the locations in New South Wales reasonably nominated by the Director-General; and
 - (iv) the Associated Operator must deliver, or procure delivery of, possession of each Novation Depot to the Successor Operator.
- (c) The Associated Operator authorises the Director-General to make payment of such component of the Novation Completion Amount in respect of any Novation Assets as necessary to meet any arrears or other amount owing by the Associated Operator under the Novation Lease.

8.3 Delivery of documents in respect of Novation Assets

On the Novation Completion Date, the Associated Operator must deliver to the Successor Operator all documents of design, technical and maintenance records, operational and maintenance manuals, data and all other documents relating to the Novation Assets.

8.4 Novation Completion Amount

- (a) The Novation Completion Amount payable by the Successor Operator for each Novation Lease will be determined in accordance with the following process:

- (i) within 10 Business Days following the Valuation Date, the Associated Operator and Director-General must meet and use their best endeavours to reach agreement on the Novation Completion Amount (if any) payable by the Successor Operator for the Novation Lease;
 - (ii) if the Associated Operator and the Director-General have not reached agreement on the Novation Completion Amount for the Novation Lease within 25 Business Days following the Valuation Date, any Completion Amount yet to be agreed shall be determined by an expert appointed jointly by the Director-General and the Associated Operator from a panel of experts jointly agreed by the Director-General and the Bus and Coach Association for the purposes of this Clause within 6 months after the Service Commencement Date;
 - (iii) if no agreement has been reached and an expert has not been appointed within 35 Business Days following the Valuation Date, the expert will be appointed by the President of the Australian Commercial Disputes Centre at the request of either the Director-General or the Associated Operator; and
 - (iv) the expert shall be instructed to determine the Novation Completion Amount payable in respect of the Novation Lease in accordance with Clauses 13.4(b) and 13.4(c) (as applicable).
- (b) The Novation Completion Amount (if any) payable by the Successor Operator for each Novation Lease in respect of an Existing Asset shall be determined on the following basis:
- (i) where the Novation Lease is a Finance Lease for a Novation Bus, as:
 - (A) the existing use market value of the Novation Bus (based on an arms length commercial arrangement between a willing buyer and a willing seller); less
 - (B) the net present value of any remaining payment obligations under the Novation Lease, including any end of term purchase option over the Novation Bus or, where there is no express purchase option in the relevant Novation Lease, assuming acquisition of the relevant Novation Asset at its assumed residual value (using a discount rate equal to the implied discount rate under the relevant Novation Lease);
 - (ii) where the Novation Lease is an Operating Lease for a Novation Bus, the Novation Completion Amount will be zero; and
 - (iii) where the Novation Lease is the lease of a Contract Region Depot, the Novation Completion Amount will be zero.
- (c) The Novation Completion Amount (if any) payable by the Successor Operator for each Novation Lease in respect of a New Asset shall be determined on the following basis:
- (i) where the Novation Lease is a Finance Lease, in accordance with the methodology set out in paragraph 9.2(c) of Schedule 4 of the MBSC as if that Novation Asset were leased by the Operator;
 - (ii) where the Novation Lease is an Operating Lease, the Novation Completion Amount will be zero; and
 - (iii) where the Novation Lease is the lease of a Contract Region Depot, the Novation Completion Amount will be zero.

- (d) The Associated Operator and the Director-General agree to be bound by the determination of the expert (including any determination as to whether a Novation Lease is an Operating Lease or a Finance Lease).
- (e) The Associated Operator must allow the expert and any nominee of the Director-General reasonable access to the Novation Assets for the purpose of determining any Novation Completion Amount.

8.5 Negative Novation Completion Amount

Where the Novation Completion Amount calculated under Clause 8.4(b) or 8.4(c) is a negative value, the Director-General shall not be obliged to procure the Successor Operator to agree to novation of the relevant Bus Lease unless the Associated Operator agrees to pay the Successor Operator the relevant Novation Completion Amount (expressed as a positive value), or agrees to the Successor Operator setting off that Novation Completion Amount against any other amounts owed by the Successor Operator to the Associated Operator.

8.6 Access to Novation Assets Pending Novation Completion Date

- (a) If the Novation Completion Date will be a date after the Termination Date, the Associated Operator agrees to use its reasonable endeavours (including the obtaining of any relevant lessor consents) to make the Novation Assets available to the Successor Operator and any Interim Operator from the Termination Date until the Novation Completion Date in respect of the Novation Lease in return for the Successor Operator or Interim Operator meeting the actual costs of the Associated Operator under the Novation Lease for that period.
- (b) During the period referred to in Clause 8.6(a), the Director-General must procure that the Successor Operator and any Interim Operator agree to:
 - (i) maintain the Novation Assets in accordance with the degree of skill, diligence, prudence and practice that would ordinarily be exercised by a skilled and experienced bus operator operating bus services comparable to the size, scope and complexity of the Bus Services and in accordance with all applicable laws, including section 7 of the Act;
 - (ii) if required by the terms of the Novation Lease, insure the Novation Assets with insurers, and on terms, approved by the Director-General;
 - (iii) comply with the terms of the Novation Lease; and
 - (iv) indemnify the Associated Operator in respect of any Losses that may be incurred or sustained by the Associated Operator in respect of or arising from the operation of the Novation Asset during that period.

9 Dealings with Associated Operator Assets

9.1 Sale Assets

Without limiting the Associated Operator's undertakings under Clause 4 of this Agreement, the Associated Operator must not, except with consent of the Director-General (consent not to be unreasonably withheld or delayed):

- (a) create or allow to exist any Security Interest, other than a Permitted Security Interest, over any Sale Asset;
- (b) in any other way:

- (i) assign, transfer or otherwise dispose of;
 - (ii) create or allow any interest in; or
 - (iii) part with possession of,
- any Sale Asset, other than by way of a Permitted Security Interest;

9.2 Bus Leases and Depot Leases

Without limiting the Associated Operator's undertakings under Clause 4 of this Agreement, the Associated Operator must not, except with the consent of the Director-General (consent not to be unreasonably withheld or delayed):

- (a) create or allow to exist any Security Interest, other than a Permitted Security Interest, over any Bus Lease or Depot Lease;
- (b) in another way:
 - (i) assign, transfer or otherwise dispose of;
 - (ii) create or allow any interest in; or
 - (iii) part with possession of,its rights under, or interest in, a Bus Lease or Depot Lease, or:
 - (iv) avoid, release, surrender, terminate, rescind, discharge (other than by performance) or accept the repudiation of;
 - (v) suspend the performance of any of its obligations under;
 - (vi) do or permit anything that would enable or give grounds to another party to do anything referred to in Clauses 9.2(b)(iv) or 9.2(b)(v) in relation to,a Bus Lease or a Depot Lease, other than by way of a Permitted Security Interest; or
- (c) materially amend or supplement, or consent to any material amendment or supplement of a Bus Lease or a Depot Lease, or expressly or impliedly waive, or extend or grant time or indulgence in respect of, any material provision of or material obligation under such a Bus Lease or a Depot Lease if and to the extent that such amendment, supplement, waiver, extension or grant takes effect in, or relates to the exercise of any power or the performance of any obligation under the Bus Lease or Depot Lease during the End of Contract Period or after the Termination Date.

9.3 Treatment of Leased Buses on Termination of Bus Lease

- (a) On the termination or expiry of a Finance Lease over an Existing Bus or New Bus, the Associated Operator must:
 - (i) where the Bus Lease grants the Associated Operator an entitlement to acquire the relevant Bus, acquire the Bus in accordance with the terms of the Bus Lease; and
 - (ii) where the Bus Lease does not grant the Associated Operator an entitlement to acquire the relevant Bus, use its best endeavours to:
 - (A) negotiate the acquisition of the relevant Bus for a value not exceeding its residual value; or

- (B) enter into a replacement Bus Lease for the relevant Bus, based on its residual value,

in each case on terms approved by the Director-General.

- (b) Prior to the termination or expiry of an Operating Lease over an Existing Bus or New Bus, the Associated Operator must submit a proposal to the Director-General recommending that it either:
 - (i) negotiate the acquisition of the relevant Bus for a value not exceeding its residual value;
 - (ii) refinance the relevant Bus as a Finance Lease for its residual value; or
 - (iii) let the relevant Bus Lease terminate or expire without further action.
- (c) Any proposal under Clause 9.3(b) recommending the acquisition or further leasing of a Bus shall be deemed an application for funding support under Clause 11.1(a) of the MBSC and must comply with the requirements of Clause 11.1 of the MBSC. Where the Director-General approves the acquisition or further lease of a Bus, such Bus shall be deemed a New Bus for the purposes of this Agreement, funded in accordance with the arrangement approved by the Director-General.

9.4 Treatment of Leased Depots on Termination of Depot Lease

- (a) Where a Depot Lease grants the Associated Operator an entitlement to a further lease term, the Associated Operator must exercise such option in accordance with the Depot Lease (unless agreed otherwise with the Director-General).
- (b) Where a Depot Lease over a Novation Depot grants the Associated Operator an option or other right to purchase the relevant Contract Depot, the Associated Operator must ensure that:
 - (i) if it acquires the relevant Contract Depot, the Contract Depot is made available to a Successor Operator on reasonable commercial terms for a period of at least 3 years following the Termination Date; or
 - (ii) if it does not acquire the Contract Depot, it provides the Director-General or his nominee with the opportunity to acquire the Contract Depot, to the extent such opportunity arises under the relevant Depot Lease (whether as the nominee of the Associated Operator or otherwise).

10 Representations and warranties

The Associated Operator makes the representations and warranties set out in Schedule 1 for the benefit of the Director-General.

11 Equitable Relief

- (a) Each party to this Agreement acknowledges that damages may not be an adequate remedy for any breach of, or failure by it to comply with, this Agreement.
- (b) Each party to this Agreement agrees that, without limiting any other right, remedy or action it has in connection with any actual or threatened breach of, or failure to comply with, this Agreement by the other party, it is entitled to seek equitable relief (including specific

performance or injunctive or declaratory relief) to restrain any actual or threatened breach of, or failure to comply with, this Agreement by the other party and the other party must not oppose the granting of such relief on the basis that the party seeking such relief has not or will not sustain any actual loss or damage.

12 Dispute Resolution

12.1 Negotiation

If there is a dispute between the parties relating to or arising out of this Agreement (other than any dispute specifically provided for under any of Clauses 7.4 or 8.4), then within 10 Business Days of a party notifying the other party of a dispute, senior representatives from each party must meet and use all reasonable endeavours acting in good faith to resolve the dispute by joint discussions. This Clause 12.1 will not prevent either party from applying to a court at any stage for injunctive or other relief.

12.2 Independent expert

Either party may by written notice to the other suggest the dispute will be best resolved by an independent expert. If the parties agree, they will submit to the following procedure:

- (a) the parties will choose and appoint an independent expert;
- (b) in the absence of agreement as to the independent expert within five Business Days of notice of a dispute, the independent expert will be appointed on the application of any party by the President of the Institute of Arbitrators Australia;
- (c) the independent expert must make a determination or finding on the issues in dispute as soon as practicable and in any event within 10 Business Days, or such longer period as may be agreed by the parties;
- (d) the independent expert will act as an expert and not as an arbitrator and may adopt such procedures as he or she sees fit;
- (e) the independent expert's decision will be final and binding on the parties; and
- (f) the costs of the independent expert will be borne equally or as the independent expert may otherwise determine and each party will bear its own costs relating to the independent expert's decision.

13 GST

- (a) If GST is payable on a Taxable Supply made under, by reference to or in connection with this Agreement, the party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration. This Clause 13 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated to be GST inclusive.
- (b) Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability. A party will be assumed to have an entitlement to a full Input Tax Credit unless it demonstrates otherwise prior to the date on which the Consideration must be provided.

- (c) Any reference in this Agreement to price, value, sales, revenue or a similar amount (**Revenue**), is a reference to that Revenue exclusive of GST.
 - (d) Any reference in this Agreement (other than in the calculation of Consideration) to cost, expense or other similar amount (**Cost**), is a reference to that Cost exclusive of GST.
 - (e) No payment of any amount pursuant to Clause 13(a), and no payment of the GST Amount where the Consideration for a Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
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14 Assignment

- (a) The Associated Operator may not assign, transfer, encumber or otherwise deal with its interest under the Transaction Documents to which it is a party without the consent in writing of the Director-General which may be granted or refused at the Director-General's discretion and on such conditions as the Director-General may impose.
 - (b) The Director-General may assign or transfer all or any of his or her rights or obligations under this Agreement to another Government Agency.
 - (c) An Enforcing Party may, in the exercise of its Powers under the Operator Security, assign all or any of the rights and interest of the Operator in, to and under the AO Subcontract to any person who has the financial and operational capacity to perform the obligations to be performed by it under the AO Subcontract.
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15 Notices

Any notice, demand, consent or other communication (**Notice**) given or made under this Agreement:

- (a) must be in writing and signed by a person duly authorised by the sender;
- (b) must be delivered to the intended recipient by prepaid post (if posted to an address in another country, by registered airmail) or by hand or fax to the address or fax number below or the address or fax number last notified by the intended recipient to the sender:
 - (i) to the Director-General:
Ministry of Transport
[GPO Box 1620
Sydney NSW 2001]
Attention: [Director, Contracts and Compliance]
Fax No: [(02) 9891 8950]; and
 - (ii) to the Associated Operator:
[#]
Attention: [#]
Fax No: [#];

- (c) will be taken to be duly given or made:
- (i) in the case of delivery in person, when delivered;
 - (ii) in the case of delivery by post, two Business Days after the date of posting (if posted to an address in the same country) or seven Business Days after the date of posting (if posted to an address in another country); and
 - (iii) in the case of fax, on receipt by the sender of a transmission control report from the despatching machine showing the relevant number of pages and the correct destination fax machine number or name of recipient and indicating that the transmission has been made without error,

but if the result is that a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent or is later than 4.00pm (local time) it will be taken to have been duly given or made at the commencement of business on the next Business Day in that place.

16 Entire agreement

This Agreement, together with any other Transaction Documents, contains the entire agreement between the Associated Operator and the Director-General with respect to its subject matter and supersedes all prior agreements and understandings between the parties in connection with it.

17 No waiver

Neither failure to exercise nor any delay in exercising any right, power or remedy by a party operates as a waiver. A single or partial exercise of any right, power or remedy does not preclude any other or further exercise of that or any other right, power or remedy. A waiver is not valid or binding on the party granting that waiver unless made in writing.

18 Rights cumulative and survival

- (a) Subject to any express provision in this Agreement to the contrary, the rights of a party under this Agreement are cumulative and are in addition to any other rights of that party.
- (b) Each indemnity in this Agreement:
 - (i) is a continuing obligation;
 - (ii) is a separate and independent obligation; and
 - (iii) survives the termination or discharge of this Agreement.
- (c) A Clause of this Agreement under which:
 - (i) the Associated Operator agrees to comply with a clause of the MBSC as if it were a party thereto; or
 - (ii) a clause of the MBSC is incorporated by reference in this Agreement,

survives the termination of the MBSC and this Agreement if the relevant clause of the MBSC is expressed to survive termination of the MBSC.

19 Amendment

No amendment or variation of this Agreement is valid or binding on a party unless made in writing executed by all parties.

20 Further assurances

Each party agrees to do all things and execute all deeds, instruments, transfers or other documents as may be necessary or desirable to give full effect to the provisions of this Agreement.

21 Costs

Subject to any express provision in this Agreement to the contrary, each party must bear its own costs and expenses relating directly or indirectly to the negotiation, preparation, execution of and performance of its obligations under this Agreement.

22 Severability of provisions

Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction is ineffective as to that jurisdiction to the extent of the prohibition or unenforceability. That does not invalidate the remaining provisions of this Agreement nor affect the validity or enforceability of that provision in any other jurisdiction.

23 Governing law and jurisdiction

This Agreement is governed by the laws of New South Wales. Each party submits to the non-exclusive jurisdiction of courts exercising jurisdiction there in connection with matters concerning this Agreement.

24 Counterparts

This Agreement may be executed in any number of counterparts. All counterparts together will be taken to constitute one instrument.

Executed as an agreement in Sydney.

Schedule 1

Representations and warranties

General Representations and Warranties

- 1 **Status.** It is a corporation duly incorporated and validly existing under the laws of [insert].
- 2 **Power.** It has the power to enter into and perform its obligations under the Transaction Documents and the AO Subcontract, to carry out the transactions contemplated by those documents and to carry on its business as now conducted or contemplated.
- 3 **Constitution.** Its constitution produced to the Director-General at the date of this Agreement and signed by its solicitors for the purposes of identification is its constitution including all resolutions affecting it.
- 4 **Corporate authorisations.** It has taken all necessary corporate action to authorise the entry into and performance of the Transaction Documents and the AO Subcontract and to carry out the transactions contemplated by those documents.
- 5 **Document binding.** Each of the Transaction Documents and the AO Subcontract create valid and binding obligations and are enforceable in accordance with their terms, subject to any necessary stamping and registration.
- 6 **Transactions permitted.** The execution and performance by the Associated Operator of the Transaction Documents the AO Subcontract and each transaction contemplated under those documents did not and will not violate in any respect a provision of:
 - (a) a law or treaty or a judgment, ruling, order or decree of a Reporting Body binding on it;
 - (b) its constitution or other constituent documents; or
 - (c) any other document or agreement that is binding on it or its assets.
- 7 **Legal proceedings.**
 - (a) No suit, cause of action, proceeding, application, claim or investigation is current, pending, threatened or in prospect against it and in particular there is no outstanding product liability or workers' compensation claim.
 - (b) No resolution has been passed for its winding up.
 - (c) No resolution has been passed for the appointment of an administrator to it.
 - (d) There is no unsatisfied judgment against it.
 - (e) There are no facts, matters or circumstances that give any person the right to apply to wind it up or to appoint a controller within the meaning of section 9 of the Corporations Act or an administrator or an inspector under the Corporations Act in respect of it or any part of its undertaking or assets or income.
- 8 **Authorisations.** Each Authorisation that is required in relation to:
 - (a) the execution, delivery and performance by it of the Transaction Documents and the AO Subcontract and the transactions contemplated by those documents;

- (b) the validity and enforceability of those documents and the effectiveness or priority of its Deed of Charge (if any); and
- (c) its business as now conducted or contemplated and that is material (including under the Act),

has been obtained or effected. Each is in full force and effect. It has complied with each of them. It has paid all applicable fees for each of them. To the extent this warranty applies to Authorisations that are only required (and can only be obtained) from the Service Commencement Date, it is only given as at the Service Commencement Date.

9 ***Statutory Requirements:***

- (a) All returns, notices and other documents required to be lodged or given by it or under the Corporations Act and other relevant acts and regulations have been duly and properly prepared and lodged or given.
- (b) There are no notices of any Reporting Body outstanding against it.
- (c) All permits, licences and registrations necessary for the conduct of its business are validly subsisting and are held by it.
- (d) It has duly observed and complied in all respects with the provisions of all laws and regulations (including the Act) and all orders, notices, awards and determinations made by any statutory or other competent authority in any way relating to or binding on it or any property owned or occupied by it.

10 ***No misrepresentation:*** All information provided by it to the Director-General is true in all material respects at the date of this Agreement or, if later, when provided. Neither that information nor its conduct and the conduct of anyone on its behalf in relation to the transactions contemplated by the Transaction Documents or the AO Subcontract was or is or will be misleading, by omission or otherwise.

11 ***Copies of documents:*** All copies of documents (including its latest audited accounts and all Authorisations) given by it or on its behalf to the Director-General are true and complete copies. Where applicable, those documents are in full force and effect.

12 ***No Security Interests:*** None of its property is subject to any Security Interest (other than a Permitted Security Interest).

13 ***Law:*** It has complied with all laws binding on it where breach may have a material adverse affect on the ability of the Associated Operator to perform its obligations under a Transaction Document.

14 ***No trust:*** It does not hold any assets as the trustee of any trust.

15 ***Transferring Assets:*** As at:

- (a) the Sale Completion Date, in respect of any Sale Assets; and
- (b) the Novation Completion Date, in respect of any Novation Assets;

the Associated Operator:

- (c) will be the legal and beneficial owner of the Sale Assets free from any Security Interest;

- (d) will have full power and authority to transfer to the Successor Operator good legal and equitable title to the Sale Assets, free from any Security Interest;
- (e) will have ensured that each Sale Bus and Novation Bus:
 - (i) is, consistent with its age, in good repair and condition;
 - (ii) is in satisfactory working order;
 - (iii) has been properly maintained and serviced in accordance with, and otherwise complies with, the terms of this Agreement;
 - (iv) is not dangerous or unsuitable for the purpose for which it is used; and
 - (v) is, to the best of the Associated Operator's then knowledge and belief, capable of doing the work for which it was designed or purchased and will be capable (subject to fair wear and tear) of doing so over its normal serviceable life; and
- (f) will have ensured that all arrangements in connection with any fleet maintenance plan are in full force and effect in respect of any Sale Bus or Novation Bus.

Schedule 2

Bus Leases

Schedule 3

Depot Leases

Schedule 4

Sale Assets

Part A – Sale Buses

Part B – Sale Depots

Schedule 5

Novation Assets

Part A – Novation Buses

Part B – Novation Depots

Annexure A

Deed of Charge

Annexure B

Bus Lease Direct Agreement

Annexure C

Depot Lease Direct Agreement

Annexure D

General Financier Direct Agreement

Annexure E

Depot Sale Contract

The standard form Contract for the Sale of Land as then current, prepared by the Law Institute of New South Wales.